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Tax regime of capital gains on sale of qualified shareholdings made by non-residents

Participation exemption for capital gains on the sale of participations by non-resident companies without permanent establishment in Italy.

Circular no. 17/E of 29 July 2024 - art. 1, para. 59, Law no. 213/2023.

With its recent Circular No. 17/2024, the Italian Tax Authority provides the first applicative clarification with reference to the extension, made by the last Budget Law (L. 213/2023), of the PEX regime also to the transfer of participations by companies and commercial entities resident in a EU or European Economic Area member Country.

With Art. 1, Par. 59 of Law No. 213/2023, the Italian Legislator, by introducing Paragraph 2-bis of Article 68 TUIR, expressly realigned the national rules with the EU principles. In fact, the exclusion of foreign companies from the PEX regime had already been censured several times, both by the CJEU and by the Italian Supreme Court.

More specifically, the new provision provides that capital gains, taxable in Italy, are subject to taxation at only 5% of their amount, if they

– are realised by companies or commercial entities (i) resident in an EU or EEA member Country, (ii) do not have a permanent establishment in Italy (in this case the so called pex regime is already provided by other internal tax rules) and (iii) are subject to corporate income tax in their own Country, thereby expressly excluding entities subject to tax transparency regimes, with direct taxation of shareholders (to identify the types of taxes equivalent to the Italian corporate income tax that must be considered for this purposes), the Italian Tax Authority refers to the list in Annex I, Part B, of Directive no. 2011/96/EU on parent-subsidiary taxation);
– arise from the transfer of participations (or similar financial instruments, including options and warranties):
  (i) so-called “qualified”, i.e. representing 2% or 20% of the voting rights in the shareholders' meeting, or 5% or 25% of the share capital, depending on whether the securities are traded on regulated markets or not, respectively;
  (ii) in commercial entities, thus expressly excluding holdings in the so-called “società semplici” (an Italian non-commercial partnership);
  (iii) having the requirements set forth in Art. 87 TUIR, i.e.: a) uninterrupted possession from the first day of the preceding twelfth months, with the shares acquired in the most recent period being considered the first to be transferred (the so-called ‘holding period’); b) classification in the category of financial fixed assets in the first financial statement closed during the holding period (the abovementioned Circular specifies that this requirement must be verified with reference to the financial statements of the foreign transferor, in accordance with the qualifications adopted by the latter, provided that they should comply with IFRS standards, or with its own local accounting standards, if they are consistent with Directive No. 2013/34/EU); (c) residence of the transferred company in a country with non-preferential taxation (a requirement that is ultroneous, as the particular tax regime, set forth in art. 68, par. 2-bis TUIR, applies only in the case of transfers of shareholdings of Italian companies); (d) exercise by the transferred company of a commercial activity.

Meeting these requirements, capital gains (net of capital losses) are subject, to substitute tax at a rate of 26%, to be applied on the 5% of their amount.

Any capital loss may be deducted from the capital gains accrued in the same tax period and the exceeding losses may be carried forward in the following four years (but only with reference to capital gains subject to this specific regime, pursuant to Article 68, par. 2-bis, TUIR).

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Foreign source dividends and double-Taxation Conventions

Foreign source dividends: the tax credit depends on the Conventions.

Corte di Cassazione, Decision No. 10204 of 16 April 2024.

With the decision No. 10204/2024, the Italian Supreme Court stated that a taxpayer who is resident in Italy for tax purposes and receives dividends from a foreign company, which are mandatorily taxed both in Italy and in the origin Country, can deduct, from the tax paid in Italy, all the taxes paid abroad, even if the amounts received do not participate in his total annual income and is subject to withholding tax in Italy.

This decision has therefore overturned the restriction contained in Article 165 of the TUIR, under which the tax credit is not applicable to those income which are taxed in Italy (by application of a withholding or a substitutive tax) but does not contribute to the formation of the taxpayer's overall annual income.

In order, for the taxpayer, to benefit from the tax credit, however, Italy must have signed, with the foreign country from which the dividends originate, a treaty against double taxation that does not provide for an express prohibition of the application of the tax credit.

In the case examined by the Supreme Court (taxpayer fiscally resident in Italy who received dividends from a US company, without the intermediation of banks or other entities), the bilateral convention (specifically, Art. 23 of the convention against double taxation between Italy and the USA, which follows the OECD Model) not only does not provide for any prohibition on the application of the tax credit, but, on the contrary, expressly obliges Italy to recognise such credit (of an amount equal to the tax paid in the USA) in all cases where taxation in Italy takes place on a compulsory and not voluntary basis.

The principle established by the Supreme Court was recently applied by the lower courts in a case involving a taxpayer who received Swiss source dividends (see CGT Siena No. 68/1/2024).

Also in this case, the bilateral convention against double taxation between Italy and Switzerland provides for the recognition of a tax credit in all cases in which the income, already taxed in Switzerland, is mandatorily subject to tax also in Italy.

Most of the bilateral conventions signed by Italy, following the OECD Model, are expressed in these terms (see, for example, the conventions with France, Germany, the United Kingdom, etc.).

On the other hand, the same rule cannot be applied with reference to the more recent Conventions (e.g. the one with Cyprus, Malta, Hong Kong, Saudi Arabia) which expressly preclude the possibility of taking advantage of any tax credit, regardless of the fact that the foreign source income is compulsorily taxed in a different way (through a withholding or substitutive tax) in Italy.

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Indirect taxation due by the sole corporate shareholder for the assets of a dissolving entity

The sole corporate shareholder who receives real estate located in Italy by way of a "transmission universelle du patrimoine" (TUP) under art. 1844-5 of the French civil code is required to pay the Italian registration tax at the proportional rate of 9% on the market value of the assets received, since the transfer cannot qualify as a merger. Cadastral and mortgage taxes also apply at the lump sum rate of 50 euro each. This was clarified by the Italian Tax Agency in its legal opinion No. 87/2024.

Pursuant to article 1844-5 of the French civil code, in the absence of a plurality of shareholders in a company, any interested party may, after one year, request the dissolution of the entity.
Following this request, the Court sets a term, which cannot exceed six months, to reinstate the plurality of shareholders. In the event of a negative outcome, the company is dissolved, and the sole remaining shareholder receives all the assets of the company as a universal transfer, without proceeding to any liquidation procedure.
To prevent this consequence, creditors of the dissolving entity could oppose the transfer within 30 days from its official announcement. That being the French rules governing the dissolution of an entity under art. 1844-5, the case stems from a ruling request presented by the French dissolving company to the Italian Tax Agency regarding the indirect taxation of the transfer of the Italian real estate properties that the French dissolving company was about to transfer to its sole corporate shareholder.
While the applicant held in the sense of lump sum taxation for registration, cadastral and mortgage tax purposes, the Italian Tax Agency stated the application of the registration tax at the proportional rate of 9%, to be applied at the fair market value of the assets.
In particular, the French company thought that the 1844-5 TUP was pretty similar, in its legal effects, to a merger between companies, determining, in fact, a universal and automatic succession of the receiving entity in the assets and legal positions of the dissolving one. Italian indirect tax law excludes proportional taxation of mergers, applying lump sum taxation with amounts that in case of corporate restructurings can be defined as negligible.
In spite of the similarities between mergers and TUPs, the Italian Tax Agency, referring to the latter, highlighted the absence of an agreement underlying and justifying the transfer of the assets and the fact that the sole shareholder cannot do anything but receive the assets of the dissolving entity.
For this reason, the deed registered in Italy for the transfer of the assets towards the corporate shareholder of the dissolving entity cannot, according to the Italian Tax Agency, qualify as a merger and has therefore to go under the general rules governing the dissolution of an entity and the assignment of the assets to the shareholders, with the consequence that the registration tax is due at the proportional rate (in this case, 9%, given the case dealt with apartments) on the fair market value of the assets. The cadastral and mortgage tax apply at the amount of 50 euro each.

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Cost basis of the shares of non-resident companies acquired by inheritance

The taxes paid in France on a legacy of shares of a French listed company must be deducted from the inheritance tax paid in Italy and contribute to the formation of the Italian cost basis of the shares for income tax purposes. This has been clarified by the Italian Tax Agency in its legal opinion No. 132/2024.

An Italian tax resident who suffered the French inheritance tax at the rate of 60% on a legacy of shares of a French listed company, submitted a ruling request to the Italian Tax Agency. The taxpayer asked whether the sums paid in France should, as he believed, be credited against the inheritance tax due in Italy and whether, for Italian income purposes, they would contribute, pursuant to art. 68, paragraph 6 of the Italian Income Tax Act, as an accessory charge to the purchase, to the formation of the cost basis of the shares relevant for any future capital gain.

In its response, the Tax Agency recalled the bilateral Convention between Italy and France on inheritance and gift taxes, pointing out that, based on the combined provisions of articles 8 and 11 of the Convention and artt. 5, paragraph 1, 29, paragraph 2, and 36, paragraph 5 of the Italian inheritance and gift tax act, the legacy was actually subject to concurrent taxation both in France and Italy, as the first country is the state in which the company was based (art. 8 Convention), while the second one is the state of residence of the transferor (artt. 5, 28 and 36 TUS). This determining the possibility of deducting from the inheritance tax due in Italy the amount already paid in France.

The Tax Agency also highlighted that, already in the Circular letter of June 24th, 1998, No. 165, the Italian Ministry of Finance clarified that in the determination of the cost basis for income tax purposes it is necessary to take into account not only the purchase price, but also any inherent burden.

Based on the above, as clarified by the Tax Agency, in the case of the acquisition of participations by way of legacy, the tax cost to be taken as a reference for the determination of any capital gain to be subject to income taxation is the amount assessed or declared for inheritance tax purposes, or, in case of an exemption from the inheritance tax, the fair market value at the date of the death of the transferor, increased by the charges strictly inherent to the acquisition of the participation, including as the case may be the inheritance tax paid abroad.

Consequently, the Italian Tax Agency agreed with the taxpayer's position and recognized that taxes paid in France should have been properly taken into account when determining the cost of the French participations.

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Income taxation and severance payment under art. 15 of Bilateral Convention against double taxation

An Italian citizen who is a Netherlands tax resident and works in Italy for a Dutch company is subject to income taxation in the latter country as well when the conditions provided under article 15 of the bilateral Convention against double taxation between Italy and Netherland are met. This rule also applies to the severance payment (known in Italy as "TFR"), since the Italian income tax legislation (TUIR) considers this allowance as a form of employee remuneration.

With its legal opinion No. 167/2024, the Italian Tax Agency answered to an individual, who, in June of a given year, transferred his tax residency from Italy to the Netherlands and, until that day, had worked in Italy for a Dutch company, receiving the relevant salary and, upon the termination of employment, the severance payment. Based on Italian rules, such a taxpayer was therefore not considered to be resident in Italy for the whole tax period beginning in January, as he had left the country before mid-year.

In particular, the applicant asked whether or not he should pay tax in Italy on the salary and on the severance payment received during that tax period.

In such cases of a non-resident worker, the Tax Agency emphasized that, according to Article 23, par. 1, lett. c), of the Italian Income Tax Act, salaries, including severance payments, are subject to taxation in Italy if they originate from employment services rendered within the territory of the Italian State.

However, as clarified in the legal opinion, this provision must be coordinated with article 15 of the bilateral Convention against the double taxation between Italy and the Netherlands, which basically provides that income from employment is taxable in the country where the employment is performed, unless, according to par. 2 of the same article, the stay in the other state does not exceed 183 days in the tax year, the salary is paid by an employer not resident in the other state nor is such remuneration borne by a permanent establishment of the employer in such other state. When these conditions are met, taxes are due only in the state of residence, even if the employment is carried out in the other state, so that, in this specific case of wages paid directly by a Dutch employer without the intervention of an Italian permanent establishment of its, the Tax Agency stated that no income tax should be paid in Italy.

With regard to the severance payment, the Italian Tax Agency also recalled that, ever since Circular letter No. 341/E/2008, its position has always been to include severance payments (TFR) within the scope of Article 15 of the OECD-like double tax conventions, since such income has the substantial nature of a compensation for work, albeit deferred. Returning to the specific case, with regard to the severance payment, the Tax Agency recalled that, on the basis of its nature of deferred remuneration relating to periods during which the work was carried out in Italy, taxation had to be accounted for in two separate periods. Therefore, the portion of the severance payment accrued in the tax periods prior to the transfer of residence had to be taxed in Italy, while the part accrued after the transfer had to be taxed only in the Netherlands.

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OECD Pillar One – Amount B Implementation Status

In February 2024 the OECD/G20 Inclusive framework on BEPS released the report on Amount B of Pillar 1[1] aimed at streamlining the transfer pricing of baseline marketing and distribution activities.

Although limited to the wholesale distribution of tangible goods[2], this approach is expected to cover a large number of subsidiaries of Multinational Enterprises (MNEs).

While the implementation date of January 1st 2025 is approaching, MNEs' preparation activities are somehow slowed-down by the uncertainty about which Countries will adopt Amont B. In fact, each Country jurisdiction is free to adopt Amount B or not. In addition, jurisdictions choosing to apply the simplified and streamlined approach can do it accordingly with two alternative options:

- allow tested parties resident within their jurisdiction to elect to apply the simplified and streamlined approach, or
- require its use in a prescriptive manner in the jurisdiction.

The OECD is also expected to publish supplementary optional qualitative scoping criteria that jurisdictions may choose to apply as an additional step to identify distributors performing non-baseline activities: this could lead in practice to a third option for implementation that a jurisdiction can choose.

It should also be noted that the outcome determined under the Amount B approach by a jurisdiction that has chosen to apply it, is non-binding on the counter-party jurisdiction where the associated enterprise that is a party to the controlled transaction is located.

The OECD is expected to publish a list of Countries opting into amount B (including modalities) in October.

Once the list of Countries adopting amount B as-of 2025 and the chosen approaches will be known, Amount B is likely to become a high priority transfer pricing topic for MNEs.

In fact, it will become important to quickly assess the impacts of Amount B's implementation. This will not be a simple, straightforward exercise as anticipated at the beginning of the Amount B project. At that time, it was expected that a simple matrix would provide the Return on Sales (ROS) percentage to which the wholesale distributor is entitled.

The final version of Amount B is more complex, requiring first of all to collect a series of data, in general for the previous three years, in relation to the distributor's: revenue, assets and expenses. Then a three steps calculation has to be made:

1. A Pricing Matrix presents the approximated arm’s length results according to a combination of the following factors: net operating asset intensity (OAS), operating expense intensity (OES), and industry. In practice, a taxpayer or tax administration will have to choose the

[1] See: A. Pluviano, OECD Pillar One Amount B - Which application approach and the Pricing Matrix. ICC Tax Digest N.1 – 2024.

[2] Several important exclusions apply. In particular Amont B doesn't apply in all cases where the tested party:

- performs retail distribution (unless retail sales do not exceed 20% of net revenues), or
- incurs operating expenses lower than 3% or greater than an upper bound of between 20% and 30% (to be decided by each jurisdiction) of its annual net revenues, or
- distributes non-tangible goods, services or commodities, or carries-out also non-distribution activities, unless the qualifying transaction can be adequately evaluated on a separate basis.

appropriate column, based on the tested party's sector of activity, among three columns in the Matrix representing the Industry Groupings; then one of the five lines has to be chosen, representing the Factor Intensity, i.e. combinations of the OAS ratio and the OES ratio. The identified ROS percentage, plus or minus 0,5%, will represent the acceptable range to test the actual outcome of in-scope transactions, i.e. applying the ex-post, outcome testing approach.

2. Then a cross-control of operating expenses applies: if the percentage of return identified in Section 1 above generates an "operating income/operating expenses" ratio outside the range set by the Report on Amount B, an adjustment mechanism must be applied to bring the ratio back to the nearest end of the range. The lower margin of the range is fixed, at 10%, but the upper margin is variable according to the factor intensity of operating assets (OAS); the upper margin can therefore vary between 40% and 70%. This upper margin is increased to 45%-80% for qualified jurisdictions.
3. An additional correction increases the margin calculated on the basis of sections 1 and 2 above, only for countries with:
    - a long-term sovereign debt rating of BBB+ or below, and
    - less than 5 comparable companies in the global selection established as part of the work on amount B.

In conclusion, it can be expected that testing the potential outcomes of implementing Amount B will become a particularly urgent exercise for MNEs, in particular in two situations:

- Countries adopting Amount B as optional, for which therefore the MNE will need to make a knowledgeable choice on whether or not to adopt it for the subsidiary located in that jurisdiction.
- Intra-group transactions between two Countries adopting inconsistent approaches (e.g.: one adopting Amount B as compulsory and the other one not adopting it at all): in such cases it will be important to address the setting of transfer prices in a way that prevents as much as possible double taxation issues.

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ICC is the institutional representative of more than 45 million companies in over 100 countries with a mission to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions, and standard setting, ICC promotes international trade, responsible business conduct, and a global approach to regulation, in addition to providing market-leading dispute resolution services.

ICC, for over a century, has contributed to regulating various aspects of international trade through the elaboration and codification of rules and practices which, universally accepted, govern in an organic and univocal way procedures otherwise different from country to country. ICC today plays a leading role, as a representative of Economic Diplomacy that interacts with States, United Nations Agencies, WTO and other organizations, giving voice to the private sector in international relations. ICC members include many of the world's leading companies, SMEs, business associations, and local chambers of commerce.

ICC Italia, based in Rome and among the founding members, plays this role at a national level by examining the wide range of international issues, including their national implications, and raising awareness among the competent national authorities.

In the **tax field**, ICC promotes international coordination of fiscal policies in order to avoid double taxation of cross-border transactions and distortion of international trade and investment and to ensure fair competition and transparency. With its **Global Taxation Commission**, ICC works with the United Nations and the Organization for Economic Cooperation and Development (OECD) as they seek to develop international taxation standards and coordination. In addition to contributing to the work of the Global Commission, the **ICC Italia Taxation Commission** issues a periodical Tax Digest, a newsletter that offers insides and updates on tax issues from its network of tax experts.

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