

Italy: First Degree Tax Court of Rome decisions nos. 11354 and 11355

Tax & Legal Alert
14 November 2022

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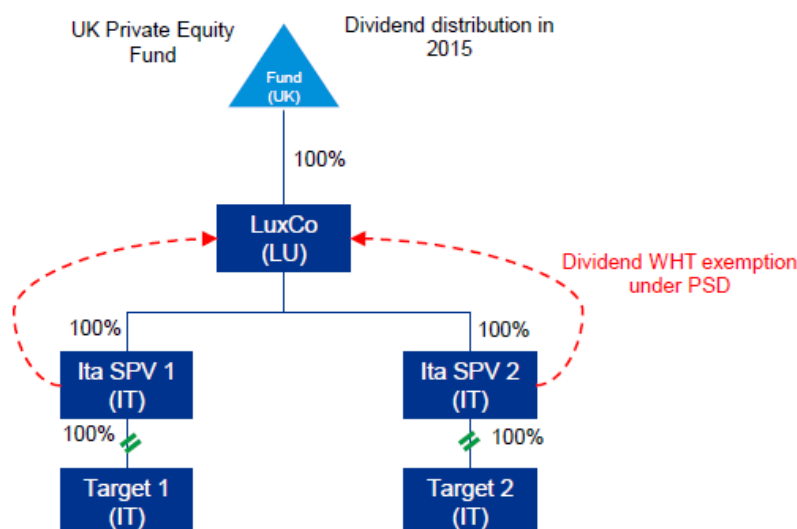
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Two recent decisions issued by the First Degree Court of Rome (nos. 11354 and 11355), on tax claims for 2015, have confirmed that intermediate holding companies in private equity structures serve a genuine, non-tax purpose and cannot be considered as mere conduit entities, as their use does not bring any tax benefit. This conclusion was based, inter alia, on the retroactive application of the EU fund exemption rule on dividends and capital gains, formally introduced from 1 January 2021 by the Finance Bill for that year.



Background

The UK private equity fund operated as shown in the diagram above, via a Luxembourg resident platform. Exit from the investment was at the level of Ita SPV 1 and Ita SPV 2, which distributed the exit proceeds to LuxCo as dividends, applying the WHT exemption under the Parent and Subsidiary Directive ('PSD').

What the Italian tax authorities challenged

The Italian tax authorities (ITA) challenged, as often happens, the WHT exemption under the PSD as the LuxCo was, allegedly, a conduit entity with no economic substance and therefore under GAAP.

The ITA also denied the application of the PSD exemption, on the basis that the necessary certificates had been collected after payment of the dividends.

The decisions

The Italian judges, inter alia, stated that:

- the LuxCo, as a bona fide intermediate holding company, served genuine – non-tax – purposes typical of the private equity industry and was not a conduit company, as proven by the fact it was not generating any tax benefit;
- the EU fund exemption on dividends and capital gains, formally introduced from 1 January 2021, should be applied retrospectively and would result in the absence of any “undue tax advantage” originated by LuxCo; indeed, the UK was still an EU Member State in 2015 and the UK private equity fund would have benefitted from the WHT exemption, retrospectively applied, had it invested directly;
- with respect to the fact that the forms/certificates required to apply the PSD had been obtained late, this infringement should not result in the non-application of the PSD exemption as such sanctions would be disproportionate to a formal infringement and, thus, not in line with the principles stated by the European Court of Justice (Case C-553/16 of 2018).

KPMG comments

The decisions are particularly welcome, given the current increasing aggressiveness by the ITA in scrutinizing completely bona fide entities.

It remains to be seen how the ITA's appeals, if any, before the higher courts (Second Degree Tax Court and, possibly, the Italian Supreme Court) will be decided. Should the decision/s be in favor of the taxpayer and consolidate into a trend, this could have a favourable impact on the current tax environment surrounding Italian inbound investments.

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Tax & Legal Alert / KPMG in Italy / 14 November 2022

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