

27 August 2015

Practice Group(s):

Tax

Italian Tax Reform

New legislation on abuse of law and statute of limitations

By *Vittorio Salvadori di Wiesenhoff*

The Italian Government has recently approved a new decree, which reshapes the definition of abuse of law and tax avoidance and changes the rules on the statute of limitations in the event of tax crimes. The decree also introduces a cooperative compliance program to enhance relationships between taxpayers and Italian tax authorities.

The new decree, which represents the first step of implementation of a wider tax reform, in compliance with the empowering legislation enacted by the Parliament in 2014, has been published in the Official Gazette 18 August 2015, n. 180 as Legislative Decree 5 August 2015 n. 128 (the **Decree 128**) and is effective as of 2 September 2015 (the **Effective Date**).

This document provides an overview of the measures included in the Decree 128 concerning the abuse of law and the statute of limitations.

Abuse of law and tax avoidance

Introduction

Art. 1 of the Decree 128 introduces a new general anti-avoidance rule (**GAAR**), within the Taxpayer Bill of Rights (Law 212/2000 - the **TBR**), with a view to provide more certainty to the taxpayers.

The GAAR replaces and supplements the current (semi-general) anti-avoidance provision set out by Art. 37-bis of the Decree 600/73, whose scope of application was limited to Italian income taxes and to a closed list of transactions, and the abuse of law doctrine developed by the Supreme Court, which has been extensively applied by the Italian tax authorities and tax courts beyond the narrow borders ruled by Art. 37-bis.

The GAAR is effective as from the first day of the month following that of the Effective Date (i.e., as from 1 October 2015). However, the new rules will also apply retrospectively to transactions which have not yet been challenged by the tax authorities through a formal deed of assessment.

The new definition of abuse of law

Art. 10-bis of the TBR provides for a brand new definition of abuse of law and tax avoidance.

An abuse of law exists when one or more transactions “*lack any economic substance and, despite being formally in compliance with tax laws, are essentially aimed at obtaining undue tax advantages*”. These abusive schemes are not enforceable towards the tax authorities, which shall disregard the tax advantages so achieved and compute the taxes on the basis of the rules and principles that have been circumvented, taking into account any tax payments made by the taxpayer in connection with the abusive transactions.

Italian Tax Reform

Art. 10-bis also states the following:

- a. transactions are deemed to be lacking any economic substance when they consist of facts, acts and contracts, even interconnected, that are not suitable to generate economic effects different from the tax advantages. The inconsistency between the individual transactions and the underlying juridical rationale of their aggregation or between the legal instruments that have been adopted and common market practices can be regarded as being evidences of a lack of economic substance;
- b. the undue tax advantages consist in benefits, even if not achieved in the short term, that are in conflict with the purpose of the tax provisions or with the principles of the tax legal framework;
- c. there is no abuse when a transaction is justified by sound and non-marginal non-tax reasons, including managerial and organizational ones, being aimed at improving the structure or the functionality of the business.

The provision clarifies that taxpayers are allowed to choose between different optional tax regimes provided by the law or between alternative transactions leading to a different tax burden. In other words, it is recognised that under the Italian's detailed rules, taxpayers frequently have a choice as to the way in which transactions can be carried out, and that differing tax results arise depending on the choice that is made. The GAAR does not challenge such choices. Clearly, it may however still come into operation if the course of action taken by the taxpayer cannot be regarded as reasonable and essentially aims to achieve a favourable tax result that the lawmaker did not anticipate when it introduced the tax rules in question.

Taxes to which the GAAR applies

The GAAR applies to all taxes, with the exclusion of custom duties.

Ruling applications

Taxpayers can file a ruling application to ascertain whether envisaged or already completed transactions imply an abuse of law. The application shall be filed prior to the deadline for the filing of the tax return or for the completion of the tax formalities relating to the underlying transactions.

The GAAR and the rest of the tax rules

The Revenue Agency is allowed to make abuse of law challenges only when the relevant tax advantages cannot be disregarded with the argument that specific tax provisions have been violated. This means that it will usually be necessary to determine whether the arrangements under scrutiny could achieve their tax avoiding purposes under the rest of the tax code, before challenging them on abuse of law grounds applying the GAAR.

Management of the GAAR by the tax authorities

Art. 10-bis of the TBR includes a set of comprehensive procedures for tax assessments involving an abuse of law under the GAAR. Failing to comply with these rules would render the assessment null and void.

Before issuing an assessment based on the GAAR, the Revenue Agency shall address to the taxpayer a formal request of clarifications on the matter, detailing the reasons why an alleged abuse of law is envisaged. This formal request shall be served within the expiration of the ordinary statute of limitations and the taxpayer shall reply within the subsequent 60 days. It is also stated that the time span between the receipt of the

Italian Tax Reform

taxpayer's reply or the deadline for sending such reply and the ordinary statute of limitations shall be not less than 60 days. If the time span is shorter, the Revenue Agency is granted an extension of the period within which they can serve the tax assessment.

Abuse of law challenges under the GAAR shall be raised with a specific tax assessment, which cannot include other charges and shall be adequately motivated. In this respect, the Revenue Agency required to specify the rules and principles that have been allegedly circumvented and detail the undue tax advantages, making also reference to the clarifications provided by the taxpayer.

Burden of proof

The authorities shall provide evidence of the alleged abuse of law, as defined above, whilst the taxpayer may invoke and demonstrate the existence of non-tax reasons supporting the transaction that is being challenged.

Administrative tax penalties

Art. 10-bis(13) of the TBR states that transactions that amount to an abuse of law under the GAAR shall be sanctioned with the imposition of the ordinary administrative tax penalties (i.e., the penalties contemplated for the filing of incorrect tax returns and / or for the failure in making the required tax payments).

Despite the clear statement in the GAAR, it is still debatable whether the imposition of penalties in respect of abusive transactions is reasonable and consistent with the provisions governing tax sanctions.

Tax crimes

It is now specifically ruled that abusive transactions that are challenged under the GAAR do not amount to tax crimes. This is a noteworthy development which should significantly reduce the flow of criminal law investigations and procedures in respect of allegedly abusive schemes. In addition, thanks to the general criminal law principle whereby newly enacted legislation applies on a retroactive basis if more favourable to the defendant (so-called *favor rei*), the provision should also positively affect criminal cases that are still pending.

Tax crimes and statute of limitations

The current rules

Under current rules, the statute of limitations is doubled when the Revenue Agency is required to make a filing with the public prosecutor for alleged tax crimes. According to the approach adopted by the tax authorities, as endorsed by the Constitutional Court, the extension also applies when the filing is made after the expiration of the ordinary statute of limitations.

The new rules

Art. 2 of the Decree 128 changes the rules, stating that the period of time in which a deed of assessment can be served is not doubled if the filing with the public prosecutor is made after the expiration of the ordinary statute of limitations.

On the basis of the amended rules, therefore, the statute of limitations will generally expire on 31 December of the fourth year following that of filing of the relevant tax return, unless, prior to the elapse of this ordinary deadline, the Italian tax authorities make the

Italian Tax Reform

filing with the public prosecutor (in which event the term is doubled). The extension will in any event no longer apply for challenges that are grounded on abuse of law basis.

The grandfathering provision

Art. 2 includes a grandfathering provision for:

- i. tax and penalty assessment notices served within 2 September 2015 which rely on the doubling of statute of limitations under the previous (looser) rules;
- ii. tax audit reports of which the taxpayer becomes formally aware within 2 September 2015, provided that the subsequent tax or penalty assessment notices are served within 31 December 2015.

Conclusions

The Decree 128 introduces detailed rules on abuse of law, providing taxpayers with a comprehensive and long-awaited framework on the matter. These new provisions, combined with those which limit the Italian tax authorities' right to extend the statute of limitations in the presence of an alleged tax crime, should improve taxpayers' rights and reduce the uncertainties generated in the recent years by the aggressive approach adopted by the Revenue Agency and by the public prosecutors when challenging tax advantages on the basis of the abuse of law doctrine.

The new rules will not only affect Italian resident persons, being relevant for non-Italian taxpayers as well. Indeed, foreign investors will want to consider the impact of the Decree 128 when structuring the acquisition of Italian properties or the execution of transactions on assets that generate Italian source income (e.g., equity and derivative trades during dividend season). Where these transactions are structured in a tax efficient manner or allow to achieve certain tax advantages, they may be challenged by the Italian tax authorities relying on the GAAR.

Reference would therefore be made to the new definition of abuse of law in Art. 10-bis of the TBR and the Revenue Agency would have to follow the procedures set out for GAAR assessments. In addition, these challenges should no longer entail the commencement of a criminal law proceeding.

But the new provisions may not only be relevant for the future. Indeed, they may also apply retrospectively to previous transactions that have not been formally assessed yet by the Revenue Agency under the old rules. Moreover, they may positively affect ongoing criminal law proceedings that are based on abuse of law challenges since abusive conducts can no longer result in a tax crime.

Italian Tax Reform

Authors:

Vittorio Salvadori di Wiesenhoff

Vittorio.Salvadori@klgates.com

+39.02.30.30.291

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto
Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle Seoul Shanghai Singapore
Spokane Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises more than 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

© 2015 K&L Gates LLP. All Rights Reserved.