TP WEEK

Italy clarifies key transfer pricing tenants

Italy's tax authority clarified a number of transfer pricing regulations at the nation's annual tax conference, Telefisco. Salvatore Mattia and Federico Vincenti from Crowe Valente explore the key changes surrounding penalty protections and discrepancies in tax filings.

May 01, 2019

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During Telefisco 2019, Italy's annual tax conference, Italy's tax authority clarified several transfer pricing (TP) tenants. Notably, the most important include:

a) Clarification regarding when penalty protection may be applied to TP documentation; and

b) The inapplicability of penalties for filing discrepant tax returns in the TP area.

Penalty protection

In accordance with Article 1, Paragraph 6, and Article 2, Paragraph 4 of Legislative Decree No. 471/1997, if a taxpayer provides the authorities with adequate documentation that shows TP policy was applied appropriately within intercompany transactions, penalties for administrative violations related to tax return discrepancies may not apply (i.e. "penalty protection").

However, taxpayers who benefit from this exemption are required to provide all the necessary documentation to allow the tax authority to carry out a complete analysis on the TP policy applied on the intercompany transactions ("suitability" of TP documentation).

Any difference between the TP methods and the selection of comparable transactions/companies which have been chosen by the taxpayer within the TP documentation during the tax audit is not considered relevant in assessing the suitability of TP documentation.

Furthermore, compliance with the applicable regulation does not imply the suitability of such documentation.

Therefore, it is important that the documents provided by the taxpayer to the tax auditors facilitate in understanding the TP policy applied and its compliance with the arm's-length principle.

Discrepancies in tax returns

Italian tax authorities have further clarified that tax returns filed with discrepancies in the TP area are not liable for penalty. However, in the case of TP adjustments, fraudulent declarations may be applied as a penalty instead.

In accordance with Article 4 of Legislative Decree No. 74/2000, which was amended by Legislative Decree No. 158/2015, a tax return discrepancy offence occurs when a taxpayer discloses an income that is smaller than the actual amount, or non-existent liabilities under the following joint circumstances:

- The total evaded tax is higher than EUR 150,000 ($170,000); and
- The total amount of non-disclosed income/profit, also through non-existent loss elements, is higher than 10% of the total amount filed in the tax return, or higher than EUR 3 million.

The novelty relies on the fact that the new provision replaces the expression "fictitious loss elements" with "non-existent loss elements".

Consequently, as confirmed by Italy's tax authority, TP adjustments may not be considered a tax offence in light of their estimated values.

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