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Law 4399/2016, Council of State Decision 1445/2016

Law 4399/2016 provides a new framework for State Aid which aims to increase investment in the private sector in Greece and Council of State Judgement no. 1445/2016 deals with the tax residence of spouses.

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A. Law 4399/2016 Introducing New Incentives for Private Investments in Greece

The Greek parliament ratified Law 4399/2016, which provides a general framework of tax incentives for private investment in Greece. For the first time, reference is made to the provisions of EU Regulation 651/17.7.2014 (General Block Exemption Regulation – "G.B.E.R."). However, the provisions of the new law will start to apply following the issuance of Ministerial Circulars for each type of State Aid scheme.

The beneficiaries of the Aid may vary depending on the type of scheme. In general, the following are eligible for the tax incentives stipulated in Law 4399/2016: sole proprietorships, commercial companies, cooperatives, social cooperatives as defined by Law 4015/2011, merging legal entities, or legal entities under formation as long as the publication procedure has been completed before the commencement of the investment, and joint ventures registered with the General Register, State and Municipal enterprises. Certain exceptions apply to the beneficiaries eligible for the tax incentives provided for by Law 4399/2016.

The participation of a beneficiary in the investment cost may be effected either through own funds or through external financing. The only limitation to the financing of the investment is that 25% of the total investment cost should not include State Aid funding or a subsidy. The minimum investment amount depends on the size of the beneficiary, and ranges from €50,000 up to €500,000 for large enterprises.

The content of the investment plan should comply with certain conditions, for example a new business unit must be established, production capacity extended, new products produced or fundamental change in the production process made.

All sectors of the economy may fall under the scope of the new tax incentive law. Specific sectors such as steel, coal and shipbuilding are excluded from benefitting from the provisions of this law, although, under certain conditions, investment projects in exempted sectors may be financed. Such projects include investment in:

- Production of energy or heat from Renewable Energy Sources
- Logistics
- Accommodation and leisure
- Processing and trade of agricultural products and investment in fishing and aquaculture

The new law makes a distinction between the maximum amount or percentage of eligible expenses for regional and non-regional State Aid and lists the types of Aid provided for as follows:

1. tax exemptions;

2. subsidy of funds to cover part of the eligible expenses (not available to companies which were not profitable in any of the 7 years prior to the year that the application for State Aid is filed);
3. subsidy of leasing for the acquisition of machinery and equipment limited to a period of 7 years (not available to companies which were not profitable in any of the 7 years prior to the year that the application for State Aid is filed);
4. subsidy of payroll cost;
5. in the case of major investments of more than €20,000,000:
   a. a fixed corporate income tax rate for a 12 year period commencing from the completion of the investment, in which case State Aid may not exceed €10,000,000; or
   b. a tax exemption at a rate of 10% of the investment cost, in which case the State Aid may not exceed €5,000,000; and
6. funding of business risk through a fund of funds.

Each or a combination of these may be provided, with the total amount of State Aid being comprised of all the types made available for each investment project.

The State Aid schemes prescribed in Law 4399/2016 are the following:

1. machinery and equipment;
2. general entrepreneurship;
3. new independent Small and Medium Enterprises (SMEs);
4. innovative aid for SMEs;
5. clusters;
6. financial intermediary organizations and funds of funds;
7. integrated regional and sector plans; and
8. major investments.

Advance payment of State Aid is permitted following certification by the competent authorities of the implementation of 50% of the cost of the investment plan. The beneficiary may use the total amount within a period of 15 tax years from the year of acquisition of the right to the State Aid, on condition that it does not exceed:

1. 20% of the total approved amount of the tax exemption annually, unless it was not fully used up in previous years due to lack of adequate profits, in which case any balance is added to the maximum annual amount for the following year; and
2. 50% of the total approved amount of the tax exemption until the tax year of the issuance of a decision relating to the completion of the investment and initiation of productive operation.

The procedure for filing and documentation requirements is implemented through the State Aid Information System of the Ministry of Finance. All investment projects are subject to being audited by the competent authorities at any phase of their implementation. For existing projects enacted under the provisions of Law 3299/2004 and Law 3908/2011, an extension of the period for their completion is allowed and pending issues relating to their completion have been addressed.

B. Council of State Judgement on the Tax Residence Status of Spouses

In the context of a pilot case the Council of State, by way of Judgement no 1445/2016, recognised that in the current social and economic environment, spouses may be tax residents of different countries. In these cases, the Court ruled that:

1. spouses who are tax residents of different countries are not obliged to file a joint tax return;
2. the burden of proof in establishing the tax residency status of spouses rests with the tax authorities;
3. a joint tax return should be filed only when both spouses are Greek tax residents; and
4. tax legislation should not be restricted by technical limitations of the electronic tax system, rather the electronic tax system should adapt to tax law.

The Council of State focused on the essence of tax residency which is central to the rights of an individual and ruled that the spouse with strong ties in a country other than Greece should be considered as a tax resident of that country, even if their spouse is a Greek tax resident.

The foregoing ruling is binding for the tax authorities only when the criteria under 1. – 4. above are satisfied. However, varying facts may lead the tax authorities to maintain that the spouses do not comply with the criteria set out by the Council of State's Judgement and require the filing of joint tax return in Greece.

It goes without saying that in the case of existence of a Double Tax Treaty for the avoidance of double taxation with Greece, the criteria for assessing the tax residence of individuals set out in such Treaty apply.

This Briefing is intended to provide general information and is not meant to constitute a comprehensive analysis of the matters set out herein or to be relied upon as legal advice. It is not meant to create a lawyer-client relationship. Legal and other professional advice should be sought before applying any of the information in this Briefing to a specific situation.
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