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Newsletter n. 2/2022

Taxation of capital gains under "*res non dom*" regime

The so called "*res non dom*" regime was introduced by the article 24-*bis* of the Income tax Consolidated Law[1] in 2016. This tax regime, concerning incomes produced abroad, is an optional tax regime, applies only to individuals and requires a choice of the taxpayer.

It can be applied if:

1. the taxpayer transfers his fiscal residence from a foreign country to Italy (art. 2, par. 2, Income tax Consolidated Law[2]);
2. the individual's fiscal residence was established in a foreign country at least for nine of the ten tax periods preceding the beginning of the option (art. 2, par. 2, Income tax Consolidated Law).

The "*res non dom*" regime allows to pay an alternative tax on incomes produced abroad, <u>if they respect</u> the conditions set in art. 165, par. 2, Income tax Consolidated Law[3]. This alternative tax does not operate for incomes <u>produced</u> in Italy by the new resident, which are taxed according to the ordinary rules concerning resident individuals.

[1] Decree of the Italian President (DPR) n. 917/1986.
[2] Art. 2, par. 2, D.P.R. n. 917/1986 establishes that "*regarding to income taxes, individuals are considered resident in Italy if, for the majority of the tax period, they are registered in the register of resident population or their residence or domicile is in Italy pursuant to the provisions of the Civil Code*".
[3] Art. 165, par. 2, D.P.R. n. 917/1986, establishes that "*incomes are considered produced abroad on the base of criteria reciprocal to those of art. 23 set for identifying the ones produced in Italy*".

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Having regard to the *quantum debeatur*, taxpayers applying the "*res non dom*" regime have to pay a fixed tax of € 100.000 for every tax period in which the option is valid, no matter of the type or amount of incomes produced abroad.

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Responding to an anti-avoidance purpose, the legislator has established that, for the first five tax periods from the coming into force of the option, capital gains produced by the disposal of qualified shareholdings held in non-resident legal entities or companies, and defined in art. 67, par. 1, let. c), Income tax Consolidated Law, cannot take advantage of the "*res non dom*" regime.

In particular, the law considers "*qualified shareholding*":

a) with regards to company listed on regulated markets, shareholdings which confer a percentage of vote above the 2% or stock ownerships higher than 5%;
b) with regards to company not listed on regulated markets, shareholdings which confer a percentage of vote above the 20% or stock ownerships higher than 25%.

This rule avoids that an owner of a qualified shareholding, related to a foreign company and able to produce a large capital gain, moves his residence to Italy just in order to benefit from the tax regime. Without this provision, after paying the alternative income tax of € 100.000 an individual could transfer again his residence in another Country, avoiding paying the capital gain on a regular basis.

For this reason, the "*res non dom*" cannot be applied to capital gains by the disposal of qualified shareholdings within five tax periods from the coming into force of the option. Therefore, if the alienation occurs before the end of this period, the capital gain will be subject to the ordinary rules provided by art. 68, par. 3, Income tax

Consolidated Law, which establishes that taxable income is the 40% of its amount.

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The capital gains derived from the disposal of qualified shareholdings are defined as the difference between the consideration received by the taxpayer and the recognized fiscal cost of the shareholding (art. 68, par. 6, Income tax Consolidated Law).

Shareholdings held by individuals moving their residence to Italy are considered as goods introduced for the first time in the Italian tax system, so that it might be problematic determining their real fiscal cost.

In order to estimate the value of the participation held by new residents, the Italian tax system identifies the fiscal cost in the purchase consideration. This value may increase if the foreign Country taxes, in an ordinary way, individuals who move to Italy (so-called "*exit tax*").

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In summary, the "*res non dom*" regime, and the consequential flat tax of €100.000 per year, is applicable to the disposal of shareholdings if:

a) no qualified shareholding is involved;

b) the qualified shareholdings are sold after the fifth tax period from the start of validity of the option.

It is important to underline that the legislator has given a specific tool to understand if the individual can benefit or not of the "*res non dom*" regime. According to art. 24-*bis*, par. 3, Income tax Consolidated Law, the foreign individual may submit a tax ruling to the Italian tax authority in order to receive an opinion regarding the compliance with requirements for accessing the regime (this specific tool is provided by art. 11, par. 1, let. b), Charter of Taxpayer's Rights).

The presentation of a tax ruling is just an option; it is not necessary in order to access the "*res non dom*" tax regime. Nonetheless, the use of this tool is suggested for people who want to benefit of this tax regime as the answer of the Tax Authority constitutes an interpretation which allows the individual to get, *ex ante* and with an official opinion, the authorisation to access the "*res non dom*" regime.

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