

NEWS TAX ALERT

THE AUTOMATIC EXCHANGE OF INFORMATION CONCERNING CROSS-BORDER RULINGS AND ADVANCE PRICING AGREEMENTS BECOMES MANDATORY

IN BRIEF

With Legislative Decree no. 32 approved by the Italian Council of Ministers on 10 March 2017 and issued by the Italian government on 15 March 2017, the automatic exchange of information regarding cross-border rulings and APAs, between the Italian Revenue Agency and the tax Authorities of EU Member States, which was previously optional, has now become mandatory.

The publication of this Decree in the Italian Official Gazette on 23 March 2017 made its provisions operative and finalized the transposition process into Italian tax law of Directive 2011/16/EU (so-called DAC 1 – Directive on Administration Cooperation). Italy has now aligned its regulatory provisions with European Union requirements, validating the mechanism for the mandatory exchange of ruling information regarding cross-border rulings and APAs.

The introduction in Italy of this obligation represents a further tool in the fight against tax avoidance and aggressive tax planning, to promote the transparency of the tax system in accordance with the OECD provisions within the BEPS Project context.

IN DETAIL

On March 15, 2017, the Italian Government issued Legislative Decree no. 32 (hereinafter “Decree”), implementing in Italian tax law Directive 2015/2376/EU (so-called DAC 3) of 8 December 2015, which amended the above-mentioned Directive no. 16. The Decree, was enacted/came into force on 23 March 2017 and its provisions are effective as of 1 January 2017, date on which the Italian Revenue Agency was required to exchange information with the tax Authorities of the other EU Member States on cross-border rulings and APAs.

Object of the information exchange

The Decree provides the communication obligation for cross-border rulings and APAs, amending Article 2 of Legislative Decree no. 29 of 4 March 2014 which implemented Directive 2011/16/EU in Italian tax law. With regards to the cross-border rulings, the new rules are applicable with reference to:

- tax rulings different from those reported under Article 31-ter of Presidential Decree no. 300 of 29 September 1973, issued in accordance with the provisions of this article;
- tax rulings related to the access to the patent box regime as provided under Article 1 of Stability Law no. 190 of 23 December 2014, where related to cross-border transactions;



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- opinions rendered on rulings requested, where the instances concerning the interpretation or the application of rules, also of conventional origin, relating to the tax treatment of cross-border transaction;
- new investment ruling as provided under Article 2 of Legislative Decree no. 147 of 14 September 2015, where related to cross-bordering transaction; and
- other tax rulings and opinions rendered on rulings requested with similar effects to the above-mentioned categories, as provided by rules issued later than the date in which the Decree was enacted.

The Decree extended the application of the mandatory exchange of information also to APAs and rulings on permanent establishments. In this regard, under Article 31-ter of Presidential Decree no. 600 of 29 September 1973, an advance pricing agreement aims at determining, in advance, the methodologies to apply for specific cross-border controlled transactions, to ensure their consistence with the arm's length principle, as provided by paragraph 7 of Article 110 of the Italian Consolidated Income Tax Act. Whereas, tax rulings on permanent establishments are aimed at defining the allocation of profits and losses to a permanent establishment in another jurisdiction different from the Italian jurisdiction of a resident company or to a permanent establishment in Italy of a non-resident.

Furthermore, Article 1 of the Decree provides for the obligation of automatic exchange of information also for tax rulings related to cross-border transaction: an operation or a series of operations, in which alternately:

- not all the parties involved are tax residents in Italy;
- one or more parties involved are simultaneously tax residents in Italy and in one or more other European jurisdictions;
- one party involved carries out its activity in another jurisdiction through a permanent establishment and the operation or the series of operations is part of the activity or constitutes the complex of the permanent establishment's activities. A cross-border operation or a series of cross-border operations includes also the transactions carried out by a legal person respect to the activities which that legal person carries out in an another European jurisdiction through a permanent establishment;
- which has cross-border impact.

Terms and conditions

With regards to terms and conditions of the mandatory automatic exchange of information, the amended Article 5 of Legislative Decree no. 29 of 4 March 2014, added by the Decree, refers to the provisions set by Article 8-bis of Directive 2011/16/EU.

Under this rule, both rulings issued, modified or renewed with effect from January 1, 2017 which rulings issued, upgraded or renewed in the previous five years are subjected to the exchange of information, taking into account that:

- for rulings issued, amended, or renewed between 1 January 2012 and 31 December 2013, the automatic exchange is applied only if they were still valid on 1 January 2014; and
- for rulings issued, amended, or renewed between 1 January 2014 and 31 December 2016, irrespectively of whether they are still valid or not.

With relation to the timing of the communication, regarding rulings issued, amended and renewed five years prior to January 1, 2017, information must be communicated before 1 January 2018. Instead, regarding rulings issued, modified or renewed with effect from January 1, 2017, the deadline is three months following the end of the half of the calendar year during which the cross-border ruling or APA has been granted.

Concerning the conditions which regulate the relations between the parties involved in the information exchange, the Decree attributes to Italian liaison services offices the task to provide to the requesting Authority of a EU Member State all the ruling information at their disposal. Likewise, Italian liaison services offices can require additional information, such as the full text of cross-border rulings or APAs. In addition, all the information to be communicated must be sent to the central registry established by the European Commission.

Rulings excluded from the information exchange

The Decree excludes from the mandatory automatic exchange of information, the following types of rulings:

- bilateral or multilateral rulings on APAs with third countries, where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties;
- Cross-border rulings exclusively concerning the tax affairs of one or more physical persons.

In addition, as provided under paragraph 2 of Article 8-bis of Directive 2011/16/EU, Member States may exclude from the communication, information on cross-border rulings and advance pricing arrangements issued, amended or renewed before 1 April 2016 to a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a annual net turnover of less than EUR 40.000.000 (or the equivalent amount in any other currency) in the fiscal year preceding the date of issuance, amendment or renewal of those cross-border rulings and advance pricing agreements.

Abrogation of paragraph 4 of Article 31-ter

The Decree sets forth the abrogation of paragraph 4 of Article 31-ter of Presidential Decree no. 600 of 29 September 1973. In particular, under this paragraph was provided that the Italian Revenue Agency was called to forward a copy of rulings to the tax Authority of the States of residence or establishment of companies whose taxpayers had implemented operation, as required by Community legislation.