

## Italian voluntary disclosure — issues likely to be faced by trustees with Italian resident settlors/beneficiaries and/or Italian assets

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**CATEGORY:**

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### Background

As previously reported, Italy has launched a voluntary disclosure programme along the lines of those already in existence in the UK and the US. The new disclosure facility will come to an end on 30 September 2015.

### The Italian VD in a nutshell

Full payment of unpaid taxes and interest; however:

- reduced penalties for unpaid tax;
- reduced sanctions for unreported assets held abroad ('FBAR' or 'RW') – *level of reduction depends on whether assets held in a white-list or black-list jurisdiction;*
- reduced period of limitation for assets held in a white-list jurisdiction (*2010 instead of 2004*);
- simplified tax calculation for small cases (up to €2m); and
- protection from criminal prosecution.

### Black-list or white-list?

Whether assets are held in a white-list jurisdiction or a black-list jurisdiction has an impact on the period of limitation (2004 v 2010) and the level of reduction of the sanctions.

Switzerland, Liechtenstein and Monaco have signed last-minute tax cooperation agreements with Italy and are now considered white-list jurisdictions for the purposes of the voluntary disclosure.

However, a number of jurisdictions that have signed tax information exchange agreements (TIEAs) with Italy – including the **Channel Islands and the Isle of Man** – continue to appear on Italy's black list. This seems extraordinary, as it would appear that early adopters of TIEAs have been penalised.

### Trust – where resident?

Trustees, protectors and beneficiaries of offshore trusts will need to consider where the trust is resident. Trusts that are tax resident in Italy are subject to corporation tax, and the trustees should report foreign trust assets in the trust's annual tax return (unless the beneficiaries have a fixed interest). This also means that the trustees should obtain a tax code/UTR for the trust.

*Trusts established in a black-list jurisdiction with at least one Italian resident settlor and one Italian resident beneficiary are deemed to be resident in Italy under a rebuttable presumption.*

The problem is that the term 'established' is not defined in the law and there is no indication as to how one rebuts the presumption of residence. Although it would stand to reason that showing that the trust is administered outside Italy should make the trust non-resident, the position remains unclear.

*Particular issues for trustees will arise when a settlor/beneficiary claims that the trust should be treated as tax resident in Italy for the purposes of the voluntary disclosure programme. In this case, the VD report should be filed by the trustees. Should they? What if there are beneficiaries*

*who disagree with the tax residence status of the trusts?*

Trust – real or a sham?

When the Italian rules on the tax treatment of trusts were first introduced, they reflected a benign approach to this legal instrument. After all, Italy was the first civil law jurisdiction to ratify the Hague Trust Convention. However, things changed at the end of 2010 when the Italian tax authorities issued a controversial circular letter in which they outlined a number of cases in which they would consider a trust as a 'fictitious interposition' or sham. The concept of 'fictitious interposition' is quite different from the concept of sham developed by case law throughout the trust law world and basically encompasses most cases in which the settlor, or a beneficiary retains some degree of control over the trust.

*Issues may arise when an Italian settlor is advised to file a VD report on the basis that the trust is a 'fictitious interposition' in circumstances where the trustees consider that there is no sham. Should they transfer the trust assets to the settlor? What if other beneficiaries disagree with the settlor's analysis? What is the trust's/the trustees' exposure if they decide to hold on to the trust assets? What are the potential double taxation implications for both the trust and the beneficiaries if Italy treats the trust as a nothing in the hands of the settlor and there are beneficiaries who are resident in other jurisdictions?*

Communication, communication, communication

Possibly the biggest pitfall for trustees and beneficiaries alike is to deal with the Italian voluntary disclosure without communicating with each other. There are many reasons why beneficiaries may feel pressured to file a VD report. They may have tax advisors who are unfamiliar with the tax concept. Or they may consider that treating the trust as tax resident in Italy or as non-existent may lead to tax benefits – eg, because until recently Italian resident trusts could claim participation in respect of incoming dividends and could pay such dividends to Italian resident beneficiaries without any additional tax. Whilst trustees should sit down with the beneficiaries as well as the settlor/any protector and may consider taking an opportunistic approach, their fiduciary duties mean that they will have to consider the wider picture, rather than limiting their analysis to a single tax event. Are there any succession planning issues? Is the Family likely to stay in Italy in the long term? Does the trust fulfil a governance function in respect of any underlying business? Would an Italian tax residence make a common law trust more susceptible of litigation before the Italian courts, etc.

Also, trustees and beneficiaries should consider the benefit of a full due diligence on the trust before rushing to any conclusion as to Italian tax status (resident/non-resident; opaque/transparent; 'fictitious interposition'/ substantial wealth holding vehicle).

Our experience

The above are just some of the issues that are likely to be faced by trustees with Italian resident settlors/beneficiaries and/or Italian assets. At Withers, we are fully conversant with the Italian tax issues, and we are trust law experts, which means that we can provide trustees, protectors, settlors, beneficiaries and their local advisers with technical support that takes into account both tax and fiduciary issues.

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