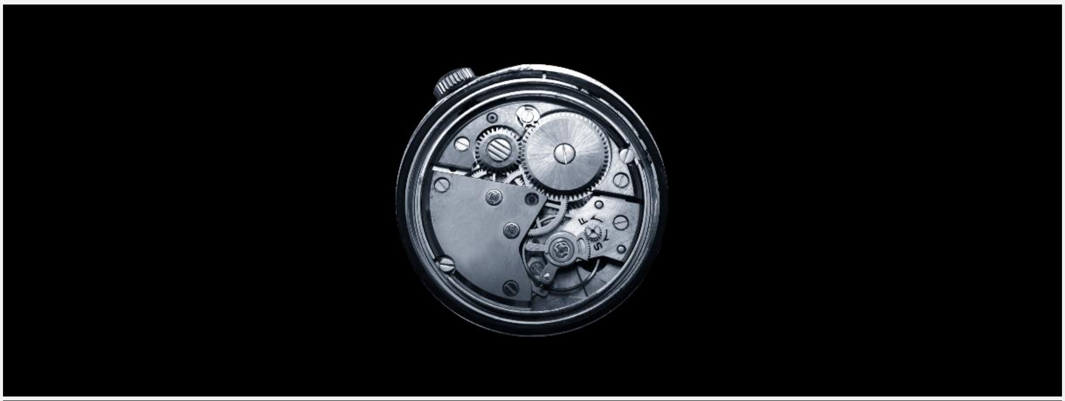

Legal Council of State opines on SAC decision involving extensions of statute of limitations for tax purposes

Greece' s Legal Council of State, a body with consulting role for the State, recently issued its opinion in the case involving the constitutionality of laws that extended the statute of limitations (SOL) for the government to assess taxes, following the landmark decision of the Supreme Administrative Court (SAC) (Decision 1738/2017) published on 27 June 2017. The SAC held that successive extensions of the SOL violate the constitutional principles of legal certainty, proportionality and "tax legitimacy," and that tax audits conducted after the expiration of the normal SOL are unconstitutional, and the relevant assessments should be annulled. The SAC decision potentially could affect a significant number of audits and assessments.

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Background

The SOL for the Greek tax authorities to assess taxes on a taxpayer generally is five years from the end of the year in which the tax return was due, although the limitations period is extended in exceptional cases up to 10, 15 or 20 years based on specific provisions.

At issue in the case before the SAC were laws enacted by the Greek parliament that extended the SOL for the government to assess taxes shortly before the SOL period expired (or before the expiration of the extended period). The effect of such legislative action was that the normal five-year SOL may not be applicable to tax liabilities arising within a fiscal year to which a tax assessment relates.

SAC decision

The SAC concluded that the legislation extending the SOL for tax assessments violates the principle of legal certainty where the legislation is applied on a retroactive basis of more than one year, i.e. the SOL period that is being extended under the legislation began more than one year before the legislation was voted on. The SAC also held that the proportionality principle requires that the prescription period for the imposition of taxes have a reasonable duration—the time period should be defined in advance and be sufficiently predictable for taxpayers. The SAC also stated that a reasonable SOL period also helps to ensure the effectiveness of audits carried out by the tax authorities; tax audits are designed to collect tax, not penalize taxpayers or to assess tax, so it is unlikely that an audit will be effective when the taxes are assessed in a much later period. Based on these findings, the SAC held that tax audits conducted after the expiration of the normal five-year SOL are unconstitutional, and the relevant assessments should be annulled.

LCS opinion

In response to a request from the Independent Public Revenue Authority (IPRA, formerly the General Secretariat of Public Revenue, the tax authorities), the LCS issued its opinion on the implications of the SAC decision):

- Decisions of the SAC are legally binding on the parties to the case. In future cases involving legal issues that already have been adjudicated by the SAC, the lower court will have to follow the SAC decision. However, the Greek tax authorities are not automatically bound by a decision of the SAC on other cases with the same legal issues, unless the tax authorities formally approve and adopt the decision (generally through the issuance of a circular). Until such time, the authorities have discretion whether to proceed with ongoing and pending audits and whether to initiate audits in cases that are deemed to be time-barred based on the SAC decision.

- A minority of the LCS expressed the opinion that the tax authorities may not issue audit notices or proceed with pending tax audits for fiscal years where the SOL has expired.

While not binding on the tax authorities, this minority view could add pressure on the tax authorities to decide ultimately to follow the SAC decision.

- The provision in the tax procedure code (TPC) that allows the tax authorities to extend the SOL from five to 10 years due to the provision or discovery of supplementary data is not affected by the SAC decision.

- Although the provision in the TPC that allows an extended 20-year SOL in tax evasion cases violates the constitutional principles of legal certainty and proportionality, the tax authorities must apply the provision until the SAC expressly rules on its constitutionality and/or its interpretation.

- Taxes already paid for time-barred fiscal years may not be refunded unless the tax assessments are annulled or amended by the Directorate for Dispute Resolution or pursuant to a court proceeding.

- The SAC decision will not excuse taxpayers from paying amounts assessed for otherwise time-barred fiscal years where the taxpayer is participating in the voluntary disclosure program.

- Criminal prosecution related to time-barred fiscal years in tax evasion cases will be determined by the relevant prosecuting authorities and criminal courts.

The tax authorities are expected to issue guidance with respect to the SAC decision to help taxpayers currently under audit for past years avoid unnecessary costs.

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