

Newsalert

Tax Department

New developments concerning direct and indirect taxation of trusts in Italy in sight as Italian tax authority published longly awaited guidelines on the matter on August 11th, 2021.

On August 11, 2021, the draft version of new guidelines (the “**Guidelines Draft**”) covering a wide spectrum of aspects concerning trusts’ direct and indirect taxation in Italy was made available by the Italian tax authority for public consultation (the consultation will be open until 30 September 2021).

Inter alia, significant clarifications are provided with respect to the tax treatment of Italian tax resident beneficiaries of foreign opaque trusts, in light of the recent amendments by Law Decree No. 124 of 26 October 2019.

The Guidelines Draft also focuses on the Italian indirect taxation regime applicable to the different phases of the trusts, *i.e.* the set-up of the trust, the attribution of the assets to the trust and the transfer of the assets to the beneficiaries.

Furthermore, the Guidelines Draft addresses Italian tax monitoring rules concerning trusts, with particular reference to the obligations arising in the hands of trusts, beneficiaries, trustees and protectors, and the obligations relating to Italian taxes on immovable properties and financial assets held abroad are also clarified by the Guidelines Draft.

The Guidelines Draft will be finalized and publish in its final version after 30 September 2021.

Income distributions by foreign opaque trusts

Under the current tax rules, amended in 2019, income paid to Italian tax resident beneficiaries by trusts and similar institutions established in States that are considered low tax jurisdictions under Article 47-*bis* of Income Tax Consolidated Act (“ITCA”), qualifies as income from capital, to be taxed progressively in the hands of the beneficiaries upon distribution.

The Guidelines Draft specifies that when referring to trusts “established” in low-tax jurisdictions, reference shall be made to the applicable criteria to identify tax residence set forth by the relevant local jurisdiction, as opposed to the criteria set forth by Italian tax law.

Moreover, Italian tax authority clarifies that a relevant jurisdiction shall be considered as being a “low-tax jurisdiction” for the purposes of trusts’ income distribution taxation in case the nominal level of taxation applicable to the trust income therein is less than 50 percent of the applicable Italian rate (that is less than 12 percent). If this interpretation would be confirmed, it could not be excluded that even trusts that are tax resident in EU/EEA countries but are not subject to tax in their jurisdiction of residence (even by virtue of a local special tax regime) would be considered as established in a low-tax jurisdiction.

Accordingly, a trust shall be considered as being established in a low-tax jurisdiction in the scenario where, in such jurisdiction, its income is not subject to tax in the hands of the trust itself nor in the hands of its beneficiaries. This holds true, as remarked in an example put forward in the Guidelines Draft, even in cases where a trust has its place of management in a given jurisdiction, where its income is subject to no taxation, and despite the trust is not considered to be tax resident therein in light of the relevant local legislation.

Special tax regimes applicable to the trust shall also be taken into account in the context of assessing the nominal level of taxation.

It is also pointed out that taxpayers are not allowed to file advance tax ruling to the tax authority in order to disregard the law provisions at issue by demonstrating that the creation of an opaque trust is not aimed at localizing a given income in a low-tax jurisdiction.

Important clarifications are also served with respect to the presumption, introduced in 2019, according to which foreign opaque trust distributions to Italian tax resident beneficiaries must be regarded as “income payments” if it is not possible to distinguish between income and capital.

In particular, Italian tax authority argued that in order to disregard such presumption, both the trust and the trustee shall provide specific accounting records which demonstrate whether the distribution at issue is paid out of capital or income.

A specific section of the Guidelines Draft is dedicated to foreign transparent trusts, *i.e.*, trusts the beneficiaries of which are identified, and that are treated as flow-through entities for income tax purposes. Indeed, Italian tax authority recalls its interpretation, put forward in Circular Letter n. 61 of 2010, confirming that income of transparent trusts that is attributable to Italian tax resident beneficiaries is taxable in their hands as capital income, irrespective on whether the trust qualifies as Italian tax resident or the income is Italian source. This interpretation has long been criticized amongst legal scholars and will certainly be one of the most relevant aspects to be considered when commenting the draft guidance.

Indirect taxes

The Guidelines Draft provides for a comprehensive overview on the position concerning indirect taxation both for Italian and foreign tax resident trusts, focusing in particular on the applicability of Italian inheritance and gift taxes, which generally applies on gratuitous transfers of assets and rights *mortis causa* as well as *inter vivos*, and to deeds establishing restrictions on use.

All the relevant phases of the life of a trust are considered by the Guidelines Draft: (i) the establishment of the trust, (ii) the attribution of assets to the trust, (iii) the transfer of the assets to the beneficiaries of



the trust, (iv) other transactions carried out during the existence of the trust and (v) the substitution of the trustee.

In the Guidelines Draft, Italian tax authority acknowledges (and agrees with) the position of the Italian Supreme Court stated in several judgements in the last years. According to the Italian Supreme Court's case law, the transfer of an asset (e.g. a real estate property) to a trust does not entail an immediate and actual transfer of the ownership of such asset but shall rather be considered as a mere impoverishment of the settlor related to the trust purposes.

On this basis, the Guidelines Draft clarifies that Italian inheritance and gift taxes shall apply at the moment of the transfer of the trusts' assets to the beneficiaries of the trusts as final transfer.

Under a previous interpretation followed by the tax authority, which now seems to be overturned by the Guidelines Draft, the attribution of assets to the trust was considered as the taxable event for the purposes of Italian inheritance and gift taxes' application. The Guidelines Draft takes no position with respect to the possibility that the interplay between the previous orientation (i.e., taxation when the assets are transferred to the trust) and the new one (i.e., taxation when the assets transferred to the beneficiaries) could trigger double taxation issues.

It is also clarified that in order to determine the different applicable rates for the purposes of Italian inheritance and gift taxes, the line of kinship between the settlor and the beneficiary of the trust should be considered.

Further clarifications are also expressed with reference to transfer taxes (e.g. registration, cadastral and mortgage taxes). Based on the same rationale behind the clarifications provided for inheritance and gift taxes scope of application, such taxes can be applied on a proportional or flat basis, depending on whether a relevant deed provides for the effective transfer of the ownership of an immovable property or not.

Tax monitoring obligations

Ultimately, the Guidelines Draft concentrates on the interactions between trusts and Italian tax monitoring obligations, also in light of the amendments set forth to Italian tax monitoring law provisions by legislative Decree No. 90 of 25 May 2017, implementing EU Directive 2015/849.

Italian tax authority clarifies that despite the current legislation concerning tax monitoring obligations does not make explicit reference to trusts, such rules shall also apply to individuals qualify as "*beneficial owners*" of assets held in a trust.

The Guidelines Draft provides for a number of cases in which, according to the Italian tax authority' view, beneficiaries of foreign opaque trusts are required to comply with Italian tax monitoring obligations. In particular, where the beneficiaries of a trust are identified, or can be easily identified, pursuant to the trust deed and to the related documentation.

In addition, no tax monitoring obligations should arise in the hands of second-degree beneficiaries (i.e., individuals becoming beneficiary of the trust only insofar the identified beneficiary ceases to be so), unless the relevant provisions of the trust provide that they could, even only potentially, claim the right to receive a distribution from the trust.

Finally, Italian tax authority states the tax monitoring obligations shall not be extended to the trustee, being the latter a mere administrator of the assets not pursuing its own interest.



Property tax on real estate held abroad (imposta sul valore degli immobili situati all'estero - IVIE) and net wealth tax on financial assets held abroad (imposta sul valore delle attività finanziarie detenute all'estero - IVAFE)

The Italian tax authority has taken the opportunity to provide further clarifications, in the Guidelines Draft, in relation to the scope of application of wealth taxes on immovable properties and financial assets held abroad (IVIE and IVAFE).

Indeed, starting from the 2020 tax period, trusts resident in Italy are included amongst the taxable persons for the purposes of application of the above-mentioned taxes.

In addition, it has also been pointed out that trusts set up in States or territories not included in the "White-List" are also considered to be tax resident in Italy if, following their set-up, an Italian tax resident taxpayer attributes to the trusts the ownership of immovable properties or the transfer real estate related rights to the trust.

For any further clarification please do not hesitate to contact Chiomenti's Tax Department at tax@chiomenti.net

