Italia issues new anti-abuse rule and other measures to enhance legal certainty in tax matters

Executive summary

As part of the undergoing Italian tax reform, the Italian Government recently approved Legislative Decree n. 128 (decree) which carries significant developments aimed at improving legal certainty in tax matters.

The decree repeals the preexistent anti-avoidance provision and introduces a written rule on Abuse of Law that replaces the unwritten principle developed by the Italian jurisprudence in the last years. The newly introduced rule better specifies the boundaries of an abusive behavior by also recognizing that, in the presence of proper business purposes, taxpayers should be free to pick and choose the transaction which triggers the lowest tax burden possible. Further, it establishes that no criminal consequences apply if transactions are deemed as abusive. The new rule may apply retroactively under certain circumstances.

The decree also modifies the rules on the statute of limitations in the case of tax crimes providing that the doubling of the terms does not apply if the crime notice is provided to the public prosecutor after the expiration of the ordinary statutes.

A Cooperative Compliance Program has been introduced to enhance relationships with the tax authorities. The program allows taxpayers to agree on tax positions prior to the filing of the relevant return and obtain quicker rulings and other benefits.

The decree was published in the Official Gazette on 18 August 2015 and it became effective on 2 September 2015.
Detailed discussion

Abuse of Law

A general anti-avoidance rule (GAAR) is introduced with the aim to provide more certainty to taxpayers regarding the assessment of any abusive conducts under the Abuse of Law principle. The GAAR is applicable to all taxes, both direct and indirect, with the exclusion of custom duties.

The rule defines Abuse of Law as “one or more transactions lacking any economic substance which, despite being formally compliant with the tax rules, achieve essentially undue tax advantages.”

Transactions are deemed to lack economic substance when they imply facts, actions and agreements, even related to each other, that are unable to generate significant business consequences other than tax advantages. As indicators of lack of economic substance, the GAAR makes reference to cases where there is an inconsistency between the qualification of the individual transactions and their legal basis as a whole and where the choice to use certain legal instruments is not consistent with the ordinary market practice.

Tax advantages are deemed to be undue where they consist of benefits that, even if not immediate, are achieved in conflict with the purpose of the relevant tax provisions and the principles of the tax system.

In any event, the GAAR establishes that there is no Abuse of Law when a transaction is justified by not-negligible business purposes (other than of a tax nature) including those aimed at improving the organizational and managerial structure of the business.

The new provision also clarifies that taxpayers are free to choose among different optional tax regimes provided by the law or between alternative transactions with a different tax burden.

Taxpayers can submit ruling requests to the Italian authorities to verify whether any envisaged or realized transactions are considered abusive. The application shall be filed prior to the deadline for the relevant tax return submission or prior to the accomplishment of other tax obligations associated with the transactions.

In the case of audits, the Abuse of Law can be challenged by the authorities only if there are no other specific tax provisions that could effectively contrast the taxpayer’s transaction.

The new rule clarifies that the burden of proof in the case of an abusive conduct is on the tax administration and, on the contrary, taxpayers have to demonstrate the existence of proper business purposes supporting the transaction that is being challenged. If a tax controversy arises, the Abuse of Law cannot be identified by the tax court if not previously alleged by the tax administration and to the extent of such allegation.

As another significant piece of the new provision, it is now specifically provided that challenges based on the new GAAR (i.e., other than based on tax evasion or implying specific tax crimes) do not trigger criminal law consequences.

To conclude, it is provided that the new GAAR is effective as of 1 October 2015 (i.e., after one month from the entry into force of the decree) and it also applies retroactively with reference to prior transactions for which no tax assessments have been issued prior to the above-mentioned date.

Doubling of the statute of limitations

As a general rule, under Italian tax legislation, a company may be subject to a tax assessment up to the end of the fourth year following the year of filing of the relevant tax return. The statute of limitation is extended to five years in the case of failure to file any tax return.

However, a specific provision states that in the case of criminal tax investigations, the statute of limitation may be extended by double. Therefore, in the case of tax crime prosecutions, the statute of limitation is extended to 8 years or to 10 years respectively.

With decision n. 247 of 25 July 2011, the Italian Constitutional Court stated that this rule should be interpreted as meaning that in the presence of criminal tax law investigations, the statute of limitation is automatically doubled even if the investigation starts after the expiration of the ordinary term.

The decree introduces significant changes to the above-mentioned rules. It clearly states that as of 2 September 2015, the doubling...
of the statute of limitations does not apply if the notice of a tax crime is communicated by the tax authorities - including the tax police - to the public prosecutor after the termination of the ordinary statute of limitations.

The previous rules are still applicable for deeds of assessment notified by 2 September 2015 as well as for tax reports notified by the same date but to the extent that the associated deeds of assessment are notified by 31 December 2015.

Cooperative Compliance Program (CCP)

An elective CCP is introduced in favor of taxpayers that have adopted an adequate internal audit model to manage and control their tax risks with the purpose of promoting communication and cooperation between taxpayers and tax authorities.

By adhering to the regime, taxpayers can benefit from the following advantages:

- Agreements on tax positions before the filing of the return
- Quicker rulings (45 days)
- No need of guarantees for tax refunds
- Reduction of applicable penalties to half of the minimum in the case of assessments concerning tax risks timely communicated by the taxpayer

Taxpayers entitled to take part to the project must be:

- Large taxpayers with a turnover of at least €10 billion, or
- Taxpayers who participated in the relevant CCP pilot project launched by Italy in 2013 with a turnover of at least €1 billion

The program is also available to taxpayers who obtain a newly introduced type of ruling aimed at agreeing in advance on the tax treatment to be applied to new investments carried out in Italy and, in general, is intended to be progressively extended to smaller businesses.

Companies who decide to apply for the program must also avail themselves of:

- A clear attribution of roles and responsibilities within their organization
- An effective procedure of identification, measurement, management and control of their tax risk
- Effective remedies in the case of failures of the procedures

Taxpayers who file a request to adhere to the CCP should receive an answer within 120 days.

In the case of a positive answer, admission to the regime will be effective as of the fiscal year in which the request is filed or until an end notice by the taxpayer.

The tax authorities may exclude the taxpayers from the program if during any of the years following the admission some of the mandatory requirements are no longer met.

Meanwhile, taxpayers should adopt a collaborative attitude with Italian tax authorities by timely disclosing transactions that may be deemed as aggressive tax planning, by promptly responding to any request and by promoting a corporate culture adhering to principles of fairness and respect of tax laws.
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EYG No. CMS760

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