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Italian tax news

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THE ITALIAN PARLIAMENT APPROVES THE NEW AGREEMENT WITH SWITZERLAND ON FRONTIER WORKERS

The Law ratifying the Agreement signed on 23th December 2020 between Italy and Switzerland regarding the taxation of **frontier workers** was definitively approved by the Italian Parliament on 31 May 2023. The new Agreement, that will replace the existing Agreement from 1974, provides for a sharing of the taxing rights of the source and residence State (even though some limitations apply on the source State) while the previous Agreement provided for an exclusive right to tax in the State where the activity was carried out.

The Law also includes a provision that states that, from 1 February 2023 to 30 June 2023 (pending the entry into force of the new provisions), the days of work performed by cross-border workers in their state of residence as remote working, up to a maximum of 40% of the working time, will be considered as carried out in the other State.

This allows for remote performances of a portion of the work without losing the status of a frontier worker and the associated benefits.

Furthermore, the Law also provides for the removal of Switzerland from the black list of individuals, as provided by the Ministerial Decree of 4 May 1999. The removal will be implemented through another specific decree.

PENALTIES ON THE MONITORING REGIME FOR FOREIGN ASSETS

The **Italian Supreme Court**, in its decision no. 11849 of 5 May 2023, affirmed that the omission of the RW form for multiple years constitutes a violation which falls within the scope of Art. 12(5) of the Legislative Decree no. 472/97.

This provision contains a specific rule for calculating penalties in connection to violations of the same nature committed throughout several fiscal years, which is usually more beneficial for taxpayers compared to situations where penalties are levied pursuant to the ordinary rules. The Supreme Court found that the omitted filing of the **RW form** for several fiscal years constitute violations of the same nature and, therefore, penalties for such behaviours shall be calculated pursuant to the beneficial regime provided for by the article at stake.

A different conclusion was reached with the Ministerial **Circular Letter** no. 138 of 5 July 2000, § 2.1.

VAT TREATMENT OF TRANSACTIONS BETWEEN PERMANENT ESTABLISHMENT AND HEAD OFFICE

With the **ruling** no. 314 of 8 May 2023, the **Italian Tax Authorities** clarified that as of 2021 ordinary VAT rules apply to services provided by a British company to an Italian company.

Therefore, if the Italian recipient is a VAT taxable person, the reverse charge mechanism should apply.

Based on the principles expressed by the **European Court of Justice** in its decision on the case C-210/04 *FCE Bank* of 23 March 2006 and by the European Commission in Working Paper no. 1027 of 25 October 2021, services between a head office and its permanent establishment located in another EU country do not constitute taxable provision of services for VAT purposes. An exception to this rule applies where the head office and/or the branch are part of a VAT Group.

These principles do not apply to non-EU companies that are part of a VAT Group established in that country since they cannot be treated as a single taxable person for VAT purposes within the European Union. This is true also for companies established in the United Kingdom that are members of a VAT Group since the United Kingdom has to be considered as a third Country since 1 January 2021.

ITALIAN VAT SPLIT PAYMENT MECHANISM EXTENDED BY THE EU

Through its press release no. 75 of 9 May 2023, the Italian Ministry of Finance announced the EU's approval for the renewal of the authorization for the split payment mechanism, which were to expire on 30 June 30.

The **split payment mechanism**, previously authorized by the EU Council with Decision no. 784/2017, modified by the subsequent Decision no. 1105/2020, is applicable to transactions carried out with public bodies, as well as economic public entities, foundations, and companies controlled or otherwise participated by public bodies, entities, or foundations, and to companies listed on the Italian stock exchange.

Through this new authorization, the VAT split payment will continue to be applied without interruption.

BENEFICIAL OWNERSHIP REQUIREMENT AND INTEREST&ROYALTIES DIRECTIVE

In its decision no. 14905 no. of 29 May 2023, the Italian Supreme Court clarified that the **beneficial owner** status, necessary for the exemption provided by Article 26-*quater* of Presidential Decree 600/73 to apply, must be determined based on three step tests:

- the substantive business activity test: through this test one need to examine whether there is an artificial arrangement because, in the absence of the actual conduct of an economic activity, the benefits of the **Interest&Royalty Directive** are not to be granted;
- the dominion test: this test evaluates the company's ability to freely dispose of the income received without being required to pass the income to a third party;
- the business purpose test: this test investigates the possible variation on the natural flow of the income to determine whether the receiving company carries out some role and functions in the relevant operation or is merely a conduit established solely for tax saving purposes.

The burden of proving the quality of beneficial owner of a given income lies on company which wants to claim the benefit of the Directive. In this regard, the mere recording of interest among the income received in the company's financial statements is not relevant.

The certificate issued by the foreign Tax Authority attesting to the company's tax residence and its liability to tax therein does not bear any weight in the analysis.

TAX TREATMENT OF DIRECTORS' PASS-THROUGH PAYMENTS

In its ruling no. 330 of 22 May 2023, the Italian Tax Authorities clarified that the remuneration paid by an Italian company to a director, with an obligation on such director to transfer such remuneration to a foreign company within the group:

- it is not taxable in the hands of the director, due to the obligation to transfer it to a third party;
- it should considered to be an income of the company receiving such amount;
- it is deductible for the paying company on an accrual basis rather than a cash basis.

Such remuneration qualifies, for treaty purposes, as business profit and it falls within the provisions of Art. 7 of the OECD Model.

Accordingly, if the Convention between Italy and the other State is the same as the OECD Model, the remuneration at stake is not taxable in Italy if there is no permanent establishment of the foreign enterprise therein. Only the residence State of the real recipient may tax such income.

UPDATED THE LIST OF THE COUNTRY EXCHANGING BANK ACCOUNT'S DATA

The lists of States indicated in Annexes C and D of the Ministerial Decree of 28 December 2015, referring to the automatic exchange of financial account data (MCAA CRS), were amended with Ministerial Decree of 5 May 2023 which was published in the Official Journal no. 110 of 12 May 2023.

Ghana, Jamaica, and Kazakhstan have been added to Annex C (States to which Italy provides data on the accounts held in Italy by their residents for all cases relating to fiscal year 2022). With this amendment, Kenya and Costa Rica shall no longer form part of the list of states in Annex C.

The Maldives have been added to Annex D (States from which Italy receives data on accounts held locally by Italian residents), whilst Kenya, Liberia, Morocco, Moldova and Uganda have been removed.

REQUIREMENTS TO CONTINUE OPERATING UNDER THE TRANSITIONAL REGIME OF CUSTOMS WAREHOUSING

The Ministerial Decree of the 17 May 2023, which was published in the Official Journal no. 124 of 29 May 2023, defines the modalities by which the **Customs and Monopolies Agency** may authorise those who work with the warehouse to operate under the transitional regime of customs warehousing even in the absence of the requirements (as per Art. 23 (12) of Legislative Decree

504/95, Italian Excise Duty Code, which establishes the conditions for authorizing to operate under the customs warehousing regime for liquefied petroleum gas and of other energy products)

The decree also states that the guarantee to be provided to avail of the customs warehousing regime shall be equal to 100% of the excise duty that is due on energy products extracted from the customs warehouse in the calendar month preceding the one when a notice was served on the operator initiating the proceedings to suspend operating under the said regime.

EXEMPTION FROM PENALTY REGIME DESPITE ABSENCE OF US TAX CODE IN FATCA REPORT

The Ministry of Finance published on its website clarification regarding obligations to obtain and report the tax identification number on pre-existing bank accounts.

On the 25 May 2023 the Ministry of Finance clarified that Italian banks and other financial intermediaries that transmit FATCA disclosures and have omitted to include the US tax identification

number of the account holders for the reporting years of 2022, 2023 and 2024 shall not be sanctioned if they:

- subsequently communicate the date of birth of the account holder;
- require this tax code annually as from 2023;
- conduct an electronic search on an annual basis to find the US tax code as from 2023;
- use a specific numeric code for each account when the US tax code is missing.

TAX TRANSPARENCY RULES FOR CRYPTO-ASSETS

The EU Commission welcomed the political agreement ("general approach") agreed to by the EU Finance Ministers on 16 May 2023 on new tax transparency rules for all service providers facilitating cryptocurrency transactions for customers resident in the EU.

The new rules complement the Regulation on **Crypto-Assets** Markets (MiCA) and the Regulation on Fund Transfers and are consistent with the OECD's initiative on the disclosure of crypto assets.

The new reporting requirements for crypto assets, e-money and digital currencies of the central bank will come into force on 1 January 2026.

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AGREEMENT AT EU LEVEL ON THE DAC 8 GENERAL APPROACH

The Council of the European Union reached an agreement on the "DAC 8" proposal which shall introduce updates to the directive administrative cooperation in the field of taxation.

The changes mainly concern the reporting and automatic exchange of information on the proceeds of crypto-asset transactions and on advance tax rulings for wealthy (high net worth) individuals.

The aim of the DAC8 is to strengthen the existing legislative framework by extending enlarging the scope for registration and reporting obligations and overall administrative cooperation of tax administrations.

VIET NAM DEPOSITS ITS INSTRUMENT FOR THE RATIFICATION OF THE MULTI-LATERAL BEPS CONVENTION

Viet Nam shall ratify the **Multilateral Convention** to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention). At present the MLI covers around 1,850 bilateral tax treaties, underlining the strong commitment at a global level to prevent the abuse of tax treaties and base erosion and profit shifting (BEPS) by multinational enterprises.

The BEPS Convention will enter into force on 1 September 2023 for Viet Nam.

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