Italy - New penalty system for violations of tax provisions in Italy

New Italian tax measures aimed at reviewing the current criminal and administrative penalty system in connection with tax matters will apply, following the recent overhaul by Legislative Decree no. 158 of 24 September 2015(1). Some of the changes to the tax penalty system are described below.

Administrative penalties (amendments to decrees n. 471 and 472 of 1997)

The decree introduces, amongst others, a number of amendments that will enter in force on 1 January 2017. Main, not exhaustive ones are mentioned below.

- Penalties for violations regarding income taxes and local business tax (IRAP) will be unified under the same law provisions.
- In case of failure to submit a tax return (whether an income tax or a withholding agents or a Vat return), if the tax return is submitted by the deadline of the following year’s tax return, and in any case before any tax assessment activity has started, penalties are reduced to 1/2 of the ordinary rate (i.e. from 120-240% to 60-120% of unpaid taxes), with a minimum of €200.
- In case of failure to declare, in the submitted tax return, income subject to income taxes or WHTs, and connected taxes, or in case of failure to declare Vat due, penalties will be reduced to 90-180% of unpaid taxes (instead of the former 100-200% range), with a minimum of €250.
- Such penalty is increased by 50% in case of frauds (e.g. use of false documentation) and is reduced by 1/3 if unpaid taxes are below €30,000.
- In the event of transfer pricing challenges against royalties or interest payments, whilst it is confirmed that no penalties will apply if the taxpayer avails of the specific documentation (Masterfile and/or Countryfile), the new

(1) Legislative Decree no. 158 of 24 September 2015 was published in Ordinary Supplement no. 55 of issue no. 233 of the Official Gazette on 7 October 2015. It is in force since today (22 October 2015). However, the measures reforming the administrative penalty system (Legislative decrees n. 471 e n. 472 of 1997 and certain other more specific provisions) will apply from 1 January 2017.
provisions extend the documentation penalty protection relief to the misapplication of treaty WHT rates to the level of such payments that exceeds the arm’s length value.

- In case of failure to remit WHTs, penalties will remain at 30% of the unpaid WHT only if WHTs are levied and declared; if WHTs are neither levied nor declared, penalties for failure to remit will not apply, though. In case of failure to levy WHTs, penalties will remain at 20% of the non-levied WHT due.

- As for Vat, in case of request of a refund of the excess of recoverable Vat resulting from the annual Vat return, if conditions required by art. 30 of decree n. 633/72 are not fulfilled, a specific penalty of 30% of the amount unduly asked for refund will apply.

- In case of violations regarding documentation and registration of transactions subject to Vat, penalties will be reduced to 90-180% of the taxable basis (from the current 100-200% range).

- In case of illegitimate Vat recovery, penalties will be reduced from 100 to 90% of the undue Vat recovery.

- A new penalty system is introduced to apply to violations regarding the reverse charge mechanism (art. 6 of decree n. 471/97, par. from 9-bis to 9-bis.3), which generally reduces penalties where failure to reverse charge does not lead to underpayment of Vat (e.g. for operators that are entitled to recover input Vat).

- If the supplier issues to a ‘habitual exporter’ an invoice not subject to Vat before receiving the specific declaration required from the customer and before checking that such declaration was electronically submitted to the Italian tax administration, the current proportional penalty (100-200% of the Vat) is replaced by a fixed one (€250 – €2,000).

- In the event of a transfer of a going concern, new law provisions confirm tax authorities past interpretations, which extend to all kinds of transfers of going concerns the ‘tax certificate’ protection against the secondary liability of the buyer for seller’s violations, there including contributions in exchange of shares.

**Administrative penalties (amendments to other specific provisions)**

- In case of failure to register an act subject to registration tax, penalties (currently from 120 to 240% of the unpaid tax) are reduced to 1/2 (from 60 to 120%) with a minimum of €200, if registration and payment of the tax are submitted by 30 days from the date the tax was due.

- In case of failure to submit to tax authorities the single annual statements (certificazione unica or CU) of income paid subject to WHTs (e.g. royalties, professional service or employment income) or in case of submission of such statements with delay or mistakes, penalties (provided by decree n. 322 of 1998) remain €100 per each CU. The maximum amount is reduced from €60,000 to €50,000 per year per each WHT agent, though. Moreover, if the CU is submitted by 60 days from the due date, penalties are reduced to 1/3 (€33,33) with a maximum of €20,000.

- A new law provision is introduced in the tax assessment code (decree n. 600/73) in order to establish how tax authorities must take unused tax losses (either current or accrued in the past) into account when re-adjusting income in case of assessment.

**Criminal penalties (amendments to decree n. 74/2000)**

The decree introduces, amongst others, the following amendments, that will enter in force on 22 October 2015.

**Failure to declare income taxes or withholding taxes (art. 4 of decree n. 74/2000)**

- The new provisions replace the term ‘fictitious costs’ with that of ‘non-existing’ ones. This amendment should indirectly clarify that transfer pricing or ‘black-list jurisdictions’ costs challenges (where costs are ‘real’ even if not at arm’s length) do not give rise to a tax criminal offence.

- Relevant thresholds, that trigger the application of criminal penalties, i.e. a minimum level of unpaid taxes and income not declared, increase to, respectively, €150,000 (instead of €50,000) and 10% of income declared or, in any case, €3,000,000 (instead of €2,000,000).

- The new provision clarifies that the following will no longer give rise to a criminal tax offence: (a) the incorrect classification or evaluation of active and passive elements objectively existing, for which the criteria applied were indicated in the statutory annual accounts or other relevant documentation for tax purposes; (b) the violation as to the correct year of deduction of a cost or taxation of a profit, and the violation of the business purpose principle to deduct a cost, were costs are real.

- Also, adjustments of items by less than 10 per cent of correct values will not be criminally relevant.

- If the tax liabilities, including penalties and interest, are extinguished by full payment of the amounts due, as a result of a voluntary disclosure (ravvedimento operoso) or the filing of the tax return omitted by the deadline of submission of the tax return of the year after, provided that such payment or submission occurs before the taxpayer has had formal knowledge of access, inspections, audits or the start of any activity of administrative or of criminal proceedings, criminal penalties do not apply.

**Failure to submit a tax return (art. 5 of decree n. 74/2000)**

- Penalties increase from 1-3 years to 1.5-4 years imprisonment but become applicable only if the unpaid taxes exceed €50,000 (instead of €30,000 under the former rule).
The same penalties are extended also to the case of failure to submit a withholding tax agents return (and not only to failure to submit income tax and Vat returns).

If the tax liabilities, including penalties and interest, are extinguished by full payment of the amounts due, as a result of a voluntary disclosure (ravvedimento operoso) or the filing of the tax return omitted by the deadline of submission of the tax return of the year after, provided that such payment or submission occurs before the taxpayer has had formal knowledge of access, inspections, audits or the start of any activity of administrative or of criminal proceedings, criminal penalties do not apply.

Failure to remit withholding taxes (art. 10-bis of decree n. 74/2000)

Penalties are extended to the case of failure to pay WHTs declared (and not just to those certified to the recipients). On the other hand, the relevant threshold, that triggers the application of penalties, increases from €50,000 to €150,000 of unpaid WHTs per year. As a consequence, since 22 October 2015, in case of failure to remit WHTs due, as resulting from the tax return or from the CU sent to recipients, by the deadline for submission of the withholding tax agents return, imprisonment from six months to two years applies, if the amount of unpaid WHTs exceeds €150,000 per fiscal year.

Such penalties do not apply if, before the declaration of opening of the trial of first instance, tax liabilities, including fines and interest, are extinguished by full payment of the amounts due.

Failure to remit Vat (art. 10-ter of decree n. 74/2000)

The relevant threshold, that triggers the application of penalties (imprisonment from six months to two years), increases from €50,000 to €250,000 of unpaid Vat per year.

Such penalties do not apply if, before the declaration of opening of the trial of first instance, tax liabilities, including fines and interest, were extinguished by full payment of the amounts due.

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