EU Direct Tax Newsalert

New developments concerning the taxation of EU/EEA non-resident investment funds with respect to Italian-sourced dividends and capital gains

On 30 December 2020, the Italian Parliament approved the 2021 Italian Finance Bill which provides, *inter alia*, for the exemption from dividend withholding tax and capital gain tax with respect to Italian-sourced dividends and capital gain received by qualified EU/EAA non-resident investment funds.

The new dividend and capital gain tax exemption regime for EU/EEA non-resident investment funds into force starting from 1 January 2021

The 2021 Italian Finance Bill provides, starting from the entry into force of the law (1 January 2021), that:

- foreign investment funds established in a EU Member State in accordance with the UCITS Directive (Directive 2009/65) and
- foreign investment funds established in a EU Member State or in a EEA Member State allowing an adequate exchange of information and managed by a fund manager subject in the country in which it is established to regulatory supervision in accordance with the AIFM Directive (Directive 2011/61)

are no longer subject to the 26% domestic withholding tax (or the lower tax treaty rate if applicable) on Italian-sourced dividends.

The 2021 Italian Finance Bill also provides – from 1 January 2021 - for the exclusion from the taxable income of Italian-sourced capital gain realised by the same type of non-resident investment funds listed above derived from the sale of qualified participations in Italian companies.

It is expressly indicated in the preparatory works that the purpose of this new piece of legislation is to equalise the tax treatment of EU and EEA non-resident investment funds (subject, prior to the new law at issue, to a taxation equal to 26% on Italian-sourced dividends and capital gain on the sale of qualified participation in Italian companies) to the taxation regime applicable to Italian resident investment funds which, instead, are exempt from taxation on those type of income.

Notwithstanding the fact that this new piece of legislation seems to acknowledge and make amends of the abovementioned discrimination put in place so far towards non-resident investment funds compared to Italian resident investment funds in breach of the free movement of capital enshrined in Art. 63 TFEU, it is important to highlight that the new tax exemption regime provides for the exemption only starting from the date of its entry into force (1 January 2021) with no retroactive effects. This means that, with specific reference to the new dividend withholding tax exemption, only dividends paid from January 2021 onwards will fall within the scope of the mentioned exemption.

It is also worth to underline that the new piece of legislation provides for the exemption only with respect to qualified investment funds established in an EU Member State or in an EEA Member State. It does not apply to Third-Country non-resident investment funds.

At present, no indications have been provided by the Government or the Italian Tax Authorities on the documentation requirements concerning benefits from the exemption regime. Guidance on the procedure to be followed is expected to be provided in the following months.

There are important consequences with respect to refund claims that have already been submitted by non-resident investment funds for dividend withholding tax suffered in previous years (i.e. prior to 2021).

As noted, the newly enacted exemption regime does not apply retroactively (i.e. for dividends paid and capital gains accrued before 2021) and it does not apply to non-resident investment funds established in Third Countries allowing an adequate exchange of information. With respect to these two exclusions, the Italian taxation regime for non-resident investment funds still appears contrary to EU Law.

This new legislation has the “indirect” effect of strengthening (especially in a litigation phase) the position of the investment funds which already submitted or are going to submit refund claims asking for the reimbursement of Italian taxes suffered in previous years because in breach of EU law.

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