Highlights

- Amending Protocol to Italy and Switzerland on exchange of information
- Exchange of Information Agreements also with Liechtenstein, Monaco, Guernsey and Isle of Man
- Constitutional Court declares Robin Hood Tax illegitimate
- Business Restructurings qualified by the Supreme Court as transfers of going concern
- Supreme Court case law on substitute tax for refinancing transactions

1. Amending Protocol to Italy and Switzerland Double Taxation Treaty

On 23 February 2015, Italy and Switzerland signed in Milan an amending Protocol to the Italy-Switzerland Income and Capital Tax Treaty (1976) and a Roadmap on the way forward in tax and financial Issues between Italy and Switzerland.
The Protocol, in particular, broadens the scope of the exchange of information clause set forth in Article 27 of the existing double tax treaty by allowing the exchange upon request of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting States (fishing expeditions are not permitted) in line with Article 26 of the OECD Model Tax Convention.
The conclusion of such Protocol is aimed at ultimately putting an end to Swiss bank secrecy and will facilitate the application of the newly introduced voluntary disclosure program (in terms of reduction of penalties and of statute of limitations for undisclosed assets held in Switzerland).

The Protocol will be applicable as from the entry into force (subject to ratification in both States) with effect for all requests regarding acts, facts, events and circumstances related to the period starting as from the date of the signature.
Within the Roadmap, Italy and Switzerland agreed inter alia on:

1. switch from exchange on request into automatic exchange of information;
2. removal of Switzerland from the Italian black lists based on the lack of exchange of information;
3. amendment of the existing frontier workers agreement achieving a solution whereby frontier workers are taxed on their employment income both in the State of work and in the State of residence (current agreements provide for exclusive taxation in Switzerland for Italian frontier workers).

2. Exchange of Information Agreements with Liechtenstein, Monaco, Guernsey and Isle of Man

Italy concluded with Liechtenstein (on 26 February 2015) and with Monaco (on 2 March 2015) a Tax Information Exchange Agreement and a Protocol which provide for an adequate exchange of information equivalent to that laid down by Article 26 of the OECD Model Tax Convention. The Agreement allows the exchange upon request of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting States. As a consequence, also Liechtenstein and Monaco (like Switzerland; see above) will be treated as a White List State for the purposes of the voluntary disclosure program.

The Italian Parliament ratified, on 4 February 2015, the Tax Information Exchange Agreements signed with Guernsey and Isle of Man.

3. Constitutional Court declares Robin Hood Tax illegitimate

With decision 10/2015, the Constitutional Court declared that the so-called Robin Hood Tax infringes constitutional law.

The Robin Hood Tax, introduced in 2008, is a surtax (for 2014 at the rate of 6.5%) applied on top of corporate income tax for enterprises operating in the energy sector. Such tax was introduced by the Government to hit extra-profits realised by the energy sector, but the Constitutional Court stated that its mechanics are such that the tax does not apply to extra-profits only, thus concluding that the tax is discriminatory and therefore unconstitutional. The Court, however, did not quash the Robin Hood Tax since its introduction, but declared it is to be eliminated only from the date of the decision: hence the tax is no longer due for the future, but there is no room, based on the decision, for a refund of the surtax paid for past years.

4. Business Restructurings: the Supreme Court qualifies them as transfers of going concern

In a landmark judgment (1955/2015), the Supreme Court ruled for the first time on the characterisation, for indirect tax purposes, of a business restructuring that entailed the stripping of risks and functions from an Italian company to a Swiss principal, where the Italian company continued to act as a consignment manufacturer.

The case involved an Italian fully-fledged manufacturer that sold the stock (materials and molds) to the Swiss principal and was indemnified for the assignment of risks and the connected loss of profit potential.

According to the court, such redeployment must be characterised as a transfer of going concern, even if executed through several separate transactions and even if the transfer does not involve the shift of the full production function, but only of the risks attached thereto (and the connected stock). The Court also stated that a going concern can be regarded as transferred even if the transfer entails movement of a limited number of employees with key positions (even if merely seconded).

As a consequence of such characterisation, this type of transactions is subject to proportional registration tax and outside the scope of VAT.

5. Supreme Court case law on substitute tax for refinancing transactions

Medium and long-term banking loans may be subject to a 0.25% umbrella substitute tax in lieu of the ordinary indirect taxes that would otherwise be due on the loan, the security documents and the other financing documents. The substitute tax may be very beneficial in case of mortgage loans because it replaces the more burdensome 2% mortgage tax. The substitute tax applies subject to a number of conditions including that the lender must be a qualifying lender (e.g. a bank) and that the loan originally contemplates a maturity period longer than 18 months.

In decision 695/2015, the Supreme Court held that such regime cannot apply to a loan granted to refinance a short-term loan (i.e. a permanent loan refinancing a bridge loan).

The Court argued that in such case the refinancing does not have the purpose of allowing productive investments by the borrower. This judgment is in contrast with the position of the tax authorities, which in 2011 ruled that the beneficial regime applies also to refinancing transactions.

view this newsletter on-line

This newsletter is intended to provide a first point of reference for current developments in Italian law. It should not be relied on as a substitute for professional advice. If further information or advice is required please refer to your Maisto e Associati contact. Maisto e Associati info@maisto.it

Piazza F.Meda 5
20121 Milan
+39.02.776931
Piazza d'Aracoeli 2
00186 Rome
+39.06.45441410

2, Throgmorton Avenue
London EC2N 2DG
+44.207.3740299
Copyright © 2014 - Maisto e Associati
unsubscribe