ITALY

ITALY

INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

Italy's corporate income tax rate (IRES) is set at 24% starting from 1 January 2017 onwards (with a 3.5% surcharge for banks and financial institutions). Italy applies also a regional income tax (IRAP) on a taxable income specifically determined (the cost of labour is from 2015 fully deductible from such tax base) at a 3.9% rate, which is raised to 4.65% for banks and financial institutions and 5.9% for insurance companies (further limited surcharges may be applied by each region).

Recent tax law amendments regard, among others:

- a patent box regime in line with OECD approach;
- new types of rulings, including special rulings for companies with large investments to be realised in Italy (over 30 million euro) or about the existence of a permanent establishment in Italy;
- a revision of the CFC legislation and the abolition of rules on non deductible costs charged by companies resident in black-listed countries;
- a tax exemption regime for income deriving from qualified long-term (5 years) investments made by pension funds into (i) Italian companies or EU/EEA entities with a permanent establishment in Italy or (ii) Italian/EU/EEA investment funds which mainly invest in companies under (i);
- a tax exemption regime for income deriving from long term (5 years) investments made by individuals in securities issued by Italian companies or EU/EEA entities with a permanent establishment in Italy (for yearly investment not exceeding EUR 30,000 and EUR 150,000 in total);
- exemption from w/h tax on interests paid on medium-long term loan granted by EU banks, insurance companies or institutional investors resident in white list countries and subject to regulatory supervision;
- a relevant downsising of the deemed deduction on equity increases (so-called "ACE") applicable from 2017;
- a new rule applicable to carried interest paid from April 2017, which is deemed to be taxed as income from capital and/or capital gain if certain conditions are met.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Italian tax authorities are monitoring the BEPS Action Plan and some specific recommendations have already been introduced into Italian laws, like e.g.:

- obligation of the country-by-country reporting for Italian multinationals (over 750 million euro turnover) and Italian subsidiaries if the controlling company is not subject to the same rule in its country or there is not a treaty allowing exchange of information;
- income paid by foreign companies may be taxable as "dividend" (i.e. substantially exempt) only if it can be demonstrated that the same payment has not been deducted from the taxable income of the foreign company (rule against hybrid mismatches);
- a new anti-abuse rule (GAAR), which unifies the previous anti-avoidance tax law and the jurisprudential concept of the abuse of law, was introduced in August 2015 and is applicable to transactions occurred after 1 October 2015 (and also prior to that date if the assessment is notified after that date). The new rule technically

defines the concept of "abuse of law" according to the rules on aggressive planning and is in line also with the concepts described in the EU Parent –Subsidiary Directive. Transactions are deemed to lack economic substance when they imply facts, actions and agreements 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 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. In the presence of proper business purposes (other than of a tax nature), including the improving of the organisational and managerial structure of the business, taxpayers should be free to pick and choose the transaction which triggers the lowest tax burden possible.

Further, the GAAR establishes that no criminal consequences apply if transactions are deemed as abusive.

As regards Action 6 on treaty abuse, there is not yet any tax law changes or drafting in new treaties incorporating the related BEPS concepts. In Instructions n. 6/E issued 30 March 2016 the Italian tax administration analysed various tax issues related to leverage buy-outs and private equity deals, including the use of foreign companies with a light organisational structure or with a conduit financial structure and affirmed the principle that, in case of artificial structures, the application of tax treaty benefits may be refused and domestic rules can be applied.

As regards Action 15 Italy has participated to the working group which has drafted the OECD Multilateral Instruments amending the tax treaties and should be going to sign its final version.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES AMONG ACQUISITIONS MADE THROUGH A SHARE DEAL VERSUS AN ASSET DEAL IN YOUR COUNTRY?

A. Share deal

Such transactions regard the transfer of shares or quotas of a company which owns the business to which the purchaser is interested in. The transaction may regard an existing company or a new company in which the relevant perimeter of the business is preliminarily included through an extraordinary transaction (like a spin off or a demerger).

Tax advantages:

- The capital gain realised by the seller can be subject to a reduced income tax burden depending upon the type of seller; in particular it could be beneficial for domestic companies (when the conditions for the participation exemption regime are applicable and for foreign companies (if a double tax treaty relief for capital gains is applicable).
- In a share deal the tax attributes carried forward (losses, interests paid exceeding limits, tax credits, etc.) stay with the company acquired and can be part of the deal, even if they are subject to certain limitation rules aimed to avoid the "trade" of tax attributes; please note that if the majority of the shares of a company are transferred and there is a change in the company's activity prior or after such transfer, the prior years' tax losses expire unless certain requisites are met.
- The share deal is not subject to indirect taxes, except in case the shares sold regard an Italian joint stock company ("società per azioni") when a 0.2% tax (Tobin tax) has to be applied.

Tax disadvantages:

- In a share deal all the contingent tax liabilities remain in the company whose shares are sold for the statute of limitation period, i.e. 31.12 of the fifth year following the filing of the tax return for 2016 onwards (for tax periods until 2015 the reference is to the fourth year subject to a potential extension to eighth year in case of criminal proceedings) and therefore the buyer should in principle seek for guaranties of the tax risks.

- In a share deal, in principle there is no step up of the assets value unless certain extraordinary transactions are realised and/or a specific option is exercised which imply the payment of a substitute tax.
- The perimeter of the deal could not correspond to the assets/liabilities of a company and therefore a preliminary carve out into a specific company may be needed and this might have some tax costs; however, the contribution of a going business into a company in exchange for shares is a tax neutral transaction that does not changes the tax values of the companies involved and leave in principle to the seller the possibility to apply the participation exemption regime on the subsequent sale of the new shares.

B. Asset deal

Such transaction regards the acquisition of assets or more frequently of a going business previously identified between the parties.

Tax advantages:

- In an asset deal the buyer acquires tax relevant values, i.e. it implies a step-up also for tax purposes in the depreciable basis of assets transferred corresponding to the purchase price paid allocated to each asset.
- In an asset deal the tax attributes (tax losses or not deducted interests) remain with the selling company and are not transferred to the buyer and this may represent an advantage for the seller in particular if the conservation of such tax attributes in a share deal could not be possible due to rules on "trade" of tax attributes;
- In an asset deal the contingent tax liabilities relating to the assets or the going concern transferred remain as a general rule with the transferring company. However, pursuant to Article 14 of Decree no. 472/1997, the buyer of a going concern is jointly and severally liable with the seller for the most recent tax liabilities and anyway for an amount not exceeding the value of the assets. A tax certificate stating the amount of tax liabilities attached to the going concern can be asked to the tax authorities and the buyer's liabilities are limited to those resulting from it. The said liability rules do not apply if the asset deals occurs in a pre-bankruptcy regulated procedure.

Tax disadvantages:

- In an asset deal the capital gain (loss) realised by the selling company is taxable (deductible) for corporate tax purposes at IRES ordinary rates (in case of assets owned by more than three years, the gain may be deferred over maximum five tax periods) and is not subject to IRAP if the asset deal regards a going concern;
- When the asset deal is realised through the transfer of a going concern, no VAT is applied and the value of the going concern, net of liabilities, is subject to a registration tax and other ancillary taxes when real estate are present; the transfer taxes are paid usually by the buyer, even if both parties are jointly and severally liable for the payment of registration tax (which is generally applied at a 3% rate, except for real estate assets mainly subject to 9%).

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

If the target company is subsequently merged with the acquiring company, the possible merger deficit (disavanso di fusione - difference between the cost of cancelled shares and the book value of the net assets of the absorbed company) can be used to step up the value of the assets from an accounting point of view. Such step up is not relevant for tax purposes unless the company exercises one of the following options regarding, in full or in part, one or more assets:

a) the absorbing company is entitled to step up the tax value of the fixed assets tangible and intangible received by paying a substitute tax at the rate of 12% on the portion of the step-up in value up to EUR5 million, 14% on the portion of the step-up from EUR5 million to EUR10 million, and 16% on the portion of the step-up in value exceeding EUR10 million. The option for the step-up can be elected in the tax return of the year in which the merger has been done or in that of the following tax year. The step-up tax values are effective starting from the fiscal period in which the option is exercised, subject to a recapture rule if the assets are disposed within the fourth fiscal period following the one in which the option is exercised;

b) according to special provisions, the step up may regard the tax value only of intangible assets (goodwill, trademarks and other intangible assets) by paying a substitute tax at the rate of 16% and obtaining a shorter depreciation period (5 years) for goodwill and trademarks instead of the ordinary period (18 years). This regime can be applied in the same periods and with the same recapture rules than a);

c) moreover, the absorbing company can optionally step up the tax value of assets other than the fixed assets by paying ordinary taxes or, in the case of a step-up of receivables, by applying a substitute tax at a rate of 20%.

Finally please note that, even without any merger with the target, if the Italian acquiring company includes the target in its consolidated accounts and attributes in such accounts the price paid also to intangibles assets; a 16% substitute tax can be optionally paid on such amount and the step up tax effects described under b) above are applicable.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

From an accounting viewpoint the goodwill paid in a transfer of a going concern (asset deal) can be amortised over its useful life, as properly motivated in the accompanying notes or, if such life cannot be reliably estimated, within maximum 10 years. For tax purposes, the goodwill must be anyway amortised in not less than 18 financial years.

In cases where the goodwill has been subject to the optional regimes described in Section 4 and the taxpayer voluntarily pays the 16% substitute tax, the tax depreciation of the goodwill can be reduced to not less than 5 fiscal periods, irrespective of its accounting depreciation.

Please note also that trademarks are treated for tax purposes exactly as the goodwill (both in ordinary and special regimes).

6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

According to Article 96 of the Italian tax code net interest expenses (i.e., interest expenses less interest income) are deductible up to an amount equal to 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA) as shown in the profit and loss statement. From 2016 onwards also dividends received from foreign controlled companies are included in the above EBITDA computation.

Interest expenses exceeding the 30% EBITDA threshold are not deductible in the relevant fiscal year and are carried forward in the following fiscal years (without any time limit) and may be deducted in a subsequent tax period if and to the extent the 30% of EBITDA is higher than net interest expenses in that fiscal year. If the 30% EBITDA exceeds net interest expenses, such exceeding EBITDA can be carried forward to offset in the future exceeding interest.

Excessive interest can be offset within a domestic fiscal unit in computing the total income within the group if (and to the extent) other companies within the group have their own 30% EBITDA exceeding their own interest expenses.

In a merger or a demerger, excess interest carried forward is subject to the same limitations imposed for the carrying-forward of tax losses (see Section 9.).

The above is applicable only for corporate income tax (IRES) while for regional income tax (IRAP) interests are fully non deductible.

The described regime is not applicable to companies operating in banking, finance, insurance and other particular industries listed by the law, for which from 2017 interests are fully deductible for both income taxes (IRES and IRAP); previously a specific rule allowed deduction of only 96% of interest expenses accrued both for IRES and IRAP.

7. WHAT ARE USUAL STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?

Acquisitions of shares in an Italian target company are made through the merger of the acquiring new company (Newco) and the target (leveraged buyouts) so that the debt is pushed down into the surviving company and interest expenses accrued on it are utilised to offset revenues generated by the target.

If, for whatever reason, a merger is not feasible, another option is to consolidate Newco and the target company in a domestic fiscal unity so that the target's tax position can be offset by the Newco's tax position.

In Instructions n. 6/E of March 30, 2016 the tax authorities have analysed various tax issues regarding leverage buy-outs, confirming that:

- in principle such transactions (and the tax deductions of interests paid) cannot be challenged under the "abuse of law" discipline, unless in special cases of artificial structures, like when the buyout structure is put in place by the same subjects who were controlling the target company;
- if the funds available for the acquisition of the target have been put at disposal of the Newco by the foreign entities of the group, this has to be considered like an intercompany service provided by such entities to Newco and subject to transfer pricing rules;
- the tax authorities may recharacterise shareholder loans into equity funds according to OECD Guidelines if, on the basis of the specific facts and agreements, the economic substance of the transaction is not that of a financial debt; as a consequence interests paid would not be tax deductible but the recharacterised amount would give raise to the deemed deduction provided by ACE tax benefit as described in Section 8.

The upstreaming of dividends may be another available strategy for pushing down debts, taking into account that dividends are taxable only on 5% of their amount.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Italy's tax system provides a deduction (so called "ACE") from corporate income tax (IRES) of a deemed interest computed by applying a certain rate to the net equity increases realised after 2010 (equity contributions and undistributed profits less reductions of equity with attribution to shareholders).

Anti-abuse rules may reduce the ACE basis in case of intercompany transactions like investments in controlled Italian companies, acquisition of participations or going businesses from Italian group companies, increase of intercompany loans to Italian group companies as compared to 2010 and also increase of investment in securities other than participations and other cash items as compared to 2010.

The rate applied in computing ACE benefit was 4.75% until 2016 and it is now reduced to 1.6% for 2017 and to 1.5% from 2018 onwards.

Please note that ACE deduction not utilised can be carried forward without time limit or used to offset IRAP tax; ACE deduction not utilised can be also surrendered to the domestic fiscal unity.

9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE?

In principle tax losses can be carried forward without any time limit but can be used to offset the taxable income only within a threshold equal to 80% of the yearly taxable income.

Limitations to the carrying forward of tax losses should apply when the following conditions are both met:

- the majority of the voting shares in the company that is carrying forward losses is transferred, and
- the main activity carried on by the company is changed from the one carried on in the fiscal years when losses were suffered. The change in the activity has to occur in the year the shares are transferred or during the previous two or the following two years.

Nevertheless, even if the above conditions are met, a company can still carry forward losses if, during the two years before the transfer of shares, it did not reduce employees below 10 units and it exceeds in the profit and loss statement of the previous year certain thresholds ("vitality test").

In a merger (or demerger), tax losses carried forward by companies involved are available for the absorbing company (i.e., the surviving entity), on the condition that the "vitality test" (see above) is respected and up to an amount not exceeding the net equity computed without taking into account any contributions and payments to equity made during the prior 24 months.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

It should be carefully determined which is the applicable statute of limitations since for years until 2015 the period can still be doubled if there has been any prior communication to a public prosecutor (irrespective of which is the course of the criminal proceeding).

In case of tax losses or exceeding interests to be carried forward, it has to be evaluated the impact of the rules which may limit the subsequent use of such tax attributes.

Also transfer pricing issues have to be considered since frequently tax audits regard such issues. It should be checked if the company had proper TP documentation according to Italian TP rules since this will prevent the application of penalties in case of tax assessments.

Finally the situation of foreign subsidiaries must be monitored since tax authorities may deem in certain situations that such companies are tax resident in Italy and therefore here subject to taxation.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

In a share deal, a stamp tax is applicable at a 0,20% rate in case of transfers of shares of joint stock companies ("società per azioni") even if executed outside financial markets.

In an asset deal, indirect taxes depends upon the type of transaction:

- in case a going concern is transferred, no VAT is applicable and a registration tax is applied on the market value of the assets transferred, including goodwill, net of liabilities transferred, as reported in the accounting books of the company. The applicable tax rate depends on the nature of assets transferred. Movable property, goodwill, patents and trademarks, inventory, etc., are taxed at the rate of 3%, while real estate assets are taxed mainly at the rate of 9%;
- in case of the transfer of an isolated asset (i.e., not a business as a going concern), if the seller is a VAT-taxable person the transactions would be likely subject to VAT.

In terms of financing acquisitions, any bank loan which lasts for more than 18 months and is granted by an Italian bank could be optionally subject to a 0.25% substitute tax (imposta sostitutiva) applied on the amount of the loan. This tax substitutes other indirect taxes due on guaranties like mortgages, pledges, etc., related to the bank loan.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

In case of a share deal, the costs directly related to the participation acquired have to be capitalised as ancillary cost of the participation (and therefore not tax deductible). If instead all or part of the costs are related to the financing received for the acquisition, it is possible to treat such costs as ancillary costs of the financing and deduct them over the duration of the financing (subject to the same limitations of the interest paid).

In case of a leveraged buyout the deduction of the costs related to the acquisition may be challenged by the tax authorities in particular if such costs are charged by the same private equity firm; if in this case the fees charged represent a service deemed to be in the interest of the private equity firm or of the investors (instead of the portfolio company), it can be challenged the deductibility of such costs for lack of inherence of the said costs.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

In case of a share deal, the treatment of the VAT paid on acquisition costs depends upon the general principles of VAT, i.e. the VAT paid on such service costs must have a direct and immediate link with the output transactions.

According to art. 4 of Italian VAT Law no VAT can be deducted if the acquiring company is an holding company operating without any direct structure aimed at exercising financial activities or other activities of direction and coordination or management activities in the participated companies. If instead the holding actively intervenes in the management of its participated companies, it may be deemed to exist the said link with the VAT output transaction and therefore VAT paid may in principle be recovered.

According to Instructions n. 6/2016 the same principles apply also in a merger leveraged buy-out where the VAT recoverability should not be allowed if the acquisition company is not involved in the management of the target.

In case of an asset deal, VAT paid on acquisition costs is in principle deductible from VAT due, unless the going concern exercises a VAT exempt activity.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

For foreign shareholders it is relevant the taxation on repatriation of profits and on capital gains at exit.

Dividends paid outbound are subject to a 27% w/h tax, unless in the following cases:

- sero w/h tax in cases where the EU Parent-Subsidiary Directive 435/90/CE is applicable (i.e. an EU parent company has held at least a 10% stake for one year in an Italian subsidiary company);
- a 1.375% (reduced to 1.20% for distribution of profits earned from 2017 onwards) w/h tax on dividends paid to UE companies or to companies of the European Economic Area giving exchange of information, if they are subject to ordinary income tax in their country;
- a reduced rate (generally 5% or 10%) may be provided by the applicable tax treaty signed by Italy.

In terms of exit, the capital gain realised by a foreign company selling shares of an Italian target is usually protected from taxes in Italy according to the applicable tax treaty.

The already mentioned Instructions n. 6/2016 clarified that the application of the above rules on dividends and capital gains should be carefully monitored in case the foreign company does not have sufficient substance requirements or is a conduit (as better described in Section 20).

Moreover, the payment of dividends/interests/royalties from Italian companies to foreign holding/finance company usually requires that the foreign company is the beneficial owner of the payments in order to apply reduced rates also according to the tax treaties.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL ENVIRONMENT THROUGH MERGERS OR A TAX GROUP?

Italian law provides for a tax-neutral regime applicable to some qualifying corporate restructurings, such as mergers, de-mergers, contributions-in-kind and exchanges of shares. Under this tax-neutral regime, a deferral of capital gains taxation is allowed and the acquiring entities receive a carryover basis in the assets acquired.

In case of transactions which allow the transfer of the tax attributes (like mergers and de-mergers) particular attention has to be devoted to the limitation rules (described in Section 9) which apply to tax losses and exceeding interests to be carried forward.

The main caveat to tax-neutral restructurings is the new rule regarding the "abuse of law" (art. 10-bis of Law n. 212/2000) which is applicable to transactions lacking of economic substance which realise undue tax benefits and that can be consequently disallowed by the tax administration.

Taxpayers may ask for a ruling to determine if the transactions that they are about to carry out may constitute abuse of law. No criminal charges would be linked to the "abuse of law" behaviour.

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET COMPANIES OF WHICH MAIN ASSETS ARE REAL ESTATE?

In case of a share deal it has to be taken into account that the favourable participation exemption regime for the selling company (see Section 17) does not apply to the transfer of shares in real estate companies (so these capital gains are subject to corporate income tax at the ordinary rate).

A real estate company is defined as a company having the value of its assets mainly represented by real estate at any time during the last three fiscal year before the shares are sold. Properties used for the purpose of a commercial activity are not deemed to be real estate assets for capital gain purposes.

In case of an asset deal made by a VAT subject, the sale of a commercial real estate is VAT exempt or, by option of the seller, is subject to ordinary VAT with the reverse charge system; anyway a 3% cadastral and a 1% mortgage taxes are due in such case (reduced by half if a real estate fund is part of the transaction).

In case of a sale realised by a non VAT subject, the sale is subject to registration tax at 9% rate in case of a commercial building and 12% in case of agricultural land (cadastral and mortgage tax are applied for a fixed amount of 200 euro each).

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

The tax system provides for various group regimes like domestic fiscal unity or world-wide fiscal unity. The benefits of such regime regard (i) the offsetting of income and losses of the various companies for corporate income tax purposes since IRES is only applied on a consolidated basis, (ii) the surrender to the fiscal unity of certain tax attributes not used by the single company (like ACE, 30% EBITDA exceeding net interests, etc.) and (iii) the non application of tax losses carryforward rules in mergers between consolidated entities.

In case of companies owned by other companies with shareholdings ranging between 10% and 50%, it can be exercised the option for the fiscal transparency regime so that the participated entity is not taxed for IRES purposes and its income /loss is transferred proportionally to the shareholders and taxed therein.

All the above regimes regard only corporate income tax (IRES) whereas local income tax (IRAP) remains applicable on a stand-alone basis.

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

Italian companies are entitled to the 95% participation exemption (i.e. only 5% of the capital gain is subject to IRES tax) if the following requirements (under Article 87 of the Italian tax code) are met:

a) the shareholding has been held at least from the first day of the 12th month prior to the disposal;

b) the shares have been booked by the seller as a long-term investment (fixed financial asset) in the first balance sheet of the holding period (no minimum percentage is required);

c) the participated company is not resident of a tax haven;

d) the participated company is exercising a real business activity (e.g. other than real estate companies or intangible portfolio companies.

The above requisites under lett. c) and d) must be fulfilled starting from the beginning of the third fiscal period prior to the sale.

Lacking any of the above conditions, the capital gain is fully subject to IRES corporate income tax in the same year or, if the shares were booked as fixed financial assets in the last three financial years, over a period up to five years.

Capital gains are not subject to local income tax IRAP.

For individuals resident in Italy, the taxation of capital gains in Italy depends on the level of shareholding, as follows:

- "qualified" participations, i.e. more than 20% of voting rights or 25% of the paid-in share capital in the company if the company is not listed at the stock exchange and respectively 2% and 5% if the company is listed; in such case the capital gain is subject to personal tax (maximum tax rate of 43% for income exceeding EUR75,000 and 46% over EUR 300,000) only for 49.72% of its amount (i.e., 50.28% exempt);
- "non-qualified" participation, the capital gain is instead subject to a 26% substitute tax.

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

For companies, there is no specific fiscal advantage if the proceeds from the sale of shares are reinvested.

For individuals, non-profit entities and non-resident taxable persons Article 68(6-bis)(6-ter) provides the exemption of the capital gains realised upon the disposal of both qualifying and non-qualifying participations in stock companies and partnerships, provided that:

- the participated entity has been set up for no more than seven years,
- the shares sold were held for at least three years,
- the capital gains realised are reinvested in another Italian resident company or partnership operating in the same business sector and incorporated within the previous three years. The new investment must be made through the subscription or acquisition of the capital of such companies and within two years from the disposal of the participations previously held.

However, the amount of the exempt capital gain cannot, in any case, exceed five times the costs borne by the company to which the transferred shares refer during five years preceding the disposal, for the purchase or the production of depreciable assets (intangible or tangible, excluding real estate properties) or for research and development activities.

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

Although no specific substance requirements are provided by the law, great attention is dedicated by the tax authorities in reviewing the real substance of foreign holding companies and in some cases to apply the tax presumptions according to which a foreign company may be deemed to be tax resident in Italy.

In Instructions n. 6/2016 the tax authorities clarified that they may apply full domestic w/h on dividends or disallow the tax treaty exemption on capital gains if foreign intermediate holding companies have:

- a light organisational structure, not performing a real activity and without any decisional autonomy from a substantial view point; or
- a conduit financial structure regarding the transaction, in which it is all organised to have a substantial correspondence between what is cashed in and out of the company.

Finally please note that in certain cases foreign companies may be deemed to be tax resident in Italy. In fact there is a rebuttable presumption according to which a foreign company is deemed to be tax resident in Italy if (i) the foreign company directly controls an Italian resident company and (ii) the foreign company is directly or indirectly controlled by Italian residents or its Board of Directors is mainly formed by Italian resident individuals.

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

The seller may need to carve out the business to be sold into a specific Newco and then sell the shares of such Newco.

This can be done through the contribution of a going business into a Newco in exchange for Newco's shares. Although the transaction may evidence an accounting step up of the values of the assets contributed, the tax regime remains of full neutrality since:

- for the receiving company the tax cost of the assets received remains the same of the contributing company;
- for the contributing company the tax cost of the Newco shares received is equal to the original tax cost of the net assets contributed.

The receiving company may anyway decide to optionally step up the assets also for tax reason by applying the substitute tax provided by the optional regimes described in Section 4.

The contributing company may subsequently sell the Newco shares to a third party by applying the participation exemption regime (even before the one year minimum holding period if the going concern were held by more than that) and get the 95% tax exemption on the taxable capital gain. Such contribution in kind followed by the sale of Newco shares is explicitly ruled by the law as non abusive practice for income tax purposes.

From an indirect tax point of view the contribution in kind in exchange for shares is subject to a fixed amount (EUR200) for registration tax purposes and for cadastral/mortgage tax purposes if building are involved. If the sale of the shares occurs immediately after the contribution, the tax offices often try to recharacterise the transaction as a sale of a going business in order to apply proportional taxes. A final position of the jurisprudence on such tax assessments has not yet been finalised.

As regards mergers and de-mergers, please note that they provide a full neutrality both for an income tax point of view and for indirect taxes.

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

As regards stock grants offered to the generality or categories of employees, there is a limited exemption up to an annual value of EUR 2.065,83 and an holding period of 3 years. As regards stock option plans, there is an exemption from social contribution but the benefit for the employee remains fully subject to ordinary personal taxation for the manager.

According to Decree Law n. 50/2017 there are new rules on "carried interests" earned by employees or directors of companies or funds. Income deriving from shares, quotas or other financial instruments will be taxed as dividends or capital gains in case of a sale and therefore it will not be taxable as income from employment if the following conditions are met:

- the total investment of employees and directors should at least be 1% of the investment of the fund or of the equity of the company;
- the shares, quotas or financial instruments should earn income only after the income attributed to other shareholders has remunerated the invested capital and a certain hurdle rate; the same applies in case of sale of the said securities;
- shares, quotas of financial instruments are held for at least 5 years unless a change of control occurs.

The above rules apply to companies or funds located in Italy or in other States or territories which allow an adequate exchange of information.

The new rule is applied to "carried interests" received after 24 April 2017 even if accrued in previous years.

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