

## Case A154/2018

Country of decision	Greece
Other countries involved	Italy
Case number	A154/2018
ECLI	EL:COS:2018:0124A154.12E5982
Date of decision	24 January 2018
Court/Chamber	Supreme Administrative Court
Parties	Delta Air Lines Inc. (the taxpayer) Τ π ο υ ρ υ ο # Ο ι κ ο ν ο μ ι κ # ν (the tax authorities)
Treaty article(s) and paragraph(s)	Greece - United States Income Tax Treaty (1950) <a href="#">Art. I(1;2)</a> , <a href="#">Art. V(3)</a> Taxable year(s): 2010
OECD equivalent article(s) and paragraph(s)	<a href="#">2(1;2;3;4)</a> (Taxes covered) <a href="#">8(1)</a> (Shipping, inland waterways transport and air transport)
Keywords	taxes covered; levy

## Summary

### Summary of facts

The taxpayer, *Delta Airlines Inc.* ('*Delta*') was an airline company established in the United States with operations in Greece. An dispute arose with regard to the the imposition of the special contribution of social responsibility (provided in article 5 of Law 3845/2010), which was imposed on the income pertaining to tax year 2010 that was attributed to the Greek operations of *Delta*. According to article 5(3) of the Greece-US Tax Treaty ('the Treaty'), profits from the operation of aircraft registered in the United States by a US company were only taxable in the United States. *Delta* argued that the assessment to pay the special social responsibility contribution for the income derived by its Greek operations in 2010 was contrary to the Treaty, as this contribution was in fact a tax that was within its scope, as determined by article 1.

The Administrative Court of Appeals of Piraeus had previously ruled in favour of the taxpayer, judging that the said contribution was indeed a substantially similar tax under article 1(2) of the Treaty and that *Delta* was thus exempt from paying it, given that by application of article 5, the profits on which it was levied were taxable only in the United States.

The tax authorities appealed to the Supreme Administrative Court.

#### *Legal background ( domestic and treaty law):*

In the aftermath of the Greek sovereign debt crisis 2009, a special, one-off social responsibility contribution provided for in article 5 of Law 3845/2010, was imposed on the total net taxable income for the year 2010 that was acquired by legal entities subject to corporate income tax. The basis of the assessment was the same as the one used for the imposition of the normal corporate income tax for the same year. The contribution was imposed on legal entities that reported total net income (taxable or not) of over 100.000 euros in 2010; entities with income lower than that were exempt from the contribution. For the entities that were subject to the contribution, the amount of the contribution was calculated at progressive rates ranging from 4% to 10%.

Article 1 of the Treaty reads as follows:

‘ 1. *The taxes which are the subject of the present Convention are:*

*(a) In the case of the United States of America:*

- *the Federal income tax, including surtaxes*  
*(hereinafter referred to as United States tax).*

*(b) In the case of the Kingdom of Greece:*

- *the income tax, including the schedular or analytical tax,*  
- *the complementary tax and*  
- *the professional or business tax*  
*(hereinafter referred to as Greek tax).*

*2. The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting State subsequently to the date of signature of the present Convention.’*

Article 5(1) of the Treaty reads as follows:

*‘ Income which an enterprise of one of the Contracting States derives from the operation of ships or aircraft registered or documented in that State shall be exempt from tax by the other Contracting State. Income derived by such an enterprise from the operation of ships or aircraft not so registered or documented shall be subject to the provisions of Article III.’*

## Issues

Whether the special contribution of social responsibility under Law 3845/2010 fell within the scope of the Treaty to the extent that it was ‘identical or substantially similar’ to income tax as meant in article 2(2) of the Treaty.

## Court decision

The Supreme Administrative Court decided in favour of the tax authorities. In line with its previous case law on the matter, the Court held that the special contribution of social responsibility under Law 3845/2010 did not have the characteristics of a “tax”. According to the Court, the contribution was genuinely a one-off extraordinary economic burden imposed on legal entities and dictated by the need to safeguard the state budget during the economic crisis. Hence, the Court concluded that the economic burden of the levy did not qualify as ‘income tax’ or as ‘an identical or substantially similar tax’ for the purpose of article 2 of the Treaty.

For these reasons, the Supreme Administrative Court overturned the decision of the lower court. *Delta* was due to pay the special contribution of social responsibility under Law 3845/2010.

## Editor’s notes

The outcome of the case is similar to the parallel case concerning *Alitalia*, decided on the same day in relation to the Greece-Italy Tax Treaty. See Greece: Supreme Administrative Court, 24 January 2018, No. 153/2018.

The outcome of the case contrasts with the decision of 21 November 2018 (No. 2465/2018) in which the special contribution on individuals under Law 3986/2011 was held to be within the scope of the Greece-United Kingdom Tax Treaty. The reasoning of both in both decisions is however consistent. In 153/2018 and 154/2018, the levy in question was a veritable one-off levy and thus had an extraordinary character. In 2465/2018, it concerned a special levy that had been levied for multiple years in a row, which watered down its extra-ordinary character and which made the Court decide it was similar to an income tax.

For more information, see the following contribution on which this summary has been based: K. Perrou - Greece: *Classification of various extraordinary levies as “substantially similar taxes”* under DTCs, in: Tax Treaty Case Law Around the Globe 2019 (Lang et al. eds., IBFD 2020), Online Books IBFD.

(available at: <https://research.ibfd.org/#/doc?url=/linkresolver/static/ttc>).

Decision in favour of	the tax authorities
Decision published in	<a href="http://www.adjustice.gr">www.adjustice.gr</a>
Other relevant cases	Greece: Supreme Administrative Court, 21 November 2018, No. 2465/2018. Greece: Supreme Administrative Court, 24 January 2018, No. 153/2018.
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