

Italy – New conditions of access for Italian companies in Switzerland.

Regulations governing foreign subsidiaries (CFCs)

Over the years, the tax regulations governing foreign subsidiaries, known among insiders as CFCs (Controlled Foreign Companies), have undergone numerous changes related to the criteria for identifying states or territories with preferential taxation regimes.

In short, if a party resident in Italy holds, either directly or indirectly, even through trust companies or through an intermediary, the control of a business, company or other entity resident or located in states or territories with a preferential tax regime, the income earned by the foreign controlled entity is attributed, on the basis of transparency, to the resident parties in proportion to the shares they hold and is taxed separately using the average rate of the resident party and, in any case, not lower than that envisaged for the companies (as of 2017, this was 24%). In general, in order to identify the preferential tax regime, we have moved from an approach based on a detailed listing in the so-called “black list”, issued pursuant to the Ministerial decree of 21/11/2001, to an evaluation of the nominal level of taxation to which the foreign company is subject and, as of 2019, to an assessment of the effective level of taxation.

Therefore, as of 2016 and until 2018, the following are considered to be preferential:

- Regimes in which the nominal level of taxation was less than 50% of that applied in Italy;
- Special tax regimes.

In the same context, and with reference to foreign subsidiaries located in states or territories other than those with preferential taxation (the so-called “white list”), the CFC regulations were applied, in any case, to the joint occurrence of the following conditions:

- Effective taxation less than more than half of that which they would have been subject to if resident in Italy;
- The earning of revenues recorded in financial statements for which more than 50% derives from so-called passive income, or from managing, holding or investing in securities, shareholdings, loans or other financial activities (typically, interest income), from the sale or granting of the rights of use of intangible rights relating to industrial, literary or artistic property (e.g. income from royalties), or from the provision of intra-group services rendered to parties that directly or indirectly control the non-resident company or entity, are controlled by it or are controlled by the same company that controls the non-resident company or entity, including financial services.

New rules for foreign subsidiaries

Article 4 of Legislative Decree 142/2018 modified the existing regulations effective in 2019, providing, in summary, for the following:

- The elimination of the previous distinction between “black list” and “white list” countries;
- The introduction of new preliminary conditions of access;
- The possibility of exclusion from the CFC regime subject to the operation of an actual economic activity.

In particular, it is necessary first of all to point out that the notion of significant control has changed in order to trigger the tax rules in question. To this end, non-resident controlled entities are considered to be businesses, companies, and entities not resident in the territory of the State for which at least one of the following conditions is met:

- They are controlled directly or indirectly, including through trust companies or third parties, pursuant to Article 2359 of the Italian Civil Code, by a person resident in Italy;
- More than 50% of the shareholdings of non-resident parties is held, directly or indirectly, through one or more subsidiary companies (pursuant to Article 2359 of the Italian Civil Code) or through a trust company or third party, by a party resident in Italy.

In addition, permanent establishments abroad of non-resident parties considered to be controlled, as defined previously, and permanent establishments abroad of resident parties who have opted for so-called “branch exemption”, are considered to be non-resident controlled entities.

If either of the two aforementioned conditions is verified, fiscal transparency mechanisms are applied if the non-resident controlled parties jointly comply with the following conditions:

- They are subject to effective taxation of less than half of which they would have been subjected to if they were resident in Italy;
- More than a third of the revenues they earn fall into one or more of the following categories:
- Interest or other income generated by financial assets;
- Royalties or other income generated by intellectual property;
- Dividends and income deriving from the sale of shareholdings;
- Income from financial leasing;
- Income from insurance, banking or other financial activity;

Income derived from the purchase/sales transactions for goods with little or no added economic value that are engaged in with parties who directly or indirectly control the non-resident controlled entity, are controlled by it, or who are controlled by the same party that controls the non-resident entity;

- Income deriving from the provision of services with little or no added economic value carried out in favour of parties who directly or indirectly control the non-resident controlled entity, are controlled by it, or who are controlled by the same party that controls the non-resident entity.

Finally, a provision is made for the possibility of disregarding the CFC rules if the party resident in Italy demonstrates that the non-resident controlled entity performs an actual economic activity through the use of personnel, equipment, assets, and premises.

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