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Italian tax news

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SPLIT-YEAR CLAUSE UNDER TAX TREATIES

The Italian Tax Authorities has recently shed light on the split-year clause present in both the Italy-Switzerland treaty as well as the Italy-Germany treaty.

By means of the rulings no. 54 of 17 January 2023, no. 73 of 18 January 2023, and no. 170 of 26 January 2023 it has been clarified that for conflicts on double residency, the article regulating the split year should be applied. In particular, this clause provides that an individual who has permanently transferred his domicile from one Contracting State to the other Contracting State ceases to be subject to tax in the first Contracting State from the day when his domicile is decisively transferred to the other Contracting State. The taxation in respect of which the domicile is decisive shall commence in the other State as from the same date.

By means of the above mentioned rulings, the Italian Tax Authorities also clarified that the split year clause should only apply when both states are entitled to consider the person as their own resident. From an Italian perspective, this requirement is verified where, among the other possible fact patterns, a resident emigrates and enrols in the AIRE after the first half of the year has passed. However, the split-year rule would apply following the change in domicile (which is considered to be the relevant date for such rule to apply under the relevant treaty provisions) which might also happen prior to the enrollement in the AIRE register.

In particualr, with ruling no. 54 of 17 January 2023, the Italian Tax Authorities stated that an individual who resided in Switzerland until 31 May 2022 and subsequently moved to Italy is considered tax resident in Switzerland until such day under Swiss law. However, the same individual would also be tax resident in Italy throughout 2022 under Italian domestic law, since he will be domiciled in Italy (June 1st - December 31st) for the greater part of the fiscal year. So, by applying the split year clause, the individual shall only be considered tax resident in Italy for the period June 1st - December 31st. Accordingly, income received in respect of employment in Switzerland during the period January 1st - May 31st is subject to exclusive taxation in Switzerland under Art. 15(1) of the Italy-Switzerland Treaty, since it is income received by a Swiss resident in respect of employment carried out in the Swiss Confederation.

EMPLOYMENT WORK PERFORMED ABROAD DUE TO COVID-19 RESTRICTIONS

The Italian Tax Authorities shed some clarification on the tax implications when workers work remotely from a jurisdiction other than that of employment.

Ruling no. 98 of 19 January 2023

With ruling no. 98 of 19 January 2023, the **Italian Tax Authorities** examined the case of a researcher, an Italian citizen, who in April 2020 received a job offer from a Swiss university for a post-doctoral researcher position with a fixed-term employment contract but who, for COVID-19 related reasons, worked remotely from Italy until June 2020. He then moved to Switzerland from mid-June 2020 and registered with the AIRE at the end of July 2020.

As both States are entitled to consider the person as their resident, according to the Italian Tax Authorities, the conflict would be resolved by resorting to the tax period splitting mechanism provided for by Art. 4(4) of the Italy-Switzerland Treaty.

Therefore, by applying Art. 15 of the Italy-Switzerland Treaty, the income paid from June 2020 with respect to the work activity carried out in Switzerland is taxed exclusively in Switzerland; by contrast, the income for the post-doctoral activity carried out in Italy until June 2020 is taxed in Italy.

Ruling no. 99 of 19 January 2023

With ruling no. 99 of 19 January 2023 the Italian Tax Authorities examined the case of an employee of a Chinese company who returned to Italy in early 2020 and remained there due to the COVID-19 restrictions. During this period, which exceeded 183 days, the person continued to work remotely, from Italy, for the Chinese company.

To establish the residency of the worker for fiscal year 2020, the Italian Tax Authorities cites Art. 2 of the TUIR, which is applicable in the absence of a regulatory provision that takes into account the COVID emergency, as well as, in the case of a residency conflict, the tie breaker rules provided for in Art. 4(2) of the Italy-China Convention.

After having analysed the fact pattern, the tax authorities established that, assuming uncritically that the person is tax resident in China for 2020, according to Article 15(1) of the Italy-China Treaty, the employee who derived employment income from the work remotely carried out in Italy, should be taxed in Italy, since the principle of exclusive taxation in the State of residence provided for in Art. 15(2) could not be applied, due to the fact that the worker was in Italy for a period exceeding 183 days.

Ruling no. 171 of 26 January 2023

With ruling no. 171 of 26 January 2023 the Italian Tax Authorities confirmed that the temporary COVID-19 measures to avoid double taxation shall no longer be applicable to Italian residents employed by a Swiss company, who work remotely from Italy following February 1st 2023, when the "COVID" agreements between the two countries cease to take effect.

The case related to an Italian tax resident, employed by a Swiss company, who during the COVID-19 pandemic had obtained permission to perform a 25% of his work time remotely from Italy.

The tax authorities stated that, as per Art. 15(1) of the Italy-Switzerland Treaty, following February 1st, 2023:

- the portion of income corresponding to 75 percent of the days worked in Switzerland is subject to taxation in both Italy and Switzerland (with credit in Italy for taxes paid in Switzerland);
- the portion of income corresponding to 25 percent of the days worked remotely in Italy is subject to exclusive taxation in Italy (in this case, in fact, the worker's residence and the place of work coincide).

ACCOUNTING STANDARDS FOR ITALIAN PERMANENT ESTABLISHMENT OF FOREIGN COMPANIES

With tax ruling no. 68 of 18 January 2023, the Italian Tax Authorities clarified that the Italian permanent estab-lishment of a non-resident bank has the option (and not the obligation) to prepare its statement needed for determining the Italian taxable income as per the IFRS principles. This is so even if the foreign

head office, which is not itself required to use international standards for its financial statements, has issued securities traded on a regulated market.

The case considered involved a listed German bank which adopts German accounting standards for the preparation of its individual financial statements. Such German bank has a permanent establishment in Italy.

In the Italian Tax Authorities reply it recalled that, since the obligation for Italian banks to use international accounting standards ceased with Art. 2-bis of Legislative Decree 38/2005, the same obligation would also not apply for Italian permanent establishments of foreign banks and other financial institutions.

TAX TREATMENT FOR INCOME DERIVED BY NON-RESIDENT AIRCRAFT CREW MEMBERS

- The Italian Tax Authorities recently issued two tax rulings on the tax treatment of income received by non-resident aircraft pilots in connection with international traffic as employees of foreign companies with a permanent establishment in Italy.
- With ruling no. 78 of 18 January 2023 the Italian Tax Authorities mantained that a Dutch resident receiving income during the years of employment aboard aircrafts used in international traffic on behalf of the foreign company which has its effective place of management in the Netherlands and a permanent establishment in Italy is subject to exclusive taxation in the Netherlands, since the latter country is the person's State of residence, pursuant to Art. 15(3) of the Italy-Netherlands Treaty.

With the tax ruling no. 75 of 18 January 2023, the Italian Tax Authorities dealt with similar facts of the ruling just described above and their reply is in line with such ruling. Indeed, in such ruling related to a pilot tax resident of Hungary, the Italian Tax Authorities maintained that, where the place of effective management of the company engaged in international traffic is located in Hungary, pursuant to Art. 15(3) of the Italy-Hungary Treaty, only the residence State of the pilot (i.e. Hungary) may tax the pilot's remuneration.

TAX NEUTRALITY OF A CROSS BORDER MERGERS UNDER ITALIAN TAX LAW

The Italian Tax Authorities have issued two rulings related to cross border mergers having effect in Italy as well.

Ruling no. 65 of 18 January 2023

According to ruling no. 65 of 18 January 2023, the merger of two foreign companies, both of which have permanent establishments in Italy, is neutral for income tax, **IRAP** and VAT purposes.

Tax neutrality is guaranteed for income tax and IRAP on the basis of Art. 172 of the TUIR should the following conditions be met:

- the transaction qualifies as a merger as defined by Italian civil law;
- the legal form of the entities involved is coherent to that provided for companies under Italian law for which neutrality is guaranteed;

- the transaction triggers effects on the tax position of at least one of the parties involved in Italy (in this specific case, the effects are those that may be produced on the valuation for Italian tax purposes of the assets of the permanent establishments involved).

For VAT purposes, the neutrality regime provided for mergers by Art. 2(3)(f) of Presidential Decree no. 633/72 is extended to the transfer of goods that takes place between the two Italian permanent establishments.

Ruling no. 140 of 23 January 2023

Ruling no. 140/2023 analyses the effects, for domestic **tax consolidation regime** purposes, of a business restructuring involving a French parent company (which is part of an Italian tax consolidation group through its permanent establishment in Italy), which incorporates its own French subsidiary (which joined the Italian tax consolidation group through its permanent establishment in Italy).

In light of the similar nature of the merger between the French companies with that governed by the Italian Civil Code, the Italian Tax Authorities maintained that Art. 124 of the TUIR should apply in this case. Such article states that "in the case of a merger by incorporation of the consolidating company into a consolidated company, the group taxation shall continue with respect to the other consolidated companies". The Italian Tax Authorities applies this provision to the case at hand and concludes that the tax consolidation headed by the permanent establishment of the consolidating company can still continue with the other consolidated companies.

REFUND OF THE WITHHOLDING APPLIED PURSUANT TO THE SAVINGS DIRECTIVE

In its decision no. 730 of 12 January 2023, the Italian Supreme Court maintained that, with respect to income that were part of the Italian voluntary disclosure procedure, any withholding levied pursuant to the so-called Savings Directive (2003/48/CE) must be refunded.

In particular, the Supreme Court maintained that pursuant to Art. 10 of the Legislative Decree no. 84 of 18 April 2005, which implemented into Italian law the provisions of Art. 14 of Directive 2003/48/EC, it is necessary to recognize the right to reimbursement on withholding tax paid abroad on interest relating to financial assets held on a bank account with a Swiss bank by a person tax resident in Italy. The Italian taxpayer had adhered to the "voluntary disclosure" procedure, which allowed the latter to regularise tax returns in a voluntary manner and, as a result, he/she may benefit from a more favourable penalty regime.

NON-RESIDENT SHAREHOLDER RECEIVING PROCEEDS FROM CORPORATE RECISSIONS

With ruling reply no. 163 of 26 January 2023, the Italian Tax Authorities analysed the tax treatment of the proceeds paid to a non-Italian resident shareholder following the recission of his shares in an Italian company.

The authorities claimed that such proceeds should be subject to the 26% withholding tax that applies to dividends as per Art. 27 of Presidential Decree no. 600/73. Indeed, where the sums paid to the withdrawing shareholder are drawn from the company's assets (so called, typical recession), the income derived by the former shareholder qualifies as capital income and not as capital gain. Accordingly, the

Italian sourcing rule provides for Italian taxation (Art. 23 paragraph 1 letter b) of the TUIR) even when the income is derived by a non resident.

The 26% withholding tax may be reduced where there is a double tax treaty in place with the Contracting State of residence of the recipient: in the case at stake, the recipient was resident in Macedonia and eligible for the reduced withholding tax at the rate of 15% as per Art. 10 of the treaty with Italy.

PRESUMPTION OF ITALIAN TAX RESIDENCY FOR FOREIGN COMPANIES WITH NOT CONTROLLING ITALIAN COMPANIES

With ruling no. 164 of 26 January 2023, the Italian Tax Authorities confirmed that, by also basing their analysis on a literal reading of the language of the law, the presumption of Italian tax residence of foreign companies provided for by Art. 73(5-bis) of the TUIR does not apply where such foreign companies, even if controlled by Italian residents, do not, in their turn, hold controlling interests in Italian companies.

TAX TREATMENT OF MOVIE DIRECTORS' INCOME UNDER ITALIAN DOMESTIC AND TAX TREATY LAW

According to ruling no. 129 of 20 January 2023:

- compensations paid for services performed in Italy by movie directors have to be qualified as income from professional services, falling under Art. 14 of the OECD Model instead of falling within the scope of Art. 17 (related to entertainers and sportsmen);
- in the absence of a fixed base in Italy, such remuneration is subject to taxation only in the State of residence of the recipient (and therefore not subject to the 30% withholding tax referred to in Art. 25(2) of Presidential Decree no. 600/73).

The above-mentioned treatment remains applicable, according to the Italian Tax Authorities, even though, in the case analysed in the ruling, the income was materially paid to a tax-transparent US partnership wholly owned by the director.

TAXATION OF PUBLIC PENSION INCOME DERIVED BY AN ITALIAN AND UK CITIZEN

With ruling no. 172 of 27 January 2023, the Italian Tax Authorities have clarified that pension payments received with respect to activities carried out in Italy in relation to a public employment by a person having both Italian and British nationality and resident in the United Kingdom are only taxable in the latter jurisdictions.

Article 18(1) of the Italy-UK Treaty provides, as a general rule, for the exclusive taxation in the State of residence of the beneficiary of pension income paid in consideration of the performance of an employment activity.

The subsequent sub-paragraph (a) of paragraph 2 establishes an exception for public pensions, which are subject to taxation only in the source State.

The scope of this exception is limited by sub-paragraph (b), which provides for the exclusive taxation in the State of residence of the pensioner also of the aforementioned public pensions when their beneficiaries are nationals of that State.

The Italian Tax Authorities also clarified that for the purposes of applying the provision in sub-paragraph (b), it is sufficient that the beneficiary has acquired the nationality of the Country of residence while the circumstance that he/she also maintained the nationality of the source State is not relevant.

FASHION STYLIST'S ACTIVITIES QUALIFY AS SELF-EMPLOYMENT INCOME EVEN WHEN PAID TO FOREIGN COMPANIES

The Italian Supreme Court, with the decision no. 2619 of 27 January 2023, stated that income paid with respect to activities rendered by fashion stylists, hairdressers and make-up artists maintain its qualification of selfemployment income, even when paid to foreign companies. As a consequence, the 30% withholding provided for by domestic law should apply to the payment.

This decision is of relevance as there is still uncertainty on whether or not payments made to foreign corporations for the activities carried out by their employees shall qualify as business income or as another kind of income.

DAC 7 DIRECTIVE ON ADMINISTRATIVE COOPERATION BETWEEN TAX AUTHORITIES

In March 2021, the Council adopted an amendment to the Directive on Administrative Cooperation (Directive (EU) 2021/514 - DAC7). Under DAC7, digital platforms through which taxpayers may sell goods, offer online and offline services or rent out real estate properties or means of transportation are required to report data on those taxpayers acting through them.

The information will be used by the EU tax authorities to prevent tax evasion or misreporting through the use of digital platforms. All Member States had to implement the Directive into their national legislation and inform the EU Commission within 31 December 2022. The following Member States have not notified or have only partially notified the measures implementing DAC7 in their domestic laws and, in January 2023received a letter of formal notice: Belgium, Estonia, Greece, Spain, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia.

EU PARLIAMENT RELEASES A FAVOURABLE OPINION ON THE SHELL COMPANIES DIRECTIVE

In its communication A9-0293/ 001-064 of 11 January 2023, the European Union Parliament gave its favourable opinion on the proposed EU directive aimed at tackling the so-called shell companies.

The draft Directive contains several rules aimed at denying, among the others, treaties and Directives benefits to companies located in EU Countries which do not meet some specific "substance" requirements.

REVISED METHODOLOGY FOR THE BEPS ACTION 14 PEER REVIEWS RELEASED BY THE OECD

On 24 January 2023, the OECD/G20 issued a new Assessment Methodology to apply with respect to the peer review process on resolution of double taxation disputes. In addition, the OECD has also indicated new data points to be reported in the annual MAP statistics and the creation of a new periodic framework for reporting APA statistics.

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