

5th Joint Seminar
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“Base Erosion and Profit Shifting (BEPS)”

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*“Transfer pricing: an instrument of
aggressive tax planning.*

Analysis of recent cases in the Italian law”



INTRODUCTION

Specially in **transfer pricing** context, multinational are increasingly able to exploit the differences between national tax systems with an aim to reduce the taxation on their income

This phenomenon is mainly generated by two factors:

- a) The strong emerging competition between legal systems;
- b) The low level of cross-border economic integration between concerned government agencies who are therefore disinclined to regulate this arising issue.



INTRODUCTION

In July 2013

OECD

published the **BEPS**

(Action Plan on Base Erosion and Profit Shifting):

INTRODUCTION

The relevant actions of **BEPS** to *transfer pricing*:

- **Action 8 – Intangibles**
- Develop rules to prevent BEPS by moving intangibles among group members. This will involve: (i) adopting a broad and clearly delineated definition of intangibles; (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation; (iii) developing transfer pricing rules or special measures for transfers of hard-to-value intangibles; and (iv) updating the guidance on cost contribution arrangements.
- **Action 9 – Risks and capital**
- Develop rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members. This will involve adopting transfer pricing rules or special measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The rules to be developed will also require alignment of returns with value creation. This work will be co-ordinated with the work on interest expense deductions and other financial payments.
- **Action 10 – Other high-risk transactions**
- Develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting transfer pricing rules or special measures to: (i) clarify the circumstances.

INTRODUCTION

The objectives of the OECD:

illustrate the certain types of tax structures
and/or
operations that may give to the problem of
BEPS

INTRODUCTION

In **transfer pricing** the method relies on the “*arm ’ s lenght principle*”

the principle on which the price which is applied in the inter-company transactions is the same that applies to transactions between independent parties



1. RECENT CASES IN THE ITALIAN LAW

The italian rule on transfer pricing:

Art. 110, c. 7 TUIR:

“the components of income arising from transactions with non-resident companies, which directly or indirectly control the resident company, (...), are valued based on the market value (...), if it results an increase in the income;

the same shall also apply if it results a decrease in income, but only in the implementation of the agreements concluded with the competent authorities of foreign states to following the special “mutual agreement procedure” provided by international conventions against double taxation of income (...)”

1. RECENT CASES IN THE ITALIAN LAW

“Domestic transfer pricing”

Supreme Court no. 17955/2013:

“ admits that it can reevaluate the criterion used for a normal value in the assessment of the fairness of fees charged on intercompany transactions in order to identify potential evasive manouvres used by the taxpayer during the tax assessment ”



2. RECENT CASES IN THE ITALIAN LAW

“The **burden of proof** in transfer pricing”

The italian rule:

Art. 2697 c.c.:

*“Whoever wants to enforce a right before a court must prove the facts on which the right is based. Who pleads the invalidity of such facts
(...)
must prove the facts on which the defense is based”*



2. RECENT CASES IN THE ITALIAN LAW

Regional Tax Commission (C.T.R.) of Milan,
no. 83-84/**2013**:

*“The **burden of proof** lies with the tax authority on the facts constitutive of the tax claim...*

It is up to the taxpayer to prove the facts preventative, amending and extinguish the same claim”.

burden of proof: 50% - 50% !



2. RECENT CASES IN THE ITALIAN LAW

Before this judgments:

- Supreme Court 13 October 2006, no. 22023: *“the Tax Authority compares the prices of the transactions audited with those obtainable in similar transactions between unrelated parties”*.
- Supreme Court 16 May 2007, no. 11226: *“the Tax Authority should assess if the taxation level is lower in the other country than in italy”*.
- Supreme Court no. 11949/2012 – no. 10739/2013: *“the burden of proof, therefore, is on the Tax Authority, **but** the taxpayer shall demonstrate that his transaction is not tax oriented”*.



3. RECENT CASES IN THE ITALIAN LAW

The last relevant case in Italian law on transfer pricing:
No. 24005/2013

“The Supreme Court has determined the primary criterion for establishing the normal value of the consideration in sales between firms belonging to a multinational group. With reference to:

- (In the main was and, if possible) to the prices or rates of the individual who provided the goods or services, the price lists of chambers of commerce and professional rates, taking into account discounts;
- (Alternatively) the price or the average amount charged for the goods or services of the same or similar kind in the open market at a time when the transaction occurs ;
- Intra-group sales in the relevant market which may be the "national" of the seller”.



CONCLUSION

- 1.** The Supreme Court, even excluding that Article 110 c. 7 Income Tax Code does not apply to internal transfer pricing, also seeks to justify the applicability of the normal value even in these cases, referring to concepts such as *avoidance* and *abuse of law*.
- 2.** The first approach (S.C. no. 7343/**2011** and no. 17953/2012) seems correct. In this case the burden of proof concerns only the analysis of the price not also other indexes as the lower level of taxation of the other State. On the contrary, the second approach (S.C. no. 22023/**2006** and no. 11226/**2007**) does not seem correct according to the OECD Guidelines (2010).

CONCLUSION

- 3.** The purpose of the ruling is to give full effect to the rule : transnational transactions due to a condition free of competition, giving the transaction "suspicious" values corresponding to the "normal".



**THANK YOU
FOR YOUR KIND ATTENTION !**

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