



Italy: New Italian Patent Box rules

Tax & Legal Alert
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On 15 February 2022, the Italian Revenue Agency issued details on how the 'New Patent Box' regime must be applied. The most important rules are that, in order to qualify for the benefit, the taxpayer must (i) 'control' the R&D risks (in line with the definitions included in the OECD TP Guidelines) and (ii) engage in R&D activity involving industrial research, experimental development, technological innovation and creative design (in line with the definitions set forth by the Ministry of Economic Development). The Italian Revenue Agency also defines the content of the 'Patent Box Documentation', which must contain a DEMPE FAR (in line again with the OECD TP Guidelines) and a Technical Report prepared by the taxpayer's Head of R&D. The first year of full application is FY2021 and, therefore, the deadline for inclusion of the calculation in the income tax return and preparation of the Patent Box Documentation is 30 November.

Starting from FY 2021 taxpayers can apply for the New Patent Box regime, which basically consists in the possibility, under certain conditions, of increasing the deduction of costs incurred in the Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) of certain eligible intangible assets.

The eligible intangible assets are:

- a) software protected by copyright
- b) patents
- c) legally protected models and designs
- d) two or more intangible assets from categories a), b) and c) that complement each other in relation to a product or a process.

The New Patent Box relief consists in the possibility of increasing by 110% the deduction of costs incurred in relation to the eligible intangible assets. The benefit must be claimed in the fiscal year when the intangible asset is patented, copyrighted or legally protected and may be used to deduct all the costs incurred in relation to the eligible assets in that year and in the previous eight years.

One of the main conditions that the taxpayer must satisfy in order to use the New Patent Box regime is engagement in the research and development described in a decree issued by the Ministry of Economic Development in May 2020, which mentions industrial research, experimental development, technological innovation and creative design. Moreover, the benefit can be obtained only to the extent that a taxpayer 'controls the risk' associated with the research activity, according to the definitions set out in the OECD Transfer Pricing Guidelines.

The main eligible costs are those of the:

- personnel and professionals directly involved in the R&D
- materials and depreciation of assets used in the R&D
- consultancy and other external services used only in the R&D.

Costs are relevant in the fiscal year in which they are incurred, according to tax rules (e.g. regardless of any capitalization/accounting principles), and for the amount actually paid (e.g. regardless of any revaluation).

Taxpayers may apply for penalty protection in case they are challenged by the Revenue Agency. This process requires the taxpayer to prepare 'Patent Box Documentation', which needs to include, among other things, the following items:

- a description of the taxpayer's business, including a functional analysis (Functions, Risks and Assets) and details of the intercompany transactions
- a description of the R&D performed internally and externally and an explanation of the taxpayer's role as "investor", showing its capability to be the operational and economic risk taker as regards the results of the R&D
- the organization charts of the functions involved in the R&D
- a technical report prepared by the R&D heads
- a detailed list of the relevant costs, divided by IP and year of reference, and properly reconciled with the trial balance and the financial statements
- the employees' timesheets.

The Patent Box Documentation must be digitally signed by the company's legal representative, and time stamped before the filing of the income tax return to which it refers. Its existence must be communicated to the Revenue Agency in the relevant income tax return.

False information, or failure to fulfil the substantive or formal requirements (e.g. time stamp), make the Patent Box Documentation unfit to grant penalty protection.

The Revenue Agency is allowed to use the information in the Patent Box Documentation only for tax audits.

If they are uncertain how to apply the rules, taxpayers may apply for a tax ruling.

The New Patent Box regime replaces the previous regime, which will continue to operate only for taxpayers which opted for it for the period 2020-2024. It is not possible to use the two regimes for the same intangible assets.

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