

## ITALY

Crowe Valente/Valente Associati GEB Partners



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## Unilateral tax settlement and mutual agreement procedures

**Federico Vincenti and Alessandro Valente of Crowe Valente/Valente Associati GEB Partners explore the complex relationship between Italy's domestic tax dispute resolution mechanisms and OECD and EU directives on mutual agreement procedures.**

The increase in transactions between companies belonging to multinational groups and of TP controls by tax authorities have made it necessary to broaden and strengthen the cooperation between tax administrations and taxpayers. This cooperation also needs to happen between the tax authorities of different states themselves, in order to identify both the criteria and technical modalities for settling any TP disputes.

For transactions or agreements involving more companies of the same multinational group, mutual agreement procedures (MAPs) and advance pricing arrangements (APAs) provide greater tax certainty for both taxpayers and tax authorities, and also a proper application of bilateral tax treaties (in compliance with the arm's length principle).

At the international level, Action 14 of the OECD BEPS project has provided a number of proposals for the adoption of measures aimed at improving access to and the functioning of MAP procedures.

In this context, Legislative Decree No. 49/2020 transposed in Italy the EU Directive of October 10th 2017 No. 1852 ("Dispute Resolution Directive"), concerning mechanisms for resolving tax disputes between countries of the EU.

Italy's transposition of the EU Directive 2017/1852 is, therefore, in line with the OECD's Action 14 of the BEPS project. Namely, by identifying common minimum standards at the international level aimed at improving disputes arising from tax matters between different jurisdictions.

The decree applies to MAP procedures opening petitions filed as of July 1, 2019 which relate to the tax period starting from January 1, 2018 and the subsequent tax periods. The submission of the petition by the affected taxpayer must be made

within three years from the date of the first notification of the act (or other equivalent documents), that originated or could originate a double taxation. Thus, we are beginning to see the first results of this new procedure in Italy.

The most important introduction (compared to the previous European MAP, the so-called "EU Arbitration Convention No. 436/90") concerns the possibility of opting for MAPs for all double taxation cases covered by the double taxation conventions, not just TP cases.

One of the novelties introduced by the Legislative Decree concerns the compatibility of the new MAP with domestic dispute resolution procedures, such as the tax settlement procedure (the so-called "*accertamento con adesione*"). In fact, prior to the entry into force of the new procedure, any settlement with the Italian tax authorities precluded access to the MAP.

On the other hand, the filing of a final judgment or a court decision following a settlement between the parties prevents the filing of a request for the MAP. And, in any case, the continuation of the procedure already initiated, therefore, would not be able to continue, at whatever stage of development it may be.

The opportunity to apply for a MAP after a tax settlement procedure with the Italian tax authorities could result in an additional advantage for multinational companies related to the payment of lower penalties.

The following are application examples:

- In the event of a TP adjustment by the Italian tax authorities (and in absence of TP documentation) the taxpayer would be required to pay penalties equal to 90% of the higher tax resulting from the TP adjustment. The penalties can be set at zero if appropriate TP documentation is prepared in accordance with the relevant Italian regulations and submitted to the Italian tax authorities during the audit;
- In case of a tax settlement procedure, in addition to a possible reduction of the higher tax, penalties are reduced by one third (therefore, penalties will be equal to 30% of the higher taxes settled); and
- If the taxpayer settles the dispute through MAP (without a prior unilateral tax settlement procedure), any applicable penalties would be due in full (90% of the higher taxes). In fact, Legislative Decree No. 49/2020 provides that, following the acceptance of the outcome of the MAP, penalties would be applied in full, except in cases where the penalties have been settled on a facilitated basis in accordance with the provisions of the current

regulations (for example, through the tax settlement procedure).

Given the above, with the introduction of the new MAP, there are several cases in which taxpayers may have:

- Proceeded to settle the dispute unilaterally with the Italian tax authorities, with the main objective of obtaining a reduction in the applicable penalties;
- Opted for the MAP to obtain the elimination of double taxation after the unilateral tax settlement procedure; or
- Fully paid penalties only on the difference between the amount defined in the tax settlement procedure and the additional amount deriving from the MAP.

In addition, noting the official record of findings delivered by the Italian tax auditors to taxpayers by March 31, 2023, any tax settlement procedure could be finalised with penalties equal to 5% of the higher taxes (instead of 30%) with an additional advantage in terms of penalty savings.

Furthermore, the reimbursement of penalties paid would be possible only in the event of the full elimination of the tax claim through the MAP.

Therefore, while the new procedure has expanded the options for accessing MAPs and improved the way they are managed, the convenience of MAPs and unilateral dispute resolution arrangements or their joint use, must be carefully evaluated through a specific analysis of the case at stake.

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