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Italian Tax Authorities Action Against Fictitious Corporate Tax Residence

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Fictitious corporate tax residence is a primary concern for States, in view of the fact that it impacts – directly and incisively – on States' taxing rights, and also since it is known to trigger double taxation as well as double non-taxation phenomena. Based on the above, it is quite evident that to counter such phenomena, a coordinated approach at international level is altogether imperative, especially since regulation of tax aspects has been playing an increasingly central role in debates and discussions between and among Tax Authorities, and international institutions.

1 Introduction

The current international scenario is pervaded by factors that clearly undermine the rightful claim to taxing rights by advanced States, due to increased taxpayers' mobility, excessive volatility of tax bases and the use of electronic channels.[1] The consequences are that:

- for Countries with advanced tax systems, exercising their taxing rights – as a characteristic manifestation of State sovereignty – is not effortless;
- conversely, for the remaining States or territories, new horizons have been opening up with regard to the development of organized strategies aimed at supporting and enhancing the incorporation of companies, the delocalization of entrepreneurial activities and the relocation of incomes abroad;
- driven by constant technological innovations and by market demands, enterprises are rewriting the rules of the single economies, in a direction in which the sense of profit ceases to be self-restrictive at national level, and profits may thus float freely within the boundlessness of cyber-networks.[2]

While on the one hand, the delocalization of business activities and incomes (especially financial ones) creates a destabilizing effect on States' economies, since they engender the erosion of taxable bases, on the other, it produces undesirable shifts of the tax burden towards less mobile factors such as, work, property and consumption, without forgetting the cost that potential controversies between Tax Authorities and taxpayers generally involves.

All this has sensitized States to the inevitable need to protect and safeguard their domestic tax bases from aggressive tax planning schemes, being ever more frequently implemented by multinational enterprises in particular, through the shifting of profits towards low-tax Countries (so-called '*Base Erosion and Profit Shifting*').[3]

Within such kind of scenario, in order to avoid double non-taxation phenomena, a critical element compelling States to highly intensive and mutual cooperation – not only for their own, but also for taxpayers' interests – is either the transfer, or the '*strictly formal*' establishment of a business entity's offices abroad: '*fictitious corporate residence*'.

Investigative procedures designed to allow so-called '*subjects fictitiously resident abroad*' to surface (i.e. to be clearly identified and disclosed), by tracing their residence back to the actual location in which the '*place of effective management*'[4] is situated, are characterized by two specific features:

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1 The supranational dimension of the economy as well as of operators causes the concept of '*territory*' – which is the unavoidable basis for States to exercise their sovereignty – to be seriously jeopardized due to the fact that relocations occur within very short terms, that business transactions are concluded in various Countries and that activities are delocalized. On the issue, cf., *ex multis*, Gamble A., *Fine della politica?*, 47 (Bologna: Il Mulino 2002), which points out that the concept of Nation-State has been superseded in this era in which the global market has imposed a cosmopolitan order that is in conflict with a territorial order; Ohmae K., *La fine dello Stato-nazione* 37 (Milano: Baldini & Castoldi 1996); Valente P., *Elusione Fiscale Internazionale* 81 et seq. (IPSOA 2014).

2 Cf. Valente P., *Manuale di Governance Fiscale* 5 et seq. (IPSOA 2011).; Valente, *supra* n. 1, at 20 et seq. (IPSOA 2014).

3 For further details on critical issues related to BEPS, cf. Valente, *supra* n. 1, at 1895 et seq.

4 For further details on identification criteria related to the tax residence of legal entities, cf. Valente P., *Convenzioni internazionali contro le doppie imposizioni* (IPSOA 2016), Commentary to Art. 4.

– the legislative frame of reference, which often invokes the so-called '*rebuttable legal presumption*';
– the peculiarity of inspection procedures, which efficiency and effectiveness do not strictly depend upon the Tax Authorities' operating methods.

The above features are bound by a common denominator, i.e. the fact that the interlocutor is, in the case at issue – or at least initially – presumably a foreign subject. Such is the reason why both, regulations and inspection procedures aimed at having such phenomenon '*emerge*' (i.e. identification of effective place of business) must be necessarily implemented and applied at transnational level.

2 Identifying the place of effective management

The concept of residence, as the starting point for the identification and weighting of the tax variable, is not univocal, since it varies pursuant to a given system and/or bilateral agreements. In principle, systems may be distinguished as follows:

– '*common law*', in which special force and meaning are attributed to the '*place of incorporation*', and basically approves that the law of the State in which the company has been incorporated be applied;
– '*civil law*' (Italy is among these) in which the following principle applies: the economic entity is governed by the tax laws of the State in which the '*administrative office*' is located.

Within such kind of context, identifying the State of tax residence of a given subject may represent a comparative element between (at least) two Countries, which must interact without somehow either detracting from the status of their own taxing sovereignty, or negatively affecting competition through tax distortions, such as double taxation, or double non-taxation.

Article 4 of the 2010 OECD Model Convention deems the '*place of effective management*' as the preferential criterion to identify the tax residence of persons other than individuals, designating by such expression, the location in which key management and commercial decisions – deemed necessary by the related business entity – are made.

Such kind of legal structure leaves room to assert that a given entity may have various (management) offices, but only one single '*place of effective management*'.[5]

The subject-matter of tax residence is of primary interest to international Groups, also for management purposes of the single associated companies. However, differently from other evasion/avoidance phenomena, such theme is characterized not only for a series of definitional criteria provided within an international context, but also for the effort required by the issuing of domestic norms and for putting taxpayer in a position to adopt the necessary measures required to duly manage any tax risks, while allowing the Tax Authorities to operate more '*effortlessly*' vis-à-vis taxpayers that do – at least initially – reside in Italy.

It goes without saying that any ascertainment as to the actual residence of business entities must ensue from a careful and painstaking investigative analysis, supported by a fair and balanced debate between and/or among the various parties. To prevent and counteract the said phenomena as above, the Italian Tax Authorities' perspective, ever more focused on so-called voluntary tax compliance,[6] has been adopting specific steps to target the '*surfacing*' (i.e. identification of the place of effective management) of subjects (i.e. collective entities, or individuals) that have been developing their own businesses through companies or entities, which place of effective management is located in Italy, but is formally established under foreign laws.[7]

3 Inspection activities

As for all inspections conducted by Italian Tax Authorities, the latter's inspection activities vis-à-vis potentially fictitiously resident abroad entities may be subdivided as follows:

– so-called '*intelligence*' activities (i.e. collection of investigative and preliminary data/information);
– so-called '*invasive*' activities (which start by exercising the power of access to premises, i.e. so-called '*discovery*').

The first part involves the introductory phase, which is necessary to properly direct all other consequent investigations; such initial phase includes discovery and documentary research phases. Any preliminary information and/or data on the business subject may be acquired through both, the Tax Authorities' own initiative as

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[5] Italy made some observations, in particular on the interpretation provided under para. 24 of the Commentary to Art. 4 of the OECD Model with reference to the '*person or group of people carrying out functions at a higher hierarchical level (such as, for example, a Board of Directors)*', as the one and only criterion to identify an entity's '*place of effective management*'. The stated opinion is that, in order to determine the '*place of effective management*', the place in which the core and substantial activity of the relevant entity is being carried out, must be duly considered.
For further details, cf. Valente, *supra* n. 4.

[6] Ultimately, reference is made to the sum total of legal-juridical, social, ethical and moral norms that underlie the so-called '*tax loyalty*'. On tax compliance, cf. Valente, *supra* n. 1, at 3377 et seq.

[7] The preliminary phase constitutes within such kind of context, a mandatory '*step*' that is both, introductory and almost desirable (also) for taxpayer, in order to allow an accurate and exhaustive definition of the context subject to investigation, and also to univocally identify the '*place of effective management*'.

well as through any input deriving from external Authorities/Organisms of any kind whatsoever.

To provide some specific examples:

– *as a result of Tax Authorities' own initiative*:

  - information that may be directly acquired through data banks and, above all, through the cross-processing of data and/or information developed by such databases [8];
  - any other Organism where Deeds and documents – that may be useful to acquire new data and/or information – are filed (trade or professional associations, Public Bodies, etc.);
  - open sources/internet portals,[9] to acquire further information on foreign companies '*allegedly*' relocated abroad fictitiously. Internet website consultations might, for example, reveal information regarding the names of qualified personnel, such as the Executive in charge of the foreign enterprise carrying out activities in Italy, the website manager, any '*contacts*' provided by the company, etc.;

– *through external sources*:

  - Italian Tax Authorities '*obviously*' receive all kinds of news and information from third parties on '*a daily basis*';
  - On the other hand, significant investigative input may also derive from:
    - *the Courts*: these may represent a highly qualified and privileged information channel from which significant operating inputs[10] may be developed;
    - *other Italian Administrations*: numerous communications have their legal basis in Article 36, paragraph 4 of Presidential Decree No. 600 of 29 September 1973, which sets forth the obligation for all Public Bodies/Entities institutionally entrusted with investigative or supervisory activities, to report to the *Guardia di Finanza* (i.e. Italian Revenue Guard Corps, hereinafter, '*GdF*') any facts that may constitute tax violations, should they be privy to such information by reason of their functions or the exercise thereof. As a matter of fact, the mentioned article imposes a reporting obligation (also) directly to the competent GdF Department, in relation to the location in which such facts were acquired, while simultaneously providing any documentation that may add evidentiary support thereto;
    - *Tax Authorities of other Countries*, within the so-called international cooperation context.

Data and information thus obtained are not – and it is worth emphasizing this point – sufficient or adequate enough to '*certify*' a business entity's tax residence, since a further investigation is generally conducted through a '*field study*' in order to successfully identify the '*center of corporate volitional impulses*'.[11]

Within such kind of context, however, the analysis of information contained in data banks plays a primary role, since it has a two-fold function, which:

– is aimed at '*surgical*' controls of subjects likely to be characterized by higher evasion risks;
– buttresses and causes the fight against large-scale evasion/avoidance transactions to become ever more incisive and effective, starting from a preliminary and in-depth knowledge of the relevant business entity.

Italian Tax Authorities, in their '*preliminary auditing phase*', move therefore in three directions:

– *risk analysis*, to be construed as a well-pondered and critical analysis of information/data contained in the Tax Register Information System as well as in other

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[8] Among these:
– Tax Register Information System (i.e. '*Ser.p.i.co.*'): useful to pinpoint, among other things, the identification for tax purposes in Italy of a foreign subject, which may occur, for example, due to the latter's ownership of real estate, rather than for his having entered into legal transactions that were concluded on national territory and for which, identification has been mandatorily set forth through a taxpayer's code;
– '*Orbis*' data bank, managed by the *Bureau van Dijk* company, in order to identify foreign companies (registered therein), in relation to which the presumptions of residency under Art., para.5 *bis*, letter a) and b) of the TUIR are relevant, rather than the formation of the Board of Directors of the foreign companies or entities and, in some cases, the '*substance*' of the same;
– Chambers of Commerce, Industry, Crafts and Agriculture, within the framework of the Register of Companies, ex Art. 2188 of the Italian Civil Code (which, for example, comprises: Financial Statements, supplemented with their related '*Explanatory Notes*', '*Management Reports*', as well as '*Auditors' Reports*'; corporate By-laws and amendments; developments of business structures; Deeds related to extraordinary management operations, etc.);
European Business Register: is a European network adhered to by twenty-eight States; it allows, thanks to the cooperation among the various '*Chambers of Commerce*', or equivalent Bodies of the respective Countries, to obtain corporate data and information therein contained.

[9] For example, the portal of the Borsa Italiana S.p.A. (i.e. the Italian Stock Exchange), rather than the websites of domiciliation companies, so-called '*box offices*'.For further details, cf. Valente P. & Cardone D.M., *Esterovestizione: profili probatori e metodologie di difesa nelle verifiche*, 297 et seq. (IPSOA 2015).

[10] On the issue, ruling No. 2916 of 7 Feb. 2013, by means of which the Italian Supreme Court declared that any wiretapping occurred in the course of criminal investigations, if lawfully acquired, may even be used in tax litigation cases, acknowledged that Art. 270 of the Italian Code of Criminal Procedure, which forbids to use the results of wiretapping of phones in proceedings other than the ones for which they have been provided, would only find application in case of criminal litigation and such application would not be extended to tax litigation matters. However, as the Supreme Court is fully aware of the defense difficulties that the subject might incur during the '*shifting process*' of evidentiary material between two different proceedings (going from a criminal to an administrative procedure), governed by different rules, recognizes taxpayer's full-fledged right to challenge the wiretapped declarations before the Tax Commissions on the one hand, while underlining – on the other – the merely circumstantial value of such evidentiary elements, in tax trials, which must be strictly based on a most stringent and rigorous analysis.

[11] Preliminary intelligence activities include anonymous whistleblowing. Already in the past, jurisprudence found itself having to deal with the anonymous reporting of tax violations that were conveyed to the competent auditing Bodies, excluding that these might represent an evidentiary element that could – by itself alone – provide the necessary support to search premises (Supreme Court, Joint Sessions, Case No. 16424, 21 Nov. 2002).

data banks, and that are cross-referenced among themselves to identify and establish the existence of any connection between and/or among entities, companies, total assets and financial flows, as well as any other useful information that may support (in the specific case) the hypothesis of fictitious residence abroad of the company;
– *intelligence*, which consists in a more ample method for the researching, collecting and processing of information and/or data which may flag the existence of any '*irregularities*';
– *economic control of the territory*, which in this case, is typical of the GdF, as the latter – through its widespread presence in the various areas of the Italian territory – is continuously targeting the identification of any and all evidence that may be useful for further and more in-depth investigations, as well as for the purpose of acquiring and using any information obtained from data banks for practical purposes.[12]

As a rule, any preliminary intelligence activities allow to obtain information on the foreign business entity and on the place where the foreign company's effective management might be potentially identified. In particular:

– any connections between and/or among the non-resident taxpayer and other resident subjects;
– any tangible and intangible assets held in Italy by the non-resident taxpayer;
– corporate data of associated resident subjects: company name and registered office, VAT (value added tax) - number, Taxpayer's Code, corporate purpose, starting date of business activities, location in which activities are carried out, administrative office and place in which accounting records are kept, number of employees and/or co-workers/associates and/or executives in charge, share capital, personal details of the Directors and of the Legal Representative, structure of the business activity carried out, professional qualifications, etc.;
– tax precedents of associated resident subjects: violations ascribed to the same in the various tax sectors; data and updated information on the foreign company's resident Directors;
– continuous presence on the Italian territory of Directors enrolled with the AIRE Register (i.e. Register of Italian Residents Abroad, hereinafter, '*AIRE*') of the formally foreign subject.

4 Tools to acquire evidence

Having regard to the growing level of '*intrusiveness*' of the Tax Authorities' preliminary investigation powers, these may be summarized as follows:

– power to avail themselves of the cooperation of other public administrations and to employ any results obtained from investigations conducted by the Criminal Investigation Department;
– power to issue summons, to request and send questionnaires;
– power to access premises (i.e. *discovery*), inspection and search of premises, of personal '*body search*' and of mandatory warrants to open sealed envelope, bags and purses, safes.

Furthermore, in order to reconstruct the actual presence of the tax residence in Italy and the simultaneous '*absence*' of the taxpayer abroad, the Italian Tax Authorities may also resort to the assistance of international cooperation instruments.[13]

Although the need to reconstruct an evidentiary framework containing a great amount of details necessarily requires an inspection, which salient feature is a '*surprise effect*' and, therefore, in order to exercise access (i.e. *discovery*) powers under Article 73, paragraph 5 *bis*, of the TUIR (Italian Income Tax Code), the opportunity to activate a '*formal*' – even if merely theoretical – tax audit, may not be excluded.

Considering that the economic subject is – still from a preliminary perspective – foreign on a normative '*presumptive basis*', or by reason of evidentiary elements acquired, which strongly indicate the existence of a fictitious corporate residence abroad, a number of procedural issues arise in connection with the manner in which preliminary investigations are activated, i.e. in particular with regard to the identification of:

– the party to whom the notification of the Deed authorizing access is addressed;
– the representative/interlocutor with whom to conduct debates (also within a multi-test context, which will be further detailed below);
– the place in which to identify the '*place of effective management*' of the foreign subject;
– accounting data by means of which income may be determined.

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[12] These three (3) complementary guidelines allow the Italian Revenue Office to obtain taxpayer's information background, highlighting thus the latter's level of so-called '*tax dangerousness*', which is useful when choosing the most appropriate method to start off the preliminary investigation and thus acquire useful elements to establish the existence of at least one of the nexus criteria identified by Art. 73, para. 3, of the TUIR.

[13] It might be worth noting that such preliminary investigative powers do not necessarily involve the obligation for the Italian Revenue Office to use the said powers always, and all of them simultaneously. The choice is based on criteria of '*administrative discretionary powers*', efficiency, effectiveness and potential profitability of such inquiring activities, also on the basis of the information background acquired.
As far as investigative methods to be activated, the Italian Legislator, in fact, fixed the '*negative limits*', rather than the '*positive limits*'. In this case, reference should be made to the principle prohibiting any aggravation of the administrative procedure, ex Art. 1, second paragraph of Law No. 241/1990, which application scope, as expressly provided by Ministerial Guidelines of 25 Nov. is extended to tax inquiries.
The principle just referred to above confirms that '*the Public Administration may not aggravate proceedings save for extraordinary and substantiated reasons arising from the preliminary investigation in process*'.

The key phases related to the inspection of premises, i.e. access, research, assessment and documentary inspection as well as the procedures to activate the tax audit, which do not exploit the mentioned '*surprise effect*', originate from the application of the so-called *multi-test.*[14]

Among the various decisions the Tax Authorities have to make with a view to the activation of the assessment, one such decision involves the place in which the assessment is to be carried out.[15] The possibility to ensure that documentation may be promptly accessed – particularly when dealing with complex accounting systems, which may be managed by internal administrative structures, namely meaning that, although rather simple in themselves, might be particularly fragmented – may be certainly better guaranteed if the above activities are conducted at taxpayer's premises.[16]

Moreover, the presence of Tax Inspectors at taxpayer's premises allows the latter to exercise his/her due rights in the event of a tax audit, being thus able to continually assist and observe the said inspection activities, either directly, or through other professional, or other party formally entrusted with such task.

Even if the above considerations generally lead to believe that it is preferable for the audit to be conducted at either the company's premises, or at the premises of the professional entrusted with such task, the same audit may in any event be conducted at the Tax Inspectors' offices in all such cases in which the said solution may be considered the most suitable by the Tax Authorities, rather than by taxpayer himself.

Regardless of whatever decision is ultimately adopted, generally in such cases in which it is deemed that sufficient elements have been identified to establish that the residence of the allegedly foreign subject is in Italy, audits are activated by exercising mandatory[17] powers of access (i.e. enforceable by law).

As a rule, access to the premises designated to business activities must be carried out on the basis of actual needs for *in loco* investigation and control, and any related activities must be carried out during regular working hours, save for exceptional or urgent cases, that must be duly supported by all suitable documentation.

It is understood that, in all such cases where the said requirements are missing, key audit objectives must in any case be pursued by having recourse to other preliminary investigative powers granted by tax laws that do not involve access.[18] Vice versa, provisions set forth under the Italian Taxpayer's Charter might end up being violated.

Both, the '*effective need of an in loco investigation and audit*' such to justify access as well as any grounds for '*exceptionality and urgency*' that would justify any interventions outside regular working hours, during which business activities are carried out, are duly reported and highlighted in the Official Pre-audit Records which the Tax Authorities draw up on the first day, also referred to as '*Access and Audit Report*'.

Slightly different precautionary measures are adopted where access occurs at the premises of professional firms, if their owners are absent. In such event, Italian Tax Authorities are required to:

- request the interim substitute, who is in charge, to contact the owner immediately, asking the latter that a proxy be issued and sent via fax – should it be missing – as provided by the law;
- should the owner not be reachable, to adopt any and all precautionary measure in order to avoid that, while waiting, any attempts be made to destroy or conceal any documentation that might be useful for assessment purposes.

In the case of Firms in partnership, it shall then be necessary to identify first the premises to be accessed that are strictly related to the subject under audit. Conversely, the power to access premises that are clearly and uniquely available to other professionals is entirely precluded; as such, any Tax Inspectors' access or stay may be exclusively allowed upon issue of a separate and specific order of access.

Inspection activities involving the tax residence of a company do not however stand out for any special peculiarity with regard to other kinds of tax audits. The said activities are, in fact, essentially aimed at identifying and tracking down:

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[14] On the so-called *multi-test*, cf. Valente & Cardone, *supra* n. 6, at 279 et seq.

[15] Preliminary investigation powers for tax assessment and for the repression of tax evasion and other findings, for direct tax purposes and VAT, as a direct consequence of preliminary intelligence activities, are regulated by Art. 52 of Presidential Decree No. 633/1972, referred to by Art. 33 of Presidential Decree No. 600/1973, and by Art. 35 of Law No. 4 of 7 Jan. 1929 as well as by Art. 51, para. 4, of Presidential Decree No. 131/1986, by Art. 34, para. 4, of Legislative Decree No. 346/1990 and by Art. 11, paras 3 and 9, of Legislative Decree No. 374/1990, irrespective of the specific case subject to audit.

[16] This last solution also allows a more immediate technical comparison with taxpayer himself as well as with any professional assisting the latter, or with other subjects entrusted therewith, which is often necessary – and desirable – in the case of fictitious corporate residence.

[17] The term '*access*' generally indicates auditors' powers to access premises, prior to exhibition of personal ID badges and due authorization by the Officer in charge of the Auditing Office, and to mandatorily dwell on such premises where taxpayer carries out its own business activities, i.e. in such cases and manners strictly provided by the law, at the premises of taxpayer's home, even without or against the consent of the party availing itself of such spaces, in order to properly carry out any and all operations required by the auditing procedure.For further details on tax audits involving fictitious corporate residence, cf. Valente, *supra* n. 1, at 827 et seq.

[18] To provide an example, by means of a Summons to appear before the Office, sending out of questionnaires, and requests to exhibit or transmit any and all Deeds and documents that might be tax-relevant.
For further details, cf. Valente, *supra* n. 1, at 827 et seq.

– '*accounting documents*': in the case at issue, from a strictly technical-legal standpoint, such documentation cannot be deemed official, given that the foreign company – by definition – could not possibly have established and kept any accounting documents (so much so that in case of companies for which activities are concluded by challenging the fictitious residence abroad, the omitted establishment of accounting records is one of the main issues raised);
– '*non-accounting documentation*': any agreements entered into, notes, correspondence, any professional studies/opinions, rendered by anyone, in connection with the foreign company allegedly residing in Italy, as well as any documentation strictly related to the foreign company, which is, nevertheless, kept on the premises of the Italian business entity. IT information is also included among non-accounting documents, as it may provide evidentiary elements concerning the tax residence.[19]

Access operations are subsequently recorded in an Official Report (i.e. Official Records of Findings, hereinafter, '*ORoF*') which will provide details of the inspections and related findings, of any requests submitted to taxpayer or to the party representing the same as well as all answers received and, in more general terms, any observations and issues raised by taxpayer, or the professional consultant who might be assisting the same.

Once premises have been accessed, and immediately upon having submitted the request to taxpayer to mandatorily exhibit the documentation held on the business or professional premises under audit, research activities ensue.[20]

Research activities are carried out, as a rule, in all of the business or firm's available premises, or if the access relates to a home, such research may be carried out in all the rooms/places that are available to the audited party on the basis of a lease agreement, or by effect of property rights, or real right of use.[21]

The main point of research activities is to trace and collect all useful elements that may substantiate:

– *with regard to the identification of the administrative seat*: the place in which key business decisions are made; the place in which the person or group of people exercising crucial business functions officially make decisions; the place in which business or group strategies are determined; the place in which Top Management issues guidelines; the place in which the Board of Directors meets and adopts resolutions, or in case of proxies (i.e. Managing Director or Executive Committee), the place in which the proxy is effectively carried out; the place in which the Shareholders' Meeting is convened, when it may be substantiated that the entity's management powers are essentially held by one or more reference Shareholders or, even, the place of residence of one Shareholder, in the case where the extent of his interference is rather obvious, such to deem the entity itself a mere '*appendage*' thereof;
– *for identification of the core purpose*: activities actually carried out by the company under audit; the place in which activities, which allowed to conclude deeds and legal transactions were carried out; identity of counterparties and the latter's residence; markets on which securities of any participated companies might have been negotiated, as well as the location of such companies.

Documentary inspection is not only effected through an analysis of accounting records, books, registers and documents, the establishment, keeping and maintenance of which is mandatory, but also – and especially – through a comparison of their contents with those of other (electronic) documents found during research activities, such as business correspondence, all accounting records compiled for internal audit purposes, any other non-accounting documentation and such third-party accounting documents with whom taxpayer had entered into business relations, which were acquired and/or examined by means of specific external consistency checks (i.e. so-called '*cross-checking*').

On the other hand, verifications consist in the factual finding of the effective business model and the genuine management system adopted by taxpayer on the basis of documents, accounting records and of such data/information, which were – in any case – acquired by Tax Inspectors.

Other findings include activities that are similar to assessments and '*measurement*' operations aimed at the logical-estimative reconstruction of the dimensions of certain economic volumes that are typical of the audited business activity and which – on the basis of its

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[19] Art. 52, para. 9, of Presidential Decree No. 633/1972, expressly referred to by Art. 33 of Presidential Decree No. 600/1973, establishes that employees accessing the premises of any subjects that generally employ data-processing, electronic, or other similar systems, have the option to provide with their own means to the processing of supporting material outside actual premises, in such cases where taxpayer does not authorize the use of its own systems and personnel. Therefore, by reason of the audited party's prohibition to process data contained in its own data-processing systems, Tax Inspectors shall be allowed to engage in whatever activities may be required to independently perform the above data-processing. Ministerial Decree of 23 Jan. 2004, which – among other things – had set forth the provision that tax-relevant documents (i.e. accounting books, records and documents) could be saved by electronic means, regulated requirements and procedures to disclose and exhibit the above-said documentation to the Italian Revenue Office in the course of access, inspections and/or audits.

[20] The power to carry out research, in fact, just as the power of access, has an authoritative and mandatory nature and may be exercised even against taxpayer's will and notwithstanding the fact that the audited party may assure that all of the requested documentation was duly exhibited.

[21] If further premises should be identified during the search, even if these are not adjacent but are available to the '*targeted*' business entity, where such premises had not been previously disclosed, pursuant to Art. 35 of Presidential Decree No. 633 of 26 Oct. 1972, searches shall also be extended to such premises, which shall then be accessed on the basis of the original authorization, always provided that further authorizations shall be obtained, should these be required.

quantitative definition and inductive reasoning – may allow to determine the effective[22] base to be taxed.

The power of access, combined with a targeted documentary research, may allow Tax Inspectors to:

– find the documentation certifying the location in Italy of the place from which the volitional impulses related to the business activities are sourced, with special reference to:
  - any documentation that may substantiate – as far as the company's official headquarters are concerned – that the same does not represent the effective administrative office/center in which decisions are made, but rather the mere and strictly formal location/domiciliation;
  - correspondence from which it is possible to conclude that management is subordinate to guidelines and instructions being issued from Italy, to the detriment of the self-determination of the same;
  - data and information related to the carrying out of the foreign company's core purpose in Italy;
  - any kind of information – even digital – that may indicate that the foreign company may simply turn out to be an *ad hoc* '*safe*', merely established to drain income flowing from Italy (and not only), i.e. a corporate '*screen*' which, embedded into a more complex architecture, allows to conceal the true income owner;
  - *dossiers*, including electronic files, which may be useful to clearly establish (vis-à-vis third parties) any flows involving internal/decision-making relations strictly aimed at '*constructing*' a formal reality that is inconsistent with the substantial one, thus concealing the true volitional centres;
  - contracts or any documentation in general, that are indicative of the existence of any obligations and/or restrictions releasing the foreign subject from any and all liability that might derive from the exercise of local Directors' functions;
  - electronic correspondence explicitly stating that middle-management/executives of the foreign entity receive specific instructions from the Italian company and its Directors;
  - any documentation corroborating that routine operations are being directly carried out by Directors/employees of the Italian company such as recruiting/hiring of employees, personnel remunerations, etc.;
– find elements exclusively related to the foreign taxpayer, such as, for example, corporate stamps/seals, contract files or letter headed e-invoices that clearly evidence the fact that any preparation, drawing up and conclusion of business Deeds/documents, even if '*formally*' referring back to the foreign enterprise, are materially implemented and resolved by the Board or by Italian personnel.

5 International cooperation request

When the preliminary inspection and assessment phases involve various systems and have an impact (as in the event of fictitious corporate tax residence) on States' sovereign taxing power, Tax Authorities may set off coordination mechanisms to enable information exchange and allow to carry out inspections simultaneously vis-à-vis taxpayers located in the respective jurisdictions.

The preliminary investigation phase and the assessment of income realized by the (formally) foreign business subject is far from simple, owing to the fact that the Tax Authorities may quite likely not have any evidence of the entire income situation of the said subject, and also because the same may avoid being subject to the exercise of preliminary powers aimed at assessing income realized abroad and to ultimately attract such income to Italy for taxation purposes.

In such kind of context, the determination of the tax residence may solely occur once the results from a meaningful information exchange with the respective Tax Authorities of the interested Countries[23] have been obtained.

Within the context of tax investigations aimed at researching and acquiring data, information and essential elements to substantiate or support and establish the existence of a '*place of effective management*' in Italy, where the so-called '*discovery activity*' has already been carried out vis-à-vis a non-resident taxpayer, Tax Inspectors shall be granted the opportunity to have recourse to international cooperation as a useful investigative tool.

The opportunity to exchange information and the need for an international approach to tax assessment procedures, may moreover lead to inspection modules such as simultaneous assessments, tax audits abroad[24] and joint tax audits.

Furthermore, European Law No. 97 of 6 August 2013 allows both, the *Ufficio centrale per il contrasto agli illeciti*

Notes

[22] Such terminology is deemed to express the principle – also from the Italian Courts' perspective – of the atypical nature of preliminary tax investigation activities, in the sense that, during such activities, it is possible to resort to any kind of further investigation that may, in any way, be of help to the self-same inspection.
In essence, they are '*technical findings*' aimed at reconstructing the business activity under audit, for the purpose of establishing its regularity and consequently allow that the audited party be assigned a rightful tax dimension.

[23] The special focus on business operations that have international importance, has led the Italian Revenue Office to make regulatory choices, by establishing a structure named '*International Section*', within the framework of the *Direzione Centrale Accertamento dell'Agenzia delle Entrate* (Central Auditing Directorate of the Revenue Office) and of the '*Gruppo Investigativo del Nucleo Speciale Entrate*' (Investigation Unit of the Special Revenue Corps), within the context of the Special Divisions of the Revenue Guard Corps, aimed at increasing tax audit projections at transnational level, by dedicating qualified resources to the most harmful evasion and avoidance cases.

[24] Other cooperation forms may involve, e.g. collection and tax credit recovery, i.e. an exchange of information within an industrial sector that consists in the interchange of information concerning, in particular, an entire economic sector (i.e. oil and pharmaceutical industries, the banking sector, etc.) and not specifically related to taxpayers.

fiscali internazionali dell'Agenzia delle Entrate (i.e. Central Tax Authorities Department for the fight against international tax crimes) and the Special Departments of the Revenue Guard, to request financial brokers, including insurance companies working in the life insurance sector, to flag transactions carried out with foreign countries also for group of taxpayers and with reference to a specific time lapse. Inspections originate from the data contained in the Centralized Computer Archive.

This is absolutely a key novelty in view of the fact that prior to the introduction of the said norm, information requests could solely be applied to subjects that were individually identified and against whom an inspection had already been activated.[25]

6 Concluding comments

The residence criterion represents the link between the exercise of the State's taxing right and the effective location of a company or an entity. Therefore, it allows to identify which State's laws are to be applied, pursuant to a formal or substantial criterion:

– companies or entities that were incorporated on the Italian territory are subject to Italian law (formal criterion);
– Italian law is (nevertheless) applicable when a company's incorporation has occurred abroad, if its administrative seat, or core purpose are identified on national territory (substantial criterion).

Inspection activities conducted by Italian Tax Authorities and, in more general terms, procedures to establish the '*place of effective management*' of such entities that are presumably foreign, are aimed at evidencing that formal data are quite different from substantial data.

Fictitious corporate tax residence surely plays an all-important role for States, given its direct impact on taxing rights, and its triggering double taxation or even double non-taxation phenomena. It is quite clear that an international and coordinated approach would be appropriate and even essential, especially in view of the fact that regulating the tax variable plays, more than ever, a key role in debates and confrontations between the Tax Authorities and international institutions.

In the light of the fact that fictitious corporate tax residence has been qualified as a transnational phenomenon, the need is for a solution that is just as transnational and that may not only facilitate, secure and streamline the acquisition of evidence, but that may especially increase the certainty that taxation will be fair and equitable for all interested Parties.

Notes

[25] In order to restrict the concept of '*large taxpayer clusters*', it would be necessary to base any reasoning on the Revenue Office's interpretation provided by its Circular No. 32 of 2006, with regard to the expression '*categories of subjects*' set forth under Art. 32, No. 5, of Presidential Decree No. 600 of 29 Sept. 1973. To such effect, the Revenue Office specified that the grouping of a given category must be either subjective or real, according to whether it involves subjective positions, even if not singled out individually, i.e. objective elements held by the third party with respect to its own institutional activities. In other words, the audit must involve a group of subjects with common operating characteristics.