

September 1st 2021

CIRCULAR 4.2021

Italian tax Central Authority issues a discussion draft on the taxation of trusts



Summary

- Trusts
- Income Tax Regime
- Indirect Taxation
- Tax Reporting Regime
- IVIE and IVAFE

TRUSTS

The Italian Tax Central Authority (Agenzia delle Entrate) has recently issued a draft of a Circular letter regarding the taxation of trusts.

The draft has been published for public consultation until the 30th of September 2021, it is therefore likely that its content may change significantly.

Business and financial operators, consulting companies and law firms, will have time until then to send their amendments or adding's to the draft, which will be evaluated by the Italian inland revenue.

The paper, for the first time ever, consists of the comprehensive and official position of the Italian Tax Authority after the major reform of the taxation of income received by a beneficiary of a trust occurred in 2019 with the Law Decree n. 124/2019, who gave rise of a lot of controversies before the Italian Tax Courts.



In this field, a particular attention is reserved on the taxation of non-resident trusts located in low-tax rates States or territories.

The draft also:

- acknowledges recent Italian Supreme Court decisions regarding indirect taxation of trusts;
- clarifies some operating aspects of the Italian tax reporting duties for the key actors;
- and finally points out some issues with reference to Italian Tax on foreign real estate (IVIE) and to Italian tax on foreign held financial activities (IVAFE).

After a brief introduction regarding the scope of the circular and a summary of the civil laws regarding trusts in Italy, the Circular Letter addresses tax issues.

INCOME TAX REGIME

As to **INCOME TAX REGIME**, the paper reminds that according to the Italian Income Tax Consolidation Act (ITCA), trusts are regarded as autonomous taxable entities subject to corporate income tax: Article 73(1) ITCA expressly lists trusts among the taxable persons subject to IRES¹ (the Italian Corporate Income Tax).

Resident trusts are taxed on their worldwide income and non-resident trusts are taxed on the income sourced in Italy.

Based on their characteristics, trusts are identified from an Italian fiscal perspective as:

- “transparent trusts”, when the income is attributed directly to its identified beneficiaries and taxed in their hands;
- “opaque trusts”, when there are no identified beneficiaries and income is taxed directly one time on the trust.

More in details the draft brings forwards that:

As to transparent trusts income tax regime:

- o an individual can be considered ‘identified beneficiary’ of a trust whenever he can claim a right to distribution of the trust’s income;
- o according to article 73 (2) ITCA, the taxable income of such trusts is to be imputed directly to the identified (vested) beneficiaries, notwithstanding its effective distribution or payment;
- o this transparency regime applies to Italian tax residents, regardless of the trust’s location and regardless of the income’s source.

As to opaque trust income tax regime:

- o according to art. 73 (1) letters. *b* and *c* ITCA, opaque resident trusts are treated as a taxable person and are therefore subject to IRES Their taxable income is determined by the general rules regarding commercial and non-commercial entities depending on their nature;
- o opaque resident trusts are taxed on their worldwide income;
- o as per art 73 (1) letter *d* ITCA, opaque non-resident trusts are subject to IRES and they are taxed only on Italian sourced income.

Particular exceptions are provided for income distributed by opaque non-resident trusts and similar entities, which are deemed resident in a ‘*tax privileged jurisdiction*’ (country jurisdictions which does not allow an effective exchange of information are considered a privileged tax regime, whenever an entity, also considering special tax regimes, is subject to a nominal tax rate lower than 50% of the Italian nominal tax rate that would apply to the same entity).

¹ The Italian Tax Central Authority, in some previous circular Letters No 48 of 6 August 2007 and No 61 of 27 December 2010, clarified that trust is a taxable person provided that the trust can be regarded as the person ‘owning’ the income from the trust fund: should this is not the case (e.g. where the settlor or the beneficiary has the power to terminate the trust at any time, or when the settlor has the power to designate himself as the beneficiary at any time, or where the settlor or the beneficiary has significant veto powers, or where the settlor can bring forward the termination date of the trust and designate himself and/or others as beneficiaries, or where the beneficiary is entitled to receive the capital, or where the trustee has to take into account the instructions given by the settlor on the management of the trust assets and income therefrom or, finally, where the settlor has the power to change the beneficiaries) the trust is disregarded and the trust does not exist from an Italian fiscal standpoint.



In this case, art. 44 (1) letter *g-sexies* ITCA – as amended by Law Decree n. 124/2019 – provides that income distributed by opaque trusts located in privileged tax jurisdictions to Italian tax residents is considered capital income and, therefore, taxed in the hands of the individuals by personal income progressive tax (IRPEF), on a cash basis.

It is important to note that the Italian Tax Central Authority, in this field, maintains that the legislative change in art. 44 (1) letter *g sexies* ITCA is based on the circumstance that the incomes are not subject to “adequate” taxation in the jurisdiction of establishment of the trust before being attributed to subjects residing in Italy.

Such interpretation clearly provides that foreign countries are (or are not) considered to have privileged taxation with exclusive reference to the treatment of income produced by trusts resident there.

Therefore, the main factor that is taken into consideration, for the purposes of qualifying capital income, is the tax treatment of trusts: reference should be made to specific rule which recognizes such a regime, where the nominal level of taxation is less than 50 per cent of that applicable in Italy.

Then in the draft, according to the Italian Tax Central Authority:

- a trust's location is determined by the trust's residence jurisdiction, depending on the criteria it could be where the trustee has his tax residence (place of effective administration) or where the trust has his main object (easier when the trust fund is mainly constituted of immovable property);
- when the trust is not considered to be fiscally resident in a State, according to the legislation of that State, despite the fact that the administration of the trust is mainly carried out there, the trust must in any case be considered “established” in that country, if the income produced by the trust is not subject to any taxation in that country either on the trust or on the non-resident beneficiaries (this is the

case of some British law “resident but not domiciled” trusts);

- similar tax treatment also apply when the trust is deemed to be resident in an EU or EEA State, if it benefits from a tax exemption regime provided for offshore trusts (this is the case of some trusts in Cyprus).

As to the determination of income in the hand of the beneficiary Italian tax resident, the paper recalls that the regime provided by art. 44 (1) letter *g-sexies* ITCA poses some issues regarding the determination of Income from Capital.

As per art. 45 (4-*quater*) ITCA, each attribution from a non-resident trust, or similar entity, to an Italian tax resident beneficiary is to be considered income whenever it results impossible to distinguish what is principal (coming from the trust fund) from what is income.

This provision sets a ‘*refutable presumption*’ which allows the Italian tax administration to consider income, consisting of revenue even if reinvested in the fund, each distribution made to an Italian tax resident individual: the presumption can be overridden by the taxpayer, giving accounting evidences consisting that the distribution actually comes from principal, to be meant as consisting of the initial trust injections and its further increments made by the settlor.

INDIRECT TAXATION

As to **INDIRECT TAX** imposed on trusts, the paper finally points out how to manage Italian **INHERITANCE AND GIFT TAX**².

² Italian Inheritance and Gift tax is currently regulated by Legislative Decree n. 346/1990 and following amendments, which provides for a series of tax rates and exemptions according to the estate's worth and the degree of parenthood between the settlor and the beneficiary. The tax base includes the market value of all transferred assets, with the exception of the immovable property site in Italy, for which the cadastral tax base is relevant.

Different rates and exemptions apply, depending on the family relationships between the parties, as follows:

- 4 % for spouses and immediate family members (parents-children and grandparents- grandchildren), with an exemption of €1 million for each beneficiary;
- 6 % for brothers and sisters, with an exemption of €100,000 for each beneficiary;



After many years of uncertainty, the Italian Tax Authority has finally embraced the Supreme Court's interpretation regarding Inheritance and Gift taxes, according to which taxes are to be levied only when the beneficiaries receive the trust fund.

The paper also states that some further indirect taxes may be levied in different moments of the trust's life, depending on whether the trust is resident or non-resident.

More in detail, the Agenzia delle Entrate maintains that:

- For resident trust, in case of.

Deed of trust: if it is drafted publicly (in front of a Notary) or authenticated by a Notary, a fixed tax on registration Euro 200,00 is levied.

Asset transfer to the trust fund: if it is drafted publicly (in front of a Notary) or authenticated by a Notary, a fixed tax on registration of Euro 200,00 is levied.

Asset transfer to the beneficiaries: are subject to Inheritance and Gift tax, should the territorial scope is met³.

Change of trustee: if it is drafted publicly (in front of a Notary) or authenticated by a Notary a fixed tax on registration of Euro 200,00 is levied.

- For non-resident trust:

The same considerations made for Resident Trusts are valid for Non-Resident Trusts which contain Italian sourced assets.

Foreign deed of trusts and asset transfers to the trust fund are nevertheless subject to Italian registration - and therefore fixed tax on registration

- whenever they determine a future transfer of wealth towards an Italian tax resident beneficiary.

TAX REPORTING REGIME

The Italian legislation on 'tax monitoring' aims to guarantee the correct and effective taxation of foreign-held investment income: in order to do so, it obliges determined categories of resident subjects to disclose foreign investments by declaring them in a dedicated section of the Italian tax return form (RW Section).

The Italian legislation on fiscal monitoring has been modified by Legislative Decree n. 90/2017, clarifying that "beneficial owners" are subject to such disclosure.

The definition of beneficial owner provided by the Italian legislation does not mention directly trusts, nevertheless, the Italian Tax Administration considers trusts (and similar entities) subject to fiscal monitoring obligations.

The draft of the Circular letter clarifies to which extent trusts and various figures normally involved in the trusts administration are subject to such obligations. More in detail:

- Trusts

Resident transparent and opaque trusts are subject to fiscal monitoring obligations. Transparent trusts are only obliged to disclose foreign activities that are not directly imputed to the trust's beneficial owners.

- Beneficiaries

Notwithstanding the percentage of principal or control of the trust, identified beneficiaries are subject to tax monitoring.

Such obligation applies also to resident identified beneficiaries of opaque non-resident trusts: in this field, the Italian Tax Central Administration clears that receiving dividends or other distributions from the foreign trust consists proof of beneficial ownership and to identified beneficiaries of discretionary trusts, when clearly identifiable i.e. the descendants of the settlor.

Potential beneficiaries (i.e. individuals mentioned in the trust deed that have no existing right towards

- 6 %, with no exemption, for other family members within the fourth level; and
- 8 %, with no exemption, in all other cases.
Gifts and transfers at death are also subject to the mortgage and cadastral taxes at a combined rate of 4 percent., in case of Italian immovable property.

³ As to the territorial scope, arts. 2(1) and (2) of Legislative Decree n. 346/1990 establishes that if the deceased/donor is a resident of Italy at the time of death/gift, the Italian inheritance and gift tax is due on all the properties and rights transferred, whether situated in Italy or abroad. Differently, if the deceased/ donor is resident abroad at the time of death/ gift, the inheritance and gift tax is due only on the properties and rights situated (at the date of death/ gift) in Italy



the trust income or principal) are not considered beneficial owners and are therefore exempted for tax monitoring obligations.

Trustees are obliged to give the beneficial owners full indication regarding: the percentage of principal they hold, the list of activities held directly or indirectly by the trust and the value of such activities.

- Trustees, guardians and settlors.

The paper reminds that the Italian Supreme Court has extended tax monitoring obligations to subjects that dispose or have the possibility to operate foreign activities (i.e. subjects that hold or dispose of third parties money, with the mandate to transfer such money to the beneficial owner or to use them on his behalf). This has to be considered, then, the final position of Agenzia delle Entrate.

Such obligation is excluded whenever a subject acts on mere mandate of another subject, without carrying personal interests; given the above, trustees, guardians and settlor are to be considered exempted from tax monitoring, especially when such obligation has been fulfilled by the trust or the beneficial owner.

IVIE (Tax on foreign real estate) IVAFE (Tax on foreign held financial assets)

As a general rule, immovable property located abroad is subject to tax in Italy.

The tax rate for IVIE is 0.76% of the value declared in the purchase contract or, when missing, of the fair market value.

For immovable properties located in a EEA country, the value is determined as it would be determined for any property or transfer tax in the relevant foreign country;

Financial assets held abroad are subject to IVAFE, specifically financial products, bank accounts and savings accounts. The tax rate varies according to which is the asset held abroad and the taxable base is determined by the market value of such financial activities.

The draft circular letter reminds that law n. 160/2019 has broadened the scope of IVIE and

IVAFA, including in their subjective scope the non-commercial entities and partnerships.

Resident trusts in Italian Tax Central Administration's view, then, are potentially subject to IVIE and IVAFA starting from 1st January 202, in case of foreign properties.

More in particular, a trust is deemed resident for IVIE and IVAFA purposes when:

- Its registered office, place of management or main object is set in Italy for more than 183 days a year;
- is established in states or territories that are not included in Italy's 'white list' (i.e. a list of countries that are considered collaborative and compliant with the exchange of information for tax purposes) ;
- at least one of the settlors and one of the beneficiaries is an Italian tax resident.

Andersen professionals remains at your disposal for any further query you may have.

The information contained in this document is for informational purposes only and does not refer to the situation of any individual or legal entity. It does not constitute legal or tax advice. This content is not a substitute for individual expert advice in individual cases. No one should act on the basis of this information without appropriate professional advice and a thorough examination of the situation. Andersen assumes no responsibility for decisions made on the basis of the above information.

