



Italian Revenue Agency clarifies the treaty regime of payments for the alienation of the exclusive right in sound recordings received by a Swiss resident singer

The Italian Revenue Agency has recently published Ruling No. 493/2020, which clarifies the tax treatment of the periodic payments made by an Italian company to a Swiss resident singer as remuneration for the alienation of the exclusive worldwide right to exploit sound recordings and recordings of performances ("**Recording Rights**"). The payments were determined as a percentage of the sales.

The Italian resident company requested the Revenue Agency to confirm whether the income received as consideration for the alienation of Recording Rights, which under Italian intellectual property law are regarded as rights related to copyrights (so-called "neighbouring rights"), falls into the definition of royalties provided by Article 12(3) of the 1976 Italy-Switzerland tax treaty ("**Treaty**"), which reproduces without significant deviations the corresponding definition encompassed in Article 12 of the 1963 OECD Model, and is thus subject to the reduced treaty tax rate (5%).

As background, the company clarified that the payments made to the Swiss singer in previous tax years had been subject to the 30% domestic withholding tax, on the assumption that they fell outside the scope of Article 12 of the Treaty, since Article 12(3) thereof covered only "copyrights" and not also "neighbouring rights" (which is a wrong proposition, since, if this were the case, the royalties would be exempted in Italy either under Article 13 or under Article 21 of the Treaty). In this respect, the company recalled some prior rulings issued by the Revenue Agency and the case law of the Supreme Court, whereby payments for the right to use "neighbouring rights" were treated as royalties for tax treaty purposes since, in addition to copyrights, the definition of royalties also explicitly included expressions such as "other rights", "related rights", or "in all other cases" (see Ruling No. 12/E of 9 February 2004 regarding the Italy-Germany tax treaty and the Supreme Court decision No. 21220 of 29 September 2006 regarding the Italy-United States tax treaty). However, no similar expressions were included in Article 12(3) of the Treaty.

The Revenue Agency, however, took the view that payments made as consideration for the alienation of the Recording Rights are to be treated as royalties under Article 12 of the Treaty. In particular, according to the Agency, neighbouring rights must be generally regarded as denoted by the term "copyrights" for tax treaty. The Revenue Agency grounded supported its conclusion also by referring to paragraph 18 of the Commentary on Article 12 OECD Model, which recognizes that the payments made to a musical performer for his copyright in the sound recording of a musical performance fall within the definition of royalties. Having regard to the previous rulings issued by the Revenue Agency and

the case law of the Supreme Court, this conclusion holds true unless the neighbouring rights are already covered by a more specific term included in the definition of royalties provided for in the relevant treaty, in which case the more specific term (and categorization) takes precedence. This could be relevant where Article 12 of the relevant treaty provides for different tax rates depending on the type of intangible generating the income.

What is less satisfactory in the Ruling is the impression that, for the Revenue Agency, the alienation of the economic rights related to an intellectual work subject to copyright (such as “neighbouring rights”) is generally covered by Article 12 (royalties), rather than by Article 13 (capital gains) of the OECD Model. Since the Ruling does not specifically address this issue and simply refers to the alienation of Recording Rights, it is not entirely clear whether this conclusion applies to all cases of alienation of neighbouring rights (as the use of the term “alienation” could suggest), or whether it is meant to apply only to the transfer of less-than-full ownership (e.g. where the relevant right is transferred for a limited period of time), as pointed out in the observation recorded by Italy in the Commentary on Article 12 of the OECD Model (§ 27 of the Commentary).

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