The Tax Disputes and Litigation Review

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Editor
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THE LAWREVIEWS

Chapter 10

ITALY

Guglielmo Maisto[1]

I INTRODUCTION

The landscape for tax dispute resolution has changed dramatically in Italy over the past few decades. Pre-litigation tax settlements were not foreseen by the procedural tax rules (and their legitimacy, particularly their compatibility with constitutional principles, was disputed) until the mid-nineties. The absence of such instruments was at times counterbalanced by the enactment of tax amnesties, which also provided the option to settle pending litigation. The Italian tax legislator introduced judicial settlements in 1992 (with effect from 1996) and pre-litigation settlements in 1997. The use of pre-litigation settlements increased over time, as they are a tool that can provide for a large reduction in tax penalties, which in Italy may be more than twice the amount of the assessed tax. Moreover, pre-litigation settlements avoid the uncertainties associated with the very lengthy time frame of tax litigation (on average, a tax dispute lasts about 10 years if litigated up to the Supreme Court).[2] The areas in which pre-litigation settlements are most successful are those involving evaluation aspects regarding corporate income tax (transfer pricing, anti-avoidance, etc.).

That said, tax litigation in Italy still has relevance. The most recent statistics issued by the Ministry of Economy, published in June 2022[3] and relating to the situation as at 31 December 2021 show that the number of cases pending before the tax courts of first instance was 147,889 and the number of cases pending before the tax courts of second instance was 124,788. Moreover, the same statistics for 2021 show that:

a the tax courts of first instance found in favour of:
- taxpayers in around 26 per cent of cases; and
- the tax authorities[4] in around 51 per cent of cases;[5]

b the tax courts of second instance found in favour of:
- taxpayers in around 29 per cent of cases; and
- the tax authorities in around 49 per cent of cases; and

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2 For a description of the organisation of Italian tax courts, see Section III.

3 'Statistical appendices and guidelines to the report on the monitoring of the status of tax litigation and on the activity of tax courts – 2021', issued in June 2022 by the Ministry of Economy and the Directorate of Tax Justice. These documents can be found on the Ministry of Economy website (www.finanze.gov.it).

4 'Tax authorities' include the Italian Revenue Agency, collector agents, the Customs and Monopolies Agency, and territorial authorities.

5 The remaining cases were closed either through judicial settlement, tax amnesty or partially in favour of both the taxpayer and the tax authorities.

c the Supreme Court upheld appeals by:
- taxpayers in 31.2 per cent of cases; and
- the Italian Revenue Agency in 38.4 per cent of cases.

The net win ratio of the Italian Revenue Agency was equal to 73.7 per cent. This ratio is determined by comparing all decisions found in total favour of the Italian Revenue Agency that became final in 2021, and the total final favourable and unfavourable decisions in 2021.

Legislative Decree No. 156 of 24 September 2015, issued in the context of a broader reform of the Italian tax system, introduced important changes that have modified some rules of the Italian tax litigation system and that will be explained below. Most of the changes introduced became effective on 1 January 2016.

Law No. 130 of 31 August 2022 (Law No. 130 of 2022), issued after the works of the interministerial commission established by the Ministry of the Economy and the Ministry of Justice to fulfil one of the objectives of the recovery and resilience plan for Italy filed with the European Commission, introduced further significant innovations to the Italian tax litigation system. The effective date of the new provisions changes according to the various rules introduced by this new Law.

II COMMENCING DISPUTES

The Italian legislation on tax litigation (Legislative Decree No. 546/1992) regulates the procedure for commencing tax disputes for all kinds of taxes.

The procedure is strongly influenced by the Italian tax system, which is based on self-assessment (i.e., taxpayers must file their tax returns on the basis of their interpretation of tax legislation). The tax authorities can rectify the tax return within certain deadlines[6] by issuing a deed of assessment. In such cases, the tax dispute is initiated by the taxpayer challenging the deed of assessment issued by the tax authorities.

The deed of assessment may be challenged through two main procedures.

6 Under Article 43(1) of Presidential Decree No. 600 of 29 September 1973 (as amended by Article 1(131) of Law No. 208 of 28 December 2015), the statute of limitations applicable to taxpayers who have duly filed their tax returns for the purposes of corporate income tax (IRES) and regional tax on productive activities (IRAP) elapses at the end of the fifth calendar year (31 December) following the one in which the tax return was filed. However, this new statute of limitations applies only to notices of assessment relating to fiscal years that will be current on 31 December 2016 and to subsequent fiscal years. For the previous fiscal years, the statute of limitations applies under the rules that were in force before the amendments enacted by Law No. 208 of 28 December 2015. In particular, before such amendments the statute of limitations expired at the end of the fourth calendar year (31 December) following the one in which the tax return was filed. However, the statute of limitations was doubled if the tax violations committed by the taxpayer gave rise to the obligation to communicate the possible commission of a criminal offence to the public prosecutor. In this event, the deadline for issuing and serving a notice of assessment expired at the end of the eighth calendar year following the filing of the tax return, provided that the communication to the public prosecutor took place before the expiry of the ordinary statute of limitations (i.e., before the end of the fourth calendar year (31 December) following the one in which the tax return was filed). Similar provisions apply (and applied until 31 December 2015) for VAT purposes under Article 57 of Presidential Decree No. 633 of 26 October 1972.

If the case involves an amount of tax higher than €50,000,[7] the assessment must be challenged by filing a deed of appeal before the court of first instance within 60 days[8] of the date on which the deed has been notified. In particular, the deed of appeal must be served first to the administrative (tax) body that has issued the assessment. To commence litigation properly, the taxpayer must file the trial record with the competent tax court within 30 days of the date on which the deed of appeal was served to the counterparty. The trial record provides the relevant court with the deed of appeal, any documents or evidence, and proof that the deed has been properly served to the administrative body.[9]

Regarding deeds of assessment of taxes[10] (e.g., corporate income tax, personal income tax, VAT, regional tax on productive activities and registration tax) involving an amount of tax lower than €50,000,[11] the Law recently enacted an advanced compulsory mediation procedure (mediation can involve disputes relating to deeds of assessment, deeds issuing penalties, notices of payment, denials of tax refunds, withdrawals of tax benefits or denials of tax amnesties, or any other act that can be appealed before the tax courts). The value of the dispute is based on the higher amount of tax (interest and penalties are not relevant). In the event of an appeal against a deed issuing only penalties, the value is determined by such penalties. In such cases, taxpayers must file and give notice of both the appeal and the application for mediation to the competent office within the deadline for the appeal (see above) with a copy of the documentary evidence that the taxpayer intends to submit to the tax court. Mediation is compulsory; failure to submit to mediation leads to a claim preclusion.[12] The tax authorities can accept (even partially) or reject the request or may make an independent proposal for mediation. The mediation agreement is executed upon its endorsement by the tax authorities and on payment of the entire amount due (or of the first instalment due) within 20 days of the day of execution. In cases of mediation, penalties are due in a reduced amount of 35 per cent of the original amount.[13] The collection of the sums due is suspended throughout the mediation procedure. If the request for mediation is rejected (or if no action is taken by the tax authorities within 90 days), the taxpayer must deposit the trial records with the court of first instance within 30 days. If the mediation procedure does not succeed, the unsuccessful party in the tax trial must pay, in addition to court costs, sum of 50 per cent of the costs of the proceedings as reimbursement of the expenses of the mediation procedure.

7 This threshold was increased from €20,000 to €50,000 by Law Decree No. 50 of 24 April 2017 with reference to the assessments notified from 1 January 2018.

8 Under the Italian law on civil law procedure, the computation of deadlines is suspended from 1 August to 31 August of each year. This suspension also applies to tax cases.

9 With reference to the first and second instance litigations started after 1 July 2019 and involving an amount of tax higher than €3,000, the appeals have to be filed to the tax authorities only by certified email and have to be electronically signed. The subsequent deposit in tax courts has to be carried out only through the telematic web portal of the tax justice. These obligations have been introduced by Law Decree No. 119 of 23 October 2018.

10 Owing to the changes introduced by Legislative Decree No. 156/2015, as of 1 January 2016, the mediation procedure is mandatory for all deeds of assessment containing a tax claim and not only for those filed by the Italian Revenue Agency (e.g., customs agency, municipality).

11 See footnote 7.

12 This modification was introduced to avoid the unconstitutionality of the provision, which would have been entailed in the case of the inadmissibility of the appeal.

13 This rate has been introduced by Legislative Decree 156/2015 and replaced the previous rate equal to 40 per cent.

In addition, tax litigation may also arise from the denial of a refund request filed by the taxpayer (rather than as the result of a tax authority deed of assessment). Reasons leading a taxpayer to apply for a refund may vary (e.g., the taxpayer paid more tax than was due or argues that the tax was not to be paid because the relevant legislation was contrary to the Italian Constitution or European law). The right to file an application for a refund must be exercised within certain deadlines provided by the law (e.g., the right to file an application for refund of income tax is generally exercised within 48 months of the date of payment and the right to claim a refund of VAT is generally forfeited after two years from the date of payment).

Once the application is filed, two scenarios are possible:

a the tax authorities issue a deed stating that the refund is not due, in which case the procedure challenging a deed of assessment, described above, is followed; and

b the tax authorities do not reply (a silent denial), in which case the refund request is deemed to have been implicitly denied after a 90-day period. In such cases, the implicit denial may be challenged before the tax court within 10 years.[14]

The above procedures apply irrespective of the tax involved (direct or indirect) and of the subject involved (i.e., individuals, companies or partnerships).

III THE COURTS AND TRIBUNALS

Tax cases in Italy are dealt with by specialised tax courts, which are independent bodies. The most significant change provided for by Law No. 130 of 2022 is the introduction of professional and specialist tax judges, appointed at the end of a public contest reserved for graduates in law and economics.[15]

The tax judiciary is organised in two tiers.[16] These are the courts of tax justice of first instance[17], which are established in the seat of each province of the state, and the courts of tax justice of second instance,[18] which are the courts of appeal and are established in the seat of each region of the state. Certain decentralised sections of second instance tax courts have been created, particularly in geographically extensive regions.

The deadline to appeal a decision of a court of first instance before a regional tax court is six months from the date on which the judgment is deposited. If one party duly serves notice of the judgment to the opposing party, the period during which the opponent may bring an appeal is limited to 60 days.

Judgments of a second instance tax court can be brought before the Tax Chamber of the Civil Supreme Court only in limited cases, including cases where the substantive or procedural law was wrongly applied or where the motivation on the key facts of the matter has been omitted.

14 Legislative Decree No. 156/2015 provides, effective as of 1 June 2016, the possibility for taxpayers to enforce positive decisions on tax refunds (and thus obtain payment of refunds) even if the decisions are still subject to appeal and litigation is still ongoing. The refund could be subject to the filing of a guarantee.

15 Once the public contests held annually are completed, new judges will gradually replace the previous ones who are not professionals.

16 Law No. 130 of 2022 changed the name of the tax courts.

17 The previous name was Provincial Tax Court.

18 The previous name was Regional Tax Court.

In tax cases, at any level, only documentary evidence can be used. Nonetheless, Law No. 130 of 2022 introduced the possibility for the judge to admit witness evidence, in written form, if they deem it necessary for the decision and even without the agreement of the parties.[19] The witness evidence can only be used to prove facts that are different from those attested by public officers (e.g., the facts attested by the tax police officers in the tax audit report).[20]

Before each tax court there is generally only one hearing scheduled to discuss the merit of the case.[21] There can be two hearings if the taxpayer has asked the judge to suspend the collection related to an appealed tax deed. In this case, a hearing for the suspension and a hearing for the discussion of the merit are set.[22] Law No. 130 of 2022 provided that the hearing for the discussion of the suspension must be set within 30 days of the filing of the request.[23] The hearing for the suspension must be separate from the hearing for the discussion of the merit.[24]

The litigation proceeding before the first-tier court lasts on average around two years; the litigation proceeding before the second-tier court lasts on average around three years; and a trial before the Supreme Court lasts about five years.

IV PENALTIES AND REMEDIES

Administrative penalties may be divided into three categories:

a Formal infringements (i.e., infringements that do not lead to a failure to pay tax): the amount of these penalties is provided as a range of fixed amounts.

b Infringements related to tax returns: the amount of these penalties is provided as a range of penalties that depend on the amount of the unpaid tax (e.g., for failing to file

19 The written testimony is established and regulated by Article 257 *bis* of the Code of Civil Procedure.

20 This new rule is applicable for the first instance appeals filed by 16 September 2022.

21 The tax courts panel generally consists of three judges. Law No. 130 of 2022 introduced a new rule based on which the disputes started against deeds of assessment involving an amount of tax lower than €3,000 are decided by a single judge, instead of the ordinary panel of three judges. For a dispute involving only penalties, the value will be based on these alone. This new rule will be effective for appeals served starting from 1 January 2023. The hearing of the single judge will be held electronically unless a specific request is made by one of the parties involved.

22 With Ministerial Decree 11 November 2020 the rules for conducting also remote hearings (first- and second-tier courts) through videoconferencing applications have been implemented. The Italian tax courts are setting up facilities in order to utilise such videoconferencing systems. During the ongoing covid-19 pandemic hearings are generally held remotely or without the attendance of the parties and rulings are based on the documents filed (as provided for by Article 27of Law Decree No. 137 of 28 October 2020).

23 The previous rule provided that the hearing should be set at the first available closed session without the indication of a specific deadline.

24 For disputes started with an appeal served from 1 September 2023, the suspension hearings will be held electronically.

an income tax return, penalties range from 120 to 240 per cent of the tax due, and for filing a false income tax return, penalties range from 90 to 180 per cent of the higher amount of tax due).[25]

c Failure to pay tax (including the delayed payment of tax): the penalty is equal to 30 per cent of the tax due (or paid late).

If a range is provided, the amount of the penalty is assessed by the tax authorities on the basis of the seriousness of the infringement, to be evaluated also in light of the behaviour of the taxpayer. The application of higher penalties must be justified by the tax authorities.

Penalties are increased by 30 per cent in the case of income sourced outside Italy and by 50 per cent when the violation is carried out through fraudulent conduct (e.g., non-existent transactions).

Accessory penalties, such as a ban from participating in public tenders, may also apply.

If the infringement is related to the tax obligations of a company, only the company is liable to administrative penalties (not the individual who, for example, signed the tax return). Other persons may be liable in addition to the company to the extent that they concurred to commit the infringement (e.g., an external adviser that promoted a disputed transaction).

Penalties do not apply in cases of objective uncertainty on the interpretation of the law, although in practice this safe harbour is rarely accepted by the tax authorities (or courts).

Generally, any large tax dispute triggers a criminal investigation as the thresholds for triggering a tax crime are very low.

For instance, the crime of filing a false tax return is triggered (irrespective of fraud) provided there is a difference between the tax declared and the tax assessed of more than €100,000, and the higher amount of tax assessed represents more than 10 per cent of the declared turnover (or the costs disallowed are more than 10 per cent of the turnover). The 10 per cent turnover test is irrelevant if the higher taxable base is greater than €2 million.[26]

For tax crimes, the company bears no criminal responsibility itself, so the criminal investigation only involves individuals (e.g., the legal representatives of the company in the years in which the tax returns had to be filed, or the individual who signed the tax returns, or both).

Normally, tax audit reports or tax assessments indicate whether the auditors have informed the criminal prosecutor about a potential crime. The criminal prosecutor will then decide in parallel whether the conditions for the crime have been met and eventually whether to start a criminal proceeding.

The administrative and criminal proceedings are parallel proceedings, and their outcomes can diverge. Generally, payment of the claims, even by way of settlement of the

25 The penalties for filing a false income tax return have been reduced by Legislative Decree No. 158 of 24 September 2015. The new provisions entered into force on 1 January 2016 according to the Finance Bill for 2016 (Law No. 208 of 28 December 2015). The old provisions provided a range from 100 to 200 per cent.

26 These thresholds have been introduced by Law Decree No. 124 of 26 October 2019 (converted into law by Law No. 157 of 19 December 2019). The old thresholds were equal to €150,000 for the taxes evaded and €3 million for the higher taxable base.

administrative proceeding, determines under the law only an automatic reduction of the criminal penalty, although in practice prosecutors tend to close criminal proceedings if the revenue interest is satisfied.[27]

V TAX CLAIMS

i Recovering overpaid tax

See Section II.

ii Challenging administrative decisions

Procedural tax rules provide a list of acts by the tax authorities that can be appealed before the tax courts. This list has been broadly interpreted taking into account the fact that the acts of the tax authorities generally affect the liability of the taxpayer. If the act of the tax authorities cannot be appealed before the tax courts, it may be appealed before the administrative courts, provided that the conditions for such an appeal are met.

iii Claimants and related parties

Tax litigation is generally initiated by the person who is liable to the disputed tax. Certain exceptions exist, including:

a Final withholding tax: if the withholding agent did not levy a final withholding tax, the tax and penalties are assessed for the withholding agent, who can initiate a civil law action against the recipient of the income for the amount of the tax due. On the other hand, if the withholding agent did not levy an advance withholding tax, the tax is assessed for the recipient of the income, while the penalties are assessed for the withholding agent.

b Corporate income tax consolidation: when a company participates in a corporate tax consolidation scheme, the assessment relating to an alleged tax violation of a consolidated company is served also to the consolidating company, and both parties have to appeal the assessment. In this case, both parties may stand together before the tax court.

Additional comments must be made for cases involving a refund of VAT. In VAT cases, a refund may be sought by a supplier even if the VAT burden is economically suffered by the customer. The latter is entitled to ask for a VAT refund only in relation to the supplier in a civil law procedure. The discrepancy between the applicable statutes of limitations (two years for suppliers in relation to the Revenue Agency and 10 years for customers in relation to suppliers) was challenged on the grounds of its compatibility with European law and the case was referred by the Supreme Court to the Court of Justice of the European Union (CJEU).[28] The Supreme Court,[29] in the light of the principle enshrined in the decision of the CJEU,

27 Of particular relevance is the double jeopardy ruling of the Italian judicial system after the European Convention on Human Rights, Chamber II, No. 172 of 4 March 2014, *Grande Stevens and Others v. Italy*, which stated the illegitimacy of the joinder of administrative and criminal sanctions according to the Engel Rule.

28 Case C–427/10, *Banca Popolare Antoniana Veneta*.

29 In Judgment No. 12,666/2012.

concluded that the supplier is not entitled to obtain a refund of undue VAT after the two-year deadline unless it is proven that the customer obtained the VAT refund as a consequence of a decision of a civil law court that cannot be appealed any further. Moreover, Italy introduced Article 30 *ter* of the Presidential Decree No. 633 of 26 October 1972, according to which suppliers are entitled to ask for the refund of the VAT wrongly charged to the customers within two years of the date of the payment. The same procedure laid down by Article 30 *ter* can be invoked if Tax Authorities assess that VAT has been wrongly charged to the customers. In the latter case, the refund request must be filed within two years of the date on which the VAT was paid back to the customer by the supplier.

VI COSTS

Italian law regulating tax litigation provides that the losing party must bear the costs of the litigation and that the costs of the winning party are declared by the court on the basis of the costs incurred. Courts can rule that each party bears, in whole or in part, its own costs, provided that both litigants are partially losers or in cases of exceptional and serious reasons that must be explained in the judgment.[30] In the event of a refusal of a mediation proposal, the losing party is ordered to pay the litigation costs if the judge upheld the ground of appeal already raised during the mediation proceeding.[31]

Law No. 130 of 2022 introduced a rule that provides for a 50 per cent increase of the costs for the party that unduly refuses a judicial settlement proposal by the other party or by the judge.

VII ALTERNATIVE DISPUTE RESOLUTION

i Pre-audit

If the infringement has not yet been assessed or investigated by the tax authorities, it may be self-corrected within certain deadlines by the payment of reduced penalties. In such cases, the amount of the reduced penalty varies depending on the point at which the violation is self-corrected by the taxpayer.[32]

Law No. 197 of 29 December 2022 (the Finance Bill for 2023) introduced a special self-regularisation procedure for violations regarding the duly filed tax returns for the fiscal years until 2021.[33] Specifically, Article 1, Paragraphs 174–178, provides for a reduction down to one-eighteenth of the minimum penalties due. This self-regularisation is completed with the payment of the amounts due or the first instalment by 31 March 2023.

30 This rule was introduced by Legislative Decree No. 156/2015.

31 This rule was introduced by Law No. 130 of 2022.

32 In such cases, penalties may be lowered down up to one-tenth of the minimum penalties due.

33 This procedure is related to the violations other than the formal irregularities and the violations assessed by the automatic controls of the tax authorities, for which the Finance Bill for 2023 provides specific special remedies. The special self-regularisation procedure is limited to taxes managed by the Italian Revenue Agency (e.g., income tax, corporate income tax, VAT), and it does not cover the regularisation of omitted tax returns.

ii Post-audit

If the taxpayer is subject to a tax audit, at the end of their activity, the auditors (which may be part of the audit department of either the tax authorities or the tax police) shall draft a final tax audit report in which all the allegations are supported. Such a report does not contain a final claim. After the report has been served, the following options are available:

a The taxpayer can submit observations or additional documentation likely to prove that the tax auditor's conclusion is incorrect. Certain limitations to the option to issue an assessment for the tax authorities apply in the 60-day period following the date on which the report is served.

b The taxpayer can consider filing an application to start a settlement procedure in relation to the contents of the report. The settlement procedure may lead to a reduction of the assessed tax, although there is no obligation upon the tax authorities to enter into the settlement. If a settlement is reached, penalties are reduced to one-third of their minimum amount on the settled tax.

c The taxpayer can decide to wait for the further assessment activity by the competent tax authority.

iii Post-assessment

Following notice of a tax assessment the taxpayer may pay the assessed tax within 60 days, together with reduced penalties. In such cases, the penalties are reduced to one-third of the assessed amount, while the higher amount of tax assessed is definitively due.[34] Alternatively, the taxpayer may file a settlement request. In such cases, the 60-day deadline for the appeal is suspended for 90 days. The settlement may lead to a reduction of the assessed tax, although there is no obligation upon the tax authorities to enter into the settlement. If a settlement is reached, penalties are reduced to one-third of their minimum amount on the settled tax.

Article 1, Paragraph 179 of the Finance Bill for 2023 introduced a further reduction down to one-eighteenth of the minimum penalties for tax settlement procedures related to tax audit reports or notices of assessment served by 31 March 2023.

iv After the commencement of the tax litigation

It is still possible to settle the case when it is under litigation. Legislative Decree No. 156/2015 introduced the possibility to conclude a judicial settlement even during the second-tier judgment.[35] The judicial settlement, as opposed to the settlement reached before the litigation starts, can be partial (i.e., it may not necessarily cover all the fiscal year under audit, and can be focused on one or more items under litigation). In cases of settlement during the first-tier judgment, penalties are reduced to 40 per cent of the minimum (on the settled amounts), whereas under the previous system the reduction was to 40 per cent of the charged penalties (i.e., also above minimum). In cases of settlement during the second-tier judgment, penalties

34 Article 1, Paragraph 180 of the Finance Bill for 2023 introduced the possibility for the taxpayer to settle the notices of assessment by paying the higher taxes assessed with the reduction of the penalties applied to one-eighteenth. This benefit is limited to notices of assessment that are still subject to appeal as of 1 January 2023 and those served until 31 March 2023.

35 The new rule is applicable as of 1 January 2016, even for pending cases. Before this change, the judicial settlement was possible only during the first-tier judgment.

are reduced to 50 per cent of the minimum (on the settled amounts). Law No. 130 of 2022 introduced the possibility for the judge to formulate a judicial settlement proposal to the parties.

Article 1, Paragraphs 206–218, of the Finance Bill for 2023 provides for a reduction down to one-eighteenth of the minimum penalties due where a judicial settlement is reached by 30 June 2023, for the cases pending before the first and second tier courts and the Supreme Court as of 1 January 2023.

v Finance Bill for 2023 special tax amnesty for litigation pending as of 1 January 2023

Article 1, Paragraphs 186–205 of the Finance Bill for 2023 introduced a special tax amnesty for the tax litigation pending before any tax court (including the Supreme Court) as of 1 January 2023. Based on such amnesty procedures, the taxpayer can close the litigation by paying the amount of taxes without penalties and interest. The amount of taxes due for the amnesty may be reduced from those under litigation depending on the outcome of the last decision lodged as of 1 January 2023, and on the level of tax court in which the case is pending on the same date. In order to benefit from this tax amnesty, the taxpayer must file an application and pay the amounts due or the first instalment by 30 June 2023.

vi Tax amnesty for low-value litigation pending before the Supreme Court

Law No. 130 of 2022 introduced a general tax amnesty for the cases pending before the Supreme Court depending on the value of the case and on the outcomes of the first and second tier court.

In cases where the Revenue Agency has lost at both instances and the case has a value not exceeding €100,000, the taxpayer may settle the dispute by paying 5 per cent of the taxes challenged.

In cases where the Revenue Agency has lost in one of the two instances and the case has a value not exceeding €50,000, the taxpayer may settle the dispute by paying 20 per cent of the taxes challenged.

Settlement is precluded when neither of the first instances courts ruled in favour of the taxpayer.

In order to benefit from this tax amnesty, the taxpayer had to file an application and pay the amounts due by 16 January 2023.

vii Tax amnesty for the amounts due to the collector agent

Article 1, Paragraphs 231–252, of the Finance Bill for 2023 provides for a special tax amnesty regarding the debts transmitted to the collector agent from 1 January 2000, to 30 June 2022. The taxpayer can regularise its position by paying the principal amounts and those accrued as reimbursement of the costs of the proceedings without penalties and interest. In order to benefit from this tax amnesty, the taxpayer has to file an application to the collector agent before 30 April 2023. By 30 June 2023, the collector agent shall notify the taxpayer of the amounts due for the tax amnesty as well as the methods and terms of payment.

viii Selected issues

Settlements and judicial settlements, as outlined above, shall have a legal basis. Therefore, it is not possible to simply agree a forfeit figure that satisfies both parties from a financial point of view without the terms of the settlement being grounded in the relevant tax provisions.

For transfer pricing disputes, the use of the mutual agreement and arbitration procedures under the EU Arbitration Convention[36] has increased. Since 2010, no penalties are levied in cases of transfer pricing adjustments if certain documentation standards are complied with. In such cases, the Arbitration Convention procedures, which effectively require waiving the domestic litigation, may be particularly appealing, because they guarantee the elimination of double taxation (unlike settlements, if the penalty protection rule does not apply, the Arbitration Convention procedures do not allow a penalty reduction).[37]

The application of the Arbitration Convention may also be useful to bring to the attention of the central tax authorities positions taken by local offices in the course of an audit before the issuance of a tax assessment (indeed, the application may also be filed following a tax audit report, before a tax assessment is issued); in such cases, if the central tax authorities realise that the position taken in the course of an audit cannot be supported during the Arbitration Convention procedures, they can instruct the local office not to issue the tax assessment and close the case.[38]

With Legislative Decree No. 49 of 10 June 2020, the Italian legislator transposed into national law Council Directive (EU) 2017/1852 of 10 October 2017 on Tax Dispute Resolution Mechanisms in the European Union. One of the main differences between the above-mentioned Directive and the EU Arbitration Convention is related to the personal and objective scope of application. Indeed, the Directive is applicable to any person, including individuals, resident in EU Member States, unlike the EU Arbitration Convention, which is applicable only to enterprises that are resident in Member States. Moreover, the objective scope of the Directive is not limited to transfer pricing rules and attribution of income to permanent establishments (as per the EU Arbitration Convention) but aims to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income. The Directive applies to any complaint submitted from 1 July 2019 in connection with fiscal year 2018 onwards.

ix Prevention of potential litigation

To prevent potential litigation, several tax ruling procedures are available.

With Legislative Decree No. 156/2015, the entire system of the tax ruling procedures was rationalised and simplified. These new rules became effective on 1 January 2016.

In the modified system, rulings are grouped into the following categories:

a on the correct interpretation of rules that are objectively uncertain and on the correct characterisation of certain situations for the purposes of specific rules;

b on the existence of the conditions for the application of special tax regimes and the validity of the elements of proof to support such conditions;

36 Convention on the elimination of double taxation in connection with the adjustment of profit of the associated enterprises (90/463/EEC).

37 With Decree Law No. 50 of 24 April 2017, the possibility to reduce the income of an Italian company in relation to transactions between associated companies with international activities has been recognised, under certain conditions. This possibility is granted after a mutual agreement or an arbitration procedure or following a definitive claim increasing the taxable base made by another state with which a double taxation convention is in force.

38 If the request for the application of the Arbitration Convention procedure is subsequent to the starting of the litigation, the judge suspends the trial according to the joint request of both parties.

c on the applicability of the general anti-abuse rule to a specific case;
d on the possibility of not applying specific anti-abuse clauses contained in certain rules; and
e on new investments (permitting Italian and foreign investors to ask for an opinion on the tax treatment applicable to important investments).[39]

The most important change is that the new rules provide that for all types of ruling (whereas in the previous regime for most types of ruling no mandatory deadline was applicable), the Revenue Agency has a limited time frame of 120 days to reply (except for rulings on interpretation of rules or characterisation of specific situations for which the time frame is 90 days). In the event of no reply by this deadline, the ruling as proposed by the taxpayer will be deemed implicitly accepted. This time period may be interrupted in the case of requests of additional documentation by the Revenue Agency (with an extension of 60 days from receipt of the documentation or 90 days in case of ruling on new investments).

Furthermore, ruling applications will no longer be mandatory except for certain requests of waiver of specific anti-avoidance rules (such as net operating loss carry-forward limitations for mergers). This is a significant change in comparison with the past when, for almost all cases (controlled foreign corporation (CFC) rules, adjusted current earnings), the filing of a ruling application was mandatory to gain access to a specific regime.

The above changes do not affect advance pricing agreements covering transfer pricing issues, permanent establishment (PE) cases, patent box or new investments that are subject to a separate specific procedure.

VIII ANTI-AVOIDANCE

Legislative Decree No. 128 of 5 August 2015 entirely revised, with effect from 1 October 2015, the set of anti-avoidance rules and abuse doctrine, and introduced a single legal definition of 'abuse of law' that replaced all definitions and doctrines previously developed (quite extensively) by the tax authorities and endorsed by case law.

The new discipline of the abuse of law (General Anti-Avoidance Rule (GAAR)) is placed in new Article 10 *bis* of Law 27 July 2000, No. 212 (Taxpayer's Bill of Rights) and repealed Article 37 *bis* of Presidential Decree 29 September 1973, No. 600 (a quasi-general anti-avoidance provision).

Based on this rule: 'One or more business operations are deemed to be abusive of law when they are deprived of any economic substance and, while formally consistent with tax law, they are aimed at obtaining undue tax advantages.'

New Article 10 *bis* specifies that:

a business operations are deemed to be deprived of economic substance when they consist in facts, contracts or deeds, even in connection with each other, that are unsuitable to generate significant legal effects different from the tax saving;
b undue tax advantages consist in tax benefits, even incurred in the long run, obtained in contrast with the purpose of the tax rules or with the principles of the tax legal system;

39 This ruling has been introduced by Law Decree No. 147/2015.

c any business operation is not considered to be abusive when it is justified by sound non-tax reasons that are not negligible (e.g., managerial or organisational reasons aimed at improving the structure or functionality of the business or of the professional activity of the taxpayer); and
d the taxpayer is always free to choose between different alternative tax regimes provided by the law or between different business transactions leading to a different tax burden.

Another rule provides that the taxpayer may always ask for a preliminary ruling under Article 11 of the same Taxpayer's Bill of Rights to know whether the business transactions he or she wishes to undertake could be considered as an abuse of law (see above).

The last two paragraphs of the new Article 10 *bis* introduced two relevant provisions. In particular, the tax authorities can invoke the GAAR only if the tax benefits cannot be challenged by other tax provisions; and the last paragraph provides for the non-criminal relevance of abusive conduct while the administrative penalties remain applicable.

The new Article 10 *bis* applies also with reference to transactions entered into before the entry into force of the Legislative Decree provided that the notice of assessment has not been served yet.

This GAAR is also in line with the relevant provisions of Directive No. 2,016/1164 of 12 July 2016 (as amended by Directive No. 2,017/952 of 29 May 2017) of the Council of the European Union (ATAD), which transposes the recommendations developed by the OECD in the context of the Base Erosion and Profit Shifting (BEPS) project.

The areas covered by the above-mentioned Directive are, in particular: limits to the deductibility of interest expenses; hybrids mismatch; exit tax and CFC rules.

The ATAD is part of an anti-tax avoidance package prepared by the European Union aimed at strengthening the rules against avoidance of corporation tax and making corporate taxation in the European Union fairer, simpler and more effective.

On 28 November 2018, the Italian government approved the Legislative Decree aimed at implementing into Italian law the provisions contained in the above-mentioned Directive. On 28 December 2018, this Legislative Decree (No. 142 of 29 November 2018) was published in the Italian official gazette.

IX DOUBLE TAXATION TREATIES

In interpreting double taxation treaties, Italian courts and tax authorities pay little attention to foreign case law and practice.[40] There is also a general tendency of courts and tax authorities not to rely on EU law. Indeed, courts are quite reluctant to rule a case on the basis of EU law and to refer cases to the CJEU. The Supreme Court has expressed its hope that the lower courts will more often apply EU law, or refer cases to the CJEU in the event of doubts on the compatibility of domestic provisions with EU law.[41]

The Supreme Court generally recognises that treaty provisions cannot generate a tax claim that does not exist under domestic law. In a few isolated cases, however, the Supreme

40 See Supreme Court Judgment No. 3,610 of 24 May 1988, whereby the court ignored the content of an agreement between the Italian and French tax authorities, which was not formalised but rather included in the internal administrative guidelines in both states.

41 See Judgment No. 18,055 of 4 August 2010 and Judgment No. 22,309 of 3 November 2010.

Court has taken the surprising view that, if Italian domestic provisions exempt an item of income but the treaty allocates exclusive taxing rights to Italy, treaty provisions trigger the taxation of income in Italy despite the lack of a tax claim under domestic law.[42]

The notion of PE was broadly interpreted by case law. For instance, in *Philip Morris*,[43] the Supreme Court held that the mere attendance of representatives of a local affiliated company (with no power of representation) at the negotiation of contracts between a foreign affiliated company and a resident entity qualifies as the exercise of 'the authority to conclude contracts in the name of' the foreign company.

In 2005, the OECD commentary was amended to reflect the opposite interpretation, but Italy inserted an observation to the commentary to clarify that the Italian jurisprudence is not to be ignored. The interpretation in *Philip Morris* was confirmed in subsequent case law, which invoked the Italian observation.[44]

The OECD Partnership Report is generally followed by tax authorities and case law.

In 2017, Italy signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 24 November 2016 (MLI).[45] The MLI is not effective in Italy as the ratification process has not yet been completed.

X AREAS OF FOCUS

A significant area of litigation is transfer pricing. In the past, the case law highlighted an approach followed by some Italian courts (including some decisions of the Supreme Court)[46] according to which transfer pricing provisions are qualified as anti-abuse provisions and are regarded as applicable only to the extent to which the tax authorities prove that the income is subject to a more favourable regime in the foreign jurisdiction, as compared with the Italian tax burden. However, in recent decisions, the Supreme Court seems to have adopted a different approach, stating that the classification of transfer pricing provision as an anti-avoidance rule must be excluded.[47] In recent transfer pricing adjustments, the tax authorities started to make secondary adjustments, re-qualifying the excessive outbound payment as either a dividend subject to withholding tax or an interest-generating loan. The tax authorities have begun litigation in several cases relating to the capital inadequacy of the Italian PEs of foreign banks

42 See Judgment No. 29,455 of 17 December 2008; Judgment No. 3,556 of 13 February 2009; Judgment No. 13,683 of 12 June 2009; Judgment No. 17,076 of 22 July 2009; Judgment No. 15,326 of 10 June 2013; Judgment No. 20,238 of 4 September 2013; and Judgment No. 2,912 of 13 February 2015.

43 See Judgment No. 3,367 of 7 March 2002; Judgment No. 7,682 of 25 May 2002; Judgment No. 10,925 of 22 September 2002; and Judgment No. 17,373 of 6 December 2002.

44 For example, Supreme Court Judgment No. 6,799 of 6 April 2004; Judgment No. 17,206 of 28 July 2006; Judgment No. 3,889 of 15 February 2008; Judgment No. 8,488 of 9 April 2010; and Judgment No. 20,597 of 7 October 2011.

45 Italy submitted a list of 84 tax treaties to be covered by the MLI.

46 Judgment No. 22,023 of 13 October 2006; Judgment No. 11,226 of 16 May 2005; Judgment No. 11,949 of 13 July 2012; Judgment No. 7,716 of 27 March 2013; Judgment No. 22,010 of 25 September 2013; Judgment No. 9,709 of 13 May 2015; and Judgment No. 15,642 of 24 July 2015.

47 Judgments No. 27,018, of 15 November 2017; No. 28,335 of 7 November 2018; No. 25,529 of 16 November 2018; No. 898 of 16 January 2019; No. 9,615 of 5 April 2019; No. 16,948 of 25 June 2019; and No. 11,837 of 18 June 2020.

(and companies),[48] and tend to follow the OECD quasi-thin capitalisation or regulatory minimum capital approach; in this regard, recent legislation provides for a reference to the OECD methodologies to compute the free capital attributable to PEs (implementing provisions are awaited).

Case law and the tax authorities tend to adopt quite an aggressive approach in assessing PEs of foreign companies hidden at the premises of their Italian-affiliated companies (see Section IX). A recent pattern of PE assessments involves Italian commissionaires of foreign principals.[49] In PE assessments, the tax authorities tend to take the view that the profits attributable to the alleged PEs are equal to the gross proceeds derived from sales in the Italian market without any deduction for costs, and the deduction of costs is achieved only through strenuous challenge to the tax authorities.

Several cases have been triggered by assessments of the Italian residence of foreign holding companies, particularly of the extent to which they are controlled by Italian residents. Several cases were triggered by the denial of the deduction of interest expenses incurred in merger leveraged buyout transactions carried out by foreign investors through an Italian vehicle funded with third-party debt. The claim of the tax authorities is generally grounded on either transfer pricing provisions (maintaining that the Italian vehicle must charge the foreign investor for an amount equal to the interest expenses incurred) or the lack of any benefit from the interest expenses for the Italian vehicle (the interest expenses are regarded as beneficial to the foreign investor) or the abuse of law provisions or principles.[50] However, in March 2016, the Italian Revenue Agency issued a Circular Letter[51] changing the approach held so far. In particular, the Italian Revenue Agency clarified that interest expenses accrued to the Italian vehicle should be generally deductible (unless the specific features of the transaction indicate that it is abusive; in this regard, the tax authorities mentioned, as an example, the case of lack of change of control). The Italian Revenue Agency invited the local offices to revise the notices of assessment already served to the taxpayers.

48 See the following Judgments of the Provincial Tax Court of Milan, Chamber I: Judgment No. 475 of 1 December 2010, Judgment Nos. 113, 114 and 117 of 1 February 2010 and Judgment No. 3,555 of 10 January 2017; Chamber XV, Judgment No. 3,496 of 17 March 2017; Chamber XIX, Judgment No. 4,496 of 3 July 2017; Chamber XXIX, Judgment No. 141 of 4 April 2011; Chamber II, Judgment No. 395 of 28 December 2011; and Supreme Court Judgments No. 26,489 of 26 November 2013; No. 23,355 of 19 September 2019; and No. 7,801 of 14 April 2020.

49 In favour of the taxpayer, see Provincial Tax Court of Milan, Chamber XLVII, Judgment No. 6,464 of 2 July 2014; Regional Tax Court of Lombardy, Chamber XXI, Judgment No. 4,871 of 23 November 2017; Chamber XV, Judgment No. 3,394 of 8 June 2016; Chamber XLIV, Judgment No. 1,520 of 29 March 2014; Chamber II, Judgment No. 125 of 20 October 2011; Chamber XXXIV, Judgment No. 137 of 2 December 2009; Regional Tax Court of Tuscany, Chamber XXXV, Judgment No. 64 of 13 January 2014; and Supreme Court, Tax Chamber, Judgment No. 3,769 of 9 March 2012, although the court decided on the basis of a procedural matter.

50 In Judgment No. 24,434 of 30 October 2013, the Supreme Court took the view that the deductibility depends on whether the overall transaction is aimed at allowing the foreign investor to realise the capital gain by selling the shares of the Italian vehicle, whether the debt of the Italian vehicle is repaid with funds originating from the foreign investor and whether the interest expenses may be regarded as beneficial to the activity carried out by the Italian vehicle; the case was referred back to the Regional Tax Court for it to take a decision based on these principles set out by the Supreme Court.

51 Circular Letter No. 6 of 30 March 2016.

Other areas of focus include the treaty beneficial ownership condition[52] and the abuse of the Parent–Subsidiary Directive through the interposition of EU parent companies controlled by non-EU shareholders.

Finally, the Italian Budget Law for 2019 (Law No. 145 of 30 December 2018) as amended by the Italian Budget Law for 2020 (Law No. 160 of 27 December 2019), introduced a digital services tax (DST) similar to the one put forward by the European Commission in its proposal of March 2018 (COM(2018) 148 final). The DST is due, on a yearly basis, for each calendar year. The DST applies to both resident and non-resident entities, with or without an Italian permanent establishment, that meet these two-dimensional thresholds in the calendar year preceding the one in which the DST should apply, either on a stand-alone basis or at the group level, total worldwide revenue not lower than €750 million or total revenue from the provision of services falling within the scope of the DST and realised in Italy not lower than €5.5 million.

As a general rule, taxable services are deemed to be rendered in Italy if the relevant users are situated in Italy in the relevant calendar year.

The DST entered into force on 1 January 2020. The taxable base of the DST consists of the gross revenues from the taxable services, net of value added tax and other similar indirect taxes. The tax rate is 3 per cent. The dispute resolution mechanisms applicable are substantially the same as those provided for other taxes.

It should be noted that the DST provisions contain a sunset clause providing that the Italian DST will be automatically repealed when the OECD reaches an agreement on digitalised economy taxation at the international level and the Italian government implements such standards in the domestic law.

52 In this context, it is worth mentioning the decision of the Supreme Court No. 27,113 of 28 December 2016. According to the court: (1) the beneficial ownership provision is a specific anti-avoidance rule; (2) the beneficial ownership status cannot be denied to a (pure) holding company just because it does not have a meaningful structure or substance; (3) a holding company is the beneficial owner of the dividends if it has some sort of autonomy in the management of the shares in the underlying subsidiaries and if it retains and reinvests the dividends received (instead of passing them on to its controlling entity); and (4) the status of beneficial owner of a sub-holding cannot be denied just on the premise that in multinational group dividends from subsidiaries (and more in general income) ultimately benefits the parent at the top of the group; there must instead have been an actual transfer of the income to the ultimate parent. Moreover, see, *ex multis*, Provincial Tax Court of Milan, Judgment No. 1,185 of 19 March 2018; Regional Tax Court of Milan, Judgment No. 4,193 of 18 October 2017; Provincial Tax Court of Milan, Judgment No. 6,162 of 2 November 2017; Provincial Tax Court of Milan, Judgment No. 2,391 of 27 March 2017; Provincial Tax Court of Milan, Judgment No. 4,638 of 7 July 2017; Regional Tax Court of Milan, Judgment No. 3,183 of 10 July 2015; Provincial Tax Court of Turin, Judgment No. 124 of 19 October 2010 and Judgment No. 14/7/10 of 11 February 2010; Provincial Tax Court of Alessandria, Judgment No. 31 of 9 March 2009; and Regional Tax Court of Turin, Judgment No. 28 of 12 January 2012. With reference to the beneficial ownership condition, it is also worth mentioning the recent decision of the Supreme Court No. 14,756 of 10 July 2020. In this case law, the Supreme Court based its decision on the judgment issued by the Court of Justice of the European Union on the 'Danish cases' (joined cases C–116/16 and C–117/16, and joined cases C–115/16, C–118/16, C–119/16 and C–299/16). The Supreme Court also recalled the aforementioned decision No. 27,113 of 28 December 2016 on the role of holding companies. Moreover, several lower-tier courts have also interpreted the beneficial ownership condition after the 'Danish cases' (see Provincial Tax Court of Pescara, judgment No. 27 of 18 February 2020; and Regional Tax Court of Lombardy, judgment No. 4,235 of 29 October 2019 and judgment No. 1,058 of 16 June 2020).

XI OUTLOOK AND CONCLUSIONS

Law No. 23 of 11 March 2014 enabled the government to reform most of the Italian tax law system. To give effect to the indication contained in this Law, the aforementioned legislative decrees have been already approved, in particular:

a Legislative Decree No. 128/2015 introducing a specific definition of the 'abuse of law' principle;
b Legislative Decree No. 156/2015 regarding the reform of tax ruling and tax litigation procedures; and
c Legislative Decree No. 158/2015 on the reform of administrative and criminal penalties.

In this context, Legislative Decree No. 147 of 14 September 2015 and Legislative Decree No. 159 of 24 September 2015 have been also approved.

Legislative Decree No. 147 amended the rules governing international taxation to make them more competitive. These new rules are focused in particular on the following issues:

a the rationalisation of the CFC rules;
b the replacement of existing 'blacklist cost' rules;
c rules about fiscal units between Italian sister companies controlled by a non-resident company;
d the introduction of an optional all-in all-out 'foreign branch exemption' regime; and
e a redefinition of the interest deduction rules for Italian groups controlling foreign entities.

Legislative Decree No. 159 of 24 September 2015 concerns the rationalisation of the collection system.

Law Decree No. 119 of 23 October 2018 introduced the obligation to start the first and second instance litigations by telematic instruments.

Legislative Decree No. 49 of 10 June 2020 transposed into national law Council Directive (EU) 2017/1852 of 10 October 2017 on Tax Dispute Resolution Mechanisms in the European Union.

Some draft laws aimed at a structural reform of tax justice, including the establishment of professional judges, have been presented in the Italian parliament.

Law No. 130 of 31 August 2022 introduced several modifications to the tax litigation system, demonstrating the commitment of Italy to structural reform of the tax justice system according to the recovery and resilience plan for Italy filed with the European Commission following the covid-19 pandemic. The most significant reform concerns the establishment of professional judges for the tax courts.

Appendix 1

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Guglielmo Maisto founded Maisto e Associati in 1991. He is a professor of international and comparative tax law at the Catholic University of Piacenza, chair of the European region and Italian branch of the International Fiscal Association (IFA), a member of the Board of Trustees of the International Bureau of Fiscal Documentation (IBFD) in Amsterdam, a member of the Advisory Board of the Master of Advanced Studies in International Taxation of the Lausanne University, a member of the Practice Council of New York University (NYU) Law's International Tax Program and a member of the Board of the American Chamber of Commerce in Italy. He represents the Italian Association of Industries (Confindustria) at the OECD Business Industry Advisory Committee in Paris. He acted as a consultant to the Ministry for European Community Affairs and was a member of the EU Joint Transfer Pricing Forum. He is a member of several law societies and of the editorial board of various Italian and foreign tax legal journals. He usually participates as a speaker in several annual tax conferences.

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