CHIOMENTI

Newsletter

Tax Department

Italian tax authority's clarifications on tax monitoring obligations

Tax Ruling No. 53 of 29 May 2019

On 29 May 2019, the Italian tax authority issued Ruling No. 53/E (hereinafter, the "**Ruling**") providing for certain clarifications on the fulfillment of tax monitoring obligations by the CEO and the general manager of an Italian foundation holding assets outside of Italy. The Ruling request was aimed at asking confirmation that the CEO and the general manager are not required to file the Italian FBAR forms (*i.e.*, Section RW of their own tax returns) with respect to the foreign assets owned by the Italian foundation.

Pursuant to Article 4 of Law Decree No. 167 of 28 June 1990 (hereinafter, the "**Decree 167**"), Italian resident individuals, non-commercial entities (including trusts and foundations) and partnerships are required to report on a yearly basis – for tax monitoring purposes – any foreign investments and assets that may generate foreign-source income subject to tax in Italy. Tax monitoring rules apply not only to direct owners of foreign assets, but also to individuals that are "beneficial owners" of the foreign assets. For the purposes of identifying the beneficial owner of foreign assets, Article 4 of Decree 167 refers to the Italian anti-money laundering rules (hereinafter, the "**Decree 231**"), as amended by Legislative Decree No. 90 of 25 May 2017.

With respect to private entities such as foundations[1], Article 20(5) of Decree 231 states that the founders, the beneficiaries and the holders of management and administrative functions qualify as beneficial owners[2]. Article 20(5) does not require that the beneficial owners of a foundation exercise control over the foundation's assets.

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[1] Indeed, Article 20(5) refers to foundations under Presidential Decree No. 351 of 10 February 2000.

[2] Pursuant to Article 20 of Decree 231, the beneficial owner of entities other than individuals (*e.g.*, companies) is the person holding direct or indirect ownership or control over the entity (control requirement). With reference to companies, individuals having direct or indirect ownership of more than 25% in the share capital of the company are considered as the beneficial owners. With respect to trusts, Article 22(5) of Decree 231 qualifies as beneficial owners the settlor, the trustee, the protector, the beneficiaries and any

The Ruling has clarified that the definition of "beneficial owner" provided by Decree 231, for the purposes of Decree 167 obligations, must be interpreted in the light of the purpose of tax monitoring provisions, aimed at ensuring the correct fulfilment of tax obligations (payment of taxes and reporting of the relevant income) by Italian resident taxpayers in relation to income arising from assets held outside Italy.

Therefore, only the owners of the assets held abroad or those who have the availability of such assets are required to fulfil the tax monitoring obligations under the Italian FBAR. Conversely, according to the interpretation provided by Italian tax authority, individuals exercising the power to dispose of foreign assets on the basis of a specific appointment on behalf of the owner, such as CEOs and general managers of foundations and directors of companies, are not required to comply with tax monitoring provisions.

The tax ruling is relevant also considering that Decree 231 does not make any reference to the control requirement in order to identify the beneficial owner of a foundation.

The rationale of the tax monitoring rules provided by the Ruling and focused on the control requirement could then be even more relevant for the identification of trusts' beneficial owners, in respect of which the control requirement is an express criterion under the Decree 231.

Although Decree 231 expressly qualifies as beneficial owners the settlor, the trustee(s), the protector, the beneficiaries and any other individual exercising ultimate control over the assets, a case by case analysis should be carried out taking into account the purposes of the of tax monitoring provisions as mentioned in the Ruling. With respect to Italian resident trusts (whose beneficiaries do not have right to claim the distribution of the trust's income and principal), based on the interpretation put forward by Italian tax authority, it may be maintained that the settlor, the beneficiaries, the trustees and the protector of an Italian resident trust shall not be required to fill in the Italian FBAR of their own tax return with respect to foreign assets owned by the trust, as long as they do not hold direct or indirect ownership or control over the trust's assets. However, the trustee will be required to fulfill tax monitoring obligations in the trust's tax return.

Moreover, clarifications provided by the Ruling may be helpful to identify the beneficial owners of non-Italian resident trusts (whose beneficiaries do not have right to claim the distribution of the trust's income and principal). In general, it is debated whether the Italian resident beneficiaries of non-Italian resident trusts – holding foreign assets – are required to fulfil tax monitoring obligations or not. The clarifications provided by the Ruling could lead to argue that Italian beneficiaries of foreign trusts would not be required to prepare the Italian FBAR forms with respect to the trusts' foreign assets. This interpretation could be grounded on the followings:

(i) the beneficiaries do not have a contingent position with respect to the trust's assets and income;

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other individual exercising ultimate control over the assets (control requirement). It is worth pointing out that Article 4 of Decree 167 does not make any explicit reference to Article 22 of Decree 231 related to the identification of the beneficial owners of trusts.

(ii) the beneficiaries are not entitled to dispose or benefit from the trust's principal, and

(iii) the distribution from a non-Italian resident opaque trust to an Italian resident beneficiary is not relevant for income tax purposes in the hands of the latter[3].

Notwithstanding the above, it is necessary to take into account that the failure to file the Italian FBAR entails the application of penalties up to 30% of the value of the unreported foreign assets. Therefore, further guidance by the Italian tax authority would be needed to clarify the tax monitoring fulfillments in the hands of Italian resident beneficiaries of foreign opaque trusts.

Contacts

Raul-Angelo Papotti
Partner – Chiomenti
Head of Tax Department
T. +39 0272157855
raul.papotti@chiomenti.net

Massimo Antonini
Partner – Chiomenti
T. +39 027215 7436
massimo.antonini@chiomenti.net

Giovanni Cristofaro
Partner – Chiomenti
Head of Wealth Management Business Unit
T. +39 0646622708
giovanni.cristofaro@chiomenti.net

[3] This conclusion holds true despite Circular Letter No. 61 of 27 December 2010 seems to maintain that income derived by Italian resident beneficiaries out of opaque trusts resident in black-list States shall be subject to tax in the hands of the beneficiaries.