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ALERT MEMORANDUM

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The Italian Government Approves Tax Reform Legislation – Highlights

On April 21, 2015, the Italian Government, as part of a comprehensive tax reform which it was empowered to enact pursuant to Law of March 11, 2014, no. 23, approved draft legislation (in the form of three draft legislative decrees) introducing new rules encompassing areas that go from abuse of law to international tax and VAT electronic invoicing. This draft legislation will be shortly transmitted to the Parliamentary Commissions which are enabled to express their opinion thereon and, thereafter, will be remitted to Government for its final approval, expected to occur by the end of June.

This memorandum briefly illustrates some of the major developments and, in particular, those material to foreign investors and to businesses having international operations.

As a general and preliminary remark, it is worth immediately noting that, in line with the principles set forth in Law no. 23/2014, these rules aim principally at providing certainty to taxpayers in complying with their tax obligations and in their dealings with the tax administration. This is definitely a much awaited and favorable development that, coupled with the reform of the tax criminal system expected to be approved in June, should address widespread concerns about the Italian tax environment being unduly complex, difficult and hostile and, as a result, inherently and unreasonably risky compared to other marketplaces.

Notion of Abuse

The first draft legislative decree introduces a new notion of tax abuse and repeals the general anti-abuse rule contained in Article 37-*bis* of Presidential Decree of September 29, 1973, no. 600.

Under this new notion, tax abuse occurs when one or more transactions lacking economic substance, even if set up in compliance with tax rules, achieve principally undue tax savings. Therefore, under the new test, there are three prongs that need to be met in order for a transaction to be tainted and challenged: (i) the absence of economic substance; (ii) the achievement of undue tax savings; and (iii) such undue savings representing the main effect of the tainted transactions. When the test is met, the transaction is disregarded and the tax administration applies taxes (and issues penalties) in accordance with the avoided rules, without that impairing other legal effects thereof.

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Transactions are deemed to be lacking economic substance if they realize no material consequences other than undue tax savings and indicia of economic substance failure are identified in the inconsistency between the characterization of the individual transactions with the overall legal background applicable to the transaction viewed as a whole, as well as resorting to legal instruments that depart from those generally used in market practice. An undue tax saving is a tax benefit, even if not immediate, achieved violating the rationale underlying applicable tax rules and the achievement of such saving must be the main objective pursued by the taxpayer compared to all the other objectives of the scrutinized transactions.

Transactions justified by not immaterial genuine business purposes, including those merely improving organization or structure, and the choice among optional tax regimes or alternative legal structures generating less onerous tax charges, no longer constitute per se abuse.

Moreover, transactions falling within the scope of the new notion of abuse are only those that cannot be challenged pursuant to specific tax rules and, by definition, they cannot trigger criminal liabilities. This development coupled with the limits imposed to the statute of limitations extension discussed below, constitutes a major important development that is expected to significantly reduce the massive criminal investigations and cases historically tried in connection with elusive fact patterns, including those currently pending, thanks to the general criminal law principle whereby newly-enacted rules more favorable to the defendant apply on a retroactive basis.

Finally, taxpayers can seek preliminary rulings to ascertain whether a set of transactions do not constitute a case of abuse and special procedural rules are contemplated to strengthen defense rights, contemplating, among other things, the tax administration having the burden to prove all features of the abuse and the taxpayer bearing the onus of proof only to corroborate valid business reasons.

The new rule should become effective as of the first day of the calendar month following the entry in force of the legislative decree and apply also to transactions executed before, but not yet assessed at, that date.

Limits to Statute of Limitations Extension in case of Criminal Challenge

Under current rules, if a fact pattern challenged constitutes a possible tax crime, the ordinary statute of limitations is doubled, therefore bringing the ordinary term to up to 10 years. This rule has been applied very aggressively as the current interpretation, blessed by the Constitutional Court, entails the possibility to re-open closed years if a potential tax crime commission is merely notified to the Public Prosecutor’s office. Over a relatively short period of time, this approach has triggered a tremendous inflation of

contentious matters over closed years, featuring delicate criminal pitfalls, and generated huge uncertainty for taxpayers.

The draft legislation approved limits the scope of the statute-of-limitations doubling rule by imposing that the notice to the Public Prosecutor's office be made no later than the expiration of the ordinary statute of limitations, therefore finally eliminating the risk of challenges on tax periods already closed for assessment that are perceived by taxpayers, in particular foreign taxpayers, as unduly harsh and unreasonable compared to international market standards.

For the transitional period, it is contemplated that tax assessments notified prior to the new rule becoming effective are governed by the current rule. Therefore, it is very likely that the tax administration will accelerate the issuance of pending assessments in the coming weeks in order to ring-fence the benefit of the statute of limitations doubling illustrated above to fact patterns already audited.

Cooperative Compliance

Following OECD guidelines and in light of the increased materiality of tax risk-related effects in the corporate and regulatory areas, it has been established a cooperative compliance program, already launched on a trial basis in 2013, to grant large corporations (in a first phase, the program is open to companies participating to the pilot or having a turnover not lower than Euro 10 billion) the option to monitor and manage tax risk.

On a mere voluntary basis, the above-mentioned companies having internal systems enabling precise allocation of tax competences and responsibilities, efficient procedures to identify, assess, manage and control tax risk as well as to remedy possible loopholes, can access this regime within 120 days from the request filing. The tax administration ensures assessment of such systems and procedures on a continuative basis applying transparent, objective, reasonable and proportional criteria. As a result of this exercise, it may request necessary changes which the taxpayer would be obliged to implement.

Benefits of the regime include preliminary discussions with the tax administration about matters that may generate tax risks, a reduced timeline for ruling procedures (45 days rather than the ordinary 120), a 50% haircut on penalties, the tax administration's waiver of the guarantees ordinarily due in connection with tax refunds and direct communication with the Public Prosecutor's office in case of a criminal challenge that should ensure shelter thereof because of the full disclosure made on the taxpayer's side by entering into the cooperative compliance program.

New International Ruling Proceedings

The international ruling procedure is entirely revisited and covers four main areas: (i) transfer pricing and assessment of exit or entry asset values in case of outbound and inbound residence transfers; (ii) existence of a permanent establishment; (iii) imputation of profits or losses to permanent establishments; and (iv) domestic or treaty tax regimes applicable to cross-border dividends, interest, royalties and other income. The ruling request must be filed in advance of the material tax event occurring according to an ad hoc procedure set in regulations to be issued within 90 days from the date of the decree becoming effective.

The ruling procedure will result in the execution of an agreement that, subject to the facts and circumstances not changing, will have a 5-year period validity, including the tax period of its execution and the following 4, with an option (i) to extend it to preceding periods and, (ii) in that case, to amend the related returns and having the penalties waived. This is a remedy needed to shelter undesirable negative tax consequences if an agreement is not reached before the end of the tax period of filing. In the absence of such an option and given the current average time-frame of international ruling proceedings (currently ranging between 18 and 24 months), the success of this new procedure would have been significantly impaired. If these agreements are subsequent to the execution of a treaty mutual agreement with foreign competent authorities, they are effective as of the later of the tax period as of which such mutual agreement runs or the tax period of the Italian ruling filing. These agreements shelter from future assessments on all matters addressed therein.

The new regime will be effective as of the date indicated in the regulations mentioned above.

New Domestic Ruling Proceedings

A brand new ruling procedure has been devised in order to provide enterprises, whether domestic or foreign, with a useful tool ensuring certainty as to the tax regime applicable to new investments to be made in Italy having a value not lower than Euro 30 million, including investments in distresses companies.

The taxpayer files a business plan detailing the magnitude, timing and means of the investment, its impact on job creation and on the Italian tax system. The ruling, to be issued within 120 days from filing (otherwise, it is assumed that the tax administration agrees with the solution articulated by the taxpayer in the ruling request filing), can address any feature material to the investment, including, for example, possible abuse features, the availability of tax consolidation or participation exemption regimes, the disapplication of CFC rules, the existence of a business as a going concern or the VAT regime applicable to the transactions and it locks the analysis and related outcome vis-

à-vis the tax administration insofar as the facts and circumstances or applicable rules do not change.

The regime will become effective as of the date indicated in a Ministerial Decree detailing the procedure, to be issued within 90 days from the decree's date of effectiveness.

Dividends Distributed out of Profits Earned in Black-Listed Jurisdictions

Pursuant to currently applicable rules, dividends distributed out of profits earned in black-listed jurisdictions by direct or indirect subsidiaries, are entirely included in the recipient shareholder's taxable income. However, this results in the regime being harsh and unfair for indirect minority equity holders that generally cannot access the information necessary to ensure compliance therewith. In addition, a further distortion stems from foreign tax credits not being granted, resulting in these dividends (as well as the gains realized upon the disposal of the related equity holding not eligible for the participation exemption regime) being taxed more than CFC income that, albeit taxed on an accrual basis, can benefit from the availability of foreign tax credits.

These issues are now addressed by (i) limiting the application of the current rules to (x) direct equity holdings in a company located in a black-listed jurisdiction or (y) indirect holdings insofar as the intermediate white-listed subsidiary/ies are more than 50%-owned; and (ii) granting to the Italian resident controlling shareholder a pro-rata foreign tax credit for taxes levied on the black-listed subsidiaries' profits out of which the dividends are distributed.

As under the current rules, a taxpayer can invoke the application of the participation exemption regime insofar as it files for, and obtains a positive answer to, an ad hoc tax ruling. Thanks to these amendments, the ruling becomes optional. In that event, the taxpayer will have to disclose the dividend ditribution (or gain realization) at issue in its tax return. Failure to comply with the diclosure obligation will be subject to an ad hoc penalty equal to 10% of the undisclosed income that, however, cannot be lower than Euro 1,000 and higher than Euro 50,000.

These amendments will become effective as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Interest Expense Allowance

The current interest expense allowance limitation, capped at 30% of EBITDA, enables to include in such base the available EBITDA of foreign-controlled subsidiaries. While originally introduced to avoid discrimination between purely domestic groups and international groups, the foreign-controlled subsidiaries EBITDA inclusion has been

considered to generate the undesirable effect of incentivizing groups to incur deductible debt in Italy to enable location of profitable businesses abroad. Hence, the rule will be repealed and instead foreign-source dividends distributed by controlled-foreign subsidiaries will be added to the EBITDA material to compure the 30% cap, on the notion that groups having an international geographical reach should enjoy an additional interest expense allowance insofar as there is an actual profit repatriation.

Moreover, it is contemplated the repeal of the last part of a regime dating back to the mid-'90s, almost entirely repealed in the past couple of years in connection with the Government's efforts to boost mid-cap companies' access to capital markets, therefore eliminating the last hindrance for non-listed issuers to access the private placement market. This rule still limits interest expense allowance paid on commercial paper and non-listed bonds issued by non-listed companies held directly or indirectly by shareholders owning more than 2% of the issuer's equity: interest incurred on such debt exceeding the official interest rate set by the European Central bank increased by 2/3 cannot be deducted (given current rates, virtually all interest is caught under the limitation). Once the legislative decree becomes effective, such debt will be treated as any other debt and its interest subject to the ordinary interest expense limitation rules.

Finally, it is contemplated that interest accrued on facilities guaranteed with mortgages over real estate intended to be leased will be fully deductible for all companies the main business of which is real estate. This rule establishes the boundaries of a specific allowance introduced in 2007 to ensure that it be available to all real estate companies and not only to those that are in the real estate leasing/managing business, as the tax administration had questionably stated in 2009, generating litigation on the matter the outcome of which has been so far confuting the interpretation adopted by the tax authoriries.

The amendments will become effective as of the tax period following the one pending when the legislative decree will become effective (conceivably, as of the 2016 tax period).

Expenses incurred in Black-Listed Jurisdictions

This regime is amended to enable taxpayers to have certainty as to the deduction of expenses incurred in connection with their dealings with counterparties, whether related or unrelated, located in black-listed jurisdictions. The rationale underlying the current rule is to avoid that sham transactions be put in place with tax-haven providers, therefore enabling the creation of hidden funds abroad. Coherently with its spirit, these expenses can be deducted if the taxpayer can provide evidence that (i) the provider has an actual commercial activity in its reference market; or (ii) the transaction was actually executed and responded to a genuine business purpose. This regime has generated an

incredible amount of challenges and litigation, at times triggering irrational consequences.

The amending rule, following a recent development already included in the 2015 Budget Law, firstly clarifies that the material black-listed jurisdictions are those that will be identified with an ad hoc Ministerial Decree that will assess them only on the basis of an adequate information exchange program in force with Italy and not to the minimum effective taxation test, currently also contemplated.

Secondly, it repeals the first exemption test illustrated above under (i), that, especially in dealings with unrelated parties has proved hard to be satified and it establishes that the expense can be always deducted up to its fair market value, it being understood –and the rule states that explicitely– that the transaction generating the expense must be actually put in place. This on the notion that if the expense is incurred at market value or at a higher value, it would be unreasonable to assume that it was executed to shift gross income and create hidden untaxed funds in tax havens.

The second exemption test under (ii), above remains as is and it ensures that, should the expense incurred be higher than fair market value, the taxpayer may deduct the entire expense insofar as that test is met.

The new rule will apply as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Permanent Establishments: Tax Regime of Italian PEs and Foreign Branch Exemption

A first set of rules aims at reorganizing the tax regime applicable to Italian PEs by simplifying their tax compliance obligations and providing the following three substantive developments: (i) the repeal of the rule that, in the absence of a treaty, enables Italy to tax certain Italian-source income even if not effectively connected to the PE; (ii) the obligation to prepare accounts in line with those due by resident enterprises operating in the same industry sector; and (iii) an explicit reference to the endowment fund to be determined according to the OECD criteria, to be spelled out in ad hoc regulations, the first on which (likely, regarding the banking sector) shall be issued within 90 days from the date of the effectiveness of the legislative decree. In this respect, it is also stated that the tax administration cannot apply penalties to assessments issued prior to the issuance of such regulations.

A second set of rules introduces the brand new regime of the branch exemption enabling to exclude from Italian taxation profits and losses realized via a foreign PE. The regime is elective and the option cannot be revoked and applies to all PEs. If among the exempted PEs there are any (i) located in black-listed jurisdictions or (ii) that

generate more than 50% passive income subject abroad to an actual taxation lower than 50% of the tax it would be subject to in Italy, they fall out of the scope of the exemption and are taxed according to CFC rules, unless one of the available CFC exemption tests is met. For existing PEs, the election can be made before the end of the second tax period following the one in which the legislative decree will become effective (conceivably, 2017).

Entering the branch exemption regime may trigger a loss recapture when, in prior years, the exempted PE has generated losses that have offset the Italian head-office's taxable income: if in the 5-year period preceding the branch exemption election, the PE generated in the aggregate a loss, future profits earned by that PE will be currently included in the Italian head-office's taxable income up to the value of that loss; excess carried-forward FTCs relating to that same PE can be used to offset Italian taxes.   This rule applies also in case of a PE transfer, or of a part thereof, to a related party having opted for the branch exemption: in that case, the transferor will have to represent the amount of the loss realized by the transferred PE in the preceding 5-year period so that the new head-office will include the acquired PE's future profits in its taxable income up to the value of that loss.

The tax admnistration can be consulted with a ruling procedure to ascertain that the foreign activities do constitue a PE and will make public disclosure of fact patterns found to be abusive in connection with this regime.

Both sets of rules will become effective as of the tax period following the one pending when the legislative decree will become effective (conceivably, as of the 2016 tax period).

Tax Consolidation

In compliance with recent European Court of Justice case law (cases C-39/2014, C-40/2014 and C-41/2014), the domestic tax consolidation rules are amended in order to enable EU or EEA-based controlling companies to ensure access to the Italian tax consolidation regime to their Italian sister permanent establishments or subsidiaries. The amendments include a number of procedural clarifications and delegate further detailed procedural features to an ad hoc regulation to be issued within 30 days from the date of the legislative decree's effectiveness.

The new rule will apply as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

CFCs

Under current rules, the CFC regime application may be avoided if a taxpayer obtains a positive ruling from the tax admnistration that confirms that one of the two exemption tests contemplated (i.e. (i) the existence of an actual commercial activity in the reference market, or (ii) evidence that the CFC holding does not aim at parking income in a tax haven) is met. As a result of the amendments, filing for a ruling becomes optional. That entails that a taxpayer may provide evidence corroborating one of the tests being satisfied in an audit scenario. No tax assessment can be issued if the taxpayer has not been given the opportunity to provide useful evidence of one of the exemptions being applicable within 90 days from the audit notice. Moreover, the tax assessment needs to explain why the evidence possibly provided by the taxpayer was not deemed material or sufficient to enjoy the exemption.

The same approach is adopted to CFCs located in white-listed jurisdictions (i.e. subsidiaries generating more than 50% passive income subject abroad to an actual taxation lower than 50% of the tax it would be subject to in Italy). However, in order to avoid significant compliance burdens in connection with the assessment of the actual taxation test, the tax administration is bound to issue ad hoc regulations indicating simplyfied computation criteria.

CFC holdings must be disclosed to the tax admnistration even if the taxpayer believes that they are eligible for exepmption. Failure to comply is sanctioned with an ad hoc penalty of 10% of any undisclosed CFC income that, however, can never be lower than Euro 1,000 and higher than Euro 50,000.

Moreover, it is established that CFC income shall be computed on the basis of Italian rules, other than those enabling to spread gains over a set period of time.

Finally, CFC rules apply only to controlled subsidiaries and no longer to equity holdings not entailing control (20% or more of value).

These amendments will apply as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Tax Residence Transfer within the EEA related Issues

In line with EU law as interpreted by the European Court of Justice (Case C-371/2010), outbound corporations' tax residence transfer to EU or EEA countries that have a tax receivables collection program with Italy, may benefit from a tax deferral at the option of the taxpayer. This rule is amended to ensure that the same option be available in case such transfer should relate to assets pertaining to a permanent establishment set up as

a result of a prior outbound residence transfer or should stem from a merger, a spin-off or an asset contribution.

Moreover, a new regime governs the asset and liability entry values in case of inbound tax residence transfers. As a general rule, asset and liability entry values are equal to their fair market value even if no exit tax is levied abroad, insofar as the company is transferring from a white-listed country. Otherwise, such values are equal to (i) the lower of historical cost, book value and market value for assets, and (ii) the higher among the those items for liabilities, unless entry values are set pursuant to an agreement entered into with the tax administration as a result of the international ruling request proceeding illustrated above.

This rule will be applicable as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Receivable Write-Downs

With the amendments included in this set of rules, it is intended to close the loop on a few items material in this area, quite sensitive to both marketplayers and the tax administration, especially in the current anti-cyclical economy.

Under current rules, cancellation of debt income (CODI) resulting from the waiver of a receivable made by a direct shareholder of the debtor is fully exempt. With a view to limiting arbitrages possibly resulting from the original creditor selling at a fully deductible loss a receivable to its debtor's direct shareholder who in turn waives it, therefore generating a fully exempt gain in the debtor's hands, the current CODI exemption is now capped at the tax basis the shareholder has in the waived receivable. This means that any difference between the debt's face value and such tax basis would constitute fully taxable CODI for the debtor. The tax basis needs to be communicated by the shareholder in the form of an affidavit, otherwise it will be deemed to be zero and, as a result, the entire debt's amount would constitute a taxable gain. Same consequences arise in case of conversion of debt into equity whether executed by means of a receivable contribution or a share capital increase subscribed by offseting the receivable held vis-à-vis the equity issuer. In this case, the tax basis that the shareholder acquires in the newly-issued shares is equal to the tax basis it had in the contributed or offset receivable, net of any related write-downs that become deductible as a result of the the conversion. However, any such waiver/contribution/offset occurring in the context of a bankruptcy proceeding fall within the scope of the special rules illustrated below, that instead enable a full allowance.

CODI is exempt if arising in the context of bankruptcy proceedings or debt restructuring plans. The current rule, however, limits the exemption to Italian proceedings or plans, therefore creating an unfair and unreasonable discrimination if CODI results from

equivalent foreign proceedings and plans. Hence, the rule is amended to extends the application of this regime also to Italian recovery plans as well as to the foreign proceedings equivalent to the Italian ones now contemplated.

Finally, in order to eliminate the uncertainities currently faced by creditors as to the material timing of a loss generated by a receivable write-down, a precise timing rule is provided for receivables that are de minimis or claimed vis-à-vis a debtor that is subject to a bankruptcy proceeding. Such loss is now deductible in the tax period in which it is accrued for accounting purposes which, however, can never be subsequent to the tax period in which a complete write-off should occur (for instance, because the receivable is disposed of or has expired).

This set of rules will be applicable as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Foreign Tax Credits

Foreign tax credit rules have also been revisited to extend to all taxpayers certain regime features currently available only to enterprises, including (i) the possibility to claim a FTC for taxes levied abroad if they are paid (and are no longer refundable) within the deadline of the tax period following the tax period of reference (generally, Septemebr 30 of the second year following the year in which the foreign income is earned and currently included in the Italian taxable income), and (ii) the 8-year carry-forward and carry-back of the excess FTCs. This rule will be applicable as of the tax period pending when the legislative decree will become effective (conceivably, as of the 2015 tax period).

Moreover, it is clarified, with a retroactive effect, that FTCs are always available for taxes covered under conventions against double taxation in force with Italy; otherwise, a FTC can be granted for any other tax or levy on income and, in case of uncertainty as to the nature of the foreign tax, a ruling request can be filed.

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Should you have any questions with respect to these recent Italian tax developments, please not do hesitate to contact Vania Petrella (tel.: + 390669522204; e-mail: vpetrella@cgsh.com) or Paola Albano (tel.: +390669522637; e-mail: palbano@cgsh.com) in the Rome office, Gianluca Russo (tel.: +390272608226; e-mail: grusso@cgsh.com) in the Milan office, or any of your regular contacts in the Tax or other practice groups at the firm.

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