Italy

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Questionnaire for National Reporters

Private Client and Immigration Working Session

Movement of High Net Worth Individuals
Localisation et Délocalisation des Clients Privés Fortunés

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Background

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realties and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

1. PRELIMINARY MATTERS

We would ask that you return completed the Questionnaire and your answers to the case studies below by **Friday, 28 February 2014** (earlier if possible please).

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

If you are a delegate responding as part of the Immigration Commission, please respond **only** to sections 1.1 and 2.1.

1.1 Immigration and Nationality [for Immigration Commission only]

1.1.1 *Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).*

1.1.2 *Are there any proposed changes to the programmes outlined in 1.1.1?*

1.1.3 *Is there a dichotomy between your Government's wish to attract HNWIs as against public perception of immigration?*

At present, there is no real immigration, residency or citizenship programme in Italy aiming to attract HNWIs.

Our laws dealing with immigration (mainly: Legislative Decree n. 286 of 25.7.1998 for non-EU citizens; and Legislative Decree n. 30 of 2.2.2007 for EU citizens) do not establish any similar programs. Special rules are only provided in favour of certain categories of workers (e.g. specialized or highly qualified workers, researchers) who can benefit of a slightly simplified entry procedure as they are exempted from the quotas which would normally limit the entry of foreign workers especially from outside the EU.

For example, no particular visa or permit of stay is provided for foreign investors.

Very recently, a provision was introduced in the Law Decree n.145 of December 23, 2013, stating that the Ministries of foreign affairs, internal affairs and labour will have to find out ways to facilitate the rules on visas and permits of stay for foreign investors and start-uppers. It remains to be seen whether and when this will be actually done, and in which manner. The final aim is of course to make Italy more attractive for foreign investors, and to simplify our complicated rules and bureaucratic procedures.

1.2 Cross-border succession

1.2.1 *Is testamentary freedom a right recognised by national law or public policy?*

(A) Yes *(B) No*

Yes. Testamentary freedom is a right recognised by Italian law, although such freedom is limited by the rules on forced heirship.

1.2.2 *Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?*

(A) Yes ***(B) No*** *(C) Not relevant to your country*

As a general rule, this is not possible. Italian law bans any contracts by which a person waives or otherwise disposes of his/her rights on another person's estate before such other persons' death. There is one exception, though. It is called "Patto di famiglia" (family business agreement) and is regulated by Articles 768-bis to 768-octies of the Civil Code. The owner of a business, or the holder of a controlling interest in a company, may transfer the business or the shares to one or more beneficiaries. Beneficiaries can only be among the transferor's descendants (i.e. son, daughter, grandson, granddaughter and so on). All those others who, at the time the contract is made, would be forced heirs by law (e.g. the transferor's spouse or other descendants different from the transferees) must be part of the contract as well, and waive their forced heirship rights. This type of contract has been introduced in order to facilitate succession in family businesses.

1.2.3 *Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.*

(A) Yes *(B) No*

If yes, is this election limited to the law of the deceased's:

(A) *Nationality* ***(B) Habitual Residence*** *(C) Other*

Yes, such choice of law is possible under the Italian private international law rules (Article 46 of Law n. 218/95). As a general rule, an individual's succession is regulated by his/her national law at the time of death.

However, such individual may, by an express clause in his/her last will, elect to have his/her succession regulated by the law of the country where he/she is resident. Such a choice becomes ineffective if at the time of death he/she is no more resident in that country. If an Italian citizen's succession is involved, any choice of law may not prejudice the compulsory portion rights that the Italian law grants to those residing in Italy at the time of the testator's death.

When Brussels IV (Regulation (EU) 650/2012) comes into force (August 17^{th} 2015) of course Italy will be bound by it, including its rules concerning the choice of law.

1.3 *Personal taxation and compliance*

1.3.1 *Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).*

Pursuant to Italian tax law (art. 2 of the Decree of the Italian President of the Republic, no. 917/1986, the Italian Income Tax Code, *Testo Unico delle Imposte sui Redditi,* TUIR), an individual is resident in Italy if:

(a) he / she is registered for a period of 183 days with the Italian Population Registry (in Italian *Anagrafe della Popolazione Residente*); or

(b) he / she has his principal place of business or interest (domicilio, 'Domicile') or residence (i.e. his habitual abode) in Italy.

The requirement under paragraph (b) can be divided into the following two sub-requirements.

i. **Habitual abode / residence** – An individual's habitual abode is situated where he is physically present (objective test) with the intention of residing there with a degree of habit and stability (subjective test). Whilst the duration of permanence in a place may indicate a habit, this is not considered a main or conclusive factor. 'Habit' and 'habitual residence' are primarily ascertained by considering where a person regularly returns to in between short or longer breaks dictated by modern life for work or study purposes, holiday or medical treatment. However, under the residence test physical presence (i.e. the objective element) plays a central role (this differs from the position under Domicile which, as you will see below, is primarily an intention-based concept).

ii. **Principal place of business or interests (*domicilio*)** - Domicile is defined as an individual's 'principal place of business and interests'. It has been suggested that 'business' and 'interests' refer to the individual's economic sphere. However, case laws and the Italian Tax Authority look at all the interests of the taxpayers, be they of an economic, business, social, personal or family nature. Domicile is, therefore, best described as principal place of economic and personal interests, rather than by its literal translation as principal place of business and interests. Note that the place where an individual's family lives is also relevant for the purposes of determining habitual residence. The Domicile test, however, differs from the 'habitual residence' test in that Domicile does not require a physical presence. The relevant factor in this case is the taxpayer's intention as to whether Italy should be the focus of his / her interests. Accordingly, although an individual is not physically present in Italy for more than 183 days, he can be considered tax resident in Italy under the Domicile requirement.

The above mentioned requirements are similar, to a certain extent, to those specified in the OECD Model of Convention for the avoidance of double taxation, which will apply in the event that an individual is considered resident in Italy and in another State with which Italy executed a Convention for the avoidance of double taxation (currently with more than 90 States worldwide).

1.3.2 *Have there been any changes introduced in the last 24 months to the definition of who is a 'taxpayer' e.g. 'resident', 'habitually resident' or 'domiciled' in your country?*

(A) Yes ***(B) No***

If yes, please briefly summarise the changes.

1.3.3 *Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?*

(A) Yes *(B) No*

Italian resident taxpayers are obliged to report their foreign assets (whether income producing or not) in their tax return, by populating the so called RW Section (in Italian '*Quadro RW*').

A law passed on 6 August 2013[1] (in force since 4 September 2013) to rectify a number of potential violations against EU law in a number of areas (and, therefore, known as the **'European Law 2013'**) extended the scope of the existing reporting rules to trusts and foundations in certain circumstances. This was achieved by cross-referencing the reporting rules to the compliance rules introduced in 2007[2] to comply with the Third EU Money Laundering Directive of 2005 (Directive 2005/60/EC of 26 October 2005).

The main amendments to the reporting obligations introduced by the European Law 2013 are the following:

- Italian resident taxpayers must disclose and report all non-Italian assets, regardless from their values (formerly € 10,000 threshold applied).

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[1] *'Law 6 August 2013, n. 97 on the introduction of provisions to comply with Italy's obligations as a member of the EU'.*

[2] *'Law Decree 21 November 2007, n. 231 on the implementation of directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing as well as directive 2006/70/EC. .*

- The duty to file the Quadro RW is now extended to those qualifying as 'ultimate beneficial owner', i.e. individuals who are not vested with the legal title of the relevant assets, although ultimately benefit and / or have control over such assets. The new reporting rules apply to 'beneficial owners' (*titolare effettivo*) of foreign assets, as defined under Italy's money laundering legislation. In the case of trusts and foundations, the existing money laundering rules contain the following definition (our translation):

  (1) If the future beneficiaries have already been determined, the individual or individuals who are beneficiaries of 25% or more of the [trust] property ('*patrimonio*');

  (2) If the beneficiaries who benefit from the [trust] have not yet been determined, the category of persons in whose main interest the [trust] has been established or is being administered;

  (3) the individual or individuals who exercise control over 25% or more of the assets of the [trust] property ('*patrimonio*')

- The sanction (in addition to, and separate from, the sanctions applicable for the omitted tax return or the untrue tax return) for omitted Quadro RW filing ranges from 3% to 15% (formerly 10% to 50%) of the value of the non-disclosed foreign assets and from 10% to 30% in the event of assets located in a black list country. Contrarily to the past, seizure of the undisclosed assets can no longer be ordered.

1.3.4 *Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?*

(A) Yes ***(B) No***

If yes, please briefly set out the key provisions.

1.3.5 *Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?*

(A) Yes *(B) No*

If yes, please briefly set out the key measures.

In addition to what already outlined under 1.3.3 above, on 10 January 2014, Italy executed with the US an agreement (the '**Agreement**') to improve the international tax compliance and to implement FATCA (Foreign Account Tax Compliance Act) in Italy. FATCA was enacted in 2010 by the U.S. Congress to target non-compliance by U.S. taxpayers using foreign accounts. FATCA requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. As a consequence, Italian banks, financial institutions, intermediaries and fiduciary companies are under the obligation to report to the IRS the name and details of U.S. citizens holding accounts with them in Italy.

The Agreement has been executed by the Italian Government's representative and it is in the process of being ratified by the Italian Parliament. The Agreement shall enter into force on 1 July 2014, although it is not unlikely that the effective date may be postponed.

Finally, Italy has recently implemented (with D. Lgs. 4 March 2014, no. 29) the EU Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, which contains rules and procedures for the exchange of fiscal information between Member States.

1.3.6 *Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or 'beneficiaries' located in your country?*

(A) Yes *(B) No*

Please refer to answer 1.3.3 above.

1.4 Mental capacity of adults

1.4.1 *What system is in place in your country to deal with an individual who has lost capacity?*

In Italy, civil courts have the power to order various measures to protect adult individuals who have lost capacity in whole or in part.

1.4.2 *Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult's personal welfare and/or property and affairs?*

(A) Personal welfare only (B) Property and affairs only (C) Both personal welfare and property and affairs

No, these special powers of attorney are not available under Italian law. However, a person may designate an Administrator ("Amministratore di Sostegno") by notarial deed in anticipation of his/her possible future incapacity (see Article 408 of the Civil Code). However, according to the majority opinion, such choice may have to be confirmed by a court order when the person in questions actually loses capacity.

1.4.3 *Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?*

Theoretically it could be recognized. Alternatively, one could seek a court order in Italy appointing an Administrator.

1.4.4 *Are there proposals for legislative change in the field of mental capacity?*

(A) Yes *(B) No*

If yes, what are the proposals?

There is a law proposal on advance directives, however it is not predictable when it will be discussed and approved by the Parliament. Also, as mentioned below, Italy has signed but not yet ratified the Hague Convention on International Protection of Adults.

1.4.5 *Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?*

(A) Yes *(B) No*

Italy signed the Hague Convention in 2008 but has not ratified it yet. Therefore, the Convention is not yet in force in Italy

1.4.6 *Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?*

(A) Yes *(B) No*

Yes. Italy ratified the Convention and Optional Protocol in 2009 (Law n.18 of March 3rd, 2009).

QUESTIONS FOR CASE STUDIES

2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

2.1 Immigration law [for Immigration Commission only]

2.1.1 *Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWIs such as Roberta and Paul to:*

(a) *move firstly to the US (please omit this if you do not advise on US immigration law);*

(b) *and then secondly to your country?*

If your advice would change if Paul was not a Dutch national, please explain.

At present, there are no special immigration programmes for foreign HNWIs in Italy.

2.1.2 *What immigration options does Gloria have to move to your country on a long term basis?*

2.1.3 *What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?*

Paul is a citizen of an EU country and, therefore, the rules regarding his immigration in Italy can be found in Legislative Decree n° 30 of February 2nd, 2007 (whereas the immigration rules for non-EU members are set forth by Legislative Decree n° 286 of July 25th, 1998).

According to Legislative Decree 30/2007, a citizen from another EU country may stay in Italy for a period exceeding three months, if

- he/she is employed or self-employed in Italy; or
- has sufficient resources for him/herself and for the family over the whole period of stay, as well as a health insurance covering all risks in the Italian territory; or

- is enrolled in an Italian public or private institute to attend school or training courses, and has sufficient resources for himself and his family as well as a health insurance; or

- is a relative to another EU citizen being entitled to stay in Italy for more than three months.

If Paul meets any of the above mentioned requirements, he may stay in Italy for a long time without the need to get a permit of stay: he only needs to apply for registration in the registry office of the municipality where he wishes to establish his residence.

Considering that the family is "exceptionally wealthy", we can presume that, even if Paul doesn't have a job in Italy, at least the resource requirement would be satisfied. In this regard, we should consider that the resources of all the family members count for meeting the threshold, which is low.

If Paul is entitled to to stay in Italy for more than three months according to the above rules, he can extend his right to his family members even if not being EU citizens. They can benefit of the right to stay as soon as they come to Italy (with him, or later) to stay with him. Family members entitled to the right of stay would include the spouse, the children and also the spouse's parent (Gloria, in our case).

However, there is a difference in terms of procedure. While Paul need just to register at the municipality's registry, his family members must previously apply for a "Carta di soggiorno" at the local police office (Questura) and then register at the municipality's registry.

Such "Carta di soggiorno" allows an EU citizen's family member to work in Italy (as an employee or self-employed) with the only exception of jobs reserved to Italians (which is very limited category). It follows that Roberta could take advantage of Paul's right to stay in Italy, to get a "Carta di soggiorno" and work in Italy as well.

Alternatively, Roberta could get her own employment-based permit to stay under the legislation concerning the immigration of non-EU citizens (e.g. for non-EU workers) but this would appear to be a more complicated and lengthy procedure. For example her entry might be subject to quotas. Also, it might take longer to obtain a permit to stay for her mother.

2.1.4 *Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?*

After five years of regular stay under the above rules, the EU citizen (Paul) and his family members (Roberta, the children, Gloria) will obtain the right to stay in Italy permanently. The family members need to get a "Carta di soggiorno permanente".

2.1.5 *Will any of the members of the family be able to acquire citizenship of your country?*

The rules on acquiring Italian citizenship can be found in Law n.91 of February 5^{th} 1992.

An EU citizen may obtain Italian citizenship after four years of continuous legal residence in Italy, as certified by the registration in a municipal's registry. Paul could therefore take advantage of this rule.

Also the children could benefit from the above. In fact, the law states that if a person acquires Italian citizenship, his children living with him become automatically Italian citizens as well.

A non-EU citizen (like Roberta and Gloria) may become Italian citizen only after ten years of continuous legal residence in Italy.

Citizenship is subject to an application to the President of the Italian Republic. The procedure is quite lengthy as citizenship is granted by a Presidential decree.

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (**the Inheritance**).
- Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.

2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

Acquisition of a property in Italy bears taxation depending on who the parties to the transaction are.

Generally speaking (although naturally analysis on a case-by-case basis would be necessary prior to any advice being given), from the mere perspective of the tax burden on acquisition, purchases made by private individuals from private individuals are more convenient. In fact, as the law currently stands, a private individual who purchases a property from another private individual or from a non-building company is liable to a purchase tax (*imposta di registro*) of 9% levied on the 'cadastral' value of the property rather than on its full market value. Cadastral values are generally considerably lower than market values. They are set centrally by the tax authorities and therefore must be verified for every single property. Just by way of example, if a property's market value is €14.5M and its cadastral value is €1.5M, in this scenario the total tax payable (but for some minor fixed costs like stamps) would be of €135K rather than €1.3M.

On the other hand, when a trust or a company (whether Italian or foreign) are acquiring a property the *imposta di registro* would be levied on the full market value paid. As a first step therefore we would investigate with Roberta and Paul whether they would be happy to hold the Penthouse in their own names.

Although from a mere acquisition perspective the solution may be reasonably simple (but please remember that any acquisition planning must be done only once it is clear who is selling the property), care should also be given to understanding what the future plans for the property are: do they intend to use the house as their principal home (in which case they may be able to benefit from a lower rate of tax at 4% rather than 9%)? Or do they plan to rent it keep it as an income-generating investment (in which case it may be possible to explore the option of acquiring via a company)? What are their long-term plans succession-wise? Are they happy to keep the property within the family as provided by law (in which case direct ownership would be advisable due also to the low inheritance tax rates and the opportunity to benefit from a €1M threshold) or will they want to plan otherwise (in which case an option would be to look at a trust structure)?

As it appears clearly, any planning in relation to the acquisition of the Penthouse will need to be done once Roberta's and Paul's wishes are clarified and all the facts have been acquired, as the variables are quite substantial.

2.3 Succession law and mental capacity

2.3.1 *What would you advise with respect to the Inheritance?*

We are assuming that Italian law is applicable to (i) the marriage between Roberta and Paul, (ii) Gloria's succession, (iii) Roberta's succession.

Gloria could donate the whole Inheritance to Roberta. Property received by gift is not a matrimonial asset under Italian law (see Article 179 of the Civil Code). Also, being Roberta Gloria's only heir, there is no risk for the gift to be challenged by others being entitled to compulsory portion of Gloria's inheritance because there are none.

However, if Roberta then should die before her husband, he would ultimately inherit part of the Inheritance by law. Roberta could only partially dispose of the Inheritance to the children (by gift or will) because Paul's compulsory portion must be preserved.

Alternatively, Gloria might by last will (or gift) dispose of all the Inheritance in favour of the grandchildren, but this could be done effectively only if Roberta and Paul agree. If the children are under age, judicial authorization may be necessary for them to accept the gift, and the gifted assets would be administered by the parents until they become of age.

It should be pointed out that, even if Roberta authorized the above disposition from Gloria to the children, Roberta would still have a claim concerning her compulsory portion of her mother's inheritance (Roberta is her only forced heir). Such claim could only be made, or waived, after Gloria's death.

Another option could be establishing a trust. There is no Italian law on trusts. However, Italy is a member to the Hague Convention on the law applicable to trusts and their recognition, made on July 1st 1985 and ratified by Law n.364 of October 16th 1989. Therefore, in principle, a trust governed by a foreign law can be established and/or recognised in Italy, if it meets the Convention's requirements.

In our case, Gloria might establish a trust and transfer the Inheritance to it. Her grandchildren could be named as beneficiaries.

It is important to note, though, that according to the Convention, a trust may not prejudice the compulsory rights arising from – for example - forced heirship and matrimonial regime rules.

Therefore, Roberta's right to a compulsory portion of her mother inheritance would still be unprejudiced.

In any case, transferring the Inheritance directly to the grandchildren (or putting them in a trust) would have the advantage to protect the assets from Roberta's creditors if any.

The matrimonial regime rules should also be considered. If Roberta and Paul are in common ownership regime under Italian law, any income or property received during the marriage relationship (unless it is property received by a spouse by succession, donation or a few other cases provided for by law) would become property in common.

Common ownership is the legal matrimonial regime in Italy, however it is not mandatory. Separation of property (and income) can be chosen, with the consequence that in principle neither spouse would have claims on the other's property or income acquired during marriage. Separation has to be appropriately formalized and registered as a choice. Separation is becoming more and more common among married couples, especially as nowadays both spouses have their own job and income.

2.3.2 *What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?*

Paul could, by notarial deed, either:

- grant Roberta a general power of attorney (effective immediately), or
- appoint her as "Administrator" in anticipation of his future incapacity. This appointment only becomes effective when Paul actually loses his mental capacity. However, it may be necessary for Roberta to then apply to the appropriate Italian court to confirm her husband's appointment.

2.3.3 *More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider?*

If Roberta and Paul wish to have only the family members inherit (spouse and children) then there is no particular succession planning issue because this is already provided for by statutory law.

From an inheritance tax perspective, passing the estate on to the spouse and children will allow to benefit of a lower rate of tax (4%) and of a €1M non-taxable threshold per heir. By way of example, if Roberta leaves her estate to Paul and the twins, the first €1M in the hands of each of them will be free of tax, with the excess taxed at a rate of 4%.

Last wills however are a useful tool, for example, to partially deviate from the legal portions (without prejudice to the compulsory portions), or to leave single assets to somebody (legatee), or to make other provisions effective after death.

Preserving the property in the meantime is also important. If the spouses own valuable real property (or other property like cars, vessels, securities…), they might consider establishing a "fondo patrimoniale" (Article 170 of the Civil Code). The "fondo patrimoniale" is a sort of separate fund (trust fund) aimed at protecting certain family property against business risks. Property in a “fondo” may only be seized for obligations connected with “family needs”. This comes at a cost however, as very stringent rules are set for administering and disposing of such property.

3. QUESTIONS FOR CASE STUDY B

3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) 'domiciled in a state of Australia';
- Single;
- Commodities trader;
- Family wealth from mining opals;
- Bruce has an Aus$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

3.2 Pre-arrival planning

3.2.1 *What pre-arrival tax planning opportunities would you advise?*

As a preliminary step, Bruce will need to obtain his Italian Tax ID Number that is issued upon request by the Italian Tax Authority. The Italian Tax ID Number does not imply per se any tax consequence, however, it is necessary in order to complete many activities that Bruce will have to carry out in order to move to Italy (e.g. rent an apartment, execute the relevant agreements with electricity and gas suppliers; etc.).

In order not to increase Bruce's tax compliance, we would advise him to move to Italy starting from the beginning of the tax year (i.e. 1 January 2014). In such a way he will face a double tax return for one year only due to the different tax year in Italy (from 1 January to 31 December) and Australia (from 1 July to 30 June). If he starts working and living in Italy during a year (let's say from July) he can potentially face double tax returns (i.e. Australian and Italian) over two years.

Depending on the amount of distributions of income coming from the Swiss portfolio and the shares in the Australian family company ('AUS Shares'), it would also be worth exploring the opportunity to engage an Italian financial intermediary as a part of Bruce's pre-planning. The intermediary would declare and pay the income distributed in favour of Bruce on his behalf. As a consequence, Bruce would receive a net distribution and he would not be under any obligation to declare the income in his tax return or to pay any further tax on it. It should also be noted that non-Italian financial investments (such as the Swiss portfolio and the AUS Shares) managed by an Italian intermediary are currently excluded from the reporting requirements to the extent that Italian tax chargeable on any income and gains is deducted at source by the intermediary.

3.2.2 *What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?*

Once resident in Italy for tax purposes, Bruce will be subject to the following tax and reporting compliance:

- Annual Tax Return: on 30 September of each year, Bruce will have to file his Italian tax return on a worldwide basis (all incomes arising worldwide and from any type of sources must be included). Different tax rates apply in Italy in relation to each relevant net income bracket, as follows:

    - Up to €15,000: 23%;
    - Between €15,000 and €28,000: 27%;
    - Between €28,000 and €55,000: 38%;
    - Between €55,000 and €75,000 41%;
    - Above €75,000 43%.

  In addition to the above, municipal and regional income taxes jointly equal to approx. 2% apply.

- "Wealth" Tax on Foreign Assets. Bruce, as Italian taxpayer, is under the obligation to pay Italian taxes on: i) real estate / properties; and ii) financial assets (e.g. shares, stock, bond, participations, etc.) located outside of Italy. With reference to real estate, the tax rate is equal to 0.76% of the real estate / property's value (determined as the purchase price or the cadastral value or the fair market value, depending from the country where the real estate / property is located). With reference to financial assets (the AUS Shares and the Swiss portfolio in our case), 0.2% applies to the fair market value of such assets as of 31 December of each year.

- Tax reporting obligations. Bruce will be under the obligation to report his foreign assets (the AUS Shares and the Swiss portfolio) by populating the Quadro RW of his Italian tax return (as mentioned in answer 1.3.3 above), unless the management of such assets is assigned to an Italian financial intermediary.

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

3.3 **Lifetime matters**

3.3.1 *With respect to the commodities business, how would you advise Bruce in relation to:*

(a) *the most tax efficient way to make the inward investment?*

Pursuant to Italian law, a commodities trader needs to carry out his business activity by means of a broker, i.e. a company duly registered with the *The Commissione Nazionale per le Società e la Borsa* (CONSOB) which is the public authority responsible for regulating the Italian securities market.

ETFplus is the market within the Borsa Italiana which relates to financial instruments connected with commodities. ETF (Exchange Traded Funds) are funds aimed at replicating the commodities trend and through which an individual can invest in the commodities market. ETF invest in the commodities and stock market and do not pay any taxes on distributions received from the investments made. The amount, however, distributed by ETF to the private individual who invested his / her money in ETF (Bruce in our case) are generally qualified, for tax purposes, as dividends' distribution subject to a withholding tax equal to 20%. Should, however, the ETF invest a portion of its fund in bonds issued by the Italian State and / or by a White Listed State, the withholding tax is reduced to 12.5% in relation to the income arising from such bonds.

ETC (Exchange Traded Commodities) are, instead, financial instruments traded within the ETFplus, that are directly linked with the commodities' price and that are usually issued by a SPV (Special Purpose Vehicle). Differently from the ETF, the ETC are not funds but financial instruments qualifying as derivative instruments. The income distributed by the ETC is always treated as a dividends' distribution, subject to 20% withholding tax.

(b) *any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?*

Should Bruce intend to invest in the commodities market as a business player rather than a private individual (for which see above), the incorporation of a company for carrying out such a business would be advisable. The reason lies with the different taxation applicable to companies and to private individual entrepreneur, as follows:

- Companies shall be subject to the Italian corporate income tax (in Italian *Imposta sul Reddito delle Società*, '**IRES**') and the regional corporate income tax (in Italian *Imposta Regionale sulle Attività Produttive* '**IRAP**'), for a whole tax rate equal to 31.4%;

- PIE shall be subject to the mentioned individual income tax rate, ranging from 23% to 43%, plus 2%.

Differently from the regime applicable in the event that Bruce invests as a private individual, in this scenario (companies or PIE as investors) the whole amount of income distributed by ETF / ETC will be subject to tax in the hands of the company / PIE at the above rates, without the application of any WHT.

No Italian tax applies, however, to distributions made by ETF / ETC to companies / PIE / private individuals that do not reside in Italy for tax purposes. It would be worth exploring, therefore, the chance that Bruce invest in the Italian commodities market through a vehicle incorporated in a EU country with a favourable tax and corporate regime (e.g. the UK, Ireland, Luxembourg or The Netherlands), in order to achieve a more efficient investment structure. Please note, however, that once the income in the hands of the foreign vehicle is distributed to Bruce while resident in Italy for tax purposes, he will be subject to tax in Italy on such distribution.

For all the considerations described under point (a) and (b) above and given the fact the Bruce has the intention to stay in Italy for a short period of time, we would suggest following one of the paths below:

- To invest in the stock / commodities market as a private individual through an Italian financial intermediary (private individual traders cannot invest directly in the stock / commodities market);

- To invest in the stock / commodities market through a non-Italian vehicle.

We would not advise Bruce to incorporate an Italian company due to the high tax rate applicable to it and to the short period of Bruce's presence in Italy.

(c) *eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?*

In light of our suggestions under point (b) above, no particular exit structuring / opportunities will need to be planned.

3.3.2 *As to the unreported bank account:*

(a) *what would you advise Bruce?*

Prior to the introduction of the European Law 2013 trusts' beneficiaries were not under any reporting obligations in relation to their interests in trusts and / or in the trust's fund, unless the trust was deemed a 'sham' or a 'fictitious interposition' structure, being the beneficiaries (or the settlor depending from the case) the real owner / manager of the assets held in trust.

Following the introduction of European Law 2013 (which applies for the first time in relation to tax year 2013), trust's beneficiaries are obliged to report their interests in trust, provided that they qualify as 'ultimate beneficial owners' of the trust's fund (see above). As of today, no case law or praxis exist being the new provisions still not applied (the Italian return for 2013 is due by 30 September 2014). Therefore it is difficult to assess with certainty how and to what extent the European Law 2013's provisions will apply in practice. However, it is already pretty clear that a beneficiary of a transparent / look-through trust holding an interest higher than 25% of the trust's capital will be under the obligation to populate the Quadro RW indicating the whole of the trust's fund as his own interest.

In light of the above, Bruce might be under the obligation to report the value of his interest in his father's trust, indicating also the bank account held by the trust with reference to 2013 going forward. In fact, Bruce seems to hold an interest in the trust equal to 25% (assuming that Bruce's cousins hold equal interest to the trust) hence he qualifies as 'ultimate beneficial owner' of the trust's funds. Should the trust be opaque and discretionary, it may be possible to argue that Bruce is not actually obliged to comply with any reporting obligation. In any event, one option may be to consider diluting Bruce's interest in the trust so that his interest becomes lower than 25%.

(b) *what are the Trustee's reporting obligations in your country?*

As far as the Trustee's obligations are concerned, if the trust is resident in Italy, the Trustee is under the obligation to:

- file the income tax return and pay the applicable taxes as an Italian company (i.e. 27.5% IRES plus 3.9% IRAP); and
- comply with the reporting obligations as an individual, by populating the mentioned Quadro RW with all assets located outside of Italy.

Should, however, the trust be not resident in Italy for tax purposes, the Trustee shall be obliged to pay Italian taxes on income arising from sources located in Italy (e.g. real estate / properties, dividends distributed by Italian companies; etc.).

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 **Succession law**

3.4.1 *Do Kylie and Jason have a financial claim against Bruce's estate?*

If Bruce died before the entering into force of the Brussels IV Regulation, probably Italian law would not apply to his succession. That's because, as mentioned before, under the Italian PIL rules an individual's succession is governed by his/her national law unless the individual in question had chosen the law of his/her habitual residence, however Bruce has not made any will. Also, I assume Bruce has not (yet) become an Italian citizen. Citizenship for non-EU citizens could be obtained only after 10 years of residence in Italy, and it is quite a lengthy procedure.

If Bruce dies after the entering into force of the Brussels IV Regulation, his succession could be governed by Italian law as being the law of his habitual residence country.

Assuming Italian law applies to Bruce's succession, Kylie and Jason would certainly have a financial claim against his estate. More precisely, since Bruce died without leaving any last will, they would inherit his whole estate, half each (per Article 581 of the Civil Code).

3.4.2 *What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?*

In Italy, when only spouse and children are the heirs, inheritance tax is only due when the total net value of the inherited assets exceeds the €1.000.000,00 threshold for each beneficiary. On the asset value exceeding that threshold, a 4% tax rate applies. Other taxes would apply if real estate is part of the inheritance, but it doesn't appear to be the case here. It would not have been easy to avoid such taxation. Gifts for example are taxed the same way as successions. A plurality of gifts valuing under the threshold might perhaps have mitigated or avoided the tax, but this should be really checked in the practice.

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