FAZZINI HOLZMILLER & PARTNERS

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**Italian tax news**

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## SERVICES INVOICED BY NON-RESIDENT TAXPAYERS WITH AN ITALIAN VAT NUMBER

The **Italian Tax Authorities**, in its rulings no. 384 and no. 387 dated 13 July 2023, clarified that:

- the existence of an Italian VAT number is irrelevant for the purpose of establishing residence in Italy of non-residents for income tax purposes;
- self-employment services rendered by non-residents are taxed in Italy only if performed in Italy (art. 23 paragraph 1 lett. d) of the TUIR);
- on the basis of the **Tax Treaties**, this income is taxed in the State where the service is rendered only where there is a fixed base in that State through which the service is performed.

These rulings analysed Italy's tax treaties with Thailand and China: it was concluded that the provision of services is taxed in Italy if, although there is no fixed base, the person stays in Italy for a certain period (more than 40 days or more than 183 days, respectively) and (in the case of Thailand) if the service is paid by an Italian principal.

## WORKERS EMPLOYED THROUGH RECRUITMENT AGENCIES

The Italian Tax Authorities, in its answer to **ruling** no. 386 of 13 July 2023, clarifies that, with respect to workers resident in Italy hired through a Bulgarian recruitment agency, Italy has an exclusive right to tax if such worker is assigned to companies based in Italy and the relevant services are performed therein (Art. 13 of the Italy-Bulgaria Convention). On the other hand, the right to taxation is shared if the Italian resident employees are assigned to companies based in Bulgaria and the relevant services are performed therein.

## TERRITORIAL CRITERIA TO BENEFIT FROM THE WIDOW (SURVIVING SPOUSE) PENSION

The Italian Tax Authorities, in its answer to ruling no. 385, of 13 July 2023, clarified that an **INPS** ("*Istituto Nazionale della Previdenza Sociale*") disability pension, derived following a private employment relationship, that is paid to a resident of France is subject to a concurrent taxation in Italy and France. The right to tax is also shared with respect to pension related payments made by INPS to a widow (surviving spouse) in connection to any kind of private employment or to public employment in the context of an industrial or commercial activity.

## JUSTIFIABLE REFUSAL OF WITHHOLDING TAX REFUND ON DIVIDENDS PAID TO PENSION FUNDS

According to the decision no. 11719 of the **Italian Supreme Court** of 4 May 2023 the refusal to refund withholding taxes paid on dividends distributed to a pension fund located in the Cayman Islands is not in violation of the free movement of capital under Art.63 TFEU. This is because the payment was made to a third country which does not have a tax treaty with Italy and does not guarantee an adequate exchange of information in accordance with the provisions of Article 168-bis TUIR. The Court held that the adequate documents required by law to prove taxation in the Cayman Islands had not been produced since the dividend credit notes had not been placed on file and the credit notes produced did not constitute equivalent documents. Therefore, the Court sustained that there were justifiable reasons behind the refusal to refund the withholding tax paid.

## PRESUMPTION OF TAX RESIDENCE IN EU COUNTRY OF ORIGIN ALSO APPLIES TO THE STAFF OF THE EUROPEAN CENTRAL BANK

With ruling no. 388 dated 13 July 2023, the Italian Tax Authorities clarified that the presumption of residence in the EU country of origin that is provided for under Article 13 of the Protocol on the Privileges and Immunities of the EU for officials and other agents of the European Union is also applicable to the staff of the European Central Bank.

The presumption applies throughout the period that the person is employed by the European institution.

## OUTSET OF THE INBOUND WORKERS REGIME

In its decision no. 2587/10/23 of 10 July 2023, the Tax Court of First Instance of Milan ruled that the language of the law which has introduced the Italian inbound workers regime (Art. 16 of Legislative Decree 147/2015) does not prescribe any temporal nexus to exist between the date of the transferring residence to Italy and the start of the work activity in Italy.

It ruled that it is therefore not necessary for the taxpayers to fulfil a requirement that is not expressly provided for by the law but, on the contrary, set by the Italian Tax Authorities whose administrative guidelines cannot have the effect of denying tax benefits beyond the limits set by the law.

## EXTENSION OF INBOUND WORKERS REGIME LIMITED TO THOSE WHO ARE ENROLLED IN THE AIRE

In Italian Parliament Question Time no. 5-01137 of 19 July 19 the Italian Ministry of Finance clarified that the five-year extension of the inbound workers regime depends on the relevant person being previously registered with AIRE.

Inbound workers not registered with **AIRE** or non-EU citizens who transferred residence before 2020 and were benefiting from the of the regime as of 31 December 2019 are not allowed to benefit from the five-year extension of the regime (which ordinarily lasts for five years as well).

## DIVIDENDS RECEIVED FROM A FOREIGN SUBSIDIARY ARE SUBJECT TO SHARED RIGHTS OF TAXATION

In its decision no. 20577 on 17 July 2023, the Supreme Court stated that dividends paid by a Spanish-registered company to an individual resident in Italy are subject to concurrent taxation in Italy (the beneficiary's state of residence) and Spain (the source state).

The Supreme Court applies the Italy-Spain double tax treaty where, in accordance with the OECD model, Art. 10 § 1 establishes the general rule that “dividends paid by a company resident in a Contracting State to a resident of the other Contracting State may be taxed in that other State”.

In other words, dividends are subject to taxation in the State of residence of the recipient, in this case Italy. That rule is only partially derogated from by Article 10 § 2, which provides that "such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident and in accordance with the laws of that State, but if the person receiving the dividends is the **beneficial owner** thereof, the tax so charged may not exceed 15% of the gross amount of those dividends".

The result is a system of shared taxation with the only limitation that in the State of residence of the company distributing the dividends (Spain) the tax may not exceed 15%.

This limitation does not affect, however, the State of residence of the recipient (Italy), which retains the general, and prevailing, power of taxation, albeit considering, according to § 2, the taxation already applied by Spain.

## ENTRY INTO FORCE OF ITALY-SWITZERLAND AGREEMENT FOR THE TAXATION OF FRONTIER WORKERS

In a press release the Swiss Federal Council announced a new Agreement between Italy and Switzerland, with an Additional Protocol, on the Taxation of Frontier Workers that entered into force as of 17 July 2023.

The new provisions are applicable from the fiscal year 2024.

A transitional regime applies to **frontier workers** residing in Italy who:

- as of 17 July 2023 are employed in the frontier area;
- have been employed in the frontier area between 31 December 2018 and 17 July 2023.

## SWITZERLAND ELIMINATED FROM ITALIAN LIST OF STATES OR TERRITORIES WITH PREFERENTIAL TAXATION

Ministerial Decree dated 20 July 2023 removes the Swiss Confederation from the Italian black-list for individuals that were listed under Ministerial Decree 4 May 1999.

This update entails that the Italian provision containing the reversal of the burden of proof for proving tax residency of individuals that mover out of Italy does not apply anymore: it is now the Italian Tax Authorities that have to demonstrate that an Italian citizen (natural persons) who emigrated to Switzerland is still to be considered tax resident in Italy.

In addition, the penalties for undeclared assets and financial assets in the **RW Form** of the tax return will apply at the ordinary rates (i.e. the penalty rates shall no longer be double of the standard rates).

The changes take effect from 2024.

## CONTINUATION OF THE TAX UNIT REGIME FOLLOWING A MERGER INVOLVING PERMANENT ESTABLISHMENTS IN ITALY

In its ruling no. 400 of 27 July 2023, the Italian Tax Authorities states that a merger between two companies based in the European Union, both of which have a **permanent establishment** in Italy, does not interrupt the tax unit regime where the acquiring company's Italian permanent establishment is the consolidating company and the acquiring company's Italian subsidiaries are the consolidating companies.

## IDENTIFICATION OF FOREIGN HEIRS WITHOUT AN ITALIAN TAX IDENTIFICATION NUMBER

Ruling no. 407 on July 31, 2023 deals with the topic of inheritance of an Italian citizen who nominates non-residents as heirs. The Italian Tax Authorities clarify that in such situations, foreign heirs without an Italian tax code must indicate their surname and first name, place and date of birth, and foreign domicile when submitting the declaration of inheritance by no later than 12 months after the succession has been opened without the need of applying for an Italian tax code.

## APPLICATION OF THE PARENT-SUBSIDIARY DIRECTIVE ON ITALIAN DIVIDENDS PAID TO PARENT COMPANIES RESIDENT IN SWITZERLAND

The Italian Tax Authorities' statement of practice no. 46 of 31 July 2023 sheds light on the conditions for a tax exemption on dividends paid from a company located in an EU Member State to its parent located in Switzerland.

The Agreement on Taxation of Investment Income between the European Community and the Swiss Confederation (hereinafter, "Swiss-EU Agreement") implements the extension of the dividend taxation regime provided for in the "Parent-Subsidiary Directive" to dividends paid by subsidiaries established in the member States of the European Union to parent companies resident in the Swiss Confederation.

Art. 9 of the Agreement at stake provides that, subject to the application of the anti-abuse provisions, dividends paid by subsidiary companies to parent companies are not subject to taxation in the state of origin where both companies are subject to direct corporate profits tax without benefiting from exemptions.

In order to prevent the Italian practice from being interpreted as a violation of the spirit and the letter of Art. 9 of the Swiss-EU Agreement and to ensure an application of the rule in accordance with EU law, the Italian Tax Authorities clarified that the guidance issued with the previous statement of practice no. 93/E of 2007 is to be considered outdated insofar as the latter implies that in the case of a partial exemption from income tax at the level of the Swiss parent company precludes recognition of the benefits of Art. 9 of the Agreement in question, resulting in the application of withholding tax on the dividends paid by investee companies resident in the territory of the State.

## PARTICIPATION EXEMPTION APPLICABLE ON CAPITAL GAINS DERIVED BY NON RESIDENT WITHOUT PERMANENT ESTABLISHMENTS

According to the Supreme Court's decision no. 21261, on 19 July 2023, capital gains realized by a non-resident company from the sale of shareholdings in an Italian company must be subject to the same tax regime as for a resident company. This even where such foreign shareholder does not have a permanent establishment in Italy to which the participation sold is effectively connected to.

Therefore, the taxpayer has the right to a refund on the difference between the amount paid and the amount due under the participation exemption.

This decision is groundbreaking as the consolidated position on this topic was that the participation exemption only applies to foreign shareholders where they have a permanent establishment in Italy.

## FOREIGN TAXES CAN BE CREDITED AGAINST THE ITALIAN REGIONAL TAX (IRAP)

With its ground-breaking decision no. 21047 of 18 July 2023, the Italian Supreme Court ruled that foreign income taxes paid abroad may be credited against Italian tax liabilities deriving from the regional tax on productive activities, **IRAP**. This, however, to the extent that IRAP is a tax covered under the Tax Treaty concluded between Italy and the State where the foreign taxes have been paid.

This decision overruled a very dated and set principle according to which income taxes paid abroad can only be off-set against Italian income tax liabilities and not also egional tax liabilities.

## WITHHOLDING TAX EXEMPTION UNDER THE PARENT-SUBSIDIARY DIRECTIVE

According to the Supreme Court's decision no. 23025, 28 July 2023, the withholding tax exemption provided by the Parent-Subsidiary Directive applies even where the parent company is not effectively subject to corporate income tax under its local law.

The requirement of tax liability must be understood as a condition of potential unrestricted tax liability, the actual payment of taxes and taxation by the State of the recipient being irrelevant.

## TAX CHALLENGES OF DIGITALISATION: OECD INVITES PUBLIC INPUT ON AMOUNT B UNDER PILLAR ONE

On 17 July 2023, the OECD announced that is seeking public comments on Amount B under Pillar One, as part of the ongoing work of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy and following the agreed Outcome Statement. The public consultation document is available in English and in French and it outlines the design elements of Amount B.

## HISTORIC MILESTONE TO IMPLEMENT GLOBAL TAX DEAL

On 11 July 2023, 138 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) agreed on an Outcome Statement recognizing the significant progress made and allowing countries and jurisdictions to move forward with historic, major reform of the international tax system. These 138 jurisdictions represent over 90% of the global GDP.

## SIGNING OF THE ITALY-LIECHTENSTEIN CONVENTION AGAINST DOUBLE TAXATION

On 12 July 2023 Italy and Liechtenstein signed a Tax Treaty in accordance with the OECD model which is intended to incorporate the accomplishments of the BEPS project.

Entry into force is subject to completion of the ratification procedure by the two States.

Below are summarized some of the most important rules of such Tax Treaty:

- the highest rate that can be levied on outbound dividends is equal to 10% of their amount. The taxation of the source State can be zeroed where the beneficiary of the payment is a limited liability company which have held 25% or more in the capital of the distributing company for at least 365 days prior to the distribution;
- the source State may tax royalties and interest up to a maximum of 10% of their gross amount;
- a land-rich clause similar to the one reported in Art. 13(4) of OECD Model is present.

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

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