# ITALY TAX UPDATE

JUNE 2013

## LAW DECREE N. 179 DATED 18 OCTOBER 2012: RECENT CLARIFICATIONS GIVEN BY THE TAX AUTHORITIES

In a recent position (n. 12/E dated May 3, 2013) Tax Authorities dealt again with the amendments made by Law Decree n. 179/2012 with reference to the international transports taxation.

In particular, art. 38 par. 1 of mentioned Decree introduced in the Italian law the notion of "basis of an air carrier", relevant also with reference to the place of establishment of the carrier itself, stating that the expression "basis" includes a number of premises and infrastructures from which an enterprise carries out its air transport activities in a stable, habitual and continuative way, through the employment of individuals that in said basis have the center of their professional activity, i.e. that work, leave and come back from there for the purpose of carrying out their professional activity.

Furthermore, starting from fiscal year ongoing as of December 31, 2012, an air carrier licensed by an European Member State different from Italy is considered established on Italian territory when it carries out in a stable or continuative or habitual way an air transport activity starting from a basis which is located in Italy.

### DOMESTIC PROVISIONS

In line with what already done in France, and at the level of the European Union (EU Reg. n. 465/2012, dated 22 May 2012), the new definition clearly addresses foreign air carriers that operate in Italy with an entity having abroad its legal seat (and thus being subject to foreign tax law).

In the Tax Authorities opinion, reference to identify a "basis" of the air carrier in Italy should be made to the definition of permanent establishment included in the Italian Tax Code (art. 162), that is in line with the OECD Model definition: "*a fixed place of business through which the business of the company is wholly or partly carried on in the Italian territory*". Based on the new definition of an "air carrier basis" introduced by Law Decree n. 179/2012, actually, Italian Tax Authorities state that the basis of an air carrier should be undoubtedly considered as a further positive exemplification of permanent establishment, even if the Law Decree does not directly amend art. 162 of Italian Tax Code, since:

- there is a **place of business**, that is to say the premises in which the foreign entity stays and that are at its disposal. The new definition, actually, provides that the air carrier basis includes a number of spaces and infrastructures;
- the air transportation activities should be carried out in the basis in a stable or continuative or habitual way, and thus the air carrier basis meets in principle the **fixity** characteristics under a spatial and temporal perspective that are required for a permanent establishment ("*a distinct place with a certain degree of permanence*");
- the **business activity** is **carried out through** the basis, or in any case in the State in which the basis is located, since the definition expressly states that the air transportation activities should be carried out "starting from" the basis.

Starting from fiscal year ongoing as of December 31, 2012, thus, an air carrier basis should be considered a permanent establishment of a foreign EU entity that carries out its business activities from a foreign State. In any case, the Tax Authorities underline that the existence of a permanent establishment can be demonstrate also with reference to previous fiscal years under the ordinary definition of art. 162 or of the applicable Double Tax Treaty.

In case a foreign air carrier is considered to have in Italy a "basis" in the above illustrated meaning, and thus to have in Italy a permanent establishment, it shall be subjected both to corporate income tax and local income tax, and it shall accomplish all the Italian fulfillments provided by tax laws (eg tax bookkeeping in order to compute taxes due in Italy, VAT registers, withholding agent's obligations with reference also to basis' employees, etc.).

## TREATY PROVISIONS

Italy signed a number of double tax treaties, all of which are in line with the OECD Tax Convention Model. The latter provides for a specific rule for ships and aircrafts international traffic[1] (art. 8, par. 1) stating that "*profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated"*, and thus in the State in which the foreign company is resident for tax purpose (under art. 4, par. 3 of the Model), regardless the existence of a permanent establishment in the other Contracting State.

All the above being stated, and in light of the fact that Treaty provisions, where more favorable, prevail the domestic Italian law, air carrier resident in Countries that signed a treaty to avoid double taxation with Italy that provides for the above clause (here including Ireland) :

- shall not be taxable in Italy with reference to the **international traffic** as above defined, even if it has in Italy a "basis" (under the definition introduced by 179/2012 Law Decree);
- on the contrary, where the foreign carrier operates through an Italian basis, profits deriving from **domestic routes** are subject to taxation in Italy regardless the existence of an Italian permanent establishment.

The above conclusions seem not in line with the tax treaties, that specifically provide the exemption for the profits deriving from operation of aircrafts that exclusively operate international traffic and not generally to "international traffic". This may lead to a further complexity in the computation of the revenues and costs related to the domestic routes on which Italian taxation should be applied.

We remain at disposal for any clarification you may need on the above.


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[1] The Model defines "international traffic" as "*any transports by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State*" (art. 3, par. 1, lit. e)).


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