Italian Supreme Court rules out the existence of an Italian permanent establishment in a case involving a commissionaire arrangement

The Italian Supreme Court ("**Supreme Court**") ruled in favour of a Swiss-resident manufacturing and distributing company ("**SwissCo**") belonging to a multinational group of the sportwear industry in a case concerning whether SwissCo's Italian commissionaire structure could represent a permanent establishment ("**PE**"). See decision no. 2597 of 27 January 2023 relating to fiscal years 2005 and 2006 and decisions no. 1709 and no. 1648 of 19 January 2023 relating to, respectively, fiscal years 2007 and 2008.

The judgment confirms prior case law of the same court (see decision no. 3769 of 9 March 2012) and sets out some firm criteria to deny the characterization of a commissionaire as a PE.

In those years, SwissCo sold its products across Europe through several commissionaires located in different European countries. One of these commissionaires was a related Italian-resident retail company ("**ItaCo**") acting on the basis of a commissionaire agreement concluded with SwissCo in 2004 ("**Commissionaire Agreement**"). ItaCo signed contracts in its own name with customers in Italy, but the ownership of SwissCo's products was then directly transferred from the Swiss company to the Italian customers.

In 2008, the Italian Tax Police started a tax audit against ItaCo following which the Italian Revenue Agency issued separate notices of tax deficiency for each of fiscal years from 2005 to 2008. The Revenue Agency claimed that SwissCo had an undisclosed Italian permanent establishment disguised (hidden) within ItaCo pursuant to Article 162 of the Italian Income Tax Code (as applicable in those years) and Article 5 of the Tax Treaty between Italy and Switzerland ("**Treaty**"). The Revenue Agency's main arguments were the following:

i) [No preparatory or auxiliary activity] The activities carried out by the personnel of ItaCo under the Commissionaire Agreement could not be considered preparatory or auxiliary because the personnel of the Italian company actually managed the sale of SwissCo's products in Italy;
ii) [No entrepreneurial risk] ItaCo could not be considered an independent agent because: (a) it did not incur any entrepreneurial risk as it received a commission (in the amount of 2-3% of Italian-sourced sales) without any bonus mechanism; (b) SwissCo reimbursed ItaCo for all the costs incurred under the Commissionaire Agreement (including the personnel costs and the rental costs for the various stores located in Italy); and (c) ItaCo's personnel was only formally employed by ItaCo, but it was in substance employed by the Swiss company. This last consideration was, in the Revenue Agency's opinion, supported by the statements made by certain employees of ItaCo concerning the instructions given by SwissCo on, for instance, the choice and prices of products, the choice of stores,

the way in which goods had to be displayed and the rules of conduct of the Italian personnel towards customers shopping in Italy.

Both the Provincial and the Regional Tax Courts decided in favour of the taxpayer, with the only exception of the Regional Tax Court's decision for fiscal year 2008, which upheld the reasoning of the Revenue Agency.

The Supreme Court confirmed that SwissCo did not have a permanent establishment in Italy in any of the assessed fiscal years for the following reasons:

i) The personnel of ItaCo did not manage the sale of SwissCo's items in Italy but merely provided its business intermediation services to the Swiss company pursuant to the Commissionaire Agreement. These services were merely preparatory and auxiliary to the activities carried out by SwissCo;
ii) There was no Italian hidden PE within ItaCo because: (a) it was not true that ItaCo did not incur any entrepreneurial risk since it received a commission which was calculated as a percentage of Italian-sourced sales (and, therefore, depended on the amount of sales), irrespective of the absence of a separate bonus mechanism; (b) ItaCo was refunded of the costs incurred as part of its remuneration for the business intermediation services provided to SwissCo set forth in the Commissionaire Agreement; and (c) the instructions given by SwissCo were simply guidelines issued by the seller to its business intermediary, consistently with the Commissionaire Agreement's provisions and business practice.

Another interesting point made by the Supreme Court is that, because the domestic notion of PE was introduced only in 2003 and modelled after the already existing OECD-based treaty notion of PE, the instruments (including especially the Commentary) used to interpret the Treaty are also relevant to interpret the domestic definition (confirming its previous case law; see e.g., decision no. 36679 of 14 December 2022).

For further information: **Maisto e Associati**

Milan
Piazza F. Meda 5
20121
T: +39.02.776931

Rome
Piazza d'Aracoeli 1
00186
T: +39.06.45441410

London
53/54 Grosvenor Street
London W1K 3HUT:
+44.207.3740299
