



Italy: WHT exemption on interest - UK banks were eligible during the Brexit transition period

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On 9 April 2021 the Italian Tax Authority published a statement on the application of article 26 (5-bis) of Presidential Decree no. 600/1973. This article provides for an exemption from withholding tax for interest and other income deriving from medium/long-term loans paid by resident companies to banks established in a Member State of the European Union.

The Italian Tax Authority statement specifies that this exemption is also available to banks established in the United Kingdom during the Brexit transition period. Failure to apply this exemption would violate the fundamental freedoms of the TFEU, resulting in 'horizontal discrimination' between recipients of these freedoms.

The 2019 Withdrawal Agreement between the United Kingdom and the European Union established that, after 31 December 2020, the United Kingdom would no longer be part of the customs and tax territory of the European Union. The agreement aimed to ensure an orderly exit of the UK for citizens and businesses, with a transition period from 1 February to 31 December 2020. During this period, EU legislation and procedures relating to the free movement of persons, services, capital and goods would remain in force in the United Kingdom.

According to Italian law too⁽¹⁾, until the end of the transition period national tax rules related to the United Kingdom's membership of the European Union would continue to apply, including those connected with an EU directive.

Furthermore, according to article 18 of the TFEU, without prejudice to the particular provisions contained therein, any discrimination based on nationality is prohibited. This includes 'horizontal discrimination', which consists in any discrimination between non-residents which leads to "*favouring without justification the citizens of some Member States over others*".

In the field of tax, this principle "*in order to eliminate all measures that could hinder the free circulation, within the Community, of goods, people, services and capital*", translates into a prohibition on Member States exercising fiscal power arbitrarily and without justification. The term *people* also encompasses companies.

(1) Article 13 of Legislative Decree no. 22 of 25 March 2019.

Therefore, for the purposes of applying article 26 (5-bis), the United Kingdom must be considered as part of the EU for the entire transition period. Failure to apply this exemption would be a violation of the fundamental freedoms of the TFEU in particular the freedom to provide services and the free movement of capital), resulting in 'horizontal discrimination' between recipients of the same freedoms.

For this reason we recommend that UK banks file refund claims for the WHT on interest applied from 1 February to 31 December 2020.

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