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*Subtopic 2) – Domestic Measures Against the Improper Use of Tax Havens*

**A comparison between the old and new Italian regulation for the selection of tax havens after Law December 24, 2007, No. 244**

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# Summary

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# INTRODUCTION

Article 1, paragraphs 83 to 90, Law December 24, 2007, No. 244 (Finanziaria 2008) ("Law 244") introduced important changes in Italian anti-avoidance tax law in order to identify tax havens.

The new regulation reverses the criteria for identifying tax havens, switching from a system (substantially) based on black lists, with positive identification, to a system (completely) based on white lists, with negative identification.



## THE OLD / CURRENT REGULATION

Before the reform made by Law 244, the identification of tax havens, under the anti-avoidance domestic rules, was done thanks to one white list and three black lists:

- a) Ministerial Decree of September 4, 1996 (**white list**);
- b) Ministerial Decree of May 4, 1999 (**black list**);
- c) Ministerial Decree of November 21, 2001 (**black list**);
- d) Ministerial Decree of January 23, 2002 (**black list**).



## THE OLD / CURRENT REGULATION

In particular:

- a) The Ministerial Decree of September 4, 1996 (**white list**) is applied to the following cases:
  - (i) exemption of the interests on bonds and other financial incomes (Article 6, Legislative Decree No. 239/96, Article 5, Legislative Decree No. 461/97);
  - (ii) presumption of residence (in Italy) for trusts if one of the beneficiaries is resident in Italy (Article 73, par. 3, d.P.R. December 22, 1986, No. 917, income tax consolidated text, "TUIR").

The criterion chosen: (only) the exchange of information with Italian Tax Authorities.



## THE OLD / CURRENT REGULATION

In particular:

- b) The Ministerial Decree of May 4, 1999 (**black list**) is applied to individuals.

Article 2 TUIR sets up a presumption of residence in Italy, unless the contrary is proved, for Italian citizens removed from the registers of residents and transferred in Countries which have a preferential tax regime.

The criteria chosen: the exchange of information with Italy **and** the (lower) tax rate.



## THE OLD / CURRENT REGULATION

In particular:

- c) The Ministerial Decree of November 21, 2001 (**black list**) is applied to the following cases:
  - (i) CFC rules (Articles 167 and 168 TUIR);
  - (ii) exemption regime of dividends and capital gains (Articles 47, 68, 87 and 89 TUIR).

The criteria chosen: the exchange of information with Italy **and** the (lower) tax rate of the foreign State **or** other equivalent criteria (see the paper of Dott.ssa Paola Batalocco).



## THE OLD / CURRENT REGULATION

In particular:

- d) The Ministerial Decree of January 23, 2002 (**black list**) is applied to the following cases:
  - (i) non deductibility of expenses as set out by Article 110, paragraph 10, TUIR (see the paper of Dott.ssa Teresa De Toro);
  - (ii) withholding tax on capital gains, as set out by Article 26, paragraph 5, d.P.R. 600/73.

The criterion chosen: exchange of information with Italy **or** the (lower) tax rate of the foreign State **or** other equivalent criteria.



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

Three new **white lists**:

- a) white list referred to the residence of individuals under Article 2, paragraph 2 *bis*, TUIR;
- b) white list under Article 168 *bis*, paragraph **1** (**adequate exchange of information**), TUIR referred to:
  - (i) non deductibility of expenses;
  - (ii) presumption of residence for trusts;
  - (iii) exemption for interests and other financial incomes;
  - (iv) withholding taxes on incomes from capital.
- c) white list under Article 168 *bis*, paragraph **2** (**adequate exchange of information + lower tax rate**), TUIR referred to:
  - (i) dividends and capital gains exemptions;
  - (ii) to the CFC rules.



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

- a) white list referred to the residence of individuals under Article 2, paragraph 2 *bis*, TUIR.

Old/Current regulation	New regulation
<p data-bbox="375 740 793 781">Article 2, par. 2 <i>bis</i> TUIR</p> <p data-bbox="144 805 1039 1247">Are deemed to be resident, unless the contrary is proved, Italian citizens removed from the registers of residents and migrants in Countries or territories which have a preferential tax regime, identified by decree of the Ministry of Finance to be published in the Official Gazette [M.D. May 4, 1999, black list].</p>	<p data-bbox="1278 740 1696 781">Article 2, par. 2 <i>bis</i> TUIR</p> <p data-bbox="1056 805 1936 1247">Are deemed to be resident, unless the contrary is proved, Italian citizens removed from the registers of the resident population and transferred to Countries or territories <b>other</b> than those identified by decree of the Minister of Economy and Finance, to be published in the Official Gazette [to be issued].</p>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

b).(i) white list under Article 168 *bis*, paragraph 1, TUIR referred to the non deductibility of expenses.

Old/Current regulation	New regulation
<p data-bbox="312 740 856 781">Article 110, paragraph 10, TUIR</p> <p data-bbox="144 805 1024 1192"><u>Shall be considered privileged tax regimes of Countries or territories identified by the Minister of Economy and Finance [M.D. January 23, 2002, black list], if the tax rate is significantly lower than that applied in Italy, or the lack of an adequate exchange of information, or other equivalent criteria.</u></p>	<p data-bbox="1215 740 1759 781">Article 110, paragraph 10, TUIR</p> <p data-bbox="1056 805 1919 1192">Are not allowed as deductions expenses and other negative components arising from transactions with <u>businesses or residents located in Countries or territories <b>other</b> than those identified in the list of the Ministerial Decree issued under Article 168-<i>bis</i> [to be issued].</u></p>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

b).(ii) white list under Article 168 *bis*, paragraph 1, TUIR referred to the presumption of residence for trusts, as set out by Article 73, paragraph 3, TUIR.

Old/Current regulation	New regulation
<p data-bbox="331 756 831 797">Article 73, paragraph 3, TUIR</p> <p data-bbox="144 821 1020 1263">Are deemed to be resident in the State, unless the contrary is proved, trusts [...] created <u>in Countries <b>other</b> than those mentioned in the decree of the Minister of Finance September 4, 1996 [white list] [...]</u>, in which at least one of the settlors and at least one of the beneficiaries of the trust are tax resident in the State.</p>	<p data-bbox="1226 756 1726 797">Article 73, paragraph 3, TUIR</p> <p data-bbox="1031 821 1906 1320">Are deemed to be resident in the State, unless the contrary is proved, trusts [...] created <u>in Countries or territories <b>other</b> than those contained in the Decree of the Minister of Finance issued under Article 168-bis [to be issued]</u>, in which at least one of the settlors and at least one of the beneficiaries of the trust are tax resident in the State.</p>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

- b).(iii) white list under Article 168 *bis*, paragraph **1**, TUIR referred to the exemption for interests and other financial incomes, as set out by Article 6, Legislative Decree No. 239/96.

Old/Current regulation	New regulation
Article 6, Legislative Decree No. 239/96 Are not subject to [Italian] tax interest, premium and other bonds [...], received <u>by residents in Countries that allow an adequate exchange of information [see M.D. September 4, 1996 (white list)].</u>	Article 6, Legislative Decree No. 239/96 Are not subject to [Italian] tax interest, premium and other bonds [...], <u>received by residents in Countries or territories included in the list referred to in the Ministerial Decree issued pursuant to Article 168 <i>bis</i> TUIR [to be issued].</u>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

- b).(iv) white list under Article 168 *bis*, paragraph **1**, TUIR referred to the withholding taxes on incomes from capital, as set out by Article 26, paragraph 5, d.P.R. 600/73.

Old/Current regulation	New regulation
<p>Article 26, paragraph 5, d.P.R. 600/73</p> <p>The rate of the withholding is set at 27 per cent if the percipient is resident <u>in Countries or territories with preferential tax regime identified in the Decree of the Minister of Finance [see M.D. January 23, 2002, black list]</u>.</p>	<p>Article 26, paragraph 5, d.P.R. 600/73</p> <p>The rate of tax is set at 27 per cent if the percipient are resident <u>in Countries or territories <b>other</b> than those mentioned in the ministerial decree issued under Article 168 <i>bis</i> TUIR [to be issued]</u>.</p>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

- c).(i) white list under Article 168 *bis*, paragraph 2, TUIR referred to the dividends and capital gains as set out by Articles 47, 68, 87 and 89 TUIR (we see only Article 47 TUIR).

Old/Current regulation	New regulation
Article 47, paragraph 4, TUIR [...] contribute fully to the taxable income the profits from companies resident in <u>Countries or territories with preferential tax regime listed in the decree of the Minister of Economy and Finance issued under Article 167, paragraph 4, [see M.D. November 21, 2001 black list] except [...].</u>	Article 47, paragraph 4, TUIR [...] contribute fully to the taxable income the profits from companies resident in <u>Countries or territories <b>other</b> than those contained in the Decree of the Minister of Finance issued under Article 168 <i>bis</i> [to be issued], except [...].</u>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

- c).(ii) white list under Article 168 *bis*, paragraph 2, TUIR referred to the CFC rules, as set out by Articles 167 and 168 TUIR.

Old/Current regulation	New regulation
<p>Article 167 TUIR</p> <p>If a resident of Italy controls, [...], an enterprise resident or located <u>in Countries or territories with preferential tax regime</u>, income earned by the foreign entity shall be charged [...] to the resident in proportion to shares held by the same [...].</p>	<p>Article 167 TUIR</p> <p>If a resident in Italy controls, [...], an enterprise resident or located <u>in Countries or territories <b>other</b> than those listed in the Decree of the Minister of Finance issued under Article 168 <i>bis</i> [to be issued]</u>, income earned by the foreign entity shall be charged [...] to the resident in proportion to shares held by the same [...].</p>



# THE NEW REGULATION and THE ISSUES RELATED WITH THE SAME

In particular:

c).(ii) white list under Article 168 *bis*, paragraph 2, TUIR referred to the CFC rules, as set out by Articles 167 and 168 TUIR.

Old/Current regulation	New regulation
<p data-bbox="443 802 726 834">Article 168 TUIR</p> <p data-bbox="144 865 1024 1252">[...] the rule laid down in Article 167 [...] shall apply even if the person resident in Italy holds, [...], shares for not less than 20 percent of the profits of an enterprise [...] <u>resident or located in Countries or territories with preferential tax regime [see M.D. November 21, 2001, black list] [...].</u></p>	<p data-bbox="1341 802 1625 834">Article 168 TUIR</p> <p data-bbox="1058 865 1917 1308">[...] the rule laid down in Article 167 [...] shall apply even if the person resident in Italy holds, [...], shares for not less than 20 percent of the profits of an enterprise [...] <u>resident or located in Countries or territories other than those listed in the Decree of the Minister of Finance issued under Article 168-bis [to be issued] [...].</u></p>



## Entry into force of the new regulation and issues raising for the tax crime laws

As set out by Article 1, paragraph 88, Law 244, the new regulation will be applicable from the tax year beginning after the date of publication of the Ministerial Decree.

Before that, the old regulation is still in force.

The white lists provided by Article 168 *bis* TUIR will become effective as from the tax period following the one in which the Ministerial Decree to be issued will be enacted.



### Transitional period

For the five years starting on the date of publication of the Ministerial Decree in the Official Gazette, Countries and territories that are not included in the current black lists set forth by Ministerial Decree May 4, 1999, Novembre 21, 2001 and January 23, 2002 nor in the current white list set forth by Ministerial Decree September 4, 1996, are deemed to be included in the new white list.

### Tax crime issues related with the new regulations

The intricate transitional period regime described above, should impact also on the tax criminal trials in progress because it is possible that the new white lists includes, for example, a Country which was black listed in the past.

The issue should be analyzed in depth because of the sensitive matter.

*Thank you!*