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REGULATION MATTERS

Italy and the transfer pricing issue

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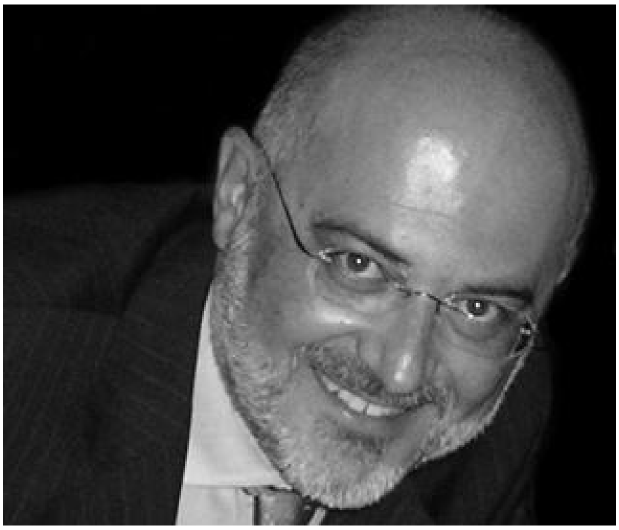

Transfer pricing is the hot topic in the tax audit world right now in Italy says Piergiorgio Valente, managing partner of law firm Valente Associati GEB Partners.

If someone were to ask a CFO or a tax director of a multinational company operating in Italy: "What's the hottest issue right now within the tax audits area?", the answer would most undoubtedly be transfer pricing.

There are a number of excellent reasons for such an unequivocal and straightforward answer.

First of all the context, viewed from both an economic international scenario and a supranational legal framework perspective. The worldwide crisis is most certainly compelling most countries to adopt stringent rules in terms of public finances.

The OECD and the European Commission are in the process of developing new guidelines in the TP area with the technical expertise and political support of all countries involved.

This is an ongoing learning process for countries such as Italy, which, thus far have neither had an in-depth, nor a long-standing experience in such matters.

At the same time, this substantiates and enables the tax authorities to exert their auditing power towards companies with international interests.

Furthermore, TP is a highly debatable and controversial area that most often gives rise to disputes between states and taxpayers, it is a field that may easily produce "funds" for states' treasuries.

Within this scenario, are there any caveats, any points calling for special attention for multinational companies investing in Italy? The answer is yes and some technical aspects should be kept in mind from an Italian tax perspective.

TP audits generally follow the same formal procedure that Italian Tax Authorities apply to regular audits.

Nevertheless, the auditing procedure may turn out to be particularly complex and should, therefore, be adequately followed and supported by the taxpayer since a great number of elements must be considered such as: the peculiar aspects of international relations, the specificity of the subject-matter and the need to interact with various jurisdictions, by keeping in mind the tax legislation currently in force in Italy.

A TP audit is perceived - by those who perform it and those who are subjected thereto - as a particularly delicate event since, on the one hand, the inspectors have to reckon with a legal framework that is concise and essential, based on outdated practices and often, by conflicting case law.

On the other hand, the taxpayer finds himself having to face an extremely uncomfortable event that most certainly determines a number of critical aspects in the management of the business.

Notwithstanding the above, the taxpayer must be aware of the fact that the auditors, from the very beginning of the audit, must comply with a rather articulate power-duties system that produces specific responsibilities, one of which is to perform and conclude the audit as quickly as possible, while bearing in mind the respect owed to the fundamental rights of both, citizens and corporations as well.

The Italian tax system is based on the principle of self-taxation. This means that the taxpayer is subjected by the tax authorities to a number of inspecting powers that may become extremely intrusive.

It is worth noting that the tax authorities' powers relating to research and acquisition of evidentiary elements of the effective taxing capacity must only be exercised within the means and the cases foreseen by law.

Consequently, the provisions that justify such powers are not subject to an analogical interpretation and, thus, each tax deed issued - that is not in compliance with procedural rules - is, in principle, to be considered null and void.

The tax authorities are currently adopting a most aggressive approach and thus, all relevant issues within the context of a tax audit procedure have to be thoroughly examined to create some kind of balance of powers, notwithstanding the fact that the considerable weight of taxing power has historically played in favour of states' revenue offices.

TP audits should nevertheless not be perceived as a mere "tax nightmare" but as a central area of confrontation between companies and the Italian tax authorities.

As such, TP management and compliance to both - the spirit and the form of the law, as well as to the best administrative practices - are becoming an essential component of tax risks analysis in order to prevent any unforeseen consequences, among which, always more frequent criminal tax implications for top management are involved.