



Italy: Clarifications on the 'subject to supervision' requirement for foreign CIVs

Tax Alert

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Offices

Milan

Via Vittor Pisani 27, 20124
T: +39 02 676441 - F: +39 02 67644758

Ancona

Via I° Maggio 150/a, 60131
T: +39 071 2916378 - F: +39 071 2916221

Bologna

Via Innocenzo Malvasia 6, 40131
T: +39 051 4392711 - F: +39 051 4392799

Florence

Viale Niccolò Machiavelli 29, 50125
T: +39 055 261961 - F: +39 055 2619666

Genoa

P.zza della Vittoria 15/12, 16121
T: +39 010 5702225 - F: +39 010 584670

Naples

Via F. Caracciolo 17, 80122
T: +39 081 662617 - F: +39 081 2488373

Padua

Piazza Salvemini 2, 35131
T: +39 049 8239611 - F: +39 049 8239666

Perugia

Via Campo di Marte 19, 06124
T: +39 075 5734518 - F: +39 075 5723783

Pescara

P.zza Duca D'Aosta 31, 65121
T: +39 085 4210479 - F: +39 085 4429900

Rome

Via Adelaide Ristori 38, 00197
T: +39 06 809631 - F: +39 06 8077459

Turin

C.so Vittorio Emanuele II 48, 10123
T: +39 011 883166 - F: +39 011 8395865

Verona

Via Leone Pancaldo 68, 37138
T: +39 045 8114111 - F: +39 045 8114390

On 27 June 2017, in the form of Resolution no. 78/E, the Italian Revenue Agency issued a tax ruling that makes it easier for foreign investment funds to show that they qualify for a withholding tax (WHT) exemption.

Premise

Under article 7 (3) of Law Decree no. 351 of 2001, proceeds from an investment in an Italian real estate investment fund (REIF) are exempt from the general final WHT of 26 percent if the beneficial owner is, for example, an investment fund (collective investment vehicle or 'CIV') set up in one of the countries allowing an adequate exchange of information and listed in the Ministerial Decree of 4 September 1996, as subsequently amended - see our [Tax Alert of 21 April 2017](#)⁽¹⁾.

The Italian tax authorities have clarified⁽²⁾ that, in order to benefit from this exemption:

- i. the foreign CIV must, according to the laws of the state where it is set up, meet the same substantial requirements and have the same investment purpose as an Italian CIV (e.g. plurality of investors and independence of the management company from the investors);
- ii. the foreign CIV or its management company must be subject to supervision⁽³⁾.

As proof that the second requirement is met, the letter of authorization to set up the fund, stating the law (e.g. the UCITS IV EU Directive) which requires such supervision, is deemed to be sufficient. A copy of this letter must be issued, as an attestation, to the management company or depositary bank holding the REIF's units.

(1) To prove that this requirement is satisfied, the CIV must provide the Italian REIF's management company with a self-statement, approved by the Ministerial Decree of 12 December 2001 (the same required in order to obtain the exemption on interest from Italian Treasury bonds and certain other similar bonds).

(2) See, for instance, Italian Revenue Agency Notice no. 2 of 2012.

(3) See Resolution no. 54 of 2013.

Facts and query presented in the application for the tax ruling

A CIV set up in the Cayman Islands, a state recently added to the list of countries allowing an adequate exchange of information⁽⁴⁾, is planning to acquire the majority of units of an Italian REIF, managed by an Italian management company. The residual REIF units will be acquired by other foreign CIVs, managed by a company set up in Delaware and acting as an 'investment adviser' subject to supervision by the Security and Exchange Commission (SEC).

The Cayman Islands CIV has the legal form of a limited liability partnership, with a general partner that, under US law, acts as 'relying adviser' of the Delaware company, and several limited partners. The general partner is the manager of the Cayman Islands CIV.

The investment adviser (i.e. the Delaware company) and the relying adviser (i.e. the general partner of the Cayman Islands CIV) are registered with the SEC through so-called 'umbrella registration'.

The Cayman Islands CIV asked the Italian Revenue Agency whether, in order to benefit from the exemption on the proceeds paid by the Italian REIF under article 7 (3) of Law Decree no. 351/2001, (i) the SEC registration of its general partner (i.e. its manager) would be sufficient proof that the 'subject to supervision' requirement is met, and (ii) how the registration can be demonstrated, given that the SEC does issue any attestations.

The Italian Revenue Agency's interpretation

The Italian tax authorities have taken the view that the general partner (i.e. the manager) of the Cayman Islands CIV and the investment adviser are subject to supervision for the purpose of the exemption of proceeds from the investment in the Italian REIF, as - under the Investment Adviser Act of 1940 - they must register with the SEC through the electronic filing and submission of an ADV form. If there is more than one adviser in the same group, operating a single advisory business, a cumulative registration ('umbrella registration') is possible. If the SEC approves this registration, the ADV form is published on the SEC's official website.

(4) With effect from 22 August 2016.

This procedure ensures that the manager and the investment advisers are subject to SEC supervision, under the provisions of the Investment Adviser Act. In order to demonstrate that this requirement is met, the Cayman Islands CIV can provide the Italian REIF's Italian management company with a copy of the ADV form and any subsequent updates. The Italian management company must verify the publication of this registration on the SEC's official website.

KPMG observations

This tax ruling is important for two reasons. First, because it adds to the clarifications already given by the Italian Revenue Agency⁽⁵⁾, by providing a detailed analysis of the requirements that foreign investors - and particularly a foreign CIV whose manager is subject to US law - must satisfy in order to benefit from the exemption on proceeds from Italian REIFs. Second, because the Italian Revenue Agency is taking a flexible approach, and seems to accept that, in cases where the supervisory authorities of a foreign state do not issue a specific attestation, the 'subject to supervision' requirement is satisfied if supervision can be inferred from public sources.

(5) In Notice no. 2 of 2012 and Resolution no. 54 of 2013.

Document prepared and written by Paola Sella

Contacts

KPMG, Tax & Legal

Eugenio Graziani

Partner,
International Corporate Tax
T: +39 045 8114 344
E: egraziani@kpmg.it

kpmg.com/it

kpmg.com/socialmedia



Fabio Avenale

Partner,
Tax Professional Practice
T: +39 011 883166
E: favenale@kpmg.it

kpmg.com/app



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