



International Tax

## Italy Tax Alert

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### Draft implementation rules issued on optional exit tax deferral regime

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The Italian Ministry of Finance issued a draft decree on 10 July 2013 that contains the long-overdue implementation rules for the optional deferral regime for the exit tax on deemed gains when an Italian company migrates to another EU/EEA jurisdiction. The draft decree addresses matters such as the computation and scope of the exit tax liability, exit tax payment elections, and termination of the regime and recapture of the deferral election amounts.

The optional exit tax deferral regime was introduced on 24 January 2012 by article 91 of Law Decree No. 1/2012 in response to the 2010 decision of the Court of Justice of the European Union in the *National Grid Indus* case, to provide for an alternative to the immediate taxation of built-in gains on the assets of the migrating company, which the court held violates the freedom of establishment principle in the Treaty on the Functioning of the European Union. Implementation rules were to have been issued by 24 March 2012, so that affected taxpayers could make elections for migrations implemented after that date (the deferral regime was available for migrations implemented after 24 January 2012, i.e. before the deadline for the implementation rules).

Under the optional exit tax deferral regime, a taxpayer that transfers its tax residence to another EU/EEA state may opt for deferral of the Italian exit tax on the built-in gains in the assets transferred abroad until the actual realization or disposal. The option to defer, however, is conditioned on the Italian company migrating to another EU member state or an EEA country that has signed a bilateral agreement with Italy for the recovery of tax claims comparable to the provisions of the EU mutual assistance directive.

#### Draft implementation rules

The draft decree contains several important rules:

- The overall gain must be determined with reference to the fair market value of all assets not attributed to an eventual Italian permanent establishment (PE) of the migrating company, including a value for goodwill and the functions and risks that would have been remunerated in a transfer between independent parties.
- The tax deferral regime is not applicable to the following: (i) trade goods and inventory; (ii) net equity reserves with tax suspension status to the

extent not booked in the accounts of an eventual Italian PE of the migrating company; and (iii) income from activities carried out in the final year of tax residence in Italy, including tax-deferred items not related to the transferred assets.

- The computation of the gain as of the migration date is final and further gains or losses accrued abroad will not affect the Italian tax liability.
- Existing net operating losses should first be offset against the taxable income of the final year of tax residence in Italy, with any excess used to offset the gain determined as of the migration date. Any further excess net operating losses may be attributed to the eventual Italian PE of the migrating company under the ordinary limitations provided in Italy's Income Tax Code.
- The tax deferral may be applied to all or only specified transferred assets; in the latter case, the overall gain will be attributed to the assets with respect to which deferral is elected by reference the ratio of the respective higher values of those assets and the total higher value of all the assets transferred.
- Where deferral is elected, the deferred Italian tax liability must be paid in the year during which the assets would be considered to be disposed of under ordinary Italian tax principles (e.g. on a sale, on the contribution of assets in exchange for shares, etc.). In the case of non-portfolio participations, a dividend distribution also would be considered a disposal.
- The migrating company also can elect to pay the exit tax in 10 equal annual installments starting from the year of the migration, but in this case, interest will be charged and the company will be required to provide a guarantee for the deferred amount.
- The tax deferral regime will terminate and the Italian tax liability will have to be paid immediately if the company subsequently migrates to a jurisdiction outside the EU/EEA; if the company is liquidated; or in the case of a merger, demerger or business contribution that results in the company's assets being transferred to an entity that is resident outside the EU/EEA.
- The Italian tax authorities will issue further guidance on the actual procedure to exercise the tax deferral option, the payment of installments, the type of guarantees to be provided (which will depend on the amount of the tax-deferred gain and the risk level associated with the specific type of taxpayer) and the annual reporting requirements in the tax return or other specific filing.

Although in draft form, the implementation rules made public by the Ministry of Finance may provide a base for discussion for multinational groups interested in restructuring their Italian operations.

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