

Case 1290/2017

Country of decision	Greece
Other countries involved	France
Case number	1290/2017
Date of decision	10 May 2017
Court/Chamber	Supreme Administrative Court
Parties	Company, name not disclosed (the taxpayer) Τ π ο υ ρ υ ο # Ο ι κ ο ν ο μ ι κ # ν (Ministry of Finance) (the tax authorities)
Treaty article(s) and paragraph(s)	Greece - France Income Tax Treaty (1963) Art. 4(2; 3)
OECD equivalent article(s) and paragraph(s)	7(1;2) (Business profits)
Keywords	attribution of profits; deductions; interpretation

Summary

Summary of facts

The taxpayer was a French bank that disposed of a permanent establishment (PE) in Greece. The case concerned the taxation of the Greek PE, in particular the deductibility of administrative expenses incurred by the head office for the benefit of the PE.

In 2000, the French bank incurred expenses for PE in the amount of approximately EUR 1,040,000. When the PE submitted its income tax return in 2001, it calculated as deductible amount only approximately EUR 118,000, increasing thus the taxable profits in Greece accordingly. The taxpayer chose to comply with the limitation that was provided by the domestic legislation, i.e. the 5% cap, as per article 100(2) of Income Tax Code 2238/1994 ('the ITC'). At the same time, the taxpayer filed a reservation to the declaration, stating that the limitation is contrary to article 4 ('business profits') of the Greece-France Tax Treaty ('the Treaty') and that the total amount of the expenses incurred should be allowed as deductible expenses without limitation. The taxpayer also claimed that, due to the application of domestic law's 5% cap to the deductible administrative expenses, it had unduly suffered an additional burden of income tax of around EUR 595,000, which should be refunded.

The tax authorities did not reply to the reservation filed by the taxpayer. The latter brought an action to the Administrative Court of First Instance. This Court and, in appeal, the Administrative Court of Appeal decided in favour of the taxpayer. The tax authorities then appealed to the Supreme Administrative Court.

Legal background (treaty law)

Article 4(1), (2) and (3) of the Treaty read as follows:

' (1) The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in the other State on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment.

(2) Where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein there shall in each State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing quite independently with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere.'

[Unofficial translation]

Legal background (domestic law)

Article 31 of the ITC, as it reads in 2000, provided that the net income of enterprises was calculated by deducting from the gross income, among other things, general administrative expenses. This general rule applied to domestic enterprises. In addition to that rule, there was a specific provision for Greek branches of foreign enterprises. Article 100(2) of the ITC provided that for the determination of the net profit in Greece of a PE of a foreign enterprise, the general administrative expenses that were incurred outside Greece could not exceed 5% of the amount of the administration expenses incurred by the Greek PE itself. Therefore, the provision of article 100(2) of the ITC put a limitation to Greek PEs of foreign companies on the general rule of article 31(1) of the ITC. Article 4(3) of the Treaty did not contain a limitation corresponding to the one found in article 100(2) of the ITC.

Issues

Whether the administrative expenses incurred by the French head office for the benefit of its Greek PE were deductible against the PE's profits realized in Greece only up to a certain percentage as *per* the applicable domestic rules limiting the deduction of costs incurred outside Greece, or whether in line with the provisions of article 7 of the Treaty, the costs were fully deductible.

Court decision

Administrative Court of First Instance

The Administrative Court of First Instance had held that the provisions of article 4 of the Treaty had a *lex specialis* character compared to the provisions of article 100(2) of the ITC and that, as such, the application of article 4 of the Treaty was not affected by the introduction of the domestic rule that was introduced in 1997. The Court observed that the deductibility of the expenses was justified not because those expenses were incurred in Greece (or elsewhere) but because those expenses were incurred for the benefit of the PE. If that condition was met, then the general administrative expenses were deductible from the gross profits of the PE without limitation. The Court further observed that the final amount of the deductible expenses had to be established after the tax authority had verified the extent to which the general administrative expenses incurred by the French bank in France and elsewhere actually related to the PE.

Administrative Court of Appeal

The Administrative Court of Appeal observed that the tax authorities had argued in appeal that the only applicable provision in the case was the domestic one, found in article 100(2) of the ITC. Furthermore, the tax authorities had argued that the provisions of article 100(2) of the ITC were not contrary to the provisions of article 4 of the Treaty, as the two provisions had a different scope of application. In particular, the tax authorities had claimed that the provisions of the Treaty applied to the expenses incurred by the PE itself and for its own benefit, irrespective of whether those expenses were incurred in Greece or elsewhere, while the domestic law provision of article 100(2) of the ITC that instated the 5% cap, applied to the expenses incurred not by the PE itself but by the head office for the benefit of a Greek PE. The Court of Appeal had dismissed this argument and had confirmed the conclusion of the Court of First Instance.

Supreme Administrative Court

The Supreme Administrative Court observed that the tax authorities argued in appeal that the decision of the Court of Appeals was wrong, as it had not examined the fact of whether the expenses incurred by the head office and charged to the Greek PE were actually related to the PE and to what extent. The Court dismissed this argument as ill-founded since it did not challenge the reasoning of the decision of the Court of Appeals. Furthermore, the issue referred to by the tax authorities had already been resolved by the Court of First Instance, which had instructed the tax authorities to examine the amount of expenses in order to decide to what extent they related to the PE and thus to what extent they could be deducted from the profits of the Greek PE under article 4 of the Treaty.

The Supreme Administrative Court also confirmed the interpretation of the lower courts as far as the application of the rule *lex posterior generalis non derogat legi priori speciali* is concerned. The lower courts had held that the Treaty had a *lex specialis* character in relation to the Income Tax Code, which had to be regarded as a *lex generalis*. Therefore, the provisions of the Treaty, being a *lex specialis*, had not been affected by the later provisions of the Income Tax Code that had the character of a *lex generalis*.

Decision in favour of	the taxpayer
Summary author	The following contribution was used in preparation of this summary: K. Perrou, Chapter 11 - Greece: <i>Attribution of Profits to PE and Limitations of Deductible Expenses under Domestic Law</i> , in: Tax Treaty Case Law Around the Globe 2018 (Lang et al. eds., IBFD 2019), Online Books IBFD. (available at: http://online.ibfd.org/document/ttcl2018_head).
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