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Italy's investment management exemption: new TP regulations for asset managers' remuneration

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Federico Vincenti and Carola Valente of Valente Associati GEB Partners/Crowe Valente report on the publication of guidelines concerning the compensation of asset managers that provide services to entities within the same group

The Italian legislation on permanent establishments (PEs), Article 162 of the Italian Income Tax Code, provides for a specific exemption from the status of dependent agent for foreign investment vehicles.

In particular, entities (including non-residents) that habitually conclude contracts for purchasing, selling, or negotiating on behalf of, or for the account of, the non-resident investment vehicle, or that contribute, even with preliminary or ancillary operations, to the purchase, sale, or negotiation of shares, financial instruments, derivatives, and credits shall be considered independent (and therefore do not qualify as a PE).

On February 22 2024, the Ministry of Economy and Finance issued a decree that delineated the independence criteria for a non-resident fund from its subscribers and the asset manager from the fund itself.

The Italian tax-resident investment manager or the PE in Italy of the non-resident entity should support its remuneration with thorough transfer pricing documentation. The Italian Revenue Agency

has provided guidelines on the application of the arm's-length principle.

Compensation of asset managers providing services within a group

Under the new regulation, on February 28 2024, the Italian Revenue Agency published guidelines for determining the compensation of asset managers providing services within agreements with entities belonging to the same group.

The most appropriate method for valuing the compensation of the asset manager should be chosen considering four criteria:

- The strengths and weaknesses of each method, depending on the circumstances of the case;
- The suitability of the method, considering the economically relevant characteristics of the transaction;
- The availability of reliable information regarding comparable transactions between independent companies; and
- The degree of comparability between the services of the asset manager and the services provided among independent companies.

The guidelines distinguish between activities provided as investment management services and activities ancillary to investment management.

Investment management services typically include:

- The purchase, sale, and negotiation of financial instruments, including derivatives, and credits;
- The administration of the collected assets (including legal services or appraisals); and
- Marketing activities (promotional offers, invitations to potential clients, etc.).

In cases where the asset manager and the investment vehicle share the assumption of the same economically significant risks (or assume separately economically significant and closely connected risks) and the comparable uncontrolled price (CUP) method is not reliable, the most appropriate method would be the transactional profit split method, considering the respective contribution offered by the parties to the realisation of the transaction.

The regulation finally refers to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the OECD Guidelines) when none of the methods in question leads to reliable results.

The "services ancillary to investment management" include one or more of the following activities:

- Activities facilitating the development of investment management activity, such as consultancy; and
- Auxiliary activities, such as financial research and analysis, processing and communication of financial data, preparation and management of IT or data processing services, administration of

properties for functional use, or administrative or accounting services.

For this second category of activities, the methods should be selected based on the circumstances of the case among those outlined in the OECD Guidelines.

The regulation also addresses the scenario in which the services provided by the asset manager fall into both categories of services and form an “aggregate transaction”. In such situations, the services should be evaluated in aggregate for the purpose of selecting the most appropriate pricing determination method; however, there is no longer a constraint on the use of the CUP or profit split method; instead, alternative methodologies provided by the guidelines that allow for more reliable results may be utilised.

The role of transfer pricing documentation

Finally, the regulation specifies the possibility of providing transfer pricing documentation typically required by Italian regulations to explain the methodologies used to determine the remuneration of the asset manager.

Transfer pricing documentation prepared according to the guidelines provided by the Italian Revenue Agency is not mandatory but may, if considered adequate during a tax audit, allow for an exemption from penalties in the case of tax adjustments.

To benefit from the penalty protection regime, it is necessary to prepare transfer pricing documentation within the deadline for filing the tax return (within nine months from the end of the financial year). The documentation must be digitally signed by the legal representative, with the application of a timestamp.

Furthermore, when filing the tax return, it is necessary to declare the possession of transfer pricing documentation by checking the appropriate box.

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