

International Tax Focus

MONTHLY UPDATE - OCTOBER 2023

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GLOSSARY

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ITALIAN LEGISLATION AND CASE LAW

1. Change in tax residence during the fiscal year

According to the Italian Supreme Court decision no. 25690, of 4 September 2023, an individual who transferred his residence from Italy to France during the second part of the calendar year can be considered, for the second half of the tax period, to be tax resident in both Italy and France. This is because of the misalignment between the domestic laws at stake; while in Italy no split-year provision exists, under French domestic law the tax residency is acquired as of the date of transfer.

Accordingly, in the absence of a split-year provision in the Italy-France [Tax Treaty](#), the "partial" residency criterion recommended by § 10 of the [OECD Commentary](#) to Article 4 of the [OECD Model Convention](#) cannot be applied.

As a consequence, the Italian Supreme Court stated that any double taxation that may arise must be eliminated relieved through the use of foreign credit provisions.

ITALIAN LEGISLATION AND CASE LAW

2. Denial of VAT refund for permanent establishments

The [Italian Supreme Court](#), in its decision no. 25685 of 4 September 2023 upheld that foreign taxpayers having a permanent establishment in Italy are not entitled to the VAT refund provided for by Art. 30(3), lett. e) of the Presidential Decree no. 633/1972.

This provision grants the taxpayer the rights to ask for the reimbursement of VAT paid on the purchase or importation of certain kinds of assets.

According to the Italian Supreme Court's reasoning, reimbursement is also not allowed for transactions carried out directly by the foreign head offices even where its permanent establishment is not involved in the relevant transaction.

Indeed, the recovery of VAT, by deduction or refund, depends on where the taxable person is established. According to the Supreme Court, in the present case, the existence of a permanent establishment in the territory of the State results in the exclusion of reimbursement as the taxpayer is considered to be established in Italy for VAT purposes.

ITALIAN LEGISLATION AND CASE LAW

3. Interest exemption under the EU-Switzerland Agreement

The Italian Supreme Court has ruled on the conditions for the exemption on interest payments provided for by the EU-Switzerland Agreement to apply.

In particular, through its decision no. 26183 of 8 September 2023, the Italian Supreme Court ruled that, in order to apply the withholding exemption regime to interest paid by an Italian company to its Swiss subsidiary, it is necessary for the recipient to be liable to tax according to the relevant domestic rules.

Indeed, the EU-Switzerland Agreement does not require for the interest paid to be actually taxed in the recipient's hands nor that such recipient must provide proof of concrete taxation in its State of residence.

ITALIAN LEGISLATION AND CASE LAW

4. Draft of the Italian legislation to implement Pillar Two has been published

The Italian Ministry of Economy and Finance has published the draft of the Legislative Decree implementing Directive 2022/2523/EU on global minimum taxation of multinational enterprises ([Pillar Two](#)).

The decree draft regulates:

- the in-scope entities which must apply the new provisions and those excluded;
- the way in which the location of in-scope entities must be identified;
- the way the charging rules related to the IIR, UTPR and QDMTT apply;
- the rules for determining the GloBE Income or Loss and the Adjusted Covered Taxes;
- how to calculate the ETR.

ITALIAN LEGISLATION AND CASE LAW

5. Preferential conventional regime applicable even to seconded employees

In its ruling no. 428 of 12 September 2023, the [Italian](#)

Tax Authorities clarified that the preferential taxation regime provided for in Art. 51(8-*bis*) of the **TUIR** – so called **preferential conventional regime** – can also be applied to a worker who is tax resident in Italy, seconded to a foreign country, who makes occasional transfers, for business needs and in the exclusive interest of the company he/she is seconded to, to one or more different foreign countries (including Italy).

However, the job activity still needs to be performed abroad for more than 183 days and all the other requirements of the law provision need to be complied with.

ITALIAN LEGISLATION AND CASE LAW

6. Beneficial owner status met even if investments are made through financial intermediaries

With its decisions no. 27305 of 25 September 2023 the Italian Supreme Court ruled on the **beneficial owner** status of a company resident in Luxembourg which received interest on Italian bonds through an intermediary investment bank that was also Luxembourg-based, which in turn held them through a central depository controlled by Deutsche Borse. In particular, the company asked for the refund of the full Italian withholding levied claiming that the reduced treaty withholding provided for by the Italy-Luxembourg Tax Treaty should have been applied instead. The Italian Supreme Court claimed that, in similar cases, the beneficial owner status can be proved through a detailed reconstruction of financial inflows with attached summary tables proving that the Luxembourg entity did, in the end, receive the amount paid under the Italian notes.

ITALIAN LEGISLATION AND CASE LAW

7. Taxation of job performances carried out in Italy by German tax resident

In its decision no. 27278 and 272922 of 5 September 2023, the Italian Supreme Court ruled on the application of Art. 15 of the Italy-Germany Tax Treaty.

The case concerns the reimbursement of taxes levied in Italy on employment income arising from activities performed by a German tax resident therein for an Italian employer under a contract providing for job travels outside the Italian territory.

According to the Court, the non-resident is taxed in Italy only for the amount of income corresponding to the ratio

of the number of days on which the employment activity is performed in Italy on the total number of days provided for the relevant contract in the calendar year.

As a consequence, the German resident was subject to tax in Italy only for the salary derived from his activities carried out in Italy while the portion of his salary related to the activities carried out abroad could not be taxed in Italy.

ITALIAN LEGISLATION AND CASE LAW

8. The Italian participation exemption applies also to foreign sellers

According to the Italian Supreme Court decision no. 27267, of 25 September 2023, capital gains realized by a non-resident company from the sale of a shareholding in an Italian company, if taxable in Italy, must be subject to tax in the same way a resident company making the same sale would be taxes.

In fact, any unequal treatment between these two situations will be in breach of **freedom of establishment principle** enshrined under Article 49 TFEU.

Therefore, provided all its other requirements are met, it is possible for such foreign seller to benefit from the participation exemption under Art. 87 of the TUIR even in the absence of a permanent establishment in Italy.

The ground-breaking conclusions reached by the Italian Supreme Court go against the long-settled position of the Italian Tax Authorities on the matter and confirm the conclusion already recently reached by the same Supreme Court on its decision no. 21261 of 19 July 2023.

ITALIAN LEGISLATION AND CASE LAW

9. Par-sub exemption to be granted even with a late residence certificate

According to the decision no. 27646 of the Italian Supreme Court of 29 September 2023:

- the late transmission of the foreign parent company's tax residence certificate does not affect the right to dividend withholding exemption, if the substantial requirements provided for by Art. 27-*bis* of Presidential Decree no. 600/73 are met;
- the provision of Art. 27-*bis*(3), related to the documentation to be acquired by the date of payment of dividends, is provided in the interest of the resident subsidiary company, which may waive it, accepting its responsibility as a tax withholding agent;

- any late documentation acquired must still prove that the requirements for the exemption to be applied were met when the dividends were paid.

ITALIAN LEGISLATION AND CASE LAW

10.

Bonds tax regime is not affected by subsequent mergers

According to [ruling](#) no. 434 of 26 September 2023, bonds issued by a non-resident company are taxed under the same tax regime they had at the time of issuance even if, in the meantime, the company has been merged into an Italian resident company without a [permanent establishment](#) in the other state.

In particular, with reference to the case at stake, the Italian Tax Authorities stated that:

- interest under the bonds is not taxed in the hands of non-resident recipients due to the absence of any territorial link with the Italian territory;
- interest is subject to the substitute tax referred to in Art. 2 of Legislative Decree no. 239/96 if the recipients are resident in Italy.

EU LEGISLATION AND CASE LAW

11.

Withholding on gross income derived by non-resident is against EU law

The decision of the [European Court of Justice](#) on the Case C-461/21 of 7 September 2023 examines the legitimacy of the withholding tax (of 16 percent, reduced to 4 percent under Tax Treaty rules) on services rendered by non-residents under Romanian law.

In particular, Romanian law provides for a withholding to be applied to income derived for services rendered by

non-residents on the gross amount of compensation agreed upon while domestic service providers are allowed to deduct costs against the compensation received.

Given that legal framework, the European Court of Justice stated that the tax treatment of foreign service providers is discriminatory and not justified.

EU LEGISLATION AND CASE LAW

12.

Directive proposal for MNE common tax base

On 12 September 2023, the European Commission presented a proposal for the so-called BEFIT Directive, *Business in Europe: Framework for Income Taxation* which aims at introducing a common framework for determining and taxing the income of multinational groups operating in different EU Member States.

The new set of rules, if accepted as they currently read, would have to be adopted by the Member States by 1 January 2028 and would apply as of 1 July 2028.

The Directive proposal provides for the aggregation of the tax bases of each company party to the group in the hands of the parent company, with the possibility of cross-border offsetting of tax profits and losses.

DTT/MLI/OECD

13.

Amount B public consultation contributions have been published

On 17 July 2023, as part of the work on the BEPS project to implement the two-pillar solution to tackle the tax challenges arising from the digitization of the economy, the OECD has launched a public consultation on the Amount B of [Pillar One](#).

The comments received were published on September 2023.

GLOSSARY

Beneficial owner

Recipient of the income having the right to use and to enjoy it, unconstrained by contractual or legal obligations to pass on the payment to another person.

European Court of Justice

It is the highest court of the European Union in matters of European Union law and currently its established in Luxembourg. Its decision cannot be appealed.

Freedom of establishment principle

Principle enshrined in Art. 49 of the TFEU according to which EU nationals shall be allowed to carry out an economic activity in a stable and continuous way in any another Member State at the same conditions of nationals of that State.

Italian Supreme Court

Highest and apical jurisdictional body of the Italian judicial system. It is the Court of last instance for all the areas of Italian law, including tax law.

Italian Tax Authorities (“Agenzia delle Entrate”)

Agency, under control of the Ministry of Finance, which performs all the functions and tasks assigned by the law in the field of tax revenue and tax duties.

Permanent establishment

In international tax law, it defines the threshold for the presence of a foreign enterprise to be taxable in another State. The domestic definition is provided under Art. 162 of the TUIR. This definition is substantially consistent with Art. 5 of the OECD Model Tax Convention.

OECD Commentary

Commentary to the articles of the OECD Model Convention expressing the consensus of the OECD Country on how the provisions of the OECD Model Convention have to be interpreted.

OECD Model Convention

Tax treaty model issued and amended throughout the years by the OECD (together with a related Commentary) as a sample and guidance for treaties to be concluded by OECD Countries.

Pillar One

Set of rules aimed at allocating a portion of multinational groups' excess profits in the jurisdictions where revenues are sourced.

Pillar Two

Set of rules aimed at tackling the shifting of profits in low-tax jurisdictions, based on an Income Inclusion Rule (IIR), an Undertaxed Payments Rule (UTPR) and a Subject to Tax Rule (STR).

Preferential conventional regime

Preferential regime for workers performing their activities abroad. Employees falling within the scope of such regime are taxed on figurative wages established by a ministerial decree rather than their real wages.

Ruling

Statement of practice issued by the Italian Tax Authorities upon request of a given taxpayer. Through a ruling procedure, a taxpayer may ask for the Italian Tax Authorities' opinion on a specific case concerning his personal position.

Tax Treaty

Tax treaty International Convention concluded between two States for the avoidance of double taxation and double non-taxation in economic transactions involving them.

TUIR (“Testo Unico delle imposte sui redditi”)

Italian Income Tax Code, enacted through Presidential Decree n. 917/86.