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As from 2008 the Italian tax legislator shifts from “black list” to “white list”.

The “Italian Budget Law” for 2008 (Legge 24.12.2007, n. 244, Art. 1, paragraph 83) introducesA. 168-*bis* in the Income Tax Act (hereinafter T.U.I.R.).

The new provision aims at simplifying the numerous and non coordinate anti-avoidance domestic rules regarding “tax havens”.

1. The previous regime.

Under the previous rules, a foreign country was considered to be a tax haven under Italian tax law, when two requirements were met:

– “lack of cooperation with the Italian Tax Authorities” and
– “remarkable lower taxation compared to Italian taxation”.

Based on those criteria “tax havens” were included in three “black lists”, which referred respectively to:
a) place of residence of individuals,
b) deductibility of costs with companies located in tax havens and
c) controlled foreign companies (i.e. C.F.C.).

* * *

a) The first black list was enacted by the Ministry of Finance with the Decree (D.M.) 4th May 1996, quoted by Art. 2, paragraph 2-*bis*, T.U.I.R., which provides that Italian individuals moving their residence to tax havens are deemed to be still resident in Italy for tax purposes, unless they prove the contrary.

* * *

b) The second black list was enacted by the D.M. 23rd January 2002, mentioned by Art. 110, paragraphs 10 and 11, T.U.I.R., which denied the deductibility of costs concerning operations between an Italian company and a foreign company located in a tax haven, unless the Italian company proves that the foreign enterprise mainly carries out effective commercial activities.

* * *

c) The third black list was enacted by the D.M. 21st November 2001, as provided for by Art. 167 T.U.I.R. (i.e. *CFC legislation rules*). According to this provision, the income of a controlled foreign company located in a tax haven is deemed to be realised by the Italian controlling company and therefore taxed in Italy. This provision does not apply if the Italian company proves alternatively that:
a) the controlled foreign company carries out its main business in the country where it is located;
b) the consequence of the participation is not to locate income in tax havens.

* * *

Furthermore, D.M. 4th September 1996 enacted a “white list” including the so called “virtuous countries”

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which cooperate with the Italian Tax Authorities under Double Tax Conventions. The white list regarded:

– tax exemption of capital gains deriving from Government securities and bonds paid out to persons resident in countries cooperating with the Italian Tax Authorities (as provided by Art. 6, of the Decree having force of law 1st April 1996, n. 239);
– deductibility of social security contributions paid out to persons resident in: UE countries or countries joining the European Economic Area (EEA) and included in the D.M. 9.4.1996 (as provided by Art. 10, paragraph 1, letter e-*bis*, T.U.I.R.);
– trusts, which are deemed to be located in Italy if: 1) they are established in a country not included in the white list and 2) the settlor or the beneficiary is an Italian resident, or 3) an Italian resident transfers to that trust the property of a real estate in Italy (as provided by Art. 73, paragraph 3, T.U.I.R.).

2. The new regime.

Under art. 168-*bis* T.U.I.R., the qualification of "tax haven" is essentially based on the lack of cooperation with the Italian Tax Authorities. The criterion of a "remarkable lower taxation compared to Italian taxation" is considered as an additional criterion for specific purposes.

Moreover, the three "black lists" will be replaced by three "white lists" indicating the so called "virtuous" countries. Accordingly, the expression "tax havens" will simply refer to those countries which are not included in the white lists.

* * *

a) The first white list will include only those countries which grant a minimum level of cooperation with the Italian Tax Authorities, with regard to:

- deductibility of costs concerning operations with foreign companies;
- tax avoidance legislation rules concerning trusts' place of residence;
- deductibility of social security contributions.

* * *

b) The second white list will include those countries applying <u>both</u> a minimum level of cooperation with Italian Tax Authorities <u>and</u> a remarkable lower taxation compared to Italian taxation, with regard to:

- controlled foreign companies legislation;
- dividends and interests paid to Italian shareholders by non resident corporations;
- capital gains from participations in non resident corporations;
- non resident small enterprises excluded from the "tax consolidation regime";
- withholding tax on dividends deriving from non resident corporations;
- anti-avoidance legislation (Art. 37-*bis*, D.P.R. 1973, n. 600).

* * *

c) The above mentioned white list of 4 September 1996 will be still in force as a third white list, with exclusive reference to the tax exemption of capital gains deriving from Government securities and bonds paid

to individuals resident in countries cooperating with the Italian Tax Authorities.

3. Under the new rules, the "lower taxation criterion" is replaced by a "cooperation criterion".

The new "cooperation criterion" will characterize each of the three white lists, becoming the main criterion for identifying "tax havens", instead of the "lower taxation criterion".
As a consequence, Italy complies with 2001 Progress Report on "Harmful Tax Competition", issued by the OECD.
This reform may benefit those countries characterized by a low level of taxation, which will cooperate with Italy under a Double Taxation Treaty. This is the case of Malta, Mauritius, South Corea, United Arab Emirates, which are still included in the "CFC black list", because of their low tax level. These countries are now likely to be included in the "white lists" of "virtuous" countries because of their "full cooperation" with Italy.
Conversely, countries which do not cooperate with Italian Tax Authorities are penalized. This case could involve Switzerland and also UE countries such as Austria and Luxemburg. As a matter of fact, they could be treated as tax havens, despite their "ordinary" level of taxation.

4. The transitional period.

These changes will not become immediately effective. The reform provides a five-year transitional period, during which the new white lists will include only those countries that are not considered as tax havens under the previous legislation.
During the transitional period, new exchange of information agreements might be signed by those countries – such as Albania, Saudi Arabia, Giordany, Libya, Senegal, Niger, Chile and Peru – which are not currently included in any black list, but at the same time should be excluded from the white lists due to the lack of a cooperation with Italy.

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