taxnotes® international

Volume 83, Number 6 ■ August 8, 2016

(C) Tax Analysts 2016. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

The EU Anti-Tax-Avoidance Directive's Effect on Italy

by Piergiorgio Vanente

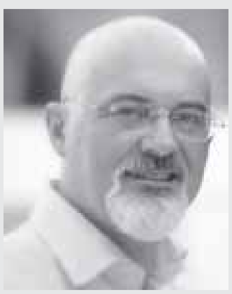
Reprinted from *Tax Notes Int'l*, August 8, 2016, p. 521

For more *Tax Notes International* content, please visit www.taxnotes.com.

PRACTITIONERS' CORNER

The EU Anti-Tax-Avoidance Directive's Effect on Italy

by Piergiorgio Valente



Piergiorgio Valente

Piergiorgio Valente, chair of the Fiscal Committee of the Confédération Fiscale Européenne, is an adjunct professor of EU tax law at Link Campus University in Rome and a managing partner at Valente Associati GEB Partners.

In this article, the author discusses the anti-tax-avoidance directive proposed by the EU on January 28 and how those measures will affect Italian tax legislation.

The anti-tax-avoidance directive (COM(2016)26) proposed by the EU Commission on January 28 outlines rules against tax avoidance practices that affect the functioning of the internal market. An amended version is part of a compromise package that addresses developments and political tax priorities that require action by the EU, and it responds to the finalization of the OECD base erosion and profit-shifting project.

On June 21 the EU Council agreed on the amended draft directive addressing tax avoidance practices. Antiavoidance measures in COM(2016)26 will have to be implemented and enforced within the framework of Italy's tax system (as well as those of other member states). Member states have until December 31, 2018, to add the provisions to their national laws and regulations except for the exit tax rules, which they must incorporate by December 31, 2019.

Future Prospects

The Italian legislature recently introduced significant changes to the tax regime applicable to enterprises under Legislative Decree No. 147 (September 14, 2015).[1] The decree contains measures to advance internationalization of Italian enterprises and adjust Italy's regime to reflect related principles shared by the international community.

Its provisions on tax credits, controlled foreign corporation rules, and exit taxes will have to be revised to account for rules in the new antiavoidance directive.

Article 14 of Legislative Decree 147/2015 allows taxpayers to opt into a branch exemption system (as an alternative to a foreign tax credit system) that is meant to avoid international double taxation.[2] The option is irrevocable and must be exercised for all of an enterprise's permanent establishments that are not located in territories included in the regulations accompanying ex-article 167(4) of the Italian Income Tax Code (TUIR), or that lack requirements in paragraph 8-*bis* of TUIR article 167.[3]

The original draft of the antiavoidance directive provided for a switchover clause to treat some income and gains as taxable rather than exempt. That clause was not included in the version approved by the EU Council. Had it been kept, the Italian legislature would have to consider and evaluate the compatibility of its branch exemption system with the EU switchover clause.

---

[1]Published in Official Gazette No. 220, Sept. 22, 2015, and effective Oct. 7, 2015.

[2]For further details on the exemption regime, see Valente et al., ''Commesse All'estero — Disciplina Fiscale e Profili Contrattuali,'' *IPSOA*, at 180 (2015).

[3]The new provisions also regulate the transition regime from the current regime — including an FTC provided by Tax Authorities' Circular No. 9/E (Mar. 5, 2015) — to the new exemption regime, which introduces the so-called loss recapturing mechanism.

(C) Tax Analysts 2016. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes International* content, please visit www.taxnotes.com.

Under article 8 of Legislative Decree 147/2015, if an Italian resident directly or indirectly controls — even through a trust company or third party — an enterprise, company, or other entity in jurisdictions defined as privileged tax regimes, income earned by that entity is imputed to the Italian resident in proportion to the participations held by the resident.[4]

The Italian CFC regime in TUIR article 167 must be coordinated with the regulations provided by the antiavoidance directive and in connection with:

- the determination of the holding participation of the foreign company;
- the requirement of the actual tax rate to be applied to the foreign company's profits; and
- the characterization of the foreign company as an artificial or ''not genuine'' arrangement, which the directive defines.

There is also the suspension regime on tax collection for transfers abroad (the so-called exit tax) in TUIR article 166 and partially reformed by article 11 of Legislative Decree 147/2015. To avoid violation proceedings by the European Commission following the Court of Justice of the European Union's decision in *National Grid Indus BV v. Netherlands*, C-371/10 (CJEU 2011), the Italian legislature passed Decree-Law No. 1/2012. That law added two important provisions to TUIR article 166.

Under paragraph 2-*quater*, Italian taxpayers that transfer their residence, for income tax purposes, to EU member states or to states that adhere to the European Economic Area Agreement can, as an alternative to the provision under paragraph 1, request suspension of the exit tax in compliance with the principles set out in *National Grid*.

Paragraph 2-*quinquies* states that a decree from the Ministry of Economy and Finance will establish enforcement provisions to identify cases that establish the termination of the suspension from taxation, the determination criteria for taxes due, and related payment procedures.

Therefore, the Italian legislature must revise national regulations under TUIR article 166 to follow the EU regime in the antiavoidance draft directive, with special attention to a taxpayer's option to pay taxes due in installments. ◆

[4]The provision also applies to controlling participations by nonresidents, in connection with income from their PEs that are subject to privileged tax regimes.

COMING ATTRACTIONS

A look ahead at upcoming commentary and analysis.

A world tax court: The solution to tax treaty arbitration (*Tax Notes International*)

Jake Heyka examines tax treaty arbitration standards while demonstrating that as a matter of fundamental justice, arbitration should be revamped, and he proposes the creation of a world tax court as a solution.

Latin American Perspectives (*Tax Notes International*)

As the world focuses on the Olympics in Rio de Janeiro, *TNI* presents a series of pieces examining timely Latin American tax issues, including BEPS, transfer pricing, taxation of digital commerce, and tax incentives for green energy, and how they affect the region and specific Latin American countries.

The Trojan horse of corporate integration (*Tax Notes*)

Edward Kleinbard argues that corporate tax reform in the form of a dividends paid deduction combined with a shareholder dividend withholding tax collected from corporations would only artificially decrease corporate effective tax rates and should not be adopted.

Advising companies on the federal employment tax implications of using a PEO (*Tax Notes*)

Elizabeth Lyon considers several federal employment tax factors for companies participating in the IRS's voluntary professional employer organization certification program.

Retroactive tax legislation (*State Tax Notes*)

Steve Johnson launches his column, More of the Web, with a discussion on retroactive tax legislation.

The false wisdom of state tax expenditure reports (*State Tax Notes*)

Liz Malm and Joe Crosby argue that state tax expenditure reports are generally poorly constructed and that to improve them, states must define their normal tax structures from which tax expenditures deviate and follow the National Conference of State Legislatures' best practices.

(C) Tax Analysts 2016. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes International* content, please visit www.taxnotes.com.