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Separation of Powers

Introduction

The separation of powers is a constitutional, organizational principle of the State and it is guaranteed by the Greek Constitution as a triple separation of state institutions/organs and as a triple separation of state functions. To make clear this separation and its manifestations in tax matters in the Greek legal system, it is necessary to state the following introductory clarifications in advance:

In the terminology of public law in our country it is more correct to refer to legislative power and executive power rather than Parliament and Government, given the fact that according to the Greek Constitution, legislative power is not solely exercised by the Parliament. Legislative power in Greece is exercised jointly by the Parliament and the President of the Republic (article 26, paragraph 1 and art. 42, paragraph 1[1] of the Greek Constitution), while executive power shall be exercised by the President of the Republic and the Government (article 26, paragraph 2 of the Greek Constitution). The judicial power shall be exercised by courts of law (article 26, paragraph 3 of the Greek Constitution).

Although legislative function is exercised by institutions/organs of legislative power, the executive power (meaning the President of the Republic and the Government and Public Administration in general) also has the right to legislate that is to enact rules of law (regulations). Nevertheless, the issue of regulations by executive power is only possible on the basis of a special (legislative) delegation granted by the institutions/organs of legislative power (article 43, paragraph 2 and 4 of the Greek Constitution). Given this fact, statutes in the Greek legal system are distinguished in formal and substantial statutes. In the Greek legal system, formal statute is the statute issued by legislative power, i.e. the statute passed by Parliament and promulgated and issued by the President of the Republic, regarless whether it contains rules of law.

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[1] Article 42 par.1 of the Greek Constitution : «The President of the Republic shall promulgate and publish the statutes passed by the Parliament within one month of the vote. The President of the Republic may, within the time-limit provided (….) send back a Bill passed by Parliament, stating his reasons for this return». Article 42 par.2 : «A Bill send back to Parliament shall be introduced to the Plenum and, if it is passed again, by an absolute majority of the total number of members, following the procedure provided in article 76 paragraphe 2, The President of the Republic is bound to promulgate and publish in within ten days of the second vote.»

Substantial statute is the statute, which contains rules of law. The substantial statute can either also be a formal statute, in case it is issued by legislative power, or a simple substantial statute in case the statute is issued by executive power. If the Constitution or any other statute refers to regulation of an issue by statute, without being defined whether a formal statute is needed for the regulation, then it is accepted that a simple substantial statute is needed, in the sense that a simple substantial statute is sufficient. In this case no formal statute is demanded.

The distinction of statutes in formal statutes and substantial statutes is of high importance for tax issues, given the fact that the Greek Constitution demands in principle a formal statute (statute enacted by Parliament and by the President of the Republic) for tax issues, whereas a simple substantial statute is sufficient for tax issues of secondary importance.

Having made the above clarifications, we can examine in detail: the relationship between the Parliament and the Tax Authorities, in what extent tax authorities influence tax legislation (1), the meaning of legal indeterminacy in tax matters (2), the consequences of legal indeterminacy in tax matters (3), the relationship between the Tax Administration and the Domestic Tax Courts (4) and finally, the relationship between different legal sources (legal pluralism) (5) in the Greek legal system.

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1 The exceptional legislative competence of executive power on tax issues: Literature and case-law

The legislative competence of Greek Government and of executive power in general is only exceptional on tax matters. The Government and executive power generally do not enjoy legislative competence on tax issues, with the exception of legislative competence on non-substantial tax elements. This exceptional legislative competence is granted by virtue of a legislative delegation, whereas the legislative power is in charge of the determination of substantial tax elements. This rule is constitutionally guaranteed and in legal theory is called "principle of (formal) legality of taxes", in the sense that a tax is imposed by formal statute (i.e. a statute enacted by Parliament and the President of the Republic), given the fact that the application principle of democracy [2] is demanded for the tax levy.

[2] The notion of the principle of democracy is defined in article 1 par. 3 of the Greek Constitution, according to which "All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution".

Specifically, the Greek legislative power is competent for establishing substantial tax elements, which consist of tax subject, tax object, tax rate, tax abatements and exceptions (article 78, paragraphs 1 and 4 of the Greek Constitution)[3]. This happens because the article 78 of the Greek Constitution mentions that the determination of all these elements demands a statute enacted by Parliament and the President of the Republic (formal statute), meaning an act of legislative power. Furthermore, according to the Greek Constitution these elements should not be subject to legislative delegation. In other words, definitions of these elements by the executive power is forbidden. Specifically, according to article 78, paragraph 1 of the Greek Constitution "no tax shall be levied without a statute enacted by the legislative power (the Greek Parliament and the President of the Republic), specifying the subject of taxation and the income, the type of property, the expenses and the transactions or categories thereof to which the tax pertains". Furthermore, according to article 78, paragraph 4 of the Greek Constitution, "the object of taxation, the tax rate, the tax abatements and exemptions (…) may not be subject to legislative delegation". Thus the determination of substantial tax elements, which are the tax subject, tax object, tax rate, tax exemptions and abatements, by executive power, one head of which is the Government (article 26, paragraph 2 of the Greek Constitution) contravenes the Greek Constitution.

For that reason, a statute enacted by Parliament and the President of the Republic (formal statute) specifies explicitly and concretely the substantial tax elements, so that they are free from any arbitrariness and powers of discretion of tax administration.[4]

As far as the restricted and exceptional competence of executive power on tax issues is concerned, it should be noted that: a) According to the Greek Constitution, the restricted and exceptional competence of executive power on tax issues refers to non-substantial tax elements as mentioned above and b) this regulatory competence of the Administration is exercised within the limits of the legislative delegation granted by statute enacted by the institutions/organs of legislative power (article 43, paragraph 2 of the Greek Constitution).

In order to make the allocation of competencies between legislative power and executive power on tax issues more comprehensible, case-law of Greek Domestic Courts and in particular of the Supreme Administrative Court (Greek Council of State, CoS) is cited, referring to issues that may be regulated by the executive power (on the

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[3] Cf. Theocharopoulos L., Tax Law, General part, Thessaloniki 2002 (in Greek), p.111-113, Finokaliotis K., Tax Law, publishers Sakkoulas, Athens-Thessaloniki 2005 (in Greek), p. 103-104, Fortsakis Th., Tax Law, Publishers Ant. Sakkoulas, 2008 (in Greek), p. 70-73.

[4] Theocharopoulos L., Tax Law, General part, Thessaloniki 2002 (in Greek), p.127-128.

basis of legislative delegation). Thereby, non-substantial tax elements are distinguished from substantial tax elements, as for the determination of the latter being absolutely competent the legislative power.

According to case-law of the Greek Council of State, the competence of executive power is restricted in issues of procedural nature, related to tax levy and tax collection.[5] Furthermore, the Greek Council of State has adjudicated as constitutional the administrative act – which is definitely issued by virtue of a legislative delegation – on the basis of which net profit rates are specified for the determination of net income of self-employed persons.[6] Similarly, the Council of State adjudicated as constitutional the administrative act which determines the property upset prices per real estate zones and their fluctuation rates.[7] This is so, because these cases do not regard determination of tax object, but the regulation of special and technical issues concerning the assessment method of real estates market value.[8] On the contrary, in case of stock transfer, meaning the taxation of benefit arising by stock transfer, the Council of State decided that this particular benefit constitutes a tax object and for that reason, forecasting imputation assessment criteria of this benefit is only possible by formal statute, given the fact that these criteria constitute a conceptual specification of taxable share benefit.[9] Of great importance are also the judgements adjudicating as constitutional, the act issued by the President of the Republic (and not by formal statute), regulating (certainly, on the basis of relevant legislative delegation) issues concerning the keeping of account books and records.[10]

Furthermore, concerning the tax-rate the Greek Council of State has constantly held in its case-law that the exact determination of the tax rate by administrative authorities is allowed on condition that the maximum and minimum limits of tax rate or at least the maximum limit of tax rate is established by formal statute[11] (that is a statute enacted by Parliament and the President of the Republic). However, the Greek Special Highest Court [12] – which is responsible to judge exclusively the

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[5] Judgments of the Council of State 924/1954, of Supreme Civil and Criminal Court (Areios Pagos) 5/1958 in Chatzitzani N., Tax laws as interpreted by the Council of State and the Supreme Court, Volume I, 1965 p. 29, (in Greek). See also L.Theocharopoulos, Tax Law, op.cit., (in Greek), p. 113. Judgments of the Council of State 348/1953, 924.1954.

[6] Judgments of the Council of State 833/1959, 1259-1260/1987, 4354/1985, 2350/1993,1482/1994

[7] Judgment of the Council of State 230/2002

[8] Judgment of the Council of State 230/2002. On the same grounds also the judgment no 1522/1999

[9] Judgment of the Council of the State 62/2001

[10] Judgments of the Council of the State 852/1984, 4599/1987, 3353/1989, 3355/1989, 3357/1989

[11] Council of State case-law 1654/1964 in: Directory of Council of State Case-law, 1961-1970, Volume IV, p. 12 (in Greek), also Council of State 1580/1980, Council of State 3039 / 1986, Council of State 949 / 2000.

[12] According to article 100 (1), item e of the Greek Constitution, the jurisdiction of the Special Highest Court comprises "settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court (Greek Council of State), the

unconstitutionality of a formal statute provision[13]- has recently adjudicated that a formal statute should not only define the maximum limit of a tax rate[14]. According to this recent judgement of the Special High Court, a formal statute should determine the exact percentage of the tax rate. The present case-law will apparently effect in future the fixed case-law of the Greek Council of State and will lead to its' conversion. In addition, as far as the tax rate is concerned, the case-law of the Greek Council of State considers as constitutional the discretion of administrative authorities, granted by formal statute, to decide on own initiative whether it is advisable to levy a tax, which is provided by formal statute in all its substantial elements (tax rate, tax subject and tax object). However, in this case, the levy of the tax by administrative authorities should be justified in the relevant administrative act or in the relevant administrative file.[15] In practice, the discretion granted to Administration by the formal legislator, concerns mainly local taxes. Therefore this issue concerns often discretion granted to local authorities, like the municipal councils.

Besides the executive power is allowed to determine – by legislative delegation - other levies, like charges for public services, which are not taxes.

Finally, an exception of the principle of (formal) legality of taxes constitutes the rare case of imposition of taxes by the President of the Republic. This case concerns a legislative delegation to the President of the Republic, through a law laying down general directives, passed by Parliament's Plenum and which sets time limits for the use of the above mentioned delegation by the President.[16] This exception is provided by the Greek Constitution in article 78, paragraph 5, aiming to impose balancing or counteractive charges or duties and to impose, within the framework of the country's international relations to economic organizations, economic measures.

1.2. The initiative of the Government on tax bills and the Parliament's role regarding their vote

The right to introduce bills belongs to the Parliament and the Government (article 73, paragraph 1 of the Greek Constitution). Bills

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Supreme Civil and Criminal Court (Areios Pagos) and/or the Courts of Auditor". See more on the role of the Special Highest Court (SHC) see below under section 2.2.

[13] In case the provision is adjudicated as unconstitutional, the judgement of the SHC is binding upon all parties (erga omnes).

[14] Special Highest Court (SHC) 8 / 2007

[15] See indicatively among others Council of State (CoS) 3163 / 2006, CoS 2817 / 2000.

[16] This is the interpretation of article 78 par. 5 in jurisprudence, see Council of State 49/1991, To Syntagma (Greek Legal Journal), p.415 (in Greek). For contrary academic views, see. Finokaliotis K., Tax Law, op.cit., p. 107-109 (in Greek).

introducing local or special taxes or charges of any nature on behalf of agencies or public or private law legal persons must be countersigned by the Minister of Coordination and the Minister of Finance (article 73, Paragraph 5 of the Greek Constitution).

As already mentioned above[17], the Government enjoys legislative competence only on non-substantial tax elements and only by virtue of legislative delegation. As far as the parliamentary practice in the introduction of tax bills is concerned, it is observed that the Government enjoys exclusive initiative in introduction of tax bills.

Parliament discusses the tax bills in detail, because according to article 76 paragraph 1 of the Constitution every bill and every law proposal shall be debated and voted on once, in principle, by article and as a whole. That is in conformity with the principle of (formal) legality of taxes and the implementation of the principle of democracy.

Indeed, the codification of substantial tax provisions requires the same detailed discussion and procedure described in article 76, par. 1 of the Greek Constitution, given the fact that according to par. 7 of the art. 76 of the Constitution, tax codes are exempted from the summary procedure described in art. 76, par. 6. This particular summary procedure may take place for vote of judicial or administrative codes.

Though, as far as the vote of codes is concerned, a relevant question rises in this regard in theory and parliamentary practice. Particularly, the art. 76, par. 6 of the Constitution provides that judicial or administrative codes drafted by special committees established under special statutes, may be voted through in Parliament's Plenum by a special statute ratifying the code as a whole. Furthermore, the constitutional provision of par. 7, art. 76 provides that likewise, legislative provisions in force may be codified by simple classification or repealed statutes may be re-enacted with the exception of statutes concerning taxation.

This explicit exemption regarding the tax law codification in summary procedure of judicial and administrative code vote aims to protect citizens from arbitrary tax levy by the executive power. (This particular tax levy is actually imposed by the special committee in charge of drafting a relevant fiscal code). This prohibition is consistent with the

[17] See in detail above under section 1.1

principle of (formal) legality of taxes established in Constitution art. 78, which prescribes that substantial tax elements are voted by Parliament in a common voting procedure. They are actually voted according to the constitutional provision of par.1, art. 76: voted on once in principle, by article and as a whole. On the contrary, the codes vote in Parliament's Plenum takes place according to the constitutional provision of par. 6, art. 76 "by a special statuted ratifying the code as a whole".

Concerning the interpretation and implementation of the particular constitutional prohibition regarding tax codes, there are conflicting views between theory and parliamentary practice.

The prevailing school of thought argues correctly that the codification of tax laws is prohibited in summary procedure, founding its arguments upon grammatical and teleological interpretation. Nevertheless, as the constitutional exclusion of tax law codification by simple classification of fiscal provisions in force – codifications that can be controlled by national courts - is concerned, they lack validity. According to this theoretical view, the following is noticed:

- Tax provisions that were in force, before the codes were voted and are also included in such codes, are still in force.
- Tax provisions included for the first time in such codes, are not in force.
- Tax provisions, which are not included in the above mentioned codes and were in force during the promulgation of the relevant codes, are still in force.[18]

On the contrary, in parliamentary legislative practice the summary procedure is applied for tax codes too. In this case, the point of view is that the codification of tax provisions which were in force, is allowed by Constitution, only by simple classification. This point of view is grounded on the fact that such a codification is exempted by the relevant constitutional prohibitive provision mentioned above and is aiming to confront with legislative complexity in Greece.[19] Thus, Parliament's Plenum voted, according to the summary procedure of par. 6 and 7, art. 76, the law no. 2238/1994 by means of which the pre-existent tax provisions for income were codified. Subsequently, the Parliament's Plenum has ratified -in summary procedure- the codification of pre-existent VAT provisions, the codification of pre-existent provisions regarding inheritance tax, donation tax and parental donation tax etc.

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[18] Theocharopoulos L., "The unconstitutionality of the ratification of the Code of Income Tax (CIT) through law 2238/94 and its legal effects", To Syntagma (Greek legal journal), 1997 (in Greek), p. 953 et seq.

[19] For more details about the interpretation and application of the constitutional provision of article 76 par. 7 of the Constitution, prohibiting tax codes, see instead of others Theocharopoulos L., "The unconstitutionality of the ratification of the Code of Income Tax (CIT) through law 2238/94 and its legal effects", op.cit., p. 995 et seq.

2. The meaning of legal indeterminacy in tax matters

2.1. Legal indeterminacy and discretion in tax legislation: Which is the role of the Administration ?

As already mentioned above in detail,[20] the principle of (formal) legality of taxes is guaranteed by art. 78, par. 1 and 4 of the Greek Constitution. Accordingly, a formal statute specifies explicitly and concretely the substantial tax elements and consequently the tax subject and object - i.e. the tax base - so that they are free from any arbitrariness and power of discretion of tax administration. Consequently, the discretion of the Administration is constitutionally prohibited regarding substantial tax elements, meaning tax subject, tax object, tax abatements, exceptions and tax rate as well.[21]

However Tax Authorities practically play a significant role regarding the elucidation of law content by issuing explanatory directives consistent to the Constitution and the law.

The role of Administration in tax regulations, in which legal indeterminacy occurs, is a two-sided issue:

a) According to positive law and the relevant literature of tax law[22] in the Greek legal system there is no room for personal evaluation. That is because, as already elaborated above, the principle of (formal) legality of taxes and the narrow interpretation of tax provisions are in force in our country. Therefore, for the Greek formal legislator (Parliament and the President of the Republic according to art. 26, par. 1 of the Greek Constitution), there is only one method by means of which the formal tax statute does not allow tax authorities room for discretion. Furthermore, vague concepts and formulation aren't allowed regarding the substantial tax elements (tax subject, tax object, tax rate, tax abatements and exceptions, article 78 of the Greek Constitution).

b) Nevertheless, the tax legislator in Greece is familiar with the following occurrence:

Technical-legislative indeterminacies are often observed in formal statutes, due to bad formulation and legislative complexity that

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[20] See under section 1.1

[21] See relevant case-law on tax rate and tax base above, under section 1.1

[22] Theocharopoulos L., Tax Law, op.cit., p.160, Finokaliotis K., Tax Law, op.cit., p. 87, Fortsakis Th., Tax Law, op.cit., Theocharopoulou Eleni, "The right to be heard before a negative administrative decision in tax procedures", Chr. Pr.L. (Greek legal journal) 2006, p. 276-285.

often leads to a maze of rules in force. That is the reason why the promulgation of directives by the Ministry of Finance is actually necessary. The directives are following almost every new tax statute.

These administrative directives addressing to local tax authorities include guidelines and intend to clarify the statute, drafting in order to clarify indeterminacy and eventually apparent inconsistencies between new provisions and former statutes amended. The forwarding of such genuine directives – always addressing officials of tax authorities -, which don't imply enactment of new rules of law, is lawful and derives from the hierarchical structure of Administration, part of which is Tax Administration. This hierarchical structure implies that Tax Administration bodies are integrated in the administrative hierarchy and are connected by mutual hierarchical nexus. This means that the directing tax authorities have the right and are, actually, obliged in the above mentioned cases to forward directives with guidelines for the following reasons: For the uniform implementation of tax statue in the whole country, for the guaranteed observance of the tax legality principle and for the equal treatment of taxpayers before the tax law, meaning the equal treatment of taxpayers by Tax Administration.

It has to be remarked that explanatory directives are binding upon tax authorities and taxpayers only if they are consistent to the Constitution and the legislation, while regulatory directives under the cover of regulation interpretation (not truly interpretative), are invalid and insubstantial in the Greek legal system.[23]

2.2 Constitutionality control of tax legislation by independent domestic Courts and the issue of legal indeterminacy

The independent domestic Courts enjoy institutional and functional independence, according to art. 87, par. 1 and 2 of the Greek Constitution. They are obliged to control the constitutionality of tax provisions, as well as of any legislative provision, according to art. 93, par. 4 of the Greek Constitution. The latter article defines that the courts are bound not to apply laws the content of which are contrary to the Constitution. Furthermore, according to art. 87, par. 2, judges are in no case obliged to comply with provisions enacted in violation of the Constitution.

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[23] See D.Kontogiorga - Theoharopoulou, "The remedy of action for invalidation before the Council of State" University Class Materials 1976, p. 48 et seq. and the bibliography and Council of State case-law therein, id., "Mandatority and enforceability of "regulatory" ministerial directives", Volume in Honour of I. Deliyiannis, Volume IV, Aristotle University Publishers, Thessaloniki 1992, p.153-174 (in Greek).

The features of the above mentioned judicial control are the following: It is an indirect control, and this is the reason why it is called incidental control. This control is incidental in the sense that the court control the tax legislation with the occasion of a judicial action (brought before it) not against a formal statute (that is impossible in the Greek legal system) but against an act of the tax administration that is based on a statute provision, the unconstitutionality of which is consequently controlled indirectly. Furthermore, this judicial control takes place "ex officio" as well, without being necessary to raise relevant objection. After all, this judicial control is a pervasive control, given the fact that it is exercised by all Courts,[24] at every point of the proceedings, even during the court conference before the publication of the judgement.

According to article 78, par. 1 and 4 of the Greek Constitution legal indeterminacy is not permitted regarding the substantial tax elements, as it is already mentioned in detail above.[25]

In any event, in the Greek legal system in general, it has to be mentioned that there is no procedural possibility of direct appeal against a formal statute provision (consequently against a formal tax statute as well). The eventual unconstitutionality of formal statute provisions is controlled by all domestic courts, at each point of the proceeding only incidentally, that is on the occasion of judicial action against administrative-tax act, which is based on the controversial legal provision.[26] In case provision is adjudicated as unconstitutional (for example due to indeterminacy), it will not be applied in this judged case. Nevertheless, the unconstitutionality of the same provision can be re-examined on the occasion of another case by another court.

Furthermore, in case the requirements of article 100, par. 1, item e of the Greek Constitution are fulfilled, that is to say as far as the Highest Courts of the Country (Council of State, the Supreme Civil and Criminal Courts (Areios Pagos) and/or the Court of Auditors) have pronounced conflicting judgments regarding the unconstitutionality of legislative provisions, the Special Highest Court is responsible to adjudicate the unconstitutionality of the provision in question and declares this provision as invalid. In this last case, the provision in question cannot be implemented and the re-examination of its unconstitutionality before any

[24] See on the control of constitutionality of laws, instead of others, Venizelos Ev. – Skouris V., Judicial control of unconstitutionality of laws, Ant. N. Sakkoulas Publishers, Athens – Komotini 1985, passim (in Greek), Manitakis Ant., Rule of Law and control of unconstitutionality of laws, Sakkoulas Publishers, Thessaloniki 1994, passim (in Greek), Spiliotopoulos Ep., Manual of Administrative Law, Ant. N. Sakkoulas Publishers, Athens 2005, p.444 (in Greek).

[25] Under sections 1.1 and 2.1.

[26] See above under section 2.2

Court is not permitted. However, the Special Highest Court is not permitted to abolish this provision, because this would contravene to article 26 of the Constitution providing the separation of powers.

Besides, eventual indeterminacy in a tax legislative provision is treated in the Greek legal system by the institutions responsible for the implementation of the relevant provision as following: The Tax Administration, as the first institution implementing the relevant tax provision, issues explanatory directives to clarify the text and its' unclear points.[27]

The administrative - tax judge, who is the final judge of the controversial legislative provision: On the one hand, according to art. 78 of the Constitution, he is obliged to apply the narrow interpretation and not any other interpretative method [28] to specify the content of the indeterminate provision and on the other hand, in case that the indeterminacy is not eliminated, the provision is considered as contravening the art. 78 of the Constitution. However in case-law conclusions of the Council of State there is no judgment considering a tax provision as unconstitutional due to indeterminacy.

3. The consequences of legal indeterminacy in tax matters

As already noticed, national courts have "de facto" the final word for law interpretation,[29] on the occasion of applying the controversial provision for the resolution of a specific tax dispute.

Generally, in the Greek legal system the following is applied:
According to article 77, par. 1 of the Constitution, the authentic interpretation of the statutes should rest with the legislative power. In case a law needs to be clarified, it can be interpretated by a new interpretative law, derived from legislative power institutions. An interpretative statute is in force retroactively since the publication of the former statute, which is being interpretated by the new one. Nevertheless, if the new statute is not truly interpretative, then it shall

[27] See above under section 2.1
[28] According to the Council of State case-law, particular rules of interpretation apply to the interpretation of tax laws. Thus, the uniform interpretation of tax laws is imposed (Council of State 32/1949) and in any case, tax laws may not be interpreted broadly (Council of State 404 – 408 /1943, 1049, 1170, 1315 / 1949, 265 /1952). Moreover, tax laws may not be interpreted extensively (CoS 909 / 1939, 1922 / 1952). There is established case-law especially for exemptions from tax liability and tax exemptions, the provisions of which need to be interpreted narrowly (CoS 2358 / 1947, 1089 / 1949). For the above case-law, see Council of State Conclusions 1929-1959, National Printing House, 1961, p.438 (in Greek)
[29] See above under section 2.2

enter into force only as of its publication (art. 77 par. 2 of the Constitution).

Certainly, tax authorities, that are primarily responsible for the implementation of tax law, are capable of issuing explanatory directives under the above mentioned restricting conditions.[30]

Finally, the domestic Administrative - Tax Courts and the Supreme Administrative Court (Council of State) have the final word in the interpretation[31] of the controversial appliable provision of tax law on the occasion of judicial appeal against a tax act founded in this controversial provision.

It should be remarked that there is no procedural possibility in our country to appeal to national courts requesting the interpretation of a legal provision. The judgement of the Court regarding eventual unconstitutionality is incidental and "ad hoc", makes the relevant provision inapplicable, but it does not affect the validity of the provision for other cases. The provision adjudicated as unconstitutional is inapplicable according to art. 93, par. 4 of the Constitution, providing that national courts are bound not to apply a statute the content of which is contrary to the Constitution.[32]

Concerning the possibility of meaning completion of eventual legal indeterminacies, the following should be remarked: The meaning completion of a tax law enacted by Parliament and the President of the Republic is not possible by issuing of regulatory administrative acts, neither through not truly interpretative regulatory directives, nor through creative interpretation by the competent Courts, whereas activistic case-law interpretation is not permitted. This very practice would contravene to the principle of (formal) legality of taxes and to the narrow interpretation of tax laws (article 78 of the Constitution). Furthermore, such a practice would be also contrary to authentic interpretation of the statutes which should rest to the legislative power (article 77 par.1 of the Greek Constitution). [33]

As far as the meaning completion of legal indetrerminacies by administrative directives is concerned and as for taxpayers' and Courts' commitment to them, the following should be remarked: According to what has been mentioned before, administrative directives addresing tax

[30] See above under section 2.1
[31] Otherwise there will be denial of justice.
[32] See above under section 2.2
[33] See above under section 3.2

authorities' officials are binding upon the officials in charge, only if they are consistent to hierarchical superior rules of law (the statute and the Constitution). In this framework, these internal administrative acts are binding upon taxpayers regarding the fulfilment of their tax obligations.

As far as courts' commitment to the administrative directives is concerned, according to article 87, par. 2 of the Greek Constitution, judges in the discharge of their duties are subject only to the Constitution and the laws. Thus, the courts in no case take into account administrative directives. Accordingly, judges listen only to the voice of their conscience and they are not bound by explanatory administrative acts, because they are not subjected to any hierarchy as administration officials do and consequently tax authorities' officials.

4. Relationship between Tax Administration and Domestic Tax Courts:

4.1. Judicial control of the application of tax law by the Administration

As already mentioned, according to the Constitution, national administrative - tax courts control the application of tax legislation by Tax administration only incidentally and only with the occasion of a judicial administrative action (brought before them) against an act of the tax administration that is based on the said tax legislation.

It should be noted that, in case of a regulation of the Tax Administration issued on the basis of legislative delegation (of art. 43 par. 2 of the Constitution), it is possible to directly challenge the regulation through an action for invalidation before the Council of State, which may wholly or partly annul the tax regulation.

Moreover, not only tax regulations but also individual administrative acts can be controlled for unconstitutionality or unlawfulness of the provisions of substantial law that form its basis by another criminal or civil court on the occasion of a criminal or civil trial.

4.2. Extent of binding force of administrative directives, information given by the Administration etc. upon national courts

Regarding the taking into account of administrative directives by the case – law of national courts, these are not taken into account, as presented in detail, as they do not constitute a source of law.

With regard to the binding force of "information" given by the Tax Administration upon courts, it should be said that there is no connection

between courts and Administration, unless the relevant question is posed in the frame of administrative - tax litigation. Thus, in this frame, it should be noted that the issue is controversial, as it is related to the applicable procedural system before the administrative - tax judiciary. On the basis of the Code of Procedure before the Administrative Courts (CPAC) that is currently is force[34], the system of judicial enquiry prevails, given the fact that administrative (tax) litigation aims at preserving public interest, which is in principle contrasted to the position taken in civil litigation.

The above procedural system is characterized by particular principles as to the distribution of the burden of proof between the parties in administrative - tax litigation, i.e. the litigants and, in the specific case, also the tax judge. These procedural principles refer both to the role of tax judge in tax litigation, out of which derives also the extent of the binding force of litigants' allegations upon him, as well as to the burden or proof borne by the parties, as procedural equals in tax litigation, namely of the Tax Administration that issued the challenged act as a party holding the administrative file, and of the tax subject whose action initiates tax litigation in the first instance.

a. The dynamic role of the judge: With regard to the role of the administrative (tax) judge in tax litigation- which is governed by the inquisitorial system- and the binding force of litigants' allegations upon him, and in particular of the allegations of the Tax Administration, the following principles apply[35]:

i) the principle of discovery of the objective (substantial) truth ex officio (article 33 CPAC), by virtue of which the judge may order the complementing of evidence and the performance of any necessary act ex officio,

ii) the principle of preliminary evidence[36], and

iii) the principle of free use and evaluation of evidence by the court, unless otherwise stipulated in a special statutory provision (e.g. increased probative effect of public documents).

Therefore, in accordance to the above principle, an administrative (tax) judge has increased powers and is not bound in principle by the administrative file and the allegation of the Tax Administration as a litigant, but only under certain conditions.[37]

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[34] Code of Procedure before the Administrative Courts (CPAC), law 2717 / 1999, Official Gazette A 97.

[35] Kontogiorga – Theocharopoulou Dim., Evidence in administrative litigation, Speech at the 2nd Congress of Administrative Judges, November 30– December 2 1990, op. cit., p. 36 et seq. (in Greek) and the footnotes therein.

[36] Theocharopoulos L., Tax law, op. cit., p.328

[37] See below under b

In particular, according to article 33 of the Code of Procedure before the Administrative Courts, tax courts are responsible for the progress of litigation. To this end it orders the performance of any necessary procedural action and takes all appropriate measures to discover the truth and the most expedient delivery of the judgement. According to article 146 CPAC, evidence is based on the data included in the administrative file according to article 149, as well as on the data that resulted from evidence proceedings before the court.[38]

Moreover, by virtue of article 148 CPAC, the court uses means of proof according to its judgment and evaluates them freely, individually or in conjunction with one another, unless otherwise provided for in a specific legislative delegation. It appears from the provisions in this article that the court only takes into account evidence that has been produced admissibly, e.g. as preliminary evidence, but these still evaluated freely, in order to form their own view. An exception to this rule is posed by article 171 on the probative effect of public documents[39].

In contrast to civil litigation, the inquisitorial system that applies in tax litigation reserves a broad spectrum of powers, initiatives as well as obligations for the administrative court, aiming at the discovery of the objective truth. The powers and obligations of the administrative court comprise, among others, the examination (even on its own motion) of the legal foundation of the challenged act or omission on the one hand (see article 79 of the Code of Procedure before the Administrative Courts), and on the other hand the delivery of a preliminary ruling for the completion of evidence (see articles 152 and 153 of the Code of Procedure before the Administrative Courts), also on its own motion, if it is deemed "necessary". In other words, in case that the evidence produced by the parties is insufficient for the administrative court to form its own view or if the court has reached a temporary factual dead end, the judge is to order the complementing of evidence[40]

However, these powers and obligations do not extent up to the point of overturning the conversational system, as is the case in criminal litigation. The latter means that the administrative judge may not disregard or surpass the rules of the law of evidence (see articles 144 to 186 of the Code of Procedure before Administrative Courts), which belong to the conversational system and include the rules on the burden

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[38] According to article 147 CPAC the following are means of proof: tangible evidence, expert reports, documents, party confession, explanations offered by the parties, testimony and judicial presumptions. It is certainly possible to exclude one or more means of proof, if so expressly provided for by the law governing the legal relation. The means of proof produced and invoked by a party are common to the other litigants as well.

[39] For more details, see below under b.

[40] K. Yiannopoulos, "Evaluation of evidence by the competent court", Diikitiki Diki (Greek legal journal), 2004 p. 306 et seq. (in Greek).

of proof[41]. Therefore, the provisions of article 145 of the Code of Procedure before Administrative Courts define the general rule of the conversational system, according to which: each party has to prove the facts invoked in support of its allegations (certainly only these facts that have direct or indirect influence in the outcome of litigation) –unless otherwise provided by the legislature – and the other litigant is entitled to counterproof. Litigants are entitled to invoke the data that results from the administrative file according to article 149. The litigant against whom a lawful rebuttable presumption is invoked bears the burden of rebuttal.

Furthermore, the said provisions of article 145 that belong to the conversational system should be interpreted in conjunction with those of article 33 of the same Code, which establish the inquisitorial system, in view of the public purpose that they serve mainly in tax litigation.

This means that the administrative - tax court does not dismiss single-handedly the factual allegations of the litigants by claiming that they were not able to prove the factual foundation of their allegations. On the contrary, by virtue of the principles of the inquisitorial system that apply in administrative - tax litigation, the court is obliged to proceed on it own motion with complementing evidence, as long as it has not formed its mind from the data included in the file, in application of article 151 of the Code of Procedure before Administrative Courts[42] [43].

The case-law of the Council of State seems to be moving to same direction in tax disputes[44]; it is thereby accepted that the meaning of article 151 of the Code of Procedure before Administrative - Tax Courts is that the administrative court only may and is not under obligation to order the complementing of evidence, when the litigants, who bear the burden of proving the factual foundation of their allegations, did not produce sufficient or any evidence. This reference to the possibility of administrative - tax judges to complement evidence reflects usual practice and refers to the cases where the evidence produced is sufficient for the court to form its own view. In the opposite case, the court not only "may" but "ought to" order the complementing of evidence.

It should be noted that this case-law does not and cannot mean that the competent courts has to form its view only from the existing evidence[45] and exclusively on the basis of Article 145 CPAC on the burden of proof. On the contrary, according to article 144 of the Code of

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[41] See. Chatzitzanis N., Code of Procedure before Administrative Courts, Ant.N. Sakkoulas Publishers (in Greek).

[42] Article 151 CPAC stipulates that, following a request of a litigant or on its own motion, the court may order by ruling the complementing of evidence by any appropriate means of proof, if it so deemed necessary.

[43] K. Yiannopoulos, "Evaluation of evidence by the competent court" («Εκτίμηση αποδείξεων από το δικαστήριο της ουσίας»), op. cit., p.306 et seq.

[44] See Council of State (CoS) 109 / 1996 , 3108 / 1996, 190 /1995, 2054 / 1995, 2170 / 2003.

[45] See also article 146 CPAC

Procedure before Administrative Courts, the administrative courts takes into account, even on its own motion with the sense described above, other data as well: commonly known facts, i.e. facts that are so widely known that there is no reasonable doubt that they are true, as well as facts that are known to the court due to previous judicial actions. The courts take equally into account the lessons of common experience, also through judicial presumptions, as well as foreign law, as long as this is known to the court, legal custom and common practice. These provisions, based on the inquisitorial system, deviate from those of article 145 CPAC and reconfirm the general inquisitorial principle which is mainly evident in article 33 of the same Code. Thus, the burden of proof, if it is not completely abolished, especially where its effects are concerned, it is mitigated to a considerable extent and illustrates the judicial guardianship of the administrative - tax judges, so that the tripartite structure of administrative – tax trial is supported.[46]

Nevertheless, in the same cases, not only is the invocation of this data by litigants for proving their factual allegations allowed, but it is advisable, in order to assist the court in the discovery of objective truth.

Moreover, according to wording of article 151 CPAC, the administrative - tax court may order by preliminary ruling the complementing of evidence, while, according to the wording of article 155 par.1 CPAC the court may request by decision from third parties information and data that is necessary for the discovery of the case.[47]

Moreover, the Code of Procedure before Administrative Courts enumerates in article 147 exclusively the lawful means of proof before competent administrative courts and does not leave them at the discretion of the Tax Administration. Subsequently, their elements and the method of production are defined in detail in articles 156 to 185. In particular, the following are stipulated in article 147 as means of proof: a) tangible evidence, b) expert reports, c) documents, d) private party confession, e) explanations offered by the parties, f) testimony, and g) judicial presumptions. It clearly results from all these provisions that no means of proof that are not enumerated in article 147 of CPAC are not admissible in administrative - tax courts, nor are the aforementioned means of proof to be taken into account by the court, if the parties have not observed articles 156 to 185 CPAC that determine in detail the elements of the means of proof and their way of submission before the court, by virtue of the principle of preliminary evidence. Finally, it should be noted that even through judicial presumptions, which are by definition related to

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[46] Kontogiorga – Theocharopoulou Dim., op.cit., Speech at the 2nd Convention of Administrative Judges, November 30– December 2 1990, op. cit., p. 36 et seq. (in Greek) and the footnotes therein

[47] Ap. Gerontas, "The burden of proof in administrative litigation", Efarmoges Dimosiou Dikeou (Greek legal journal), special issue II, pp.19-21 (in Greek).

indirect evidence, the powers of administrative - tax judges are enhanced, given the fact that judges are frequently called upon to deduct consequences from known about unknown things, based on the lessons of common experience and reason (enriched by generally accepted principles of science and art)[48].

With regard to the binding force of public documents upon courts, it is noted that, according to article 171, public documents that have been drafted by the competent institution by observing all statutory formalities have full probative force for the information stated in them, either that the person that drafted them acted or that the information stated took place before him, and counterproof as to such information is only possible if these documents are challenged for falsity. Otherwise, the content of public as well as private documents is freely evaluated, according to the provisions of article 148. Other evaluations by public institutions that are included in public documents are also freely evaluated by administrative - tax courts, while counterproof against them is also permissible. Moreover, audit reports that are drafted by tax institutions have the full probative force of article 171 par. 1[49], except for the information contained in them and the confessions of the auditee.

As a consequence of all the above, the dynamic role of administrative – tax judges in the respective litigation is evident. This role is inherent in the inquisitorial system that is currently in force and is justified by the need for discovery of objective truth (in favour of public interest) and by the need for limitation of natural inequality of the parties, i.e. between tax subjects and tax administration, as the latter holds the data of the case or is in proximity to facts that have to be proved.[50]

b. Burden of proof: With regard to the burden of proof of the litigants as procedural equals in tax litigation, namely of the Tax

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[48] See Dim. Kontogiorga – Theocharopoulou, Speech at the 2nd Convention of Administrative Judges, November 30– December 2 1990, op. cit., p. 39, J-Ph. Colson, L' office du juge et la preuve dans le contentieux administrative, these, 1970, p. 77 et seq., B. Pacteau, Contentieux Administratif, 2nd ed., PUF 1989.

[49] See below under b. It should be clarified that, as concerns confession as a means of proof, it was accepted by the Council of State (CoS) that there can be no confession of the State (of the Tax Administration) or acknowledgement that is binding upon the court, as king as no such binding force is provided for in express provisions (CoS 306/1954, CoS Conclusions 1929-1959, National Printing House, 1961, p. 442). Since 1999, this case-law has been codified in the CPAC currently in force, and therefore only the confession of the private party litigant is included in the means of proof to be taken into account by the court, according to article 147 CPAC, as presented earlier. Nevertheless the most usual means of proof in administrative court practice are documents, both public and private, while tangible evidence and expert reports are rare. Testimony that was taken in preliminary evidence procedure is not uncommon. Unfortunately, this testimony is not taken by observing the conditions of article 185 of the Code of Procedure before Administrative Courts and in that way evidence is rendered inadmissible.

[50] Kontogiorga – Theocharopoulou Dim., 2nd Congress of Administrative Judges, op. cit., Theocharopoulos L, Tax Law , op. cit., p.296, J-Ph. Colson, L' office du juge et la preuve dans le contentieux administrative, these, 1970, p. 77 et seq..

Authority that issued the challenged act as the party holding the administrative file, and of the tax subject whose action initiates tax litigation in the first instance, the following should be noted:

The burden of proof of the Tax Authority is fulfilled by producing in court the evidence it holds.

As mentioned above, this data is taken into account by the court only as long as it constitutes lawful means of proof. Certainly because of the position of each litigant in administrative - tax litigation, there is a differentiation in the means of proof that each litigant is to produce.

With regard to the Tax Authority, its main means of proof is the public common document that its instruments draft after the performance of an audit, usually called audit report. It is a public document that contains a description of all actions undertaken by the public instruments that drafted the document, everything that took place before them, as well as their further findings. The audit report is conclusive evidence as far as the actions of the report authors and everything that took place before them are concerned.[51]

It is however common practice that the Tax Authority produces before the court also other documents, both public and private.[52] Article 173 of the Code of Procedure before Administrative Courts does not distinguish between submitted copies of public and private documents, while it is stipulated that they can be evaluated by the court, as long as the latter is convinced of their accuracy from other data[53].

A question arises in cases where the Administration refuses to produce critical evidence in court, claiming that this evidence is comprised of confidential documents. It has been adjudicated[54] however, that reasons of such nature may in principle justify a restriction to the right of free access of the litigant to the file submitted in court; nevertheless, under no circumstances is the non-submission of

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[51] Should a private party litigant wish to challenge the fact that some of the aforementioned facts that are certified as actual in the report, he should challenge the audit report as falsified (see as relevant articles 169 et seq. CPAC, as well as articles 144 et seq. of the Code of Tax Procedure). Nevertheless, as far as the opinions of the authors, other information and any confessions of the tax object are concerned, the audit report is freely evaluated and there may be counterproof (CoS 377/2007, 893/2001, 2071/1990).

[52] Under the previous regime (i.e. the regime of the Code of Tax Procedure), according to article 146 (1) CTP, when the public documents submitted by the tax authorities were non-certified copies of the original documents, it has been adjudicated that they cannot be taken into account by the court (CoS 1325/1988). In case that the submitted documents were copies of private documents, according to article 146(2) of the same code, then their content could be co-evaluated along with the remaining evidence.

[53] Thus, the supreme administrative court in interpreting article 173 it adjudicated that it results from these provisions that simple copies of documents that are means of proof are taken only subsidiarily into account by the court, which, being convinced of their probative value, is to co-evaluate them along with the remaining evidence produced, without these copies, photocopies etc having to be necessarily certified (CoS 3561/2005).

[54] CoS 4600 / 2005, 3631 / 2002

confidential information in court justified. Any opposite opinion would surpass the purpose of classification of certain information as confidential, would amount to complete exclusion of judicial control in significant areas of administrative action and would constitute a drastic restriction to the right to judicial protection that is not tolerated by the Constitution (art. 20 par. 1) and art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Therefore, in case that the justification of the challenged administrative act is based on confidential information, the administration is on the one hand not obliged to mention in the main body of the challenged act the facts that emerge from the above confidential information, but on the other hand it ought to submit the said confidential information for consideration by the court, in a way that is certainly compatible with their classification as confidential.

Finally, the Council of State has adjudicated[55] that only testimonies taken according to the rules in articles 152 et seq. of the Code of Tax Procedure (CTP) constitute lawful means of proof during the procedure before administrative courts. Administrative - tax courts can not take into account testimony that does not meet the requirements of the above provisions, not even by virtue of the principle of free evaluation of means of proof by courts of article 124 CTP, as this principle presupposes the use of means of proof prescribed by statute. Nevertheless these testimonies may be taken into account, if were not taken in order to be produced in administrative - tax court but were taken according to administrative procedures[56]. Concerning this issue, the meaning of the provisions in articles 147, 148 and 179 of the Code of Procedure before Administrative Courts is analogous. Thus, the Tax Authority has proved its views on the fictitiousness of invoices by producing an extrajudicial statement taken according to administrative procedures and not in view of the trial; it thus constitutes an extrajudicial testimony that may not be taken into account according to the meaning of these provisions. [57]

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[55] Emerges from the conjunction of the provisions in articles 123, 152 and 154 of the Code of Tax Procedure that was earlier in force.

[56] Consequently, testimony in the form of solemn declarations of law 1599 / 1986, as well as sworn testimonies of third parties given before a notary, which have substantial influence upon the outcome of the trial that is in progress before an administrative courts, are not considered to be lawful means of proof and may not be taken lawfully into account, not even for the subsumation of judicial presumptions, as the necessary formalities prescribed by the Code of Tax Procedure were not observed in order to ensure their validity, because they are testimony that was given in violation of articles 152 et seq. of the CTP. However, the above restriction does not apply in case that the solemn declaration was not given to be submitted to an administrative court, but was taken according to administrative procedure or its content refers to the audit report.

[57] CoS 2931 / 2006

With regard to the time of submission of evidence by litigants and subsequently about the taking into account of the relevant evidence by the court, the following should be mentioned:

In article 150 of the Code of Procedure before Administrative Courts it is stipulated that: "Documentary evidence and testimony of article 185 should be submitted to the court at the latest until the day immediately preceding the day of the first hearing of the case. Submission at a later hearing is only admissible, when their timely submission was impossible, according to specifically justified adjudication by the court".

Moreover, in article 96 of the same code entitled "Change of object – new claims and evidence" it is stipulated that: "2. It is permissible to put forward new factual allegations in appellate litigation, as long as they refer to issues that were challenged in the first instance litigation and their submission was deemed to be justified."

It results from these provisions that, in principle, the production of new evidence by the litigants has to be in the form of preliminary evidence and in particular until the day immediately preceding the first hearing of the case. Production at a later stage is in principle not allowed; it may however be admitted in court by a specially justified ruling only in the special case that its timely production was impossible.

It has been adjudicated that, according to article 96 of the Code of Procedure before Administrative Courts, invocation and production of new means of proof in appellate litigation is only permissible only to prove new factual allegations, when their submission only at the second instance is duly justified and not when they aim to prove allegations that were also put forward at the previous instance.

In application of article 197 of the Code of Procedure before Administrative Courts it has been adjudicated[58] that, in case of a remedy rejected by final court judgement due to lack of conclusive proof of the factual basis of the demand or of the claim due to non-submission or unlawful submission of evidence, the judgement may develop res judicata not only on evidence issues but also on a question of substance, which is to be proved by this evidence. The above interpretation of the CoS produces the result that cases are not reopened before competent courts, when they aim at the satisfaction of the same claim and for which a court judgement has been issued that is not subject to regular methods of review, by invoking each time new evidence and thus infringing the provisions of the Code of Procedure before Administrative Courts on res judicata. If interpreted in the above light, the provision of article 197(1)

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[58] CoS 166/2007

of the above Code does not contravene article 20 par. 1 of the Greek Constitution[59], nor article 6 par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[60], because the right to judicial protection by courts that is protected by these provisions is subject to restrictions, as long as there are no limitations that affect the said right in its substance. The prohibition of reopening cases for which a court judgement has been issued that is not subject to regular methods of review constitutes a permissible restriction.

4.3. The binding force of case-law upon the Tax Administration

The Tax Administration takes into account the case-law both of national courts and the ECJ. In fact it is under obligation to take into account the relevant case-law, in case it has received a circular that informs about the content of the relevant judgements. When there is an ad hoc res judicata, it is bound by it.

There is not a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts.

With regard to the legal binding force of the Administration by case-law, the following applies:

In the Greek legal order, by virtue of article 95 par. 5 of the Constitution, the Tax Administration has to conform to the "res judicata" of court judgements that may not be challenged by ordinary or extraordinary methods of review. Only in case that there is no res judicata, i.e. there is no ad hoc court judgement, the administration applies the particular provision to the particular tax subject, by interpreting the particular provision according to their opinions and with its own responsibility (disciplinary, civil, criminal). Therefore, if there is a court judgement in another real case, the administration is under no obligation to uphold the interpretation of the particular provision, as there is no res judicata to bind it. Nevertheless, the Administration usually follows the said interpretation of the provision, especially when it is interpreted through the judgement of the Council of State, i.e. of the Supreme Administrative Court of the country.

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[59] Article 20 par. 1 of the Greek Constitution stipulates that every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law.

[60] Ratified by legislative decree 53 / 1974 (Official Gazette A 256)

The infringement of the obligation of the Administration to adhere to court judgements (article 95 par. 5 of the Constitution), generates responsibility for each competent instrument, as stipulated by law. A law determines the necessary measures to ensure the adherence of the administration.

Nevertheless, in practice the administration always adheres to judgements only in case there is an ad hoc judgement on the matter, while it is possible to disregard case-law in another case for which there is no res judicata, despite the fact that it is case similar to the one that has already been adjudicated.

5. Relationship between different legal sources (legal pluralism):

5.1. Legal pluralism

The Parliament, the Tax Administration and the Greek National Courts comply with different legal sources, depending on the legal source position in the hierarchy of sources of law.

The sources of law[61] are distinguished in those of a national and of supranational level.

The classic written legal sources of tax law at national level are hierarchically classified as follow: sources at constitutional level (the Greek Constitution primarily), sources at formal statute level, sources at substantial statute level or at level of tax regulatory act and finally the tax assessment at personal level. Nevertheless, it is observed that even in the same rank in the hierarchical structure of legal sources, there is an internal hierarchical structure based on different criteria, most important of which is the formal criterion in the sense that the institution/organ and the process is of high importance (depending actually on the hierarchical classification of the institution that issued the act). For example, a formal statute voted by Parliament's Plenum is of a higher rank than any other formal statute voted by Sections of the Parliament.

The classic written tax law sources at supranational level are established in article 28, par. 1 and 2 of the Greek Constitution. Particularly, the article refers to special rules of international law and to the rules of European community law.

[61] On the sources of law, see instead of others, Tachos A., Greek Administrative Law, Sakkoulas Publishers, Thessaloniki – Athens 2005, p.94 et seq. (in Greek).

Concerning the rules of international law they "shall be an integral part of domestic Greek law" (art. 28, par. 1 of the Greek Constitution). In detail, according to article 28, paragraph 1 of the Greek Constitution, rules of international law are divided in two categories: the generally recognised rules of international law and the international conventions/treaties.

The generally recognized rules of international law, as well as international conventions/treaties as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

Under the category of international conventions as described in art. 28, par. 1 of the Constitution fall double tax treaties concerning income tax, capital tax and inheritance tax. These treaties shoud consequently be ratified by formal statute to be integrated in the domestic legal system. These treaties after having been ratified, prevail over any other legal rule, and are classified between the Constitution and a formal statute. Consequently, their integration in the domestic legal systems does not occur “ipso jure” -as opposed to generally recognised rules of international law - and their amendment or repeal by vote of a new statute its not possible since their ratification (unless this very same procedure is followed).

Greece has concluded various bilateral double tax treaties[62] that constitute the international convention tax law of our country and after having been ratified by statute,[63] they prevail[64] over any contrary provision of the law.[65]

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[62] Especially the treaties for the avoidance of double taxation on income that have been signed until 2006 by Greece are included in the two volumes published by the Directorate of International Economic Relations (IER) of the Ministry of Economy and Finance in English and Greek entitled: “Avoidance of Double Taxation with regard to Income and Capital”, September 2006, Conventions, Forologiki Epitheorisi (in Greek).

[63] See instead of others Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40 (in Greek).

[64] For the legislative supremacy of the said tax treaties against national law, according to the dictation of article 28 of the Constitution, see indicatively the relevant case-law of the Council of State 3416/2004, Council of State 1975/1991, TrDPrAth 7956/2005. See also. Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40 (in Greek). The same in Anastopoulos I. – Fortsakis Th., Tax Law, op. cit., 2003, p. 362, n^{o} 399 (in Greek), Finokaliotis K., Tax Law, Sakkoulas Publishers, Athens - Thessaloniki 2005, p. 230, n^{o} 503 (in Greek), Barbas N., Taxation of income, Sakkoulas Publishers, Athens - Thessaloniki 2003, p. 354, (in Greek), Chrisogonos K., Individual and Social Rights, Ant. N. Sakkoulas Publishers, Athens, Greece, 1998, p. 14, (in Greek). However, it was adjudicated in a large number cases that tax treaties supercede the general provisions of national law as special provisions, especially tax treaties that were concluded before entry into force of the 1975 Constitution, given the fact that at the time their

As far as the OECD's Model Tax Convention on Income and on Capital and its Commentaries is concerned, they are not part of the Greek international convention tax law, because the OECD Model Tax Convention has not been ratified by statute, as defined in article 28 of the Greek Constitution regarding the enforcement of international conventions / treaties. Nevertheless, bilateral double tax treaties follow OECD's Model Convention content and the rules on the allocation of fiscal sovereignity indicated by this Model Convention.[66] [67]

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superlegislative effect was not provided in the constitution. The indicatively mentioned judgements ruled on the basis of the "lex specialis derogat legi generali" Council of State 3450/2005, DEfAth 3100/2001, Council of State 4078/1997, Council of State 1038/1994, Council of State 1627/1991, DEfAth 1315/1991, Council of State 550/1991, Council of State 3016/1986. See Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40 (in Greek).

[65] The pre-EU international tax treaties for the avoidance of double taxation remain in force also for Greece, as for every member state of the EU (compare VOGEL K., Double Taxation Conventions, Kluwer Law and Taxation Publishers, 2nd Edition, Deventer-Boston 1997, p. 74), but also according to the interpretation of article 307 EC (according to article 307 of the EC Treaty "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.", see Prevedourou Eug., article 307 in Skouris V., Commentary of the EU and EC Treaties, Ant. N. Sakkoulas Publishers, 2004, p. 1678-1687, (in Greek), member states are under the obligation to ensure the compatibility of these conventions with community law (see Finokaliotis K., Tax Law, 2005, op.cit., p.230-232, nos. 504-506 (in Greek), Chatzioakimidou Eu., Tax Treaties. Their application in partnerships, Nomiki Vivliothiki Editions, 2005, p. 47 and the footnotes therein (in Greek). For the above issues, see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40-41 (in Greek).

[66] Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.41-42 (in Greek). It should be noticed that the Model Tax Convention is prescriptive and not binding. According to the Model Tax Convention, States are allowed to take uniform action against double taxation. On the recommendation of the OECD's Council: Member states should comply with the Model Tax Convention and its Commentaries when signing or revising bilateral double tax treaties. They should also take into consideration reservations of Tax Administrations which are formulated in the same text (of the Commentaries). Revisions of the Model Tax Convention and its Commentaries should also be taken into consideration by Tax Administrations, when they are asked to apply bilateral double tax treaties provisions, in case they are based on the Model Tax Convention, see OECD, Model Tax Convention on Income and on Capital, Introduction, p. 7, n° 3. Nevertheless, this does not imply that Commentaries of the Model Tax Convention constitute legal commitment [Contra Vinieri V., who claims that Commentaries are legally binding, see "The meaning of the term "resident" in double tax treaties", Epixeirisi (Greek legal journal) 2/2005, p. 275 (in Greek)], although the Commentaries were jointly agreed and accepted or even through reservations which were formulated about this issue by representatives of the Ministries of Finance of the OECD's Members States. Only double tax treaties concluded between two states are legally binding on internartional level – as expressively cited repeatedly in the Introduction of the OECD Model Tax Convention (OECD, Model Tax Convention…, op. cit., Introduction, p. 15, n° 29). Commentaries concerning the OECD Model Tax Convention do not constitute annexes of the bilateral double tax treaties, but are widely recognised by States though as interpretative tool for uniform application of the particular treaties (OECD, Model Tax Convention..., op. cit., p. 15, n° 29 και p. 10,

With regard to European community law, it may be deduced from the conjunction of par. 1 and 2 of article 28 of the Constitution, as well as from the rules of community law itself (the binding force of which varies according to whether it is primary or secondary law) in which cases it forms part of the national legal order and what its position in the hierarchy of sources of law is. The position of European community law may be inferred from the ECJ case-law but also from the jurisprudence of the highest national courts (Supreme Court (Areios Pagos), Council of State, Court of Auditors and Special Highest Court).

According to article 28 par. 2 of the Constitution, authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

It is generally accepted that primary European community law possesses direct effect in member states and upon their nationals.

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n° 15). Furthermore, the case-law of the Court may take them into consideration, when interpreting bilateral treaties (OECD, Model Tax Convention ..., op. cit., p. 15, n° 29.3).

[67] The interpretation of bilateral tax treaties should follow the provisions of the Vienna Convention of 23-5-1969 on the Law of Treaties (ratified in Greece by the decree 4021/1974). According to art. 31, par. 1 of the Vienna Convention, treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, see Roukouna E., International Law, t. A., Athens 2005, p. 147 (in Greek), Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.43 (in Greek)**,** Finokaliotis K., Tax Law, op.cit., p. 230, n° 503, Anastopoulos I. – Fortsakis Th., Tax Law, op. cit., p.363, n° 401. Concerning the interpretation of bilateral tax treaties according to the provisions of Vienna Convention, see Chatzioakimidou Eu., Tax Treaties. Their implementation on partnerships, op.cit., p. 60-67 and references. However, the view (see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.43) that Commentaries of the Model Tax Convention should be particularly taken into consideration (both by Administration and the Courts), in case that a provision of the bilateral double tax treaty is identical to that of the Model Tax Convention, is correct. Furthermore, it is not correct to claim that issues not mentioned in the bilateral double tax treaties are "filled/supplemented" by provision of the OECD Model Tax Convention, even more in case that the Model Tax Convention provision existed before the conclusion of the controversial bilateral treaty. Given the fact that the States concluding the treaty have taken into consideration the Model Tax Convention (and the Commentaries) and follow its formulation or, on the contrary, extravagate from its formulation, their intention is clearly concluded. Besides, the respective treaty signed by the States and ratified by statute is the double tax treaty in force and not the OECD Model Tax Convention. Thus an incorrect interpretation of the Vienna Convention was produced by judgment nr. 9360/2000 of the Administrative Court of First Instance in Athens: the "intepretation" and the "completion./supplement" of the provisions of article III of the treaty between Greece and USA, according to article 7 par. 3 of the OECD Model Tax Convention and particularly based on the incorrect arguement that the above mentioned article (of the Model Tax Convention) is not abolished because it was considered as special in comparison with the laterly voted general domestic law provision. There is a confusion in the present judgement regarding particularly the fact that the articles of the OECD Model Tax Convention do not constitute provisions of Greek legislation since they have not been ratified by statute, as provided by article 28 of the Greek Constitution. Consequently, given that OECD's Convention is not part of Greek law, it couldn't constitute a special Greek statute prevailing over a general Greek statute. Concerning this issue, see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.43 (in Greek)

Nevertheless, various opinions have been supported in our country with regard to the hierarchical classification of European community law in relation with national laws and national constitutions, such as: the superlegislative power of community law or only of primary community law, the latter of which is also more accurate, the supremacy of European community law against national Constitution, the supremacy of national Constitution against community law or relations of equality between the two legal systems (or at least the lack of competition between them), unless civil liberties and the foundations of democracy are at stake, in which case European community law prevails. In any event, it is certain that European community law enjoys in our country superlegislative power by virtue of article 28 par.2. Thus, national courts control (national) statutes for their compatibility with the said European community law only incidentally, in the same way that they control the eventual unconstitutionality of a statute. With regard to secondary community law, it has firstly no direct effect and secondly, its content, particularly in tax issues, e.g. directives related to tax issues, is transposed into the Greek legal order by statute.

Irrespective of the above doctrinal or jurisprudential views on the position of European community law in the hierarchy of the sources of law, one cannot overlook the fact that, in practice, pecuniary penalties imposed by community institutions, community funding and community support programmes are a last resort and operate as an “enforcement apparatus” of European community law, so that member states adhere to European community law, in order not to be deprived of the latter. Consequently, the prevalence of European community law against national legal orders is de facto ensured.

Beyond written sources, “unwritten” sources of law are also accepted. Through the latter sources of law, new legal rules are created by interpretation that constitute soft law. However, the creation of such rules in national tax law is very limited, due to the principle of (formal) legality of taxes.

5.2. The taxpayers' legal remedies for the protection of their rights

Generally, in the Greek legal system the legal remedies in which the taxpayer has access to and assure him/her effective protection of his/her rights are granted either by the domestic legal system or by EC law. Regarding tax treaties, as already mentioned in detail above, they enter into force in the Greek legal system after their ratification by domestic statute. After having been ratified, they become part of domestic

law and, consequently, legal remedies accessed by taxpayer for protection of his/her rights granted by domestic law are effective also for his/her rights granted by these treaties.

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From the issues elaborated, it is deduced that the hierarchy of legal sources in our country is conform with (and follows) the distinction of State Institutions/Organs and State functions according to article 26 of the Greek Constitution and the application of the principle of democracy as well as according to article 1 par. 3 of the Greek Constitution. Thus, the supremacy of the formal legislator is guaranteed in principle, which, almost, prevails in tax issues. However, in parallel, the judicial control of the executive power (or, otherwise, of the Public Administration, where Tax Authorities belong to) is guaranteed and of the legislator as well as in the rare case of unconstitutionality of a statute or its contradiction to primary Community Law – a judicial control which, simultaneously and primarily, ensures civil and human rights against arbitrariness of Tax Authorities in taxation.

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