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Recent Developments in International Taxation

Italy

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This report summarizes the most significant international tax developments that have occurred in Italy since the last report dated June 2022.

Introduction

The main legislative novelties to Italian tax legislation generally occur every year-end when the financial bill is approved and enacted and years 2022 and 2023 were no different in this respect as **Law No. 197 of 29 December 2023** ("**Budget Law 2023**") marked significant tax law revisions at a domestic level.

As far as the scope of the present work, the main measures in national and international taxation in Italy might be listed in the following:

1) Deductibility regime for "Black-List" costs;
2) Substitute tax on profits and earning reserves of subsidiaries resident in State or territories with a privileged tax regime;
3) Provisions over the taxation of capital gains realized by non-resident persons on the sale of the stakes into non-resident "real estate" companies and entities
4) Investment Management exemption, by which new presumptions of non-existence of a permanent establishment of foreign entities have been introduced;
5) Cryptocurrency Taxation discipline and related monitoring undertakings of the taxpayers.

In addition to the above, the Budget Law 2023 introduced several provisions to facilitate the taxpayers to settle the pending disputes with the Tax Authorities (so called "**Tregua Fiscale**"), within the future perspective of the tax reform system.

2022 Year has been also characterized by the repeal of the so-called "systematic dummy companies" regime ("*Società in Perdita sistematica*") enacted with the Decree Law No. 73/2022 (converted into Law No. 122/2022), according which it provided, until the tax period in progress as at 31 December 2021, the taxation of a minimum income starting from the following tax period in cases where the taxpayer had declared tax losses in the previous five or a tax loss in the four tax periods and an taxable basis lower than the minimum income in one of the previous five.

Additionally is to be reported that, **on 4th August 2023**, the "Enabling Law" for the Italian tax system reform has been definitely approved by the Italian Parliament[1], also intervening and enshrining certain specific principles in the field of international taxation, as well as providing for the transposition of the Council Directive (EU) 2022/2523 of 14 December 2022, following the internationally agreed common approach based on the OECD technical guide on global minimum taxation, with the introduction of, inter alia: *(a)* a national minimum tax and *(b)* a specific and dissuasive penalty regime ("**Pillar 2**").

Furthermore, a particular focus has been pinned over the development of the so-called **"Cooperative Compliance" framework**, within the aim to encourage a new culture relationship between the taxpayers and the Tax Authorities and to promote the legal certainty.

Italy has implemented also the following European Union Directives relevant in the international tax area: Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 with regard to cross-border conversions, mergers and divisions; Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC 7**").

Finally, it is worth nothing that, by the Ministerial Decree enacted **on 20 July 2023**, Switzerland has been definitively delete from the list of the Countries with privileged tax systems as per article 1 of the Ministerial Decree of 4th May 1999 which novelty leads to important improvements from the taxpayer perspective.

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1. *Budget Law 2023 – Main novelties relevant under the international taxation perspective of* **international taxation.**

1.1. *Deductibility regime for BlackList costs*

The Budget Law 2023 introduced certain deductibility limits to expenses resulting from transactions with companies or professionals resident or located in states or territories considered "non-cooperative" ("**Non-Cooperative Parties**") for tax purposes as per Annex I of EU list adopted by Conclusions of the Council of the European Union[2].

As per such novelty, costs arising from transactions with **Non-Cooperative Parties** for tax purposes:

- that do not exceed the normal value are deductible *tout court* (i.e. without the need to prove the actual economic interest of the transaction);
- that exceed the normal value are deductible, for the excess, upon demonstration of actual economic interest.

The principle according which the CFC rule applies in priority to the regime of the regime for Black-List costs is confirmed. Furthermore, the obligation to make autonomous disclosure of the costs in the tax return is also reintroduced, regardless of whether they are lower or higher than the normal value.

1.2. *Substitute tax on profits and earning reserves of subsidiaries resident in State or territories with a privileged tax regime.*

The Budget Law 2023 provided also the possibility to redeem or repatriate, through the payment of a substitute tax, the profits and profit reserves undistributed for the taxpayers who hold stakes into non-resident companies and entities located in States or territories with privileged tax regimes, as of the date of entry into force of the same Budget Law 2023. The profits and profit reserves must result from the financial statements closed in the tax year previous the one in progress as at 1th January 2022.

The taxpayers must exercise the specific option in the tax return for the tax period ending 31 December 2022 and entails the payment, in a lump sum in 2023, of a 9% substitute tax for participations held by companies and 30% for participations held by individuals.

This provision also introduces a further reduction in the rate by a further three percentage points if the controlling entity repatriates the relevant profits or earnings reserves by the deadline for payment of the balance tax for the 2023 tax period (for 'solar' taxpayers by 30 June 2024).

1.3. *Provisions over the taxation of capital gains realized by non-resident persons on the sale of the stakes into non-resident "real estate" companies and entities.*

The 2023 Budget Law amended the provisions related the taxation in Italy of the non-resident persons which hold stakes into "real estate" non-resident companies and entities ("not listed"), to be intended as entities which 50 percent of the value is to be referred, at any time during the 365 days preceding their sale, directly or indirectly, from real estate located in Italy.

This novelty introduced the new taxation principle, in line with the original Article 13(4) of the OECD Model, according which the income from capital gains realized from the resale o redeem of real estate companies is to be considered relevant for Italian tax purposes if the real estate assets are therein located. Therefore, the Italian Legislator intended to treat the taxation of capital gains on the disposal of participations in companies whose value derives predominantly from real estate located in Italy in the same way as the taxation of capital gains on the direct disposal of such real estate.

The new rules do not cover collective investment undertakings ("UCITS") that are established in an EU country or in a European Economic Area (EEA) country in accordance with the UCITs or AIFM Directives, in respect of which, and regardless of their legal form, the ordinary exemption regime remains confirmed.

1.4. *Investment Management exemption, by which new presumptions of non-existence of a permanent establishment of foreign entities have been introduced.*

The 2023 Italian Budget Law have amended the Italian permanent establishment provisions by inserting an investment management exemption in the lines of the UK one. In particular, in order to avoid (and guarantee) the foreign asset manager from tax challenges, by means such novelty new presumptions of non-existence of a permanent establishment of foreign entities have been introduced, if where certain requirements are met, either for so-called "*Agency Permanent Establishment*" as well as so-called "*Physical Permanent Establishment*".

The Investment Management Exemption is reserved to:

- foreign investment vehicles, resident of the States included in the "*white list*" as per Italian Ministerial Decree of 4 September 1996) acting in Italy not to have a taxable presence therein;
- the same vehicles must be compliant with certain independent requirements to be identified with a Ministerial Decree of future enactment;
- the person who act in Italy on behalf of the vehicles must not hold corporate offices as director or statutory auditor (or similar) and not be entitled to participate in the economic results of the vehicle itself;
- the person who act in Italy on behalf of the vehicles must be remunerated at market value.

1.5. Cryptocurrency Taxation discipline and related monitoring undertakings of the taxpayers.

The Budget Law 2023 set forth a new discipline related to the tax regime of crypto-assets, distinguishing between "non-entrepreneurs" and "entrepreneurs" taxpayers.

For such purposes, "*crypto-assets*" are defined as "*a digital representation of value or rights that can be transferred or stored electronically, using distributed ledger or similar technology*".

As regards "N*on-entrepreneurs*", the tax regime of crypto-assets provides that income arising from is not subject to taxation if less than, in the aggregate, EUR 2,000 in the tax period. In addition, the exchange between crypto-assets having the same characteristics and functions does not also constitute a taxable event.

If the value is higher than EUR 2,000, Capital gains and other income referred to in Article 67 co. 1 lett. c-sexies) of the TUIR are subject to the 26% substitute tax referred to in Article 5 co. 2 of Legislative Decree 461/97.

The administered or managed savings regime (*"risparmio amministrato" and "risparmio gestito")* as per articles 6 and 6 Legislative Decree no. 461/1997 shall apply.

As regards the "*Entrepreneurs*", without prejudice to the ordinary determination of income relevant for corporate tax purposes, by way of derogation from the general valuation criteria, the positive and negative components resulting from the valuation of crypto-assets at the end of the tax period, regardless of the allocation to the Profit and Loss Account, are not included in the income statement. The criterion of tax irrelevance of crypto-asset valuations also extends to IRAP.

Finally, it is worth mentioned that the crypto assets are subject to the fiscal monitoring duty by financial intermediaries and the taxpayers themselves by mean the disclosure in the tax return by fulfilling the so-called RW form.

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2. *The “Enabling Law” for the Italian tax system reform (“Legge Delega per la riforma del sistema fiscale”)*

2.1. General principles under the international taxation principle

As regards on the recent development in international taxation in Italy - as above mentioned - on 3rd August 2023, the “Enabling Law” for the Italian tax system reform has been definitely enacted by the Italian Parliament also intervening and enshrining certain specific principles in the field of international taxation.

In first instance, the Enabling Law introduced the principle of the necessary coherence of the Italian system with international law, in particular by invoking the OECD recommendations within the BEPS (Base Erosion and Profit Shifting) project and with the jurisprudential evolution of the European Union Court of Justice, notably with regard to harmonized taxes (VAT and excise duties);

In addition, it has also been provided for new principles over the rules governing the tax residence identification of the taxpayers. The provision identifies as its scope of intervention the revision of the regulation of the tax residence of natural persons, companies and non-corporate entities as a criterion for personal connection for taxation, and of measures to make the income tax system more competitive at the international level. It also provides for the coordination of these rules with the rules on permanent establish organisation and that of the special regimes in force for persons transferring their residence to Italy, also considering the possibility of adapting it to the performance of work in “*agile mode*”.

2.2. Transposition of the Council Directive (EU) 2022/2523 of 14 December 2022

It has been delegated the Italian Government to transpose the Council Directive (EU) 2022/2523 of 14 December 2022 concerning the establishment of a global minimum level of taxation for multinational groups on a large scale in the European Union (“**Minimum Global Tax**”), in line with the common approach approved at international level (“**Pillar 2**”) on the basis of the Organisation for Economic Cooperation and Development's technical guide on global minimum taxation.

The objective of introducing, inter alia, a national minimum tax due with respect to all undertakings, located in Italy, belonging to a multinational or national group and subject to low taxation and a penalty regime, in line with that in force for income tax, for the breach of the minimum taxation requirements of multinational and national groups of undertakings and an effective and dissuasive sanctioning regime for the breach of the relevant disclosure requirements is specified.

Within the envisaged goal to be achieved, the legislator has also delegate to the Government to review, for the purpose of simplifying and rationalising, the regime of controlled foreign companies (so called "CFC") by updating the criteria for the computation of the taxable income subject to taxation in Italy and by coordinating the same rules with those under implementing for the purpose of the “Minimum Global Tax” as per Council Directive (EU) 2022/2523 of 14 December 2022.

2.3. *Amendments over the Cooperative Compliance regime*

The so called "Cooperative Compliance Regime" was introduced by Legislative Decree No. 128 of 5 August 2015, under the rubric "Provisions on legal certainty in relations between tax authorities and taxpayers, in implementation of Articles 5, 6 and 8, paragraph 2, of Law No. 23 of 11 March 2014" (Legislative Decree 128/2015 - pdf). Taxpayers with a system of detection, measurement, management and control of tax risk, understood as the risk of operating in violation of tax regulations or contrary to the principles or purposes of the tax system (so called "**Tax Control Framework**"), are eligible.

The Enabling law provides for several amendments that the Government is called to implement and execute in order to encourage the adoption by the taxpayers and the connected improvements in the relationship between the taxpayers themselves and the Tax Authorities under the general principle of the “*preventive disclosure of tax risks*” and with the aim increasing the level of certainty on relevant tax issues.

In particular, the main amendments to incentive to the develop of the “Cooperative Compliance” culture may be highlighted in as follows:

- extend the entities eligible for such regime;
- introduce the possibility of certification by qualified professionals of the so-called “Tax Control Framework”;
- provide for the possibility to manage under the Cooperative Compliance Regime also matters relating to tax periods prior to admission to the regime itself;
- introduce new and more penetrating forms of preventive and endo-procedural contradictory examination of facts relevant under the tax risk perspective;
- provide for simplified procedures for the regularization of the taxpayer's position;
- provide for the issuance of a special policy of conduct governing the rights and obligations of the administration and taxpayers;
- provide that exclusion from the regime, in the event of non-serious tax violations, such as not to undermine the mutual trust between the tax administration and the taxpayer, be preceded by a transitional observation period, at the end of which the exit from or continuation in the regime is determined;
- enhance the bonus effects associated with joining the regime by providing, in particular:

  (i) the administrative penalty protection;

  (ii) the exclusion, without prejudice to the provisions laid down pursuant to Article 20(1)(b) (to which reference is made), of criminal tax penalties;

  (iii) the reduction by at least two years of the limitation periods for assessment activities provided for in respect of taxpayers whose integrated tax risk detection, measurement, management and control system is certified by qualified professionals, also with regard to their compliance with accounting principles

Therefore, at the date hereof the Government is called to definitively implement and executes those principle provide under the Enabling Law.

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3. Other EU Directives transposed into the Italian Legislation system

3.1. <u>Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 with regard to cross-border conversions, mergers and divisions.</u>

The Legislative Decree no. 19/2023 transposed the European Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions into Italian law.

Such legislation has introduced regulation over the different extraordinary corporate transactions involving organisational and financial reorganisations in which more than one European jurisdiction is involved, combining the principle of "*freedom of establishment*" of companies with the protection of the interests of the parties involved in the transactions, also in the light of the principles expressed in the case law of the Court of Justice of the European Union. Among the noteworthy innovations is the introduction, as a further instrument for the protection of the interests involved, of the attribution to the notary of the obligation to certify:

(i) the regular fulfilment of the formalities preliminary to the completion of the transaction and
(ii) the task of checking that the transaction is not carried out for abusive or fraudulent purposes

by issuing the so-called "preliminary certificate" attesting to.

The new rules entered into force on 3 July 2023 and apply to cross-border and international transactions in which none of the participating companies has already announced the project relating to the operation on the same date.

3.2. <u>Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("DAC 7")</u>

By means the Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, the EU legislator has the aims to improve the existing regulatory framework by extending and strengthening the provisions concerning all forms of information exchange and administrative cooperation between member countries and, at the same time, extend the scope of operations of the automatic exchange of information provided by digital platform operators.

DAC 7 Directive has been transposed into the the Legislative Decree No. 32 of 1 March 2023.

The main innovation, with respect to private operators, is the obligation incumbent upon the operators of digital platforms to periodically report to the tax authorities (in Italy, the "*Agenzia delle Entrate*") the data and fees received by the “sellers” active on their portals.

For such purposes, a seller shall be regarded as resident in the Member State where it has its main business establishment address. If the platform operator with reporting obligations finds that the seller has a Tax Identification Number ("**NIF**") issued by a Member State other than the Member State of the main address, it considers the seller to be resident also in the Member State that issued the NIF.

From an objective viewpoint requirement, the communication duties concern proceeds from transactions involving the sale of goods and personal services, rental of any means of transport and lease of real estate, including residential and commercial real estate and parking spaces (defined as "**Relevant Activity**"). The data reported are then subject to automatic exchange between the Member States, in order to help the Tax Authorities to collect the taxes owed.

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4. *Switzerland has been definitively delete from the list of the Countries with privileged tax systems “elenco dei Paesi a regime fiscale privilegiato”.*

Finally, it is worth mentioned that Switzerland will be no longer considered as a “tax haven” for tax purposes. In fact, by the Ministerial Decree enacted on 20 July 2023, Switzerland has been definitively delete from the list of the Countries with privileged tax systems as per article 1 of the Ministerial Decree of 4th May 1999.

On the taxpayers' side, starting from 1st January 2024, such novelty triggers several advantages such as:

- the burden of proof on the transfer of residence considered fictitious by the Tax Authorities for blacklisted countries is lifted,
- the repeal of the doubling of penalties for violations of the tax monitoring obligation, i.e. the indication in the RW form of the income tax return of data on real estate or financial assets held abroad and, consequently,
- the repeal of the doubling of assessment terms deadline, which would have meant that the financial administration would have ordinarily had 10 years to proceed with the tax assessment and in the case of “omitted tax return” increased up to 14 years.

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[1] See Atto Camera: 1038-B S.797. - "*Delega al Governo per la riforma fiscale*" (approvato dalla Camera e modificato dal Senato) (1038-B) - https://www.camera.it/leg19/126?pdl=1038-B.

[2] The EU list of non-cooperative jurisdictions for tax purposes adopted by the Council on 14 February 2023 is composed of: American Samoa, Anguilla, Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, Russia, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu – see https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.