

Tax Connect Flash

Date: 13/07/2010

Italy: no capital gain taxation on foreign groups restructuring Italian operations

The creation of an Italian sub-holding company is useful, inter alia, to claim the fiscal consolidation regime.

If a tax treaty does not exist or if a treaty (e.g., the Italy – France tax treaty) does not fully shelter against the Italian capital gain tax, the creation of an Italian sub-holding company by foreign groups directly owning Italian subsidiaries may give rise to a capital gain tax exposure.

The Italian tax authorities have now recognized the possibility to re-organize the Italian operations on a carry-over basis.

The Italian fiscal consolidation regime

According to the Italian income tax code, Italian group companies can apply for the fiscal consolidation regime if, inter alia:

- the Italian companies are commonly controlled by an Italian holding company (or, under certain circumstances, an Italian permanent establishment of a foreign person); and
- the Italian holding company (or, under certain circumstances, the Italian permanent establishment of a foreign person) owns 50% of the capital and of the voting and profit rights in each company of the group.

Thus, without a common Italian holding company (or, under certain circumstances, an Italian permanent establishment of a foreign person) no fiscal consolidation can be claimed.

Foreign group companies

Some foreign groups initially operate in Italy by incorporating several subsidiaries without an Italian sub-holding company. This may be for business or for Italian or foreign fiscal reasons.

If, at a given point of time, certain subsidiaries are in a loss position and others are in a profit position, fiscal consolidation is needed to offset tax profits and tax losses.

The contribution of Italian participations underneath an Italian sub-holding company is considered, under Italian tax law, as a sale of participations and subject to income tax. However, in most cases, Italian tax law can be sheltered under the concerned double tax treaty.

Absence of treaty protection

If a tax treaty does not exist or if a treaty (e.g., the Italy - France tax treaty) does not fully shelter against the Italian tax, the creation of an Italian sub-holding company may give rise to a capital gain exposure.

The Italian tax exposure is equal to, as far as qualified participations are concerned, 13.673% of the realized capital gain (calculated on an arm's length basis), being 49.72% (capital gain subject to tax) times 27.5% (corporate income tax rate). As a matter of fact, a transitory regime allows, limited to participations owned as at January 1, 2010, to manage the capital gain tax exposure by stepping-up the cost basis paying, as far as qualified participations are concerned, a 4% substitute tax on the market value of the same. The step-up is possible only in case an appraisal made by an independent expert, certifying the value of the participations, is made by October 31, 2010.

The Italian tax authorities have now recognized the possibility to contribute qualified participations into an Italian holding company on a carry-over basis. Namely, following the criticisms made by scholars and by the Italian association of Italian share companies on certain previous rulings of the Revenue Agency, the circular letter No. 33 of June 17, 2010 extends the possibility to apply, under certain circumstances, for a carry-over regime also in a group context.

It goes without saying that the carry-over regime is disregarded if the transaction is in contrast with the abuse of law principles.

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