

## Italian Tax Agency clarifies transfer pricing documentation rules

During an annual tax workshop organized by an important Italian financial newspaper, the Italian Tax Agency made public a number of interesting clarifications regarding the documentation of intercompany transfer prices for purposes of accessing the penalty protection regime provided by art.1, paragraph 2-ter of Legislative Decree n.471/97, in the event of an assessment of arm's length principle violations.

The items discussed included:

- The requirements to access the penalty protection regime;
- The confidentiality of the information provided to the tax administration by means of transfer pricing documentation;
- the relationship between the possibility of filing the communication confirming the presence of "suitable" documentation and the start of tax audits or tax examinations in general;
- the possibility of benefiting from a 15-day deadline for the submission of the economic analyses, in addition to that provided for the rest of the documentation; and
- the penalty protection regime and nondeductible costs.

### Penalty protection regime

The Tax Administration has pointed out that the type of control illustrated in the regulation issued by the Head of the Tax Agency on September 29, 2010, does not constitute a limitation on the application of the new rules, the scope of which remains as determined by the presence of the prerequisites to be met for the application of art. 110, paragraph 7, of Presidential Decree n.917/86 (the Italian consolidated law on income tax, or TUIR), pursuant to the instructions included in Ministry Circulars n. 33/9/2267, of September 22, 1980 and n. 42/12/1587, of December 12, 1981. For instance, as the regulation makes reference to cases just relevant to commercial relationship between resident and nonresident "companies," which control the former, are controlled by them or by the same company that controls the former, the Tax Administration has confirmed that "the penalty protection regime regulated by art.1, paragraph 2-ter of Legislative Decree n.471 of December 18, 1997, can be applied in all cases when the conditions set forth in art. 110, paragraph 7 of the TUIR are met." Hence, for example, an Italian company controlled by an individual resident in Italy, which engages in transactions with a foreign enterprise controlled by the same individual, will have access to the penalty protection regime.

### Confidentiality of information

Information disclosed to the tax authorities by means of transfer pricing documentation made available by a taxpayer wishing to obtain penalty protection may not be used by the Tax Administration for purposes other than the statutory ones, as needed to enable the tax offices to perform their review. This is in line with the provisions of art.68, Presidential Decree n. 600. An example of the type of information a company may want treated as confidential would be that relevant to manufacturing know-how, patents, formulas or industrial secrets in general.

### Tax audits and the right to file the "communication"

As a general rule, the start of a tax audit or inspection with reference to a "prior fiscal year" (that is, a fiscal year prior to that including the date of May 31, 2010), would block the filing of the communication stating the presence of proper documentation and, as such, prevent the taxpayer from obtaining penalty protection for that fiscal year. However, it has been clarified that, if the tax audit concerns only taxes other than those on income – such as the value added tax – the taxpayer would have the right to file the aforementioned communication even after the beginning of the audit. Conversely, the same right will not be granted if the tax audit concerns income taxes, even if there is no reference to intercompany transactions.

### Extended deadline for delivery of documentation

The tax authorities clarified that the new 15-day deadline, from the relevant request, imposed on taxpayers to hand over the section of the Country File relevant to the economic analyses, (subsection 5.1.3) is separate from the original 10-day period, and hence could be added to it, provided "the request to hand over the documentation [relevant to sub-section 5.1.3]...is made at a later date than that for the remaining documentation...", which would still be subject to the regular 10-day deadline. In conclusion, the "mini-extension" of the period for the delivery of documentation sufficient to obtain

penalty protection has been confirmed; however, the longer period will be available only with reference to tax audits starting on or before June 30, 2011.

## **Nondeductible costs**

The tax authorities have cleared up another important issue regarding the possibility of extending the penalty protection regime to claims based on the lack of a sufficiently robust link between certain costs and the relevant revenues, as charged to the Italian party by foreign related entities, pursuant to art. 109, comma 5, TUIR. In fact, the Tax Administration has confirmed that art. 1, comma 2-ter, Legislative Decree n. 471/97, the portion of the law that prevents the application of tax administrative penalties, can be applied only to claims relevant to article n.110/7. This clarification may become relevant when preparing transfer pricing documentation suitable to obtain penalty protection in the presence of significant intercompany service costs charged out to the Italian entity, and the taxpayer lacks proper and complete documentation.

— Aldo Castoldi (Milan)  
Partner  
Deloitte Italy  
acastoldi@deloitte.it

## **About Deloitte**

Deloitte refers to one or more of Deloitte Global Services Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Global Services Limited and its member firms.

“Deloitte” is the brand under which tens of thousands of dedicated professionals in independent firms throughout the world collaborate to provide audit, consulting, financial advisory, risk management, and tax services to selected clients. These firms are members of Deloitte Touche Tohmatsu Limited (DTTL), a UK private company limited by guarantee. Each member firm provides services in a particular geographic area and is subject to the laws and professional regulations of the particular country or countries in which it operates. DTTL does not itself provide services to clients. DTTL and each DTTL member firm are separate and distinct legal entities, which cannot obligate each other. DTTL and each DTTL member firm are liable only for their own acts or omissions and not those of each other. Each DTTL member firm is structured differently in accordance with national laws, regulations, customary practice, and other factors, and may secure the provision of professional services in its territory through subsidiaries, affiliates, and/or other entities.

## **Disclaimer**

This publication contains general information only, and none of Deloitte Global Services Limited, its member firms, or its and their affiliates are, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your finances or your business. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. None of Deloitte Global Services Limited, its member firms, or its and their respective affiliates shall be responsible for any loss whatsoever sustained by any person who relies on this publication.