A number of jurisdictions (including the US, the UK and Italy) have launched voluntary disclosure ('VD') programmes. A substantial number of cases involve private foundations, typically legacy structures based in Liechtenstein and Panama.

As the concept of foundations is alien to common law, their tax treatment raises delicate issues in the context of US and UK VD and although the UK issued a general statement in the context of its Memorandum of Understanding with Liechtenstein, the practical analysis often differs from the stated position. Similar issues exist in Italy, as there are no statutory rules on the tax treatment of foundations.

PRIVATE FOUNDATIONS

A private foundation represents a legal entity set up by an individual via a primary donation and managed by its own body. In comparison to a trust, Liechtenstein foundations are legal entities with legal personalities. The person bringing assets into the foundation is called the ‘founder’ and is comparable, from a tax perspective, to the settlor of a trust. Beneficiaries can exist and the governing body of the entity, which is similar to the role of the trustees in a trust, is the council of the foundation.

Private (or family) foundations are not disciplined (governed?) under Italian law. However, when dealing with the taxation of private foundations from an Italian tax perspective, in the absence of a specific set of rules, it is common practice to apply the tax treatment of trusts to them, to the extent that similarities exist between the two holding structures.

FOUNDATIONS – ITALIAN TAX ISSUES

Italy has recently launched a voluntary disclosure programme along the lines of those already in existence in the UK and the US. The voluntary disclosure plan allowing Italian resident taxpayers to ‘regularise’ their relationship with the tax authorities had been expected for some time and will come to an end on 30 September 2015. Taxpayers have to pay all taxes and interest for their undisclosed assets. However, reduced penalties and sanctions apply and protection from criminal prosecution is covered under the VD umbrella.

A surprising element in the law is that the programme has been extended to allow corporate entities, trusts and non-commercial entities (such as foundations) to participate alongside individuals. This aspect has been introduced into the new law to allow for individuals with business interests, trust structures and other assets in various non-commercial entities to make a full disclosure of their undeclared assets. Italian tax authorities particularly appear to have entrepreneurs and family-owned businesses in mind as they constitute a large proportion of Italy’s business community.

However, in this context, we need to consider that both the Italian tax legislation and the Italian tax authorities often adopt an aggressive approach towards these structures. In particular, the Italian rules on the tax treatment of trusts (and foundations) have changed over time, classifying a foundation as tax resident in Italy for the mere existence of an Italian beneficiary/founder and/or Italian assets and treating a foundation as a mere nomineeship every time the founder or a beneficiary retains some degree of control over the structure.

Therefore, special attention ought to be paid to analysing the residence of the foundation (under the actual/main and the deemed residence tests) and its very existence from a tax perspective (sham/fictitious structure). In light of the above, the entitlement to apply for the Italian voluntary disclosure procedure could be permitted for one of the persons involved in the foundation (eg founder, beneficiaries) or for the foundation itself.

OUR EXPERIENCE

The above mentioned issues are likely to be faced by foundations and, in conclusion, it seems essential, within the current legislative framework, to analyse private foundations in detail. In this regard, Withers has advised several governments (including Guernsey, Isle of Man and Cyprus) on the subject of private foundations. Also, as part of Withers’ expertise in the American and UK voluntary disclosure programmes, which have been in place for many years, our firm has helped founders and beneficiaries to regularise many foundations.

Specifically, we have explored more than 1,000 procedures in the US and around 400 in the UK, many of which involved Liechtenstein and Panama foundations.
This enables us to provide councils, founders, beneficiaries and their local advisers with technical support that takes both tax and fiduciary issues into account.
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