

# Tax Alert | Budget Law 2023

*Tax – Private equity and investment management*

Italy introduces the Investment Management Exemption with the 2023 Draft Budget Law – Additional certainty in sight for foreign investors

## Introduction

The 2023 Draft Budget Law was approved by the Council of Ministers on 22 November 2022 and sent to Parliament on 29 November 2022 for approval before year-end. The 2023 Draft Budget Law contains a significant amendment to Article 162 of the Italian tax consolidated act (“ITCA”) which clarifies that, under certain conditions, no permanent establishment (“PE”) of a foreign investment vehicle will be considered to exist in Italy because of the activities carried out therein by the investment managers. This will provide additional certainty to investors and, coupled with the tax incentives for human capital already in place, it is expected to attract additional investments into Italy.

The Italian Ministry of Economy and Finance will issue a decree aimed at enacting the new provisions.

## I Overview of the draft provisions

The amendments to Article 162 of ITCA – by implementing in Italy the s.c. investment management exemption – are aimed at excluding an Italian agency PE in the hands of non-Italian tax resident investment vehicles as a consequence of the presence in Italy of Italian or non-Italian tax resident asset or investment managers.

In particular, as regards the definition of agency PE, the new Article 162(7-ter) states that it does not arise if independent asset/investment managers (both Italian or non-Italian tax residents, including those operating in Italy through a PE), habitually and even exercising discretionary powers, (a) enter into contracts for purchasing, selling or negotiating financial instruments, derivative and receivables on behalf of foreign investment vehicles (and their

direct or indirect controlled companies), or (b) actively contribute, including with preliminary and ancillary activities, to the executions of the transactions under previous letter (a).

By presumption of law, an asset/investment manager is regarded as independent from the foreign investment vehicles (and its controlled entities), if the following conditions set forth by new Article 162(7-*quarter*) are met:

- i. the foreign investment vehicle and its non-Italian tax resident controlled companies are resident (or established) in States that allow for an adequate exchange of information with the Italian authorities (i.e., the States included in Ministerial Decree dated 4 September 1996 as amended and supplemented from time to time, s.c. White-List States).
- ii. the foreign investment vehicle meets the independence requirements that will be established by a Decree to be issued by the Minister of Economy and Finance;
- iii. the asset/investment manager, that performs its activity within the Italian territory, (a) must not hold any directorship or managing office in the corporate bodies of the foreign investment vehicle and its non-Italian tax resident controlled companies, and (b) must not be entitled to more than 25% of the profits of the foreign investment vehicle (also considering profit entitlements held by other entities of the group).

The ministerial decree will determine the profit entitlements that shall be taken into account for verifying compliance with the threshold under letter (b);

- iv. the Italian tax resident asset/investment manager, or the PE of the non-Italian tax resident entity, is remunerated at arm's length for the services supplied to the other entities of the group, and proper transfer pricing documentation is prepared. In this respect, the Italian tax authorities shall issue the relevant implementing guidelines.

Furthermore, the 2023 Draft Budget Law would introduce Article 162(9-*bis*) regarding the exclusion of the configuration of an Italian fixed place base of business PE in the hands of the foreign investment vehicle and its controlled companies. In particular, provided that the requirements set forth by Article 162(7-*quater*) are met, the Italian enterprises – that carry out their business activity in Italy through their personnel based in Italy – do not constitute *per se* an Italian fixed base of business PE of the foreign investment vehicle due to the mere circumstance that the activity rendered by the Italian enterprise is beneficial for the foreign investment vehicle.

## II Preliminary analysis

The introduction of this new provision is a welcome development as it is aimed at addressing an open technical point encountered by foreign investment vehicles relocating their key personnel to Italy. So far, certainty on such an issue has been successfully obtained through ruling procedures with the Italian tax authorities. Indeed, although a PE of investment funds cannot arise (as funds cannot retrieve business income), the issue remained for the vehicles below the funds and the asset/investment manager.

The provision does not provide an *ad hoc* definition of investment vehicles or asset/investment manager. In this respect, according to the explanatory notes of the 2023 Draft Budget Law, the definition of investment vehicles should include the “institutional investors” as defined by

Article 6(1)(b) of Legislative Decree No. 239/1996 should fall within the scope of the new Article 162(7-ter)(7-quater). According to the guidance provided for by the Italian tax authorities for the purposes of Legislative Decree No. 239/1996, an “institutional investor” is an entity, whether or not subject to tax, carrying out investment activities on its own behalf or on behalf of other persons and established in White-List States (e.g., investment funds, pensions funds, insurance companies that are subject to regulatory supervision in their States of establishment). Should the investors not be subject to regulatory supervision, a given foreign entity with specific experience and competence in financial instruments can anyhow fall within the definition of “institutional investors” if it has not been organized or incorporated to manage investments on behalf of a restricted number of participants resident of Italy or of a State not included in the White List.

With respect to condition (iv) above, it is worth highlighting that an advance ruling request aimed at confirming that the remuneration of the asset/investment manager is compliant with the arm’s length principle can be submitted to the Italian tax authorities.

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*For any further clarification please do not hesitate to contact Chiomenti’s Tax Department at [tax@chiomenti.net](mailto:tax@chiomenti.net)*

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