

Greece: “Taxes Covered” – Is an extraordinary levy on business profits covered?

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- 1. Introduction**
- 2. Facts of the Case**
- 3. The Court’s decision**
- 4. Comments on the Court’s reasoning**
 - 4.1. Is the “extraordinary contribution” a tax?
 - 4.2. Is “the extraordinary contribution” an income tax?
 - 4.3. Is the “extraordinary contribution” a “substantially similar” tax?
 - 4.4. Does the double tax convention cover double taxation arising only from the regular tax obligations in a contracting state, excluding extraordinary tax obligations?
- 5. Conclusion**

1. Introduction

In recent years, primarily due to the financial crisis, a number of additional fiscal or parafiscal charges have been introduced in Greece, under various names and of various types. The present case concerns one of the first of such charges, the one-off extraordinary social responsibility contribution imposed by Article Five of Law 3845/2010 on the total net profits of corporate taxpayers reported in financial year 2009.

This special contribution is a one-off levy, imposed on all corporate taxpayers that had total net profits over EUR 100,000.00 in financial year 2009. Corporate taxpayers with total net profits of less than the EUR 100,000.00 threshold were totally exempted. For the taxpayers covered by the provisions, the contribution was based on the whole amount of the total net profit; the EUR 100,000.00 did not function as a tax-free amount.

The contribution was calculated on the total net income according to the following progressive tax rates, applicable in the respective income brackets:

Total Net Income bracket in EUR	Rate
1 – 300,000	4%
300,001 – 1,000,000	6%
1,000,001 – 5,000,000	8%
Excess	10%

The total net profit of corporate taxpayers for the purposes of this special contribution was calculated in the same way and following the exact same rules that apply for the calculation of the total net profits under the regular regime of corporate income tax applicable in Greece under the Income Tax Code. In particular, Article Five of Law 3845/2010 provides that the contribution is imposed on the total net income, as this is determined according to the provisions of Article 31(19) and Article 105(7) of the Income Tax Code.¹

Furthermore, the taxpayers were not required to file any declaration in order to be assessed for the contribution. The tax authorities made the assessment taking into account the data available to them according to the corporate income tax returns that corporate taxpayers had filed for the financial year 2009 and notified the taxpayers accordingly. The amount assessed is not deductible for corporate income tax purposes.

The case discussed here concerns the compatibility of this extraordinary one-off contribution with the provisions of Article 1 of the Greece-USA DTC.²

¹ Where the corporate taxpayer has an obligation to report under the International Accounting Standards, then the total net profits taken into account for the calculation of the extraordinary social responsibility contribution are the profits reported according to the IAS.

² Legislative Decree 2548/1953 (published in the Official Gazette Folio A' 231/27-8-1953).

2. Facts of the Case

The taxpayer is a PE of a US airline company operating in Greece. Permanent establishments operating in Greece are subject to corporate income taxation. The PE reported in financial year 2009 a total net income of EUR 10,828,770.80; the PE was assessed by the tax authorities for a contribution of EUR 956,877.06.

The assessment was disputed by the taxpayer on the grounds that it was incompatible with the provisions of the double tax convention between Greece and the United States. According to Article 5(1) of the Greece-USA treaty, on ships and aircraft, the total net profits of a PE in Greece of a US shipping or airline company are exempted from Greek corporate income tax; such a PE is subject to tax only in the United States (state of registration).³ The important question here is whether this extraordinary social responsibility contribution is included in the scope of application of the Greece-USA DTC.

The treaty between Greece and the USA is a very old treaty and therefore Article 1 which provides for the taxes covered by the convention differs from the current Article 2 of the OECD Model Convention. Article 1 of the treaty contains only two paragraphs that correspond to Paragraphs 3 and 4 of the current Article 2 of the OECD Model Convention.⁴ Article 1(1) of the treaty contains the enumeration of taxes covered as they stood at the time of the signature of the treaty, whereas Paragraph 2 of the same article extends the protection of the treaty to any other taxes of a substantially similar character imposed by either contracting state subsequent to the date of signature of the Convention. The two first paragraphs of the current version of Article 2 of the OECD MC are missing.

After receiving the assessment, the taxpayer argued that the extraordinary contribution of social responsibility was in fact an income tax, which is included in the scope of application of Article 1 of the double taxation convention between Greece and the US and therefore, it should not be burdened with the contribution, as its Greek profits were exempt from taxation in the source state.

The case was brought before the Administrative Court of Appeals of Athens.

3. The Court's decision

The Administrative Court of Appeals of Athens, in its judgment number 481/2012 of 7 February 2012⁵ ruled against the taxpayer, concluding that the extraordinary social responsibility contribution was not included in the scope of application of the Greece-USA DTC. The court's argumentation evolved around the is-

³ The exemption however does not include the obligation to report the taxes by filing an annual tax return in Greece.

⁴ According to Art. 1 para. 2 of the 1950 treaty between Greece and the USA (2) *The present Convention shall 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.*

⁵ The decision is not reported at the time this paper was finalized.

sue of whether the extraordinary contribution of social responsibility is a tax, whether, in particular, it is an income tax and whether it can be considered as a substantially similar tax to the regular corporate income tax already covered by the convention.

The court began its analysis by stating that the extraordinary contribution under scrutiny was introduced, according to the explanatory report submitted to the parliament with Law 3845/2010, in order to address the extraordinary needs that resulted from the severe fiscal problems of the Greek state and it was enacted in the context of the recourse of the state to the financial aid of the European Union and the International Monetary Fund. As a consequence, the court found that this extraordinary contribution did not constitute an increase of the normally due income tax but rather it constituted an extraordinary fiscal burden imposed on the higher income earners, as made obvious from the particular provisions on the exemptions from the payment of the contribution and on the way it was calculated.

The court concluded that, judging by the nature and the aim of the extraordinary contribution, it could not be considered as a tax "substantially similar" to (corporate) income tax under Article 1(2) of the Greece-USA DTC. It added that the aim and purpose of Article 1(2) of the Greece-USA DTC is to eliminate double taxation arising from the imposition of the ordinary corporate income taxation only, that is the ordinary regulation of the tax obligations of the taxpayers, according to their ability to pay, and not any double taxation that arises from the imposition of extraordinary socioeconomic measures.⁶

Furthermore,⁷ the court explicitly contradicted the argument of the taxpayer that the extraordinary contribution was an income tax. In particular, the court argued that the income or the profit, based on which the extraordinary contribution was calculated, served as a criterion of the ability to pay of the taxpayer burdened with the contribution and did not constitute the object of the extraordinary contribution but was simply used as the basis for the calculation of the amount of the contribution that was owed. The court acknowledged in its judgement, that the taxable event was the acquisition of net income by corporate taxpayers and it did not make any difference whether any particular taxpayer was subject to corporate income tax in Greece or not.

Based on the above considerations, the court concluded that the extraordinary social responsibility contribution was not a "tax" covered by Article 1 of the Greece-USA DTC and therefore the taxpayer was not granted treaty protection in this case.

Unfortunately the judgment of the court does not seem very well founded.

⁶ See para. 5 of the decision.

⁷ See para. 6 of the decision.