

## client alert

INVESTMENT | TURKEY |

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### NEW MEASURES TO PROMOTE INVESTMENT

The "Law Amending Certain Laws to Improve the Investment Climate" No. 6728 (the "Law No. 6728") was enacted on 15 July 2016 and published in the Official Gazette No. 29796 dated 9 August 2016.

This newsletter briefly summarises the changes of Law No. 6728 on several important laws for investors conducting or intending to conduct business in Turkey.

#### **INCOME TAX LAW NO. 193**

Wages paid to employees of regional administrative centres opened by Turkish non-resident corporations duly authorised by the Turkish Ministry of Economy shall be exempted from income tax, provided that such wages are paid using income generated outside Turkey.

The above provision shall become effective on 1 September 2016.

#### **STAMP DUTY LAW NO. 488**

- For papers (e.g. agreements) signed in multiple original copies, the proportional stamp duty shall be payable only once (as opposed to the previous regime where the stamp duty was payable for each executed original copy, thus creating a significant tax burden for the transacting parties).
- Contractual penalty clauses shall not trigger stamp duty liability provided that they do not constitute a standalone agreement. In other words, only executing a separate agreement on this very specific matter could generate stamp duty. However, the risk is not totally remote if, in the same agreement, some penalty clauses totally independent from the purpose and scope of the agreement are stipulated between the parties. In other words, such clauses should be considered as an integral part of or accessory to the purpose and scope of the agreement.
- Share purchase agreements related to shares of Turkish joint stock companies, limited liability companies and partnerships limited by shares shall be exempt from stamp duty. This modification will significantly decrease the tax burden on these kinds of transactions.

- Law No. 6728 has added a new exemption to existing stamp duty exemptions regarding the transfer of loans granted by banks, foreign credit and international institutions, whereby the transfer of receivables arising from the same is no longer subject to stamp duty. This amendment is expected to boost the circulation of money without creating any stamp duty leakage. However, it is worth noting that ordinary corporations cannot benefit from such exemption.
- If an agreement is subject to the capped amount of stamp duty calculated over the transaction amount, the increase of such transaction amount at a later stage shall not trigger any additional tax liability, provided that other stipulations of the agreement are not amended. The implementation of this provision will require further clarification as to the scope of such "other stipulations". Applicability of this principle is indeed questionable where provisions are amended in a way that has no impact on the original provisions determining the stamp duty (e.g. applicable law, competent jurisdiction, addresses of notices, clauses etc.).
- Where a paper contains more than one suretyship and/or guarantee, stamp duty shall be levied only one time on each category of such collaterals (i.e. once for the suretyship and once for the guarantees).
- The following transactions are exempt from stamp duty:
  - option and future agreements and relevant documents concluded by, or via, banks and intermediary institutions;
  - buy-sell agreements, suretyships and securities recorded on such agreements concluded by associations and foundations and real persons for their residency;
  - lease agreements and suretyships and securities recorded on such agreements concluded by craftsmen and self-employed persons exempted from income tax and taxpayers through a single entry system of bookkeeping, for usage as workplace;
  - documents related to the purchase, sale, lease, management, and assignment of assets and rights arising from lease certificates, partnerships to a joint venture for the issuance of lease certificates, and their payments;
  - agreements and related documents prepared by venture capital funds or venture capital investment trusts for the exclusive purpose of venture capital investments; and
  - agreements between investors and intermediary institutions with regard to margin trading, short sales and lending and borrowing of securities.

One must also note that the amendments of Law No.6728 aim to boost economic development by making the application of stamp duty more flexible. Indeed, the Turkish Council of Ministers is allowing the authorities to reduce proportional stamp duty rates to 0% through decrees. This should enable the Council of Ministers to determine different stamp duty rates for different types of papers by taking into consideration the type of transactions that local authorities intend to incentivize.

The above provision entered into force on 9 August 2016.

## CORPORATE TAX LAW NO. 5520

Law No. 6728 has reviewed the scope of the "related party" definition set out under Article 13 of the Corporate Tax Law. Accordingly, at least 10% of shareholding, voting or dividend rights are required for a transaction to be considered as hidden distribution of dividends. If at least 10% of voting or dividend rights are granted without establishing a partnership structure, the parties shall also be deemed as related parties.

Furthermore, the following new methods for determining the price or fee applicable to transactions between related parties, defined as "transactional profit methods", have been added to the relevant Article:

- (i) Transactional net profit margin method: a method based on the analysis of the net profit margin determined by the taxpayer on an appropriate basis that takes into account the costs, sales or assets.
- (ii) Profit share method: a method based on the distribution of total business profit or loss related to the transactions performed by the related parties on a *pro rata* basis of the functions and risks undertaken by said related parties, in line with the arm's length principle.

Additionally, taxpayers may now use another self-determined mechanism if the arm's length principle could not be evidenced through application of all other mechanisms set forth by the relevant Law.

Lastly, the tax loss penalty to be applied to late or incomplete accrual of taxes due to hidden distribution of dividends is reduced to 50% for taxpayers who fully comply in due time with the documentation obligations with regard to transfer pricing.

In transfer pricing matters, the Council of Ministers have the additional authority to:

- (a) decrease the rates used in determining related parties down to 1% or increase them up to 25%;
- (b) cancel this requirement entirely;
- (c) extend the scope of documentation obligations by requesting information on the activities of related parties abroad in line with international agreements;
- (d) determine the procedures with regard to the exchange of this information with tax authorities of other countries, in line with international agreements; and
- (e) determine further principles and procedures with respect to transfer pricing.

The above provisions entered into force on 9 August 2016.

## VALUE-ADDED TAX LAW NO. 3065

Law No. 6728 has revised the scope of sale-leaseback agreements executed by financial leasing companies, participation banks and development and investment banks within the framework of Law No. 6361 on Financial Lease, Factoring and Financing Companies.

Accordingly, sale, lease and transfer of all types of movable and immovable assets that are purchased and leased back to the relevant lessor within the framework of sale-leaseback agreements executed by the aforesaid companies shall now be exempt from value-added tax.

This provision entered into force on 9 August 2016 and is applicable retroactively for transactions performed as from 2 August 2013.

### **EXPENDITURE TAXES LAW NO. 6802**

The funds obtained from the transactions before the money and capital markets by the pension investment funds, mutual funds, investment trusts, venture capital funds and venture capital investment trusts, shall now be exempt from the banking and insurance transaction tax, which ranges from 1% to 5% (the "BITT").

Furthermore, banks and financial institutions shall now be allowed to deduct the applicable BITT from taxes related to the collected fees, commissions and other amounts that are returned to consumers within the framework of Law No. 6502 on Protection of the Consumer, from the BITT of the period during which the said returns are made.

Insurance companies may also deduct cancelled parts of the taxes related to the cancelled policies of the BITT within the period during which said cancellations are made.

The above provisions entered into force on 9 August 2016.

### **TURKISH COMMERCIAL CODE NO. 6102**

Law No. 6728 has also amended various provisions of the Turkish Commercial Code No. 6102, the major amendments being:

- authorised signatories of natural or legal person merchants may now submit their declarations of signature directly to the director or vice-director of the relevant trade registry without being subject to notarisation;
- articles of association of joint stock companies may now be signed directly before the director or vice-director of the relevant trade registry without being subject to notarization;
- articles of association of joint stock companies are no longer subject to the valuable paper fee;
- founders' statements are no longer part of the documents required for the incorporation of joint stock companies; and
- the proceeds arising from the sold assets of a company in liquidation may now be distributed to the shareholders of such company at the earliest after the lapse of a period of 6 months (previously 1 year) as from the third notification made to the creditors. Accordingly, the liquidation procedure may now, under normal circumstances, be completed within 6 months instead of 1 year.

The above provisions entered into force on 9 August 2016.

## **BANKRUPTCY AND ENFORCEMENT LAW NO. 2004**

The amendments wrought by Law No. 6728 on the Bankruptcy and Enforcement Law No. 2004 (the "Bankruptcy and Enforcement Law") focus on the provisions regarding the postponement of declaration of bankruptcy.

According to the amendments made by Law No. 6728, the recovery project to be submitted to the court for the postponement of declaration of bankruptcy shall contain the objective, true sources and measures including new cash sources, as well as a method that would cover the operating costs and working capital needs of the relevant company.

Furthermore, the court may also take preventive measures for the protection of the assets of the relevant company, such as suspending initiation and pursuit of enforcement proceedings launched against the company upon request of postponement. Interim injunctions or ancillary attachments shall not be imposed and prescriptions and foreclosures shall not be applied anymore during this period, in contrast with the former provisions of the Bankruptcy and Enforcement Law.

A new article regarding appeal against decisions on the postponement of declaration of bankruptcy has also been included in the Bankruptcy and Enforcement Law. However, preventive measures on the debtor's assets shall not be affected by the decision of reversal of the Court of Cassation, unless otherwise ruled by the latter.

The above provisions entered into force on 9 August 2016.

## **SOCIAL SECURITY AND GENERAL HEALTH INSURANCE LAW NO. 5510**

Amendments to the Social Security and General Health Insurance Law No. 5510 mainly focus on combining the financial notifications required by the stipulations, extending the scope of responsible persons regarding the accuracy of notifications to be made to the Social Security Institution.

Accordingly, financial advisors authorised through written agreement, independent accountant financial advisors and certified public accountants of companies, are henceforth held jointly and severally liable, along with the employer, for the accuracy of tax and premium service notifications of the financial books and records to be sent to the Institution via internet, electronic and similar media.

Furthermore, both the monthly premium and service declarations that were formerly submitted to the Social Security Institution and the withholding tax declarations that were formerly submitted to the Ministry of Finance, shall henceforth be submitted to the Ministry of Finance through the new declaration form "Withholding and Premium Service Certificate".

The above provisions entered into force on 9 August 2016.

## **CHEQUE LAW NO. 5941**

Amendments made to the Cheque Law No. 5941 by Law No. 6728 bring stricter requirements for cheque account owners and cheque drawers.

All cheque books shall now contain the Turkish identification number of its real person owner and the Central Registration System number (in Turkish, *MERSİS numarası*) of the legal entity owner.

Moreover, the cheques shall henceforth contain a serial number provided by the corresponding bank and a 2-d code. Banks shall not be allowed to distribute cheque books that do not contain such specific items to cheque account owners as from 31 December 2016. However, the lack of the bank serial number or 2-d code on foreign cheques or on cheques that were printed prior to 31 December 2016 shall not affect the validity thereof.

Furthermore, bounced cheque drawers shall be subject to a judicial fine up to 1,500 days for each bounced cheque.

The above provisions entered into force on 9 August 2016.

*In compliance with Turkish bar regulations, opinions relating to Turkish law matters which are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.*

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