Bloomberg Tax

International Tax News®

NUMBER 0 JANUARY 28, 2020

INSIGHT: Italy Taxes the Digital Economy

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Italian Budget Law for 2020 (Law No. 160 of December 27, 2019) introduced a 3% digital service tax (Italian DST) on revenues deriving from certain digital services provided to users located in Italy, which applies to entities that meet certain revenue thresholds.

Italian DST applies beginning January 1, 2020, without the need for any ministerial implementing decree, and will be repealed once measures agreed at international level to tax the digital economy enter into effect (sunset clause).

According to the explanatory notes of Budget Law for 2020, Italian DST is inspired by the European Commission Directive Proposal of March 21, 2018 (EU DST Proposal), which represents an interim solution to tax certain digital services where users contribute significantly to the process of value creation.

Taxable Persons Italian DST applies to resident and nonresident entities, which meet, individually or at group level, the following conditions in the previous calendar year:

- total amount of worldwide revenues not lower than 750 million euros ($832 million);
- total amount of revenues deriving from qualifying digital services provided to users located in Italy not lower than 5.5 million euros.

Therefore, an entity is subject to Italian DST on taxable revenues realized in 2020, if revenues realized in 2019 exceed both thresholds.

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Reference to the calendar year may result in an administrative burden for taxpayers whose financial year is different from the calendar year.

Qualifying Digital Services In line with Article 3 of the EU DST Proposal, Italian DST applies to revenues deriving from the provision of the following digital services:

- the placing on a digital interface of advertising targeted at users of that interface (digital advertising);
- the making available to users of a multi-sided digital interface which allows users to find other users to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users (digital intermediation);
- the transmission of data collected about users and generated from users' activities on digital interfaces (transmission of user digital data).

The following services do not qualify as digital services for Italian DST purposes:

- supply of goods or services directly between users of the interface in the context of a digital intermediation service;
- supply of goods or services that are contracted online via the website of the supplier of such goods or services, and where the supplier does not act as an intermediary;
- the making available of a digital interface where the sole or main purpose of making the interface available is for the entity making it available to supply digital content to users or to supply communication services to users or to supply payment services to users;

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■ the making available of a digital interface utilized to manage certain banking and financial services as well as the transmission of data from the providers of such services;

■ the activities of organization and management of digital platforms for the exchange of electric energy, gas, environmental certificates and fuels, as well as the transmission of the related collected data and any other related activity.

As indicated by recital 9 of the EU DST Proposal, the DST should apply only to revenues resulting from the provision of digital services that are largely reliant on user value creation. Therefore, the reason for the above exclusions should lie in the minor contribution of the users to the process of value creation.

Users Located in Italy Italian DST applies only to revenues deriving from qualifying digital services provided to users located in Italy. The territorial scope of the Italian DST is in line with the criteria provided under Article 5 of the EU DST Proposal to determine the place of taxation within the EU.

As regards digital advertising, a user will be deemed to be located in Italy if the advertising in question appears on the user's device at a time when the device is being used in Italy in that calendar year to access a digital interface.

As regards digital intermediation, if the service involves a multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users, a user will be deemed to be located in Italy if the user utilizes a device in Italy in that calendar year to access the digital interface and concludes an underlying transaction on that interface in that calendar year.

If the service involves a multi-sided digital interface different from the one described above, a user will be deemed to be located in Italy if the user has an account for all or part of that calendar year allowing the user to access the digital interface and that account was opened using a device in Italy.

As regards transmission of user digital data, a user will be deemed to be located in Italy if data generated from the user having used a device in Italy to access a digital interface, whether during that calendar year or any previous one, is transmitted in that calendar year.

The user's device will be deemed to be located in Italy by reference to the internet protocol (IP) address of the device or any other method of geo-location, in compliance with data privacy regulations. Therefore, taxable persons are required to monitor the location of their users for Italian DST purposes.

The Italian tax authorities recently clarified that revenues from qualifying digital services become taxable for Italian DST purposes at the time when the user is deemed to be located in Italy according to the above rules, independently from the time of the payment of the consideration for the service.

Taxable Revenues and Tax Rate Taxable revenues include total gross revenues deriving from qualifying digital services provided to users located in Italy, net of value-added tax (VAT) and other indirect taxes.

For each calendar year, taxable revenues deriving from users located in Italy are determined according to specific rules which are substantially in line with Article 5 of the EU DST Proposal.

Revenues deriving from qualifying digital services provided to entities of the same group are not subject to Italian DST. In order to define the term ''group'' reference is made to Article 2359 of the Italian Civil Code.

The Italian DST rate is equal to 3%, which applies to the taxable revenues realized by a taxable person in a calendar year.

Obligations Taxable persons shall keep dedicated accounting records to indicate, on a monthly basis, information on revenues derived from qualifying digital services and the elements utilized to determine the portion of such revenues realized in Italy.

Italian DST shall be paid by February 16 of the calendar year following the one in which taxable revenues are realized and the related tax return shall be filed by March 31 of the same year.

Companies which are part of the same group appoint a company of the group to fulfill the obligations deriving from the Italian DST.

Nonresident taxable persons without a VAT identification number shall request from the tax authorities an identification number for Italian DST purposes and in certain cases they shall appoint an Italian tax representative.

Italian residents which are part of the same group of nonresident taxable persons are jointly liable for the obligations deriving from the Italian DST.

Penalties As regards penalties, reference should be made to rules related to VAT, insofar as compatible.

Points to be Clarified There are some issues in relation to the provisions introducing the Italian DST that need to be clarified by the Italian tax authorities.

Italian DST could lead to possible cases of double taxation where profits deriving from revenues subject to Italian DST are also subject to corporate income tax. Considering that Italian DST seems to qualify as an indirect tax, it should not be covered by the double tax treaties concluded by Italy but, according to Italian tax rules, it should be deductible from Italian corporate income tax. This solution to alleviate possible double taxation seems in line with recital 27 of the EU DST Proposal and the related Impact Assessment Report (see page 57).

The term ''group'' should be clearly defined. On the one hand, in excluding intragroup services from the application of the Italian DST, the law makes reference to the definition of group provided under Article 2359 of the Italian Civil Code. However, the term ''group'' is also utilized by the Italian DST law in other contexts (e.g. determination of the revenue thresholds also at

group level, appointment of a group company to fulfill the obligations deriving from the tax and joint liability of Italian residents which are part of the same group of the nonresident taxable persons) without a specific definition.

Italian tax authorities should clarify if reference can be made to Article 2359 of the Italian Civil Code or to the Italian transfer pricing ministerial decree May 14, 2018 or to Article 2 of the EU DST Proposal which refers to the ''consolidated group for financial accounting purposes.''

In addition, Italian DST law uses the term ''digital interface'' several times without specifically defining it. Italian tax authorities should clarify if reference can be made to the definition provided under Article 2(3) of the EU DST Proposal, which reads as follows: ''digital interface means any software, including a website or a part thereof and applications, including mobile applications, accessible by users.''

As regards fines, it should be clarified if the reference to the VAT penalties includes criminal VAT offenses.

Planning Points Despite some aspects that still need to be clarified, Italian DST is applicable beginning January 1, 2020. Therefore, digital companies should:

- verify if the total amount of worldwide revenues generated in calendar year 2019—individually or at group level—are not lower than 750 million euros;
- verify if the total amount of revenues generated in calendar year 2019—individually or at group level—from qualifying digital services provided to users located in Italy are not lower than 5.5 million euros;
- if both of the above thresholds are exceeded, take the necessary steps to comply with the obligations introduced by the Italian DST.

In addition, Italian residents who are part of the same group as nonresident taxable persons should be aware that they are jointly liable for the obligations deriving from the Italian DST.

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