

Legislative Decree n. 128, dated 5 August 2015

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1. Introduction

On 5 August 2015, the Italian Government approved the legislative decree no. 128 entitled "*Provisions on legal certainty in relations between tax authorities and the taxpayer, pursuant to Articles 5, 6 and 8, paragraph 2, of the law 11 March 2014 n. 23*" (hereinafter, the "**Decree**"). The Decree was published in the Official Journal no. 190 on 18 August 2015 and is effective as of 2 September 2015.

The Decree partially implements a broad reform of the Italian tax system based on certain principles contained in Law no. 23 of 11 March 2014 (hereinafter, the "**Delega Fiscale**").¹

The Decree aims at enhancing the relationship between the Italian Tax Authorities and the taxpayers.

The Decree covers the following aspects:

- abuse of law and tax avoidance;
- statute of limitations concerning the tax assessment;
- cooperative tax compliance.

2. Abuse of Law and Tax Avoidance

2.1 General Aspects

The Decree introduces a specific provision relating to anti-avoidance criteria. Before the Decree, the Italian tax system applied a quasi-general anti-avoidance provision contained in Article 37-*bis* of Presidential Decree of 29 September 1973, no. 600; the abuse of law principle (which was not laid in a law provision) and several specific anti-avoidance rules.

The Decree amends law no. 212, dated 27 July 2000, so called "*Statuto del Contribuente*", (hereinafter, the "**Law 212/2000**") by inserting Article 10-*bis* which is devoted to govern the matter in question.

The Decree introduces a general anti-abuse/anti-avoidance rule to apply with respect to all taxes (other than custom duties); in addition, it repeals Article 37-*bis* of Presidential Decree of 29 September 1973, no. 600.

In a nutshell, the new Article 10-*bis* concentrates in one provision the previous quasi-general anti-avoidance rule and abuse of law principle.

As to the specific anti-avoidance regulations, they take precedence over the general anti-abuse/anti-avoidance rule (*genus-species* hierarchy test). Consequently, Italian Tax Authorities cannot challenge the validity of a given transaction by using the general anti-abuse/anti-avoidance rule if a different and more specific provision(s) already addresses the matter.

The provisions set forth in the new Article 10-*bis*, Law 212/2000, are effective as of 2 October 2015.

¹ At the date of this newsletter, some other legislative decrees have been enacted and published in the Official Journal; such decrees implements some other aspects of the reform. Among all the said decrees, these ones below are of particular interest from a tax perspective:

- no. 175/2014, concerning the "*simplification of the tax system and pre-filled tax returns for individuals*". The decree is effective as of 13 December 2014;
- no. 127/2015, concerning the "*electronic invoicing and other VAT aspects*". The decree is effective as of 2 September 2015.

On 21 April 2015, the Italian Government has approved the draft legislative decree on "*measures for the growth and the internationalization of the enterprises*". The publication of the said legislative decree in the Official Journal is still pending at the date of this newsletter.

On 27 June 2015, the Italian Government has issued five draft legislative decrees falling within the scope of the *Delega Fiscale* (hereinafter, the "**Draft Decrees**"). The Draft Decrees are now undergoing approval process with the Italian Parliament; they concern:

- tax agencies;
- fiscal evasion and tax base erosion;
- administrative sanctions for tax violations;
- tax rulings;
- tax litigation;
- tax collection system.

2.2 *The New General Anti-Avoidance Rule*

Pursuant to Article 10-*bis*, Law 212/2000, an Abuse of Law may be identified where one or more operations:

- show a lack of economic substance; and
- (although being formally in compliance with the Law) enable the taxpayer to achieve undue tax advantages.

In case the conditions above are met, the Italian Tax Authorities are entitled to (i) disregard the tax treatment applied by the taxpayer to the operation(s) and (ii) claim higher taxes (and penalties) due on the basis of the tax rules that have been circumvented by the taxpayer. In the context of the claim the Italian Tax Authorities must take into account the taxes already paid by the taxpayer.

According to Article 10-*bis*, Law 212/2000,

- operations lacking of any economic substance mean operations entailing facts, acts and contracts, even interconnected, that are not capable of producing significant effects other than tax benefits.

The lack of economic substance might be inferred from the inconsistency between the characterization of each segment of a transaction considered separately with the juridical rationale of the transaction viewed as a whole. Furthermore, a strong evidence of the lack of economic substance exists when the taxpayer has made use of legal instruments that differ from those usually adopted in the market.

- undue tax advantages mean tax benefits (whether or not achieved in the short-run), the achievement of which by the taxpayer is in conflict with the purposes of specific provisions of the Italian tax laws or principles.

Transactions supported by sound economic reasons (other than tax ones) including managerial and organizational reasons should not be characterized as abusive. However, in order for the transaction to qualify as legitimate under the Abuse of Law viewpoint, the economic reasons shall not be negligible.

In this respect, it is worth noting that, within the context of a tax assessment, the burden of proving the existence of non-marginal economic reasons (other than tax ones), supporting the transaction(s) under scrutiny, rests with the taxpayer. In turn, the Italian Tax Authorities must provide evidence of the alleged abusive nature of the transaction.

2.3 *Tax Ruling Concerning the Abuse of Law*

Article 10-*bis*, Law 212/2000, provides that taxpayers may file a request of ruling in connection with a specific transaction which may be scrutinized under the Abuse of Law perspective.

The request of ruling shall be filed by the taxpayer either prior to the deadline for the filling of the tax return in which the tax effects of the transaction become relevant or prior to the deadline for the fulfillment of the tax duties related to the transaction.

2.4 *Procedural Aspects Concerning the Tax Assessment*

Italian Tax Authorities willing to claim a violation concerning the Abuse of Law must first notify the taxpayer a request of clarifications (hereinafter, the “**ROC**”). The ROC must contain the reasons underlying the alleged Abuse of Law with respect to the transaction under scrutiny. The subsequent, notice of assessment (hereinafter, the “**NOA**”), if any, must only deal with the alleged Abuse of Law violation and must provide an adequate explanation concerning (i) the tax provisions or principles that, in the view of the inspectors, have been circumvented by the taxpayer (ii) the undue tax benefits the taxpayer has achieved (iii) the reasons why the clarifications provided by the taxpayer (if any) are considered not satisfactory.

In case the Italian Tax Authorities fail to fulfill all the procedural conditions set forth by Article 10-*bis* of Law 212/2000, the NOA will be considered null.

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2.5 Abuse of Law and Criminal Violations

Article 10-*bis*, Law 212/2000, stipulates that the tax violations grounded on Abuse of Law do not characterize, *per se*, as a criminal law offense punishable in accordance with the criminal tax law provisions; this provision, due to the “*favor rei*” principle, should apply also with respect to assessments pending at the date the law becomes effective.

3. New Rules on Statute of Limitations for Tax Assessment

Before the Decree was enacted, the rules governing the statute of limitations for tax assessment concerning income taxes and VAT provided for that the “ordinary statute of limitations” could have been doubled in cases where the tax violation(s) would have amounted to a criminal law offense. For the “extended statute of limitations” to apply it was sufficient that the tax authorities made a notice to the public prosecutor informing him that the alleged tax violation may have occurred.

This extension of the statute of limitations has been litigated in courts and criticised by scholars as it was not clear if the statute of limitations could have been extended only if cases where the criminal offence was discovered during the ordinary statute of limitations or even when such term was already expired.

Article 10-*bis*, Law 212/2000 addresses the issue stating that the “extended statute of limitations” does not apply in cases where the notice to the public prosecutor is sent after the “ordinary statute of limitations” has expired.

Nonetheless, Article 10-*bis*, Law 212/2000, states that NOA served to the taxpayer before the date of entry into force of the Decree (2 September 2015) are to be considered valid. Furthermore, report of findings and appearance requests are valid if: (i) they are notified to the taxpayer before 2 September 2015 and (ii) the subsequent NOA is notified within the 31 December 2015.

4. Cooperative Tax Compliance

The cooperative tax compliance programme (hereinafter, the “**Programme**”) is optional and may be adopted by taxpayers that meet specific conditions and undertake particular obligations *vis-à-vis* the Italian Tax Authorities.

Taxpayers willing to opt for the Programme must have an organizational structure capable of monitoring and managing the tax risks. Such a structure must enable the taxpayer to prevent or reduce the occurrence of tax violations (“**Tax Control Framework**”).

Qualifying taxpayers are companies with a total turnover or operating revenues not lower than a specific threshold. More precisely, the Decree stipulates that the first application of the Programme will be limited to taxpayers (endowed with a Tax Control Framework) with a turnover or operating revenues not lower than (i) 10 billion Euro or (ii) 1 billion Euro only if the taxpayer has already applied for the Pilot Project Programme, according to the public invitation issued on 25 June 2013 and published on the Italian tax Authorities’ website.

Moreover, the Programme entails transparency and full disclosure on tax information between the taxpayer and the Italian tax Authorities. Taxpayer must inform the Italian Tax Authorities about certain complex transactions that may trigger tax violations or may be perceived as aggressive tax planning.

In a nutshell, the Programme allows the taxpayer to receive from the Italian tax Authorities a preliminary evaluation of the tax consequences of the transactions to be carried out. The Programme streamlines the cooperation between the taxpayer and the Italian Tax Authorities by way of reducing the length of administrative procedures (*inter alia*, the tax rulings). The Programme also entails a reduction of the administrative penalties arising from tax violation. Furthermore, taxpayers joining the Programme will not be required to provide guarantees with respect to the reimbursement of income taxes and VAT.

The provisions contained in the Decree concerning Cooperative Tax Compliance will be further implemented by a forthcoming ministerial decree.

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