

Permanent establishment and the treaty tie-breaker

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Where the Swiss company is not resident in Italy, Italian tax may still apply through a permanent establishment. Article 162 TUIR has been revised to follow the OECD's work on the artificial avoidance of permanent establishment status. It treats as a permanent establishment a fixed place of business in Italy and a person who, acting on behalf of the foreign company, habitually concludes contracts or works towards their conclusion, the company then concluding them without substantial modification.¹ A Lugano trader whose sales manager lives in Varese, works from home and negotiates the contracts that Lugano signs creates exactly this risk. The post-pandemic rules on telework for cross-border workers have made it more acute (Chapter H.I).

If both Switzerland and Italy treat a company as resident, the double taxation convention of 9 March 1976 resolves the conflict. Its tie-breaker rule in Article 4 paragraph 3 assigns residence to the state in which the place of effective management is situated.² The convention thus offers protection only to a company whose effective management is in fact in Switzerland. In Italian proceedings, the Swiss company must prove this with the same evidence that Article 73 TUIR requires: board minutes, contracts, communications and the residence of the persons who actually take the decisions. Chapter H.III discusses the convention, the mutual agreement procedure and the permanent establishment provisions in detail.

1 Dividends and withholding tax in brief

Dividends paid by a Swiss trading company are subject to Swiss withholding tax of 35 per cent. An Italian individual shareholder may recover the excess over 15 per cent under Article 10 of the double taxation convention. An Italian company holding at least 25 per cent for at least two years may obtain full relief under Article 9 of the Agreement between

Switzerland and the European Union on the automatic exchange of financial account information. The provision took over the parent-subsidiary rule of the former savings tax agreement of 26 October 2004.³ In the opposite direction, dividends from an Italian subsidiary to a Lugano holding are exempt from Italian withholding tax under the same provision if the conditions are met. In a resolution of 31 July 2023 the Italian Revenue Agency accepted that a partial exemption at the level of the Swiss parent company does not exclude the relief, abandoning its stricter position of 2007.⁴ Interest and royalties between associated companies benefit from the same agreement. Chapter H.III covers these rules, the refund procedures and the anti-abuse conditions.

Common misconception. Many owners believe that a Swiss company is safe from Italian tax as long as it is registered in Lugano, has a Swiss director and files Swiss tax returns. Italian law looks at the place where strategic decisions and day-to-day management actually take place (Art. 73 para. 3 TUIR as amended in 2023). It presumes Italian residence for foreign holding companies controlled by Italian residents (Art. 73 para. 5-bis TUIR). A Swiss company managed from Italy is an Italian taxpayer, whatever its register entry says.

2 Notes

1. TUIR, Art. 162 paras 1, 6 (dependent agent who "abitualemente conclude contratti o opera ai fini della conclusione di contratti senza modifiche sostanziali da parte dell'impresa") and 7 (independent agents), text at Brocardi.it, <https://brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-i/art162.html>. ↩
2. Convention between the Swiss Confederation and the Italian Republic for the avoidance of double taxation and the settlement of certain other questions relating to taxes on income and on capital of 9 March 1976, SR 0.672.945.41, Art. 4 para. 3 ("Ort ihrer tatsächlichen Geschäftsleitung"), text at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-fr/0.6/0.67/0.672.945.41-4-7.html>. ↩
3. SLCLEX, "Italian Tax Authority: Dividends Paid To The Swiss Parent Company Are Exempt", Mondaq, 15 August 2023, <https://mondaq.com/italy/withholding-tax/1355122/italian-tax-authority-dividends-paid-to-the-swiss-parent-company-are-exempt> (Art. 9 of the Agreement of 26 October 2004 as amended on 27 May 2015; 25 per cent for two years). Federal Act on Withholding Tax of 13 October 1965 (WHTA), SR 642.21, Art. 13 para. 1 ("35 Prozent der steuerbaren Leistung" on capital income), text at droit-bilingue.ch,

<https://www.droit-bilingue.ch/de-fr/6/64/642.21-13-17.html>; DTA Switzerland–Italy, Art. 10 para. 2 ("15 vom Hundert des Bruttobetrages der Dividenden" where the recipient is the beneficial owner), <https://www.droit-bilingue.ch/de-fr/0.6/0.67/0.672.945.41-10-13.html>. ↩

4. SLCLEX (above), on Agenzia delle Entrate, Resolution No. 46/E of 31 July 2023, superseding Resolution No. 93/E of 2007. ↩

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