

Italian decree implements EU directive on dispute resolution mechanisms

July 1, 2020

In brief

The Italian Government, on June 10, enacted legislative decree no. 49/2020 (the decree) implementing Directive (EU) 2017/1852 (Directive) on tax dispute resolution mechanisms in the European Union. The legislation aims at governing tax disputes arising from the interpretation and application of conventions for the avoidance of double taxation across the EU.

In detail

Main changes to the current legal framework

Compared to the existing legal framework on the matter, the Directive and the decree provide for several significant innovations:

- Unlike most of double tax conventions entered into by Italy, the taxpayer may present the case to the competent authorities without necessarily initiating prior court litigation at a domestic level.
- A request to set up an Advisory Commission for arbitration can be filed for cases falling within the scope of the Italian double tax treaties (i.e., also outside transfer pricing issues) where a mutual agreement is not reached between the competent authorities, thus allowing for certain timeframes in the interpretation and application of the same tax treaties.
- Differing from the European Arbitration Convention (no. 90/436/CEE), the scope of the procedure is not limited to transfer pricing, and to the allocation of profits to permanent establishments, and therefore Directive-governed procedure are concerned — in principle — with all double tax treaty cases (still with a focus on cases of international double taxation). Therefore, MAP requests could be filed by individuals and companies not belonging to multinational groups.
- Unlike the European Arbitration Convention, a case may be presented for MAP regardless of domestic tax administrative procedures under which tax assessments turn final and cannot be further disputed (e.g., Directive MAP could be accessed despite prior audit settlement).

Italian additions to the framework of the Directive

In pursuance of a number of amendments enacted by the decree, where access to MAP is denied by one or some (but not all) of the involved competent authorities, the applicant may either submit the case to arbitration (and waive pending or future appeals, as provided for in the Directive) or appeal before the Tax Court (as already held by the Joint Sitting of the Italian Supreme Court in orders no. 12759 and 12760 of 15 June 2015).

Moreover, in case the Advisory Commission is not timely set up (or the independent person is not appointed from the Italian side), the Regional Tax Court of Lazio (i.e., second-tier Tax Court located in Rome) is the sole empowered court to rule under the decree.

The Directive originally includes 'serious penalties' that still allow access to MAP (instead of a discretionary obstacle subject to a case-by-case evaluation of the competent authorities under the European Arbitration Convention), but may prevent access to arbitration when actually imposed. The Italian decree confirms that relevance is given to criminally relevant conducts only. Unlike the wording of the Directive (which deem 'serious penalties' those relating to willful or grossly negligent tax conducts), tax conducts amount to crimes under Italian law only where willful and specifically purported (such as tax breaches exceeding certain thresholds and/or characterized by fraudulent or evasive aims). Therefore, for instance, where a criminal penalty is imposed due to a criminal court ruling for a false tax return, failure to file a tax return, or for tax fraud, MAP still would be accessible, whereas the Italian competent authority would deny access to arbitration.

In the context of interactions between MAP and domestic court proceedings, the eligibility for suspension of litigation is extended as it could be requested regardless of the notice of MAP opening. With respect to Directive procedures, the motion to suspend the proceedings can be filed by the sole taxpayers (whereas the motion must be jointly signed by the taxpayer and by the local Revenue Agency office contesting higher tax liability if the relevant MAP is presented under double tax treaties or European Arbitration Convention). Moreover, with respect to the procedures governed by the Directive, the decree provides for the automatic suspension of collection when court proceedings are commenced and suspended upon taxpayer's request.

The Italian decree includes important aspects related to the enforcement of the mutual agreement or of the arbitration decision, as the taxpayer is entitled to claim the fulfillment through court procedures that are normally applicable to tax judgments (so-called motion for enforcement). In case the Italian tax authority claim is entirely cancelled by the mutual agreement or the arbitration decision, penalties shall be refunded upon taxpayer's specific request.

In order to facilitate the fulfillment of the mutual agreement or the arbitration decision, the decree derogates to Italian statutory limitation for tax assessment by doubling the applicable limitation period (i.e., 10 or 14 years, depending whether a tax return was filed in Italy related to the disputed fiscal year — e.g., in case a tax return is filed for FY 2018, the statute of limitation for tax assessment would expire on December 31, 2029 for the purposes of giving execution to the outcome of Directive procedures).

The takeaway

The newly enacted decree overcomes a number of current obstacles to MAP access (such as audit settlements and possible criminal penalties, at least under the European Arbitration Convention) and to arbitration (such as lack of effective arbitration clauses within double tax treaties and failure to set up the Advisory Commission under the European Arbitration Convention). The decree also improves many other procedural aspects, conveying certain results for international procedures for alternative resolution of tax disputes.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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