Italy: Changes to the TP framework

On April 24 2017, a new law decree (N. 50/2017) introduced changes to the Italian transfer pricing framework. Antonella Della Rovere and Federico Vicenti from Valente Associati GEB Partners look at the changes.

In a nutshell, the Italian provision on transfer pricing (art. 110 para. 7 of the Italian Income Tax Code) was amended to clearly and definitively encompass the principle of open market conditions.

More specifically, until the above amendment, the relevant provision implied the principle of open market conditions, regulating by reference to other provisions of the Italian Income Tax Code including it (art. 9). Following the recent amendment, the provision explicitly refers to such principle. In particular, according to the amended provision, profit from transactions between Italian enterprises and related foreign enterprises shall be estimated "by reference to the conditions and prices that would have been agreed between subjects operating in open market conditions under comparable circumstances".

Further guidance on the transfer pricing criteria and methods, in line with the respective OECD Guidelines, is foreseen to be provided by virtue of future ministerial decree.

It arises that the above outlined legislative intervention aimed at:

- Further aligning the Italian transfer pricing regime with the relevant OECD Guidelines, as updated in 2010, taking into account most recent considerations in the context of the base erosion and profit shifting (BEPS) project;
- Provide updated guidance at a domestic level as regards the application of the transfer pricing regime. It is worth noting that the latest relevant circular was issued in 1980, following publication of the 1979 OECD Guidelines, introducing the open market conditions' principle in the context of transfer pricing evaluations and adjustments.

Apart from the above, an additional amendment introduced in Italy by virtue of the same recent legislation refers to transfer pricing adjustments by foreign tax authorities. It focuses on adjustments to the taxable base of foreign enterprises related to Italian ones and involved in transactions therewith implying decrease of the Italian taxable base. The amendment seeks to allow adjustment in Italy without activation of mutual agreement procedures (MAP).

Consequently, in case of such adjustment, the corresponding decrease of the taxable income of the Italian enterprise may be recognized either through the (traditional) MAP or in one of the following ways:

- With the conclusion of audits effected in the context of international cooperation which outcomes are to be shared among the cooperating states
- Following application of the taxpayer in case the adjustment is definitive, in accordance with the arm's-length principle and leading to increase of the taxable base in a foreign jurisdiction. It is a precondition that a convention for the avoidance of double taxation (DTA) is in effect between Italy and such foreign jurisdiction, providing for exchange of information.

Before the amendment, decrease of the taxable base in Italy following transfer pricing adjustment by foreign jurisdiction was allowed only in case of agreement with the foreign competent authorities in the context of MAP under applicable DTA.

The amendment aims at warranting to multinational corporations elimination of double taxation in case of transfer pricing adjustments, regardless of MAP (as per art. 25 of the OECD Model Tax Convention). Such guarantees are particularly important in view of the ongoing revision of MAP in the context of the BEPS project.

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