

Newsletter

Tax Department

Implementing provisions of the new cooperative compliance procedure for permanent establishments of foreign multinationals

On 16 April 2019, the Italian tax authorities (“ITA”) issued implementing provisions of the cooperative compliance procedure for permanent establishments (“PE”) introduced by Law Decree No. 50 of 24 April 2017.

Such procedure is targeted at large multinationals with permanent establishment exposure in Italy in fiscal years still open for assessment; in these situations foreign multinationals are now allowed to determine, jointly with the ITA, whether a PE in Italy exists, and, if so, the profits attributable to such PE. The benefits for the taxpayer are both in terms of administrative and criminal penalty protection.

I Access to the procedure

As already provided by Article 1-bis of Law Decree No. 50 of 24 April 2017 (“Law Decree No. 50/2017”), the implementing provisions confirm that the procedure applies to non-resident entities belonging to large multinational groups with a worldwide turnover exceeding EUR 1 Bn making supplies of goods or services in Italy exceeding EUR 50 Mn with the support of one or more Italian-resident auxiliary companies (or PEs) belonging to the same group. Differently from advance pricing agreements, this new cooperative compliance procedure is designed for non-resident entities already having an “economic presence” in Italy, in order to give more certainty on the Italian tax qualification of such economic presence (*i.e.*, as to whether it is carried out through a permanent establishment).

1. Worldwide turnover higher than EUR 1 Bn: this threshold is assessed over a three year period by taking into account the gross revenues deriving from the supply of goods and services as accounted for in the consolidated financial statements of the multinational

group pertaining to the financial year in which the request is filed with the ITA and the previous two financial years.

2. Supply of goods and services in the Italian territory exceeding EUR 50 Mn: similarly to the previous condition, this threshold is assessed, over a three year period, by taking into account the gross revenues deriving from supply of goods or services in the Italian territory as accounted for in the financial statements of the non-resident entities belonging to the same multinational group.
3. Support of Italian resident auxiliary companies or PEs of entities belonging to the same group: in order to initiate the cooperative compliance procedure, it is required that at least an Italian-resident company/PE supports the non-resident entities in making supplies of goods or services in the Italian territory. "Support" means that there shall be a direct or indirect economic link between the activity performed by the Italian-resident auxiliary company/PE and the revenues realized by the non-resident entity. It is noteworthy that ITA will consider the activities performed by the Italian auxiliary company in their globality, *i.e.*, by taking into account:
 - the activities performed by both the Italian-resident auxiliary company and the non-resident entity filing the request; and
 - the combination of the activities performed in the Italian territory by the non-resident entity filing the request and other non-resident entities belonging to the same group.

Finally, it is necessary that the non-resident entity filing the request with the ITA (as well as the Italian-resident auxiliary company/PE) is not officially informed about the start of any audit activities by the Italian tax authorities or criminal claims regarding the existence of an undisclosed PE in Italy.

II Purpose of the procedure

The purpose of this procedure is to assess, jointly with the ITA:

- a) the existence of a PE in Italy in the fiscal years still open for assessment and, if so
- b) to agree on the profit attribution as well as on the taxable base for VAT purposes.

The definition of "PE" given by the implementing provisions results from a combination of the definitions provided by the Italian Income Tax Code, the applicable double taxation convention and Article 11 of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011, laying down implementing measures for VAT purposes.

If a PE is found to exist in any given fiscal year, the ITA and the non-resident taxpayer may come to an agreed and final profit attribution thereto. Such agreement is valid only after the timely payment of additional taxes due and reduced administrative penalties.

If the agreement is not reached or if the taxpayer does not fulfil its payment obligation, ITA will serve a tax assessment notice to the non-resident entity within the end of the year following the one in which the entity filed the request, applying full penalties and interest for late payment.

If it is concluded that the non-resident entity does not operate in Italy through a PE, ITA is bound by the outcome to the extent that factual and legal circumstances remain unchanged.

Where no PE is found to exist, ITA may still further investigate the appropriateness of the Transfer Pricing policy adopted.

III Benefits

In case of successful completion of the procedure, the taxpayer will be discharged from criminal penalties related to the omitted filing of the tax return and administrative penalties will be reduced to half of their amount (*i.e.*, to 1/6 of 120% of additional tax).

After payment of the taxes due, the non-resident entity having a PE in Italy may further have access to the cooperative compliance program with the ITA set forth by Legislative Decree No. 128 of 5 August 2015.

III The filing

The request shall contain the relevant information for the identification of the taxpayer as well as of the Italian-resident auxiliary companies/PEs. It will be further necessary to submit documentation on the non-resident entity's business model, TP documentation, financial statements as well as supporting documents of the (non) existence of a PE in Italy.

The request may be filed by certified email or, for non-resident entities that do not possess any certified email, ordinary email, by registered letter or also directly submitting it to the competent office in Rome.

The ITA must declare the request admissible within 30 days from receipt of the documentation (in case of further requests, such deadline is extended) and the assessment procedure shall be concluded within 180 days from the day in which the ITA declares the request admissible.

V Final remarks

This new procedure has undoubtedly significant strengths in that it provides more certainty in an often "grey area" of international taxation, also by granting the taxpayer full discharge from criminal penalties and reduction of administrative penalties.

On the other hand, however, the taxpayer has to prove the non-existence of a PE in Italy or come to an agreed profit allocation with the ITA, facing the risk that the ITA may further investigate into TP policy or, if no agreement is reached, serve a tax assessment with possible criminal consequences.

It is therefore highly advisable to make an in-depth analysis before deciding to file the request for this particular cooperative compliance procedure.

Do not hesitate to contact one of the experts of our tax department at tax@chiomenti.net.

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