

## September 2023

### Italian tax news

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## VAT TREATMENT OF PROVISION OF ONLINE GAMING SERVICES

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With the **ruling** no. 416 of 4 August 2023 the Italian Tax Authorities clarified the VAT regime to be applied to the following services provided indirectly by a company to “private consumers”, availing of professional gamers as agents:

- “avatar enhancement,” which is the request of customers to find third parties willing to play on their behalf for the advancement of their avatar's level within an online video game;
- “coaching,” or hours of instruction that customers can purchase from professional gamers.

The ruling clarifies that these services do not fall within the electronic services definition (Art. 7 of EU Regulation No. 282/2011). The Italian Tax Authorities stated that:

- “avatar enhancement” must be qualified as a complex service territorially relevant for VAT purposes in Italy (place where the supplier is located), pursuant to art. 7-ter paragraph 1 letter b) of Presidential Decree 33/72, with the application of the ordinary rate of 22%;
- “coaching” falls within the scope of teaching activities (interactive and non-automated) that are carried out in the territory of the State when they are materially carried out there pursuant to Art. 7-quinquies paragraph 1 letter a) of Presidential Decree 633/72.

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## IRRELEVANCE OF TAX REPRESENTATIVE FOR THE RIGHT TO VAT REFUND

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The **Italian Supreme Court**, in its decision no. 24207 of 9 August 2023 upheld that taxpayers who do not have their domicile or residence in Italy but in another EU member state and appoint a tax representative in Italy have the right to a VAT refund.

The ruling, which reiterates the conclusions already present in the decision of the same Italian Supreme Court no. 21684 8 October 2020, is in line with EU case law.

Indeed, the **European Court of Justice** has stated, in the past decision on case C-323/12, that the mere appointment of a tax representative is not sufficient to consider that the taxable person has “a structure with a sufficient degree of stability” and personnel in charge of managing its economic activities.

Art. 38-ter of Presidential Decree no. 633/72, as it read during the facts of the case (the case relates to a VAT refund for the year 2008), allowed a VAT refund to persons domiciled or resident in Member States who lacked not only a **permanent establishment** but also a tax representative in Italy; the European courts upheld that this the rule was contrary to Directive 79/1072/EC (later repealed and replaced by Directive 2008/9/EC) in its part mentioning the tax representative.

The Italian Supreme Court confirms in its judgement that the presence of a tax representative does not affect the right to a VAT refund.

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## TAXATION OF CAPITAL GAINS ON SHAREHOLDINGS SOLD BY A PARTNERSHIP RESIDENT IN GERMANY

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According to the **Italian Tax Authorities'** ruling no. 418 of 16 August 2023, a capital gain realized by a German-registered holding company established as a Kommanditgesellschaft ("KG") upon the sale of 100% in an Italian tax resident limited liability company (Srl) can only be taxed in Germany. From a civil law point of view, the KG is comparable to an Italian Sas. From a tax perspective, the same KG is considered transparent, and its income is attributed proportionally to the shareholders. In the present case, the partnership's income is taxed entirely in the entity's State of residence by a company with a certificate of residence in Germany.

According to Article 13(4) of the **Tax Treaty** between Italy and Germany, capital gains on participations "are taxable only in the Contracting State of which the alienator is a resident" (in this case, therefore, only in Germany). This provision also applies to the partnership in this case because the Additional Protocol to the Convention, paragraph 2, states that "a partnership shall be considered a resident of the Contracting State under Art. 4(1) of the Tax Treaty between Italy and Germany if it has been formed in accordance with the laws of that State or has in that State the principal object of its business." However, the limitations on Italy's right to tax contained in the distributive rules (Articles 6 -23) are applicable only to the extent that the income derived by the partnership is subject to the tax in Germany.

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## TAX IMPLICATIONS FOR FRONTIER AND REMOTE WORKERS

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The Italian Tax Authorities published the **Circular Letter** no. 25 of 18 August 2023, which analyses the tax profiles of remote work (so-called smart working) and the tax rules for frontier workers considering the changes introduced by Law no. 83, of 13 June 2023 (i.e. the removal of Switzerland from the Italian black-list for individuals).

It is confirmed that the criteria to determine the tax residence of individuals remain those as provided for in Art. 2 of the **TUIR**. In a nutshell, a person shall be considered resident in Italy where for the greater part of the taxable period (i.e. 183 days in a year, or 184 days in case of a leap year), such person is registered in the registers of the resident population, or has their domicile in the territory of the Italian State, or has their residence in the territory of the Italian State. The rule does also apply for individuals working remotely.

The second part of the Circular Letter analyses the special discipline concerning **frontier workers**, also in the light of the removal of Switzerland from the Italian black-list for individuals contained in the Ministerial Decree of 4 May 1999.

Regarding the effective date of Switzerland's removal from the black-list, the Circular Letter confirms that, for the purposes of the presumption of residence, the new rule will be effective as of fiscal year 2024.

However, the audit activities carried out until tax year 2023 remain unaffected.

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## **REGULARIZATION OF CRYPTO-ASSETS HELD BEFORE 31 DECEMBER 2021**

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The Italian Tax Authorities ordinance no. 290480 dated 7 August 2023 approved the tax return and instructions for regularizing crypto-assets held and/or any related income realised by 31 December 2021, pursuant to Art. 1(138) to (142) of Law no. 197/2022 (Budget Law for 2023).

The request must be submitted by 30 November 30 and the procedure is granted only for individuals, non-commercial entities and non-commercial partnerships resident in Italy.

For the purposes of the regularization at hand, if the taxpayer did not earn any income in the tax period but had cryptocurrencies to declare in the **RW Form**, a reduced penalty of 0.5% of the value of the undeclared assets must be paid for each tax period concerned.

If, on the other hand, the person in question has earned income in the relevant period, regularization takes place by paying:

- a “substitute tax” equal to 3.5% of the value of the assets held at the end of each year, or at the time of realization; and
- a surcharge of 0.5% of the same value, by way of penalties and interest, which “repeives” violations of tax monitoring rules.

The application for regularization must be accompanied by the receipt of the payment made by means of the **F24 form** and the accompanying report with the relevant supporting documentation, which may be drawn up according to the template in Annex No. 3 of the Ordinance.

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## **EXCLUSION OF EXCISE TAXES ON FUELS FOR VESSELS ENGAGED IN TRANSPORTATION**

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In its decision no. 15542 dated 1 June 2023, the Italian Supreme Court ruled that domestic goods related to vessels dedicated to transportation fall under the export regime as per Art. 254(1) of Presidential Decree no. 43/73.

For this reason, the supplies are non-taxable for excise and VAT purposes.

The use of the vessel for transport can also be derived on the basis of contractual commitments that identify predetermined routes and precise deadlines to be paid by the parties.

The favourable regime does not automatically apply for pleasure crafts. Pursuant to Art. 254(2) of Presidential Decree no. 43/73, additional formalities are required such as the departure from the port within eight hours of embarkation, entry of departure in the departure and arrival log for duty-free embarkation of ship's stores, and similar entry in case of call at a foreign port and return to a domestic port.

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## TUNISIA FILES ITS INSTRUMENT TO RATIFY BEPS MULTILATERAL CONVENTION

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On 23 August 2023 a press release was published stating that on 24 July 2023 Tunisia filed its instrument to ratify the **Multilateral Convention** for the Implementation of Tax Treaty Measures to Prevent the Erosion of the Tax Base and Profit Shifting (BEPS Convention), which now covers some 1,850 bilateral tax treaties, emphasising its strong commitment to prevent the abuse of tax treaties and the erosion of the tax base and profit shifting (BEPS) by multinational enterprises. The BEPS convention in Tunisia will enter into force on November 1, 2023.

As of 1 August 2023, about 1,200 treaties concluded between the 82 jurisdictions that have ratified, accepted or approved the BEPS Convention have already been amended by the BEPS Convention. About 650 additional treaties will be amended once the BEPS Convention is ratified by all signatories.

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We remain at your disposal for any clarification and we take this opportunity to extend our best regards.

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