

Changes to Advance Agreements in Italy

by Piergiorgio Valente

Reprinted from *Tax Notes Int'l*, September 19, 2016, p. 1063

PRACTITIONERS' CORNER

Changes to Advance Agreements in Italy

by Piergiorgio Valente



Piergiorgio Valente

Piergiorgio Valente is the managing partner of Valente Associati GEB Partners, chair of the Fiscal Committee of the Confederation Fiscale Européenne, and adjunct professor of EU tax law and tax and financial planning at the Link Campus University in Rome.

In this article, the author discusses recent Italian regulations on the implementation of advance agreements for international enterprises.

Regulation 42295/2016, issued March 21 by the Italian tax authorities, introduced provisions for the implementation of advance agreements for enterprises with international activities. Legislative Decree 147 (2015), which became effective October 7, 2015, introduced the advance agreement institution and superseded the so-called international ruling standard. The tax authorities must publish a yearly summary of various interpretative positions for both regimes.

General Procedure

The new regulations mainly apply to enterprises that want to enter into an advance agreement with the Italian Revenue Office regarding the tax treatment of some cross-border transactions. The regulations define the procedural terms and conditions of those agreements in such contexts as transfer pricing, flows of dividends, interests, royalties, and entry and exit values for residence transfers.

The regs define the term “international enterprise” as an enterprise that resides in Italian territory and:

- participates in the equity, fund, or capital of non-resident subjects, or which equity, fund, or capital is participated in by nonresident subjects;
- may have paid to or received from nonresidents dividends, interests, royalties, or other income components; or
- carries out activities through a permanent establishment in another state.

The new advance agreement provides:

- the definition of the arm’s-length price in inter-company transactions;
- the application of norms on the allocation of profits or losses to the PE in another state, as well as on the payment to or receipt by nonresidents of dividends, interests, royalties, and other income components; and
- prior definition of entry or exit values for residence transfers.¹

The agreement process starts with filing a request with the Advance Agreements and International Controversies Office, Central Audits Directorate, International Section (Ufficio Accordi preventivi e controversie internazionali dell’Agenzia delle Entrate, Direzione Centrale Accertamento, Settore Internazionale). The request must be on ordinary, unstamped paper and forwarded via registered mail with return receipt, or via

¹The prior definition of exit or entry values in cases of residence transfers is governed by article 166 and 166-bis of the Italian Income Tax Code. For further discussion, see Valente and Raffaele Rizzardi, *Delocalizzazione, Migrazione Societaria e Trasferimento Sede* 117 (2014).

direct delivery, and the Advance Agreements and International Controversies Office issues a receipt upon filing. The request must be signed by the company's legal representative and must indicate on penalty of ineligibility:

- the data identifying either the enterprise or the PE (if the request is submitted by a nonresident enterprise);
- the subject matter of the advance agreement and a summary of the facts and the proposed solution — for example, if the subject matter is transfer pricing, a description of intercompany transactions must be provided, including the methods applied to determine the arm's-length value; and
- any documentation that can substantiate ownership requirements regarding the enterprise with international activities.

The regulations specify that within 30 days of receipt the office must declare the request admissible, inadmissible, or barred from proceeding. The enterprise may be summoned to determine whether the information provided is comprehensive and to negotiate how proceedings will be carried out. That process must be concluded within 180 days from receipt of the request.

The Italian tax authorities may access the premises where the business activity is carried out to acquire anything that may be useful in preliminary proceedings. An official record of findings must be prepared each time the authorities exercise that right.

The procedure is concluded with the signing of the agreement by the tax authorities' executive in charge and by the enterprise's legal representative or any other party with the necessary representative powers. The agreement identifies and defines all elements in the request application; binds the parties; and is effective for the current tax period, as well as the following four.

Should the request involve a prior verification of the requirements to establish whether a PE is located in Italian territory, the procedure has two stages: documentary and operative. During the documentary stage, the Italian tax authorities conduct a preliminary investigation using available data and information. During the operative stage, the authorities access one or more of the premises where business activities are carried out to acquire anything that could be useful for the preliminary investigation. That procedure is also concluded with the signing of an agreement by the parties' representatives.

The regulations clarify that once the parties have stipulated to an agreement, the tax authorities can verify whether the enterprise is observing the terms or if there have been any supervening changes to the conditions on which the agreement is based. If they identify any changes to those underlying conditions, they can summon the enterprise to reach an agreement on them.

In a detailed petition, the enterprise may request during the agreement's effective period that the terms be modified if significant changes have occurred that will affect the validity of the conclusions previously reached.

Procedure for International Enterprises

The Advance Agreement Institution abrogated article 8 of Decree-Law 269/2003 (the international ruling standard).² It is regulated by article 31-*ter* of Presidential Decree 600/1973.

The advance agreement is binding on the taxpayer and the Italian tax authorities for the tax period in which the agreement was reached as well as for the subsequent four periods, unless any changes in circumstances would significantly affect the agreement.

However, should the agreement be signed after agreements concluded with the competent authorities of any foreign states under the mutual agreement procedures in a tax treaty, the advance agreement binds the parties in prior tax periods that do not precede the tax period in progress on the date the taxpayer submits the advance agreement request.

If changes to the underlying circumstances were to occur in a tax period preceding the date of the agreement (but not preceding the period in progress when the request was submitted), the taxpayer may invoke the so-called rollback rule for that period. That rule provides retroactive validity to adopting a different behavior by filing a so-called supplementary tax declaration (*dichiarazione integrativa*).

Under paragraph 4 of article 31-*ter* of Presidential Decree 600/1973, the Italian tax authorities must forward a copy of the agreement to the tax authorities of any states where a resident or established enterprise has carried out the transactions.³

To give taxpayers greater certainty on tax aspects, Legislative Decree 147/2015 also introduces rules for companies planning to make new investments in Italy. Enterprises that might have a significant effect on employment and plan to invest at least €30 million in Italy can request a ruling from the tax authorities regarding their investment plans and any operations they might engage in to realize that plan. Investment may also involve restructuring enterprises in economic crisis to realize beneficial employment effects. The timing scheduled by the business plan controls, so there is no legislative requirement that invested amounts be realized in a single tax year.

²For further discussion, see Valente, *Manuale del Transfer Pricing* 1801 (2015).

³That provision aligns Italian legislation with the EU's most recent position on tax rulings.

The request can refer to any tax aspect that might be linked to the investment plan and to the performance of the envisaged economic activity, including any interpretative, applicative, or prior valual aspects that might involve possible tax abuse or avoidance.

The tax authorities must send a formal written reply within 120 days (that may be extended another 90 days

if further information is required). The agreement binds the Italian tax authorities and the enterprise for five years (the tax period in progress when the request was filed plus the four subsequent tax years). Tacit consent is provided if the tax authorities do not timely reply. ◆