

Italy holds public consultation on new transfer pricing rules

Italy has launched a public consultation on new draft transfer pricing regulations containing further guidance on transfer pricing criteria and methods, write Antonella Della Rovere and Federico Vincenti of Crowe Valente/Valente Associati GEB Partners.

On April 24 2017, the Italian provision on transfer pricing, article 110 paragraph 7 of the Italian Income Tax Code, was amended to clearly and definitively define and establish the principle of open-market conditions.

According to the amended provision, profit from transactions between Italian enterprises and related foreign enterprises shall be estimated “by reference to the conditions and prices that would have been agreed between subjects operating in open market conditions under comparable circumstances”.

The amended provision referred to further guidance on the transfer pricing criteria and methods, in line with the respective OECD Guidelines, to be provided by virtue of the forthcoming Ministerial Decree.

In this regard, the Ministry of Economy and Finance launched on February 21 2018 a public consultation on the Draft Ministerial Decree (draft decree), which contains the guidelines on the application of transfer pricing rules.

In particular, the draft covers the following topics:

- Definitions to be considered within a transfer pricing context, i.e. related parties, controlled transactions, terms of transaction, etc. In particular, following the draft decree, the concept of control seems to be related to the cases where a company owns, directly or indirectly, more than 50% of the shares of another company as well as to all cases in which a set of circumstances is indicative of a given company's influence over the entrepreneurial decision of another;
- Notion of comparability and economically relevant characteristics to be taken into account for the comparability analysis; in this regard, the provisions of the draft decree are fully aligned with the OECD Guidelines;
- Circumstances under which more transactions could be aggregated for transfer pricing purposes; in this regard, in cases where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis, the draft decree provides the possibility to “aggregate” transactions for the comparability analysis and for the selection of the most appropriate method;
- Criteria for selecting the best transfer pricing method to be adopted in accordance with OECD guidelines. In this regard, the draft decree indicates the five methods to be analysed to verify compliance with the arm's-length principle - the comparable uncontrolled price method (CUP), the cost plus method, the resale minus method, the transactional net margin method and the profit split method - and adopts the so-called “best method rule”. Therefore, it is necessary to select the most appropriate method for a particular case, taking into account the strengths and weaknesses of the five methods, the appropriateness of the method considered in view of the nature of the controlled transaction, the availability of reliable information and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them. However, as indicated in the OECD Guidelines, where the traditional transaction method and the transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method. Moreover, where the CUP method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is to be preferred. The draft decree underlines that the audit by the tax authority must be performed on the basis of the transfer pricing method selection by taxpayer;
- Determination of the arm's-length range; in this regard, the provisions of the draft decree are fully aligned with the OECD Guidelines.

Moreover, the Italian legislator introduced on April 24 2017 the new article 31 *quater*, paragraph 1 c) of the Presidential Decree No. 600/1973, which refers to transfer pricing adjustments by foreign tax authorities. Where adjustment is final, leading to an increase of the taxable base in a foreign jurisdiction, the Italian taxpayer is now allowed to initiate a procedure in order to obtain a corresponding decrease of the taxable income of the Italian enterprise without the activation of a mutual agreement procedure (MAP).

In this regard, the public consultation mentioned above concerns also a draft of the instructions related to the new procedure, to be issued by the Italian tax authority. The instructions provide details for the application by the taxpayer, steps and timing of the procedure, and interactions with the MAP.

Finally, the public consultation concerns the official translation of the relevant parts of the OECD Transfer Pricing Guidelines released in July 2017 published by the Ministry of Economy and Finance.



*Antonella Della
Rovere
Partner*

*a.dellarovere
@gebnetwork.it*



*Federico
Vincenti
Tax man-
ager*

*f.vincenti
@gebnet-
work.it*