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MAIN NEWS OF THE "INTERNATIONAL TAXATION" DECREE

On 28 December 2023, Legislative Decree No. 209 of 27 December 2023, "Implementation of the tax reform in the field of international taxation" (the "Decree"), implementing Law No. 111 of 9 August 2023 "Delegation to the Government for tax reform", was published in the Official Gazette. The main changes are outlined below.

TITLE I - INTERNATIONAL TAX PROVISIONS

✓ Residence of natural persons (Art. 1)

The Decree brings significant changes to the criteria for determining the tax residence of natural persons, as set forth in Art. 2(2) of Presidential Decree No. 917 of 22 December 1986 ("TUIR").
The new text provides that individuals are considered resident for income tax purposes, if they are "*in the territory of the State for the greater part of the tax period*", meeting specific criteria:
- "*residence*" as per the civil code;
- "*domicile*";
- "*presence*".

The principle remains that the individual is deemed to be tax resident if even one of the prescribed conditions above is met "*for the greater part of the tax period*". However, it is added that fractions of a day are now considered in the calculation.
Changes compared to the previous legislation include:
- replacement of the civil law criterion of domicile, defined as "*main place of business and interests*" (Art. 43 of Italian Civil Code), with a criterion of a substantive nature. Domicile is now defined by the new rules as the *"place where personal and family relationships primarily are developed",* excluding the relevance of economic and patrimonial ties. The civil law criterion for identifying residence is still referred to for identifying residence as the "*place where the person has habitual abode*" (Art. 43 of the Italian Civil Code);
- the relevance of "*physical presence*" in the territory of the State for determining tax residence, a criterion expressly mentioned in previous regulations.

The "*registration in the registry of resident population*" retains its relevance, but the new rules specify that this criterion applies "*unless proven otherwise*". Therefore, while retaining its relevance in determining tax residence, under the new rules it constitutes a relative presumption (in place of the previous absolute presumption), which may be rebutted providing contrary evidence.

✓ Residence of companies and entities (Art. 2)

The Decree introduces changes to the criteria for determining the tax residence of capital companies and other non-corporate entities, regulated by Art. 73 TUIR, and of partnerships and assimilated entities, regulated by Art. 5 TUIR.
The essential change to Art. 5 and 73 TUIR by the Decree consists of replacing the criteria of the "*registered office*" and the "*main business purpose*" with:
(i) the "*place of effective management*", defined as the *"continuous and coordinated assumption of strategic decisions"* relating to the company, entity, or association as a whole, and

(ii) the "*place where the company's day-to-day management primarily takes place*", defined as *"the continuous and coordinated carry out of the current management activities"* relating to the company, entity, or association as a whole.

The formal criterion of the "*registered office*" and the principle of three alternative criteria remains unchanged. A company, entity or association is deemed to be tax resident if at least one of the three criteria laid down in the rule is met "*for the greater part of the tax period*".

According to the Government Explanatory Report to the Decree, the provision aims at ensuring greater legal certainty, also aligning the domestic residence criteria with those provided by international practices and by double tax treaties signed by Italy.

Consistent with the introduction of the new criteria of effective place of management and the main place of management, the provision concerning the presumption of residence in the territory of the State of companies and entities controlled or managed by persons resident in the territory of the State, provided for in paragraph 5-bis of Art. 73 TUIR, has also been reformulated.

The Decree also introduces other mere coordinating or updating changes to the regulatory (e.g., replacing references to Art. 168-bis TUIR with Art. 11(4)(c) of Legislative Decree 239/1996 to indicate the countries that provide an adequate exchange of information ("w*hite list"*).

✓ **Simplification of the regulation of controlled foreign companies (Art. 3)**

The Decree introduces significant changes to the regulation of controlled foreign companies ("CFCs"), as provided in Art. 167 TUIR.

The main tax news concerns the redefinition of the criteria for determining taxable income in Italy and other measures aimed at coordinating new CFC rules with the domestic rules transposing Directive 2022/2523/EU on global minimum tax.

In summary, the Decree revisits Art. 167(4) TUIR, considering foreign entities subject to taxation in a low-tax jurisdiction ("effective tax rate*"* lower than 15%). The calculation of the effective tax rate is based on the *ratio* between the sum of current taxes, deferred tax assets and liabilities and the profit before tax, as resulting from the subsidiary's financial statements. This simplified criterion applies if the foreign subsidiary financial statements are audited by authorized external auditor, with the findings being used under for the purpose of the consolidating accounts of the Italian resident parent company.

The Decree also provides that, if the condition relating to the certified foreign subsidiary financial statements is not met or if foreign controlled entities have effective taxation lower than 15%, in order not to be subject to the CFC rules, controlling entities will have to test that the foreign controlled entity is not subject to an effective taxation lower than 50% that would have been applicable if that entity had been resident in Italy.

Additional new rule concerns of Art. 167(4-bis) TUIR, which, aiming at coordinating the CFC regulations with the provisions on global minimum tax, provides that in the calculation of the effective foreign taxation, the equivalent domestic minimum tax, potentially payable by the non-resident subsidiary in the foreign jurisdiction, is also taken into account.

Finally, the Decree introduces a new optional and alternative mechanism with respect to the ordinary regime set forth in Art. 167(4)(a) TUIR, which allows for the application of a 15% substitute tax to be calculated on the net accounting profit of the foreign subsidiary or permanent establishment. This accounting profit is determined based on the

accounting principles used for the consolidated financial statements, grossed up by the foreign taxes that have contributed to determining this value, the write-downs of assets and provisions for risks.
This option, if exercised, lasts for three consecutive fiscal years and is irrevocable. Moreover, it applies to all foreign subsidiaries that meet the conditions of Art. 167(4)(b) TUIR, i.e. whose income from so-called passive income amounts to at least one-third of the total income. The option applies if foreign subsidiaries financial statements are audited by authorized external auditor in the foreign jurisdiction.
A forthcoming provision of the Director of the Revenue Agency will set forth the procedure for exercising and revoking the option.

- ✓ **Framework provisions for tax incentives compatible with European principles and provisions on state aid (Art. 4)**

The Decree introduces a framework provision establishing the conditions for the introduction of specific tax incentive measures qualified as State aids.
Specifically, tax incentives are granted to self-employed and individuals with business incomes, who have their domicile or permanent establishment in Italy, according to the options afforded by the European reference framework, in compliance with the principles set forth in Art. 107 and 108 of the Treaty on the Functioning of the European Union ("TFEU").
The specific conditions are:
(i) tax incentives shall be authorised by the European Commission pursuant to Art. 108(3) TFEU, subject to prior notification;
(ii) the incentives shall comply with the aid categories specified in Regulation (EU) No 651/2014 of European Commission;
(iii) the incentives shall comply with the conditions and limits laid down by Regulations related to the application of Art. 107 and 108 TFEU to *de minimis* aid (Regulation (EU) No. 1407/2013, Regulation (EU) No. 1408/2013 and Regulation (EU) No. 717/2014).

- ✓ **New facilitation scheme for inbound workers (Art. 5)**

The Decree introduces a new favourable regime for inbound workers, replacing the existing tax regime outlined in Art. 16 of Legislative Decree No. 147 of 14 September 2015. The new tax regime provides for the taxation of 50% (instead of 30% under the previous regime) of employee, assimilated and self-employed income, up to a maximum of Eur 600,000 (a limit not previously provided for), earned in Italy by workers who transfer their residence to Italy.
The application of the new regime is subject to the fulfilment of specific conditions:
(i) workers shall commit to stay in the territory of the State for at least five years i.e. the year of the transfer of tax residence and the following four years (instead of the two years under the previous regime).If tax residence is not maintained for at least four years, the worker forfeits the benefits and the Inland Revenue will recover the benefit, with interest;
(ii) the workers shall qualify as non-tax resident in Italy for at least three fiscal years prior to the transfer (instead of two years under the prior regime). If the individual works in the territory of the State in favour of the same entity for which he was

employed abroad before the transfer or in favour of an entity belonging to the same group, the minimum requirement for residence abroad is:
1) six fiscal years, if the employee has not previously been employed in Italy in favour of the same entity or of an entity belonging to the same group;
2) seven fiscal years, if the employee, prior to his transfer abroad, was employed in Italy in favour of the same entity or an entity belonging to the same group;

(iii) the work activity shall be carried out for most of the fiscal year (at least 183 days per year) in Italian territory;

(iv) the workers shall be highly qualified or specialised, as defined by Legislative Decrees No. 108/2012 and No. 206/2007.

The taxation is reduced to 40% if the worker moves to Italy with a minor child or newborn child or adopted minor during the period of use of the scheme. In the latter case, the higher reduction applies starting from the fiscal year in which the birth or adoption occur and for the remaining period of eligibility.

For the purposes of verifying the condition of foreign tax residence, in relation to fiscal years prior to the entry into force of the Decree, Italian citizens are deemed to be resident abroad if they have been enrolled in the Registry of Italians resident abroad (AIRE) or have been resident in another State pursuant to a convention against double taxation on income.

The new regime lasts for five years and cannot be extended (unlike the previous regime), except for persons who transfer their registered residence in 2024 and who have purchased a residential property unit used as their main home by 31 December 2023 (and in any case within the 12 months preceding the transfer), for whom the 50% relief is extended for a further three years.

The new favourable rules apply to persons transferring their tax residence to Italy as of tax year 2024.

On the other hand, the previous (and more favourable) regime remains applicable to workers who have transferred their registered residence to Italy by 31 December 2023 or who have entered into a sports employment contract by the same date.

✓ **Transfer of foreign economic activities to Italy (Art. 6)**

The Decree provides for a taxation for income tax and IRAP purposes equal to 50% of the taxable income ("reshoring") of economic activities transferred to Italy from foreign jurisdictions, other than to the European Union or the European Economic Area member states.

The reshoring applies for the fiscal year current at the time of the transfer and for the following five fiscal years and provided that the company maintains separate accounting records, allowing the accurate determination of the income and value of the net production eligible for relief.

Facilitated transferred economic activities also include business activities carried out by companies belonging to the same group.

The tax relief does not apply to activities that were already carried out in the Italian territory in the 24 months preceding the transfer and they will be taxed ordinarily.

The relief is forfeited if the relocation of the activities, even partially, is carried out in Italy to foreign countries ("offshoring") in the following five fiscal years, or in the following ten for large enterprises. In such a case, the tax authorities recover the unpaid taxes, with interest, in the period of tax relief ("recapture").

The effectiveness of the provisions is conditional upon authorisation by the European Commission pursuant to Art. 108(3) TFEU.

TITLE II - TRANSPOSITION OF COUNCIL DIRECTIVE (EU) 2022/2523 OF 15 DECEMBER 2022 ON GLOBAL MINIMUM TAX

✓ Global minimum tax (Art. 8-60)

The Decree transposes Directive 2022/2523/EU (the "Directive") establishing the *global minimum tax* into Italian law.
The Directive transposes into the single market the core of the global agreement on the Second Pillar ("Pillar *2"*) released by the OECD/G20 Inclusive framework on BEPS, aiming at introducing a minimum effective taxation of multinational enterprises at the global level, substantially reflecting the Model Rules published by the OECD in 2021.
The application of this measure concerns companies located in Italy that are part of a multinational or domestic group with annual revenues equal to or exceeding Eur 750 million in its ultimate parent entity's consolidated financial statements in at least two of the four fiscal years immediately preceding the tested fiscal year.
In summary, the procedure consists of the following steps:
- assess whether the group is subject to the overall minimum taxation;
- identify the group's entities in each country, applying specific localization rules;
- determine the income and consequently the relevant taxes of each entity in the group;
- calculate the level of effective taxation of all entities located in the same jurisdiction;
- apply the minimum supplementary tax, to ensure that such group is liable to pay tax at a 15% effective minimum tax rate.

The three levels of taxation
The Decree introduces a supplementary taxation mechanism through three different tax levies:
(i) the Income Inclusion Rule ("IIR"), payable by parent companies (parent company or ultimate controlling entity of a multinational or domestic group) located in Italy, relating to any entities that are low-taxed in the country where is located;
(ii) the Under Tax Profit Rule ("UTPR"), payable by one or more enterprises of the multinational group located in Italy in relation to the enterprises of the group that are low-taxed, if the equivalent minimum supplementary tax has not been applied, in whole or in part, in other countries;
(iii) the Qualified Domestic Minimum Top-up Tax ("QDMTT") payable in relation to all enterprises of a multinational or domestic group that are low-taxed located in Italy.
The mechanism is structured by a top-down methodology in which the IIR is levied by the entities closest to the top in the chain of ownership. Conversely, the UTPR has a safeguard function in the system ("backstop rule"), as it only applies in specific circumstances where the IIR is not applied. The QDMTT applies if the group companies, operating in Italy, have effective tax rate lower than 15% as minimum taxation.

Filing Obligations and Payments
The new rules set out the requirements for the tax filing and payments obligations.
Each company located in Italy is required to submit a relevant communication to the tax authorities containing:
- company identification data;

- information on the corporate structure of the multinational or domestic group to which it belongs, including details of ownership interests held by one undertaking in another one;
- all the information necessary to calculate: (i) the effective tax rate of the jurisdiction in which at least one enterprise is located, (ii) the amount of top-up tax due with respect to each enterprise belonging to the group, (iii) the allocation of the amount of such top-up tax based on the UTPR allocation formula and all the information for the application of the QDMTT with respect to each country;
- the list of options provided for by the rules under review that have been exercised and revoked in the fiscal year to which the relevant disclosure relates, as well as the list of those that are currently outstanding for that year.

The obligation does not apply if another group company located in a State that has entered into a qualified agreement with Italy (defined by the Decree as a "*bilateral or multilateral agreement in place between two or more tax authorities for the automatic exchange of information relating to relevant communication"*) has already fulfilled the reporting obligation. The filing deadline is set for the fifteenth month following the last day of the relevant fiscal year (e.g., for the fiscal year 2025, the deadline will expire on 31 March 2027).

In cases of failure to file or filing with a delay of three months or more, an administrative penalty of Eur 100,000 shall apply. In cases of submission with untruthful or incomplete data, a penalty of between Eur 10,000 and Eur 50,000 shall apply. Overall, the penalty may not exceed a maximum limit of Eur 1 million, with reference to all group companies located in Italy for each fiscal year.

An annual tax return is required to be filed within the same time limits as the relevant notification.

The relevant payments are made for each year in two instalments:

- first instalment, equal to 90%, by the eleventh month following the last day of the relevant financial year;
- balance, equal to the remaining 10%, by the last day of the month following the deadline for submitting the annual tax return.

TITLE III - PROVISIONS TO FACILITATE COMPLIANCE WITH HYBRID MISMATCH

✓ Provisions on documentation of hybrid mismatch (Art. 61)

The Decree introduces new provisions on hybrid mismatches, enacting an optional regime that grants a penalty protection conditional upon the possession of appropriate documentation to assess the application of the rules designed to neutralise such misalignments.

The provision enacts an optional regime consistent with the one already in force for transfer pricing, allowing taxpayers who prepare appropriate documentation with a legal certainty and promptly communicated to the tax authorities, to grant protection from administrative penalties (Art. 1(2) of Legislative Decree No. 471 of 18 December 1997) in case of a breach of the Italian anti-hybrid mismatch legislation.

A forthcoming decree of the Ministry of Economy and Finance will set forth the modalities, content, and terms of the communication.

The protection is also extended to fiscal years prior to 2023, provided that the documentation is prepared by the deadline for filing the tax return for the fiscal year in which the

Decree becomes effective (or by the sixth month following the date of approval of the implementing decree, whichever is later).
However, the provision applies if the infringement has not already been assessed and no tax accesses, inspections, audits, or other assessment activities have started of which the taxpayer or jointly and severally liable persons have had formal knowledge.

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For information: info@5lex.it