RSM PALEA LAURI GERLA

Associazione professionale di Studio Palea, Studio L4C, Studio Gerla Associati

TAX NEWS

2015 – 7/8

RSM

TABLE OF CONTENTS

JURISPRUDENCE

Identification of the tax residence: do "family ties" or economic interests prevail?
(Court of Cassation, judgment no. 6501 of March 31st, 2015)

It is known that, in international tax matters, the identification of the tax residence of a person is very important to properly evaluate and comply with tax implications.

This happens because the determination of the place of residence for tax purposes allows defining *which* Country is entitled to tax the incomes realized and, consequently, *what* the *terms* and the taxation *measures* are: the definition of the Country of residence has also an impact on the formalities which the employer, if necessary, is obliged to fulfill.

The rules to determine the tax residence can be found in the regulations of each Country, while the rules at conventional level (contained in the Treaties for the avoidance of double taxation) mainly aim at solving the cases of *double tax residence* in order to univocally identify which Country is the Country of residence and in order to define the taxation powers of the Country of "residence" and of the Country where the income is produced.

With the brief notes below and following a brief *excursus* on the regulatory framework, a recent judgment of the Court of Cassation (judgment no. 6501 of March 31st, 2015) shall be pointed out. Such judgment, in its view, "reopens" the debate on the prevailing of the elements concerning family ties compared to the economic/property elements as a mean based on which the Country of tax residence of an *individual* is identified.

<u>The internal regulations</u>
As is well-known, article 2, paragraph 2, of the Italian Presidential Decree 917/86 introduces 3 different and alternative situations which define the tax residence of an individual in Italy.
More specifically, for the income taxes purposes, those people who *for most of the tax period*:

- ✓ are registered with the registry of the resident population,
- ✓ have their domicile, as defined by the Italian Civil Code, in the State's territory,
- ✓ have their residence, as defined by the Italian Civil Code, in the State's territory

  are considered as tax resident in Italy.

Paragraph 2-bis of the same article 2, with reference to those individuals who have "formally" migrated to Countries *with favorable tax regimes*, (removing themselves, consequently, from the Registry of the resident Population and registering with AIRE – i.e. Registry of Italian residents abroad), provides a reversal of the burden to prove the tax residence: in this case, in fact, the taxpayer is still considered as tax resident in Italy unless proved otherwise by the same latter (if, according to the ordinary rule, the Tax Authorities have to prove the fact that the person emigrated abroad has possibly maintained the residence in Italy).
Please note that:

- the domicile is defined, pursuant to art. 43 of the Italian Civil Code, as the place where the person has established the *main seat of his business and interests*;

- the residence, always based on art. 43 of the Italian Civil Code, is the place where the person usually lives.

Provided that the evaluation on whether a person shall register with the register of the resident population or not is an objective element, the focus is almost always aimed at identifying the "domicile", as the application of such criterion may lead to tax disputes.
As we have seen that the domicile shall be traced in the Country representing the "business and interests center" of the taxpayer, the meaning of "business" and "interests" shall be explained. Therefore, it is necessary to evaluate, case by case, the concrete situation of the taxpayer, by examining several factors.

<u>The practice and the case law</u>
The practice of the Italian Revenue Agency has provided, over the years, many hints useful to carry out the above evaluation: among the several documents issued, the resolution no. 304 of December 2nd, 1997 shall be mentioned.
In this resolution, it is properly reminded that:

"The expression "business and interests" as of art. 43 above, paragraph 1, shall be interpreted in a broader sense, including not only the relationships bearing an economic and property nature but also the moral, social and family relationships ... so that the determination of the domicile is deduced from all the factual elements that, directly or indirectly, show the presence of such combination of relationships in a certain place and the main impact it has on the life of the person"

Moreover, in the document of the Italian Revenue Agency it shall be pointed out that:

"the importance assumed by the subjective element and, especially, the extension of the terms "business and interests"
to the relationships not relating to the property element leads to the fact that the concept of domicile cannot be evaluated based on mere quantitative criteria, but can be evaluated based on qualitative criteria.
Therefore, the fact that the subject has maintained his family ties or the "center" of his social and property interests in Italy must be considered as sufficient to prove an effective and stable connection with the Italian territory so that the time requirement provided by the regulation is fulfilled"

Therefore, the Tax Authority identifies, by way of example, some elements to be examined:

- the family ties and the relational bonds and the attachment to Italy;
- the economic interests in Italy;
- the interest to keep or bring back to Italy the profits realized by providing services abroad;
- the intention of living in Italy also in the future to be inferred from facts and conclusive acts.

From these few hints it is possible to grasp that the place where the taxpayer's family lives is of primary importance for the evaluation.

This interpretation has, over the years, also been endorsed by the case law: by way of example, the judgment of the Court of Cassation no. 12259 of May 19th, 2010, which pointed out the following, shall be mentioned:

"the center of interests and

business – and therefore the domicile – is independent from the taxpayer's physical presence in Italy, as it is sufficient to have the will to establish and maintain, in the state territory, the main seat of the personal business and of the property, moral, social and family interests"

The judgment no. 6501

In the dispute recently examined by the Court of Cassation, the Italian Revenue Agency claimed the right to subject a Swiss citizen to taxation, who had already been an Italian citizen registered with the AIRE since the Seventies, due to the failure to submit the tax return related to the incomes received by this latter in Italy.
In this reconstruction the taxpayer objected by providing factual elements that would show, in his view, that since long he had lost any tax relationship with Italy and that therefore he could not be considered as resident in Italy for tax purposes.

The appeal of the taxpayer was accepted at first instance, on the assumption that it was not possible to consider him as an Italian citizen anymore.
The Italian Revenue Agency appealed, stating the legitimacy of the tax assessment, as the Italian citizens, even though they are removed from the registry of the resident population, if they have moved to Countries with favorable tax regimes, the same latter are assumed to be resident in Italy, unless proof of the contrary is given; proof that, according to the Agency itself, had not been provided in this case.

Even at second instance, the reasons of the taxpayer prevailed, and therefore the appeal of the Italian Revenue Agency was rejected: according to the Regional Tax Commission, the proper evidence countering the assumption as of art. 2, paragraph 2-bis of the TUIR (i.e. Income Tax Consolidation Act) had been given, considering that the taxpayer had been a Swiss citizen since the 70s, with a Swiss passport, and that the same latter lived in Switzerland where he worked as an employee with a permanent contract, which provided eight working hours per day, having in Italy only a leased property for archival purposes.

The Italian Revenue Agency has then appealed to the Court of Cassation. Its appeal was rejected again.
While analyzing the arguments of the Tax Authorities, the judges have carried out an apparent "change of direction" compared to the aforementioned usual interpretation that is mainly based on the familiar/emotional element, stating that:

- the center of the vital interests of the subject must be identified by preferring the place where the management of those interests is habitually carried out by third parties in a recognizable way;

- the emotional and familiar relationships – whose central importance is invoked by the applicant Italian Revenue Agency for tax residence purposes – *do not* have a significant priority to prove the tax residence, as they are taken into consideration only in connection with *other* evidential criteria – properly considered in this case – which univocally certify the place with which the subject has the closest connection.

Conclusions

The recent stop of the Court of Cassation, while probably remaining a minor event, has perhaps the merit to remind that the identification of the center of economic and family interests always involves a complex analysis of different factors, activities in which there are no elements prevailing on other ones:

the complexity will then be "the greatest" in case the center of economic interests can be located in a Country different from the one that can be considered as the center of emotional interests.

It shall also be pointed out that the approach of the Italian Revenue Agency constantly keeps the elements related to the place where the family interests are located at the center of the assessment activity.

TAX DEADLINES – AUGUST / SEPTEMBER 2015

- This list is not comprehensive of all tax deadlines; the most recurrent administrative deadlines have been omitted
- From January 1st, 2014, the compensation limit has increased from Euro 516,456 to Euro 700,000.

The limitations applicable to compensations shall be reminded, as follows:

- ☐ in terms of VAT (see Tax News 2010/09);
- ☐ in terms of income tax and IRAP (Regional Income Tax) (see Tax News 2014/9);
- ☐ in the presence of expired tax debts recorded in the debtors' list, for amounts exceeding Euro 1,500 (see Tax News 2009/10, 2009/12 and 2010/1).

August

Saturday 1st

Tax disputes – (reduced) suspension of the procedural deadlines

From the above mentioned date and until August 31st, according to the Law no. 742/1969, the procedural deadlines for tax jurisdictions are suspended.

This means that the calculation of the deadlines related to the tax disputes (i.e. the deadline to appeal against a notice of assessment, to file documents, to appeal against a judgment, etc.) is suspended for the entire month of August, to resume again from September 1st.

Please note that until last year the suspension amounted to 46 days (i.e. until September 15th).

Thursday 20th

Payments of IRPEF – IRES – IRAP taxes (subjects being beneficiaries of the extension

Deadline for the payment (with the increase of 0.4%) of the 2014 balance and for the first payment on account of 2015 IRPEF-IRES-IRAP taxes and deadline for the taxes whose payment expires on the same date on which the payment of income taxes expires, to be carried out by the subjects benefitting from the extension of payments (VAT holders whose activities fall within the scope of the sector studies – excluding those with revenues exceeding 5.164 million – the shareholders of partnerships or corporations under transparency regime and the shareholders of professional associations).

September

Wednesday 30th

Tax returns – deadlines for the submission

Deadline for the electronic filing of the Modello Unico 2015 of corporations and of partnerships (if their tax year coincides with the calendar year), as well as of individuals.

Voluntary Disclosure – application deadline

Unless possible extensions are provided, within the above mentioned date, the request to have access to the regularization procedure of the capital illegally held abroad shall be electronically submitted.

Employees and retirees – second payment on account of IRPEF tax

Expiration of the deadline, for employees or retirees, to communicate to the withholding agent the will not to be subjected to the second (or only) payment on account of IRPEF tax or the will to be subjected to it to a lower extent compared to what is mentioned in the 730 form.

SPECIAL FOCUS

The new R&D tax credit

In the Tax News 2014/12, among the several tax rules introduced by the so-called "Legge di Stabilità 2015" – i.e. Stability Law 2015 – (art. 1, paragraph 35, Law no. 190 of December 23rd, 2014) a new tax credit for R&D was pointed out.

The regulation referred to a following Ministerial Decree which ruled the different application aspects of the discipline: such Decree (dated May 27th) was made official at the end of July, making the discipline of favor effective.

Please find below the main features of the R&D bonus.

Subjects benefitting from R&D tax credit
For what concern eligible companies, the deduction regime for R&D costs is available for all businesses (Italian resident companies as well as subsidiaries of foreign groups and Italian branches of foreign branches).

Investments benefitting from R&D tax credit
The notion of eligible activities is given by article 4 of the implemented Decree, which identifies:

experimental researches with the main scope of knowledge acquisition even if abstract and in absence of an immediate or practical application;

b) applied research aimed at the creation of competences for the development of new products,

processes or services or to improve the ones existing, or aimed at the creation of complex systems needed for industrial research; (c) the acquisition, combination, structuring and use of knowledge and existing skills of a scientific, technological and commercial nature, aimed at the production, planning and projecting of new (or modified or improved) products, processes and services;

(d) the production and testing of products, processes and services, if not used for industrial or commercial purposes.

How to quantify the tax credit and who benefits from this latter
To calculate the tax credit, enterprises will take into consideration the following costs:

highly qualified staff engaged in eligible R&D activities (staff with an Italian or recognized Ph.D and/or Master's Degree in a scientific or technical subject);

depreciation charges on instruments and laboratory tools, costing not less than 2.000 Euros per unit (as published in the Ministerial Decree of December 31st, 1988);

R&D expenses performed in collaboration with Universities, public research institutes or equivalent bodies, other kind of companies and start-ups regulated by Law Decree no. 179/2012;

technical expertise related to industrial or biotechnological patents, even if acquired from external sources.

This amount must be declared in the annual Tax Return related to the tax period in which the relevant costs have been borne, and pursuant to article 6.1 of the implemented Decree, it is included neither in the corporate income tax (IRES) nor in the regional business tax (IRAP).

The article 5.3 of the implemented Decree provides for a tax credit amount equal to:

25% of the incremental expenses referred in points (a) and (c) of article 4,
50% of the incremental expenses referred in points (b) and (d).

The incremental costs must be calculated to the average of such investments made in the last three years (or less, if companies have been in business for a smaller period) preceding the year-end of the relevant period under investigation.

So, from the tax year 2015 to 2019 all incurred expenses for R&D of at least Euro 30.000 (minimum requirement per year), and up to Euro 5.000.000 can be considered eligible for tax credit.

The tax credit can be used exclusively if it is offset, starting from the tax period following the one in which the eligible costs have been borne.

In order to benefit from the tax credit, according to article 7 of the implemented Decree, a specific accounting documentation must be certified by an audit firm, a member of the statutory auditors or a single registered auditor.
For those companies not subjected to auditing, the costs borne for said accounting certification activities are eligible within the maximum limit of Euro 5.000.

RSM PALEA LAURI GERLA

Foro Buonaparte 67, 20121 - Milano
Tel +39 02 89095151
Fax +39 02 89095143

Roma – Via delle Terme Deciane 10 – 00153, (registered office and operating office)
Torino – Via Ettore De Sonnaz 19 – 10121 (operating office)

www.rsm.it

P.IVA e CF: IT13174301005

THE POWER OF BEING UNDERSTOOD
AUDIT | TAX | CONSULTING