

## NEW CRITERIA SET BY ITALIAN LEGISLATION TO IDENTIFY THE TAX RESIDENCE OF COMPANIES

### 1. *Comparison of the wording of the old and new Article 73 of the Income Tax Consolidation Act (“Testo Unico delle Imposte sui Redditi” or “TUIR”)*

With Legislative Decree No. 209 of 2023 (“Decreto Internazionalizzazione”, i.e., “Internationalization Decree”), the Italian Parliament amended – among other things – certain provisions of the Income Tax Consolidation Act (TUIR) (Presidential Decree No. 917 of December 22, 1986) with specific reference to the criteria for identifying the tax residency of natural and legal persons.

The amendments introduced actually appear to transpose the interpretative guidelines applicable to the previous wordings, in order to identify the concepts in the rule itself in a more immediate manner.

In particular, the previous wording of Article 73, paragraph 3 of the TUIR indicated three possible alternative criteria to establish when a company (or entity) was “resident for tax purposes” (and thus subject to taxation) in Italy. Under the previous rule, companies were deemed to be residing in Italy if for the “greater part of the tax year” they had in the territory of the State:

- I. their registered office; *or*
- II. their administrative headquarters; *or*
- III. their main object.

Now, however, in the light of the new rule, a company is resident for tax purposes if for the greater part of the tax year it has in Italy:

- I. their registered office; *or*
- II. their place of effective management; *or*
- III. their main place of ordinary management.

In fact, the current text of the rule provides that companies and entities are subject to corporate income tax that “*those companies and entities which for the greater part of the tax year have their registered office or effective place of management or main place of business within the territory of the State. Effective place of management means the continuous and coordinated taking of strategic decisions concerning the company or entity as a whole. Ordinary management means the continuous and coordinated performance of day-to-day management acts concerning the company or entity as a whole*”.

### 2. *Registered office and branch office*

The criterion of the “registered office” remains unchanged from the previous wording. The registered office is the place indicated in the Articles of Association of the company, where the administrative organization of the company takes place or should conventionally take place. Each company may only have one registered office, which - for the purpose of fulfilling disclosure obligations - must mandatorily be notified to the territorially competent Register of Enterprises. At the registered office, notifications of deeds and correspondence will be served (except for the use of certified electronic mail), meetings of the Board of Directors and of the Shareholders will usually be held, the competent court where certain procedures are to be instituted and where registrations of company deeds are to be made will be identified.

The criterion of the registered office as a criterion of connection with the Italian territory is therefore an “objective” criterion since the registered office of the company is an information published in a register that can be accessed by everyone: in other words, it is sufficient to consult that register to know the registered office of the company which, if located in Italy, would necessarily result in the company being subject to Italian taxation.

A foreign company may also set up a “branch office” in Italy to be compulsorily registered pursuant to Article 2197 of the Italian Civil Code with the competent territorial registers together with the name of the representative in charge: also in this respect, the connecting criterion capable of attracting taxation does not seem to leave room for uncertainties of interpretation.

### 3. The place of effective management criterion

Based on this criterion, the Italian Tax Authorities could deem a foreign entity to be subject to Italian taxation if it has its decision-making headquarters in Italy, i.e., the place where the top management decisions relevant to the entity’s management are taken.

According to the rule, in fact, “effective management” means: “*the continuous and coordinated taking of strategic decisions concerning the company or entity as a whole*” (differing from “ordinary management” which would instead concern the continuous and coordinated performance of “*day-to-day management*” acts).

In order to understand whether a foreign entity may have effective management in Italy, it will always be useful to refer to the relevant rules of operation to understand who is in charge of - and how the - adoption of the strategic decisions that guide the management of the company is regulated: whether there is a board of directors<sup>1</sup>, if it is a collegiate body, or a director or directors with joint or several powers, whether there is a managing director with broad powers to determine the business strategy or other similar management body.

It is then a matter of verifying whether the aforementioned individuals or the individual top manager concretely decide the business strategy on an ongoing basis in Italy and thus “test” the circumstance on the basis of the criteria of connection with the Italian territory drawn up for natural persons by the “Internationalization Decree”<sup>2</sup>.

To give a practical example: a managing director resident for tax purposes in Italy - endowed with powers such as to have a decisive influence on the management of the company and autonomous from the collegiate management body - could abstractly satisfy the connection criterion of the place of effective management of the foreign company in Italy.

In the case where a person not formally included in the corporate structure is in charge of the foreign company - for example, a “*de facto*” director who, although has not received any express delegation of authority and is not a member of the company’s management body, is able to direct the course and management of the company’s business from Italy - the latter would be the epicentre of the “effective management” capable of establishing the entity’s tax residence in Italy.

And again, the hypothesis of “direction and coordination” exercised by Italy, should it prove to be real and continuous “interference” in the administration of the foreign company, materially violating the latter’s legal and managerial autonomy, would in theory lead to the foreign company being deemed to be a tax resident in Italy.

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<sup>1</sup> The criterion of effective management may be difficult to apply, for instance in the case of decisions of the management body taken 100% by audio/video conference (i.e., in the absence of a precise physical location).

In this regard, it is useful to recall what the Italian Supreme Court has affirmed with regard to the “*esterovestizione*” (i.e., the artificial location of an individual’s or company’s tax residence in a foreign country with more favorable tax regulation) “*in the face of a board of directors of the company composed of persons residing in different places, with decisions therefore taken by videoconference, the court, in the impossibility of establishing a precise place of meeting and resolution of the aforementioned board, has congruously valorised, for the purposes of the verification indicated in the introduction, the identification of the place where the director who gave the directives of the operation responding to the constitutive purpose of the company resides and works*”.(Cass. Pen, 16.03.2020 n. 10098).

<sup>2</sup> Pursuant to Article 2 of the TUIR, as recently amended by the “Internationalization Decree”, tax residents in Italy (for the entire year) are those who for the greater part of the tax year have in the territory of the State, alternatively:

- their residence (understood as habitual abode) as defined in Article 43 of the Italian Civil Code;
- their domicile, understood as the place where the individual’s personal and family relationships are primarily developed (the previous reference to the place of business and interests is superseded);
- their physical presence.

#### **4. The criterion of ordinary management mainly conducted in Italy**

The last criterion introduced by the Internationalization Decree bases the residence for tax purposes in Italy of the company and the entity on the basis of “ordinary management mainly conducted in the territory of the State”, namely: *“the continuous and coordinated performance of day-to-day management acts concerning the company or entity as a whole”*.

In other words, a company could be deemed to be resident for tax purposes in Italy if it normally carries out in Italy all or most of the acts relating to the normal operation of its “main” business, i.e., its “*day-by-day*” activities, conducted in Italy.

Thus, it could be said that, in this case, the legislator does not take the activities of the so-called “decision makers” as the basis for tax residency as far as managerial and strategic decisions are concerned (“effective management” as referred to above), but the activities of the foreign entity’s more operational top management (more “executive” acts).

However, as to what is actually meant by “the continuous and coordinated performance of day-to-day management acts concerning the company or entity as a whole” for the purposes of identifying the ordinary management of the foreign company in Italy, it is necessary to wait for a circular of the Revenue Agency.