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## RECENT DEVELOPMENTS IN THE ITALIAN LEGAL SYSTEM

### ECONOMIC AGREEMENT BETWEEN INDIA AND ITALY

#### *Italy and India have decided to set up a Joint Business Council*

On January 31, 2011, India and Italy have decided to set up a Joint Business Council (JBC), a bilateral trade cooperation body, to increase relations in the infrastructure, manufacturing and ICT areas. The agreement will be managed by the Federation of Indian Chambers of Commerce and Industry (FICCI) from the Indian side and by Confindustria from the Italian side. Presently the current trade between India and Italy is equal to USD 7.35 billion (see "Italia India newsletter" published by ICE).

### TAX LAW

#### *Tax treatment applicable to closed-end real estate funds*

On March 9, 2011, the Italian Tax Authority issued Circular Letter No. 11/E (the "**Circular Letter**") providing some clarifications on new set of rules introduced by Law Decree No. 78/2010 (converted into law) regarding the tax treatment applicable to closed-end real estate funds (the "**RE Funds**").

The Circular Letter focuses on (i) the tax regime of the distribution of profits to non resident entities and (ii) on the transitory regime.

By way of background, the main measures introduced by Law Decree No. 78/2010 can be summarized as follows:

- (i) the term "investment fund" ("*fondo comune di investimento*") provided for by art. 1, 1, j of the Legislative Decree February 24, 1998, n. 58 has been modified; the new version reads as follows: "*investment fund shall mean the autonomous pool of assets raised, through the issue of one or more fund units, by a plurality of investors, for the purposes of investing the same pool of assets in accordance with a preset policy; divided into units pertaining to a plurality of investors; collectively managed in the interest of the investors, though fully independently from those investors*" (this translation is not official). Pursuant to the Law Decree 78/2010, the Ministry of Finance will issue a decree detailing the scope of such new definition. It is expected that such decree will clarify the requirement relating to the "plurality of investors" and the "independent management";

- (ii) in cases where RE Funds do not comply with the new definition, the management company (the SGR) shall either (a) make the appropriate changes to comply with the new definition within 30 days from the issue by the Ministry of Finance of the implementing decree or (b) resolve for the liquidation of the relevant RE Fund within 30 days from the issue of the same decree;
- (iii) proceeds deriving from RE Funds that qualify as income from capital distributed to non-Italian resident participants (without a permanent establishment in Italy) are subject to a final withholding tax at the rate of 20% starting as of May 31, 2010 (in relation to profits generated by the relevant RE Fund after December 31, 2009). Prior to the enactment of Decree 78/2010, proceeds distributed by RE Funds and received (and beneficially owned by), amongst others, by persons resident for tax purposes in States included in the list of States and countries allowing an adequate exchange of information with the Italian Tax Authority (so called "white list") and non resident institutional investors established therein even if not liable to income taxation therein benefited from an exemption. The Law Decree 78/2010 has limited the exemption from the mentioned 20% withholding tax on distributions to such non resident investors; the exemption now applies only to proceeds received by: a) pension funds and collective investment vehicles established in white-listed jurisdictions; b) international bodies set up on the basis of international agreements executed in Italy and c) central banks.

With regard to pension funds and collective investment vehicles established in white-listed jurisdictions, the Circular Letter clarifies that in order to determine whether an entity qualifies for the purposes of the exemption, it is necessary (i) to make reference to the laws of the State where such entities are set-up and (ii) to determine if it pursues the same scope of investment of Italian pension funds or Italian collective investment vehicles, irrespective of its legal form.

Based on the above clarification, the exemption regime should be applicable to proceeds payable to investments funds and open-end investment companies located in States included in the "white list", as well as to non resident entities located in the same white list State that are comparable to such institutions by considering their scope of investment; moreover, since the provision, at present, does not require the non resident collective investment undertaking to comply with any particular civil law or regulatory requirement, the exemption regime may be applicable to proceeds paid to non resident entities established in States outside the European Union or not complying with European directives (so long as established in white list States).

Moreover, to benefit from the exemption, non resident investors would have to provide the Italian withholding agent with a self certification stating their residence and period in which they have held the quotas of the RE Funds.

Profits distributed to non resident investors different from those indicated above cannot benefit from the exemption and would, therefore, be subject to the withholding tax levied at 20% or at a reduced rate (generally 10%) if a double taxation convention applies (and the relevant conditions are duly satisfied). The Circular Letter clarifies that, absent a specific conventional provision, profits distributed by Re Funds shall qualify as "interest", and, therefore, fall within the scope of art. 11 of the double taxation conventions entered into by Italy in accordance with the OECD Model.

As mentioned, the Circular Letter clarifies that the new regime set out in Law Decree 78/2010 applies to proceeds distributed to non resident entities starting as of May 31, 2010 provided that they relate to profits generated after December 31, 2009. Distributions of profits generated by the RE Funds before December 31, 2009 still follow the previous rules. In addition, it is clarified that distributions relating to profits generated by RE Funds up to December 31, 2009 are considered distributed with priority over those relating to profits generated after January 1, 2010.

Finally, the Circular Letter specifies that distributions of proceeds by RE Funds, already existing as at January 1, 2004, relating to profits generated by the same up to December 31, 2003 to non resident entities

enjoy an exemption from any Italian tax irrespective of the State where the recipient resides.

### ***New VAT reporting measures***

Italian Government has introduced a number of anti-fraud measures within the strategy aiming at preventing and combating international VAT frauds especially those made in the form of the so called "carousel frauds". A "carousel fraud" occurs where fraudsters obtain VAT registration to acquire goods such as electronic devices and mobile phones VAT-free from other Member States. They then sell on the goods at VAT inclusive prices and disappear without paying over the VAT (paid by their customers) to the relevant tax authorities.

The most important of these anti-fraud measures, implemented starting from July 2010, introduced on VAT taxpayers established in Italy a new obligation consisting in an electronic communication, to be filed monthly or quarterly to the Italian tax authorities, of output and input transactions carried out with economic players established in the so called "black list" countries. This obligation has been further implemented through regulations issued by the Italian Ministry of Finance. Further reporting obligations have been introduced:

- reporting for services within European Union to be submitted to tax authorities (article 50, par. 6 of Law Decree no. 331 of 30 August 1993), applicable starting from 2010;
- communications related to transactions higher than Euro 3,000 (article 21 of Law Decree no. 78 of 31 May 2010), applicable starting from 2010, even though for the first adoption of the measure the threshold has been increased to Euro 25,000;
- a specific authorization request to tax authorities must be filed by Italian taxable persons that intend to carry out transactions within European Union, before any operation is put in place (article 27 of Law Decree no. 78 of 31 May 2010).

## **LABOUR LAW**

### ***The recent reform of the employment law introduced by the so-called "Collegato Lavoro"***

On November 24, 2010, entered into force Law 183/2010 (so-called "*Collegato Lavoro*") significantly amending existing provisions and introducing new regulations on labour law. The key changes implemented by Law 183/2010 relate to challenge of dismissals and fixed-term contracts, arbitration and certification of employment contracts.

In particular, the new employment law introduces the following amendments.

**Strict deadlines for challenging dismissal** Employees have the right to challenge the dismissal within 60 days from the date of receipt of written notice of dismissal by sending to the employer a written communication. Following such communication, the employee who intends to bring a claim against the employer shall file the claim before the Labour Court no later than the following 270 days (previously, employees had 60 days from communication to challenge the dismissal before the employer and five years to bring the claim before the Labour Court). The employee may try to settle the dispute out of the Labour Court by having recourse to an arbitration panel or by filing a request with the competent Settlement Committee of the Local Labour Office (*Commissione di Conciliazione presso la Direzione Provinciale del Lavoro*).

**Invalid fixed-term employment contract** The above deadlines have been extended, *inter alia*, to unlawful fixed-term employment contract. According to Law 183/2010, if an employee successfully challenges the validity of the fixed-term contract, he or she is entitled to receive between 2.5 and 12 monthly salaries and the contract automatically becomes an indefinite term contract. Previously, an employee successfully

challenging a fixed-term contract was entitled to the salary accrued from the termination of the fixed-term relationship (provided that he/she offered the performance of his/her working activity) and the re-establishment of the employment relationship. Several interpretations have been issued as to whether such indemnity has to be added to the *medio tempore* salaries (under the previous rule) or if it shall be deemed as a limit to the compensation for damages. The latter interpretation has been recently agreed by the Supreme Court which, however, said that the *ratio* of the new law may conflict with the Italian Constitution. Moreover, it is under discussion in the Parliament to postpone to December 31, 2011 the entry into force of the above-referred deadlines to be applied both to dismissal and fixed-term contract; therefore, Law 183/2010 may be amended due to legislative actions and different interpretations of the relevant rules that will be provided by scholars and case-law in the following months.

**Certification of employment contracts** Law 183/2010 allows administrative authorities to certify facts and circumstances which are deemed to constitute just cause or a justified reason for dismissal, and which a judge must consider as such in the event of subsequent litigation.

**Other provisions** Law 183/2010 delegates the Government to issue legislative decrees on employment-related maternity and paternity leave, women in the workplace and equal opportunities, study leave and apprenticeships. Moreover, Law 183/2010 modifies the administrative sanctions to be applied in case of failure to comply with working time regulation.

## NEWS FROM THE EUROPEAN UNION

### *Free trade agreement UE-India*

In spring 2011, the European Union and India will sign an agreement to free the trade of goods, services and investments. The agreement foresees the opening of the industrial and agricultural markets and the liberalization of investments and services sectors. The aim of such agreement is to further increase the trade between India and EU.

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