

Permanent establishments in both directions

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A Swiss company that is managed in Switzerland may still be taxed in Italy through a permanent establishment. Article 162 TUIR, revised in 2017 in line with the OECD work on the artificial avoidance of permanent establishment status, covers a fixed place of business in Italy and a person who habitually concludes contracts, or plays the principal role leading to their conclusion, on behalf of the foreign company.¹ The convention of 1976 contains an older definition. Article 5 refers to a fixed place of business through which the enterprise wholly or partly carries on its activity and lists among the examples a building site or construction or installation project lasting more than twelve months.² Where the convention applies, its narrower definition prevails. A Swiss company that keeps its Italian sales manager, now working from home in Como, and lets him negotiate the contracts that Lugano signs, creates exactly the risk that both definitions address. The reverse risk is less discussed. An Italian company whose owner and managing director has moved to Lugano and conducts its affairs from his home or from a Ticino office may create a Swiss permanent establishment of the Italian company. Under Swiss law, a foreign company is subject to tax on the profits of a permanent establishment in Switzerland, defined as a fixed place of business in which the business activity of the enterprise is carried on wholly or in part, such as a branch, a sales office or a permanent representation. If the effective management of the company as a whole is exercised in Switzerland, the company becomes subject to unlimited Swiss tax liability.³ The Swiss tax authorities rarely pursue such cases, but they may become relevant if the Italian company is later sold, if a Swiss bank asks for the tax status of the entity or if the Italian authorities, faced with a claim that the company is managed from Switzerland, ask where it is then taxed. The coherent answer is that a company is managed where its managers live and work, which means that an entrepreneur who moves to Ticino should either hand the management of his Italian company to managers in Italy or accept that the company's strategic management has moved with him.

1 Branches and the Italian taxation of foreign profits

A Swiss branch of an Italian company is the simplest structure in company law, but it rarely achieves the purpose of a move. The Italian company remains an Italian resident taxed on its worldwide profits, including those of the Swiss branch. Italy grants a credit for the Swiss tax under Article 165 TUIR, so that the branch's profits bear in the end the higher Italian rate.⁴ An Italian company may opt, irrevocably, for the exemption of the profits and losses of all its foreign branches under Article 168-ter TUIR, a regime that applies to all branches of the company and is subject to the conditions of the controlled foreign company rules where a branch meets their requirements.⁵ For a branch in Ticino with real staff and premises, the option exempts the Swiss profits from Italian tax. It makes the branch a vehicle for a Swiss operation without a separate company, though Swiss banks and counterparties often prefer to deal with a Swiss legal person.

2 Notes

1. TUIR, Art. 162 paras 1, 6 and 7 and notes, text at Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-i/art162.html> (as amended by Law No. 205 of 27 December 2017). ↩
2. DTA Switzerland–Italy, Art. 5 paras 1 and 2 (text above) ("una sede fissa di affari in cui l'impresa esercita in tutto o in parte la sua attività"; "un cantiere di costruzione o di montaggio la cui durata oltrepassa i dodici mesi"). ↩
3. DBG, Art. 50 ("wenn sich ihr Sitz oder ihre tatsächliche Verwaltung in der Schweiz befindet"), <https://www.droit-bilingue.ch/de-fr/6/64/642.11-50-58.html>, and Art. 51 para. 1 lit. b and para. 2 ("Betriebsstätten sind insbesondere Zweigniederlassungen, Fabrikationsstätten, Werkstätten, Verkaufsstellen, ständige Vertretungen ..."), <https://www.droit-bilingue.ch/de-fr/6/64/642.11-51-59.html>; LT, Art. 62 (tax liability limited to the part of profit and capital taxable in the canton), <https://m3.ti.ch/CAN/RLeggi/public/index.php/raccolta-leggi/legge/num/580>. ↩
4. TUIR, Art. 165 para. 1, text at Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-ii/art165.html> ("Se alla formazione del reddito complessivo concorrono redditi prodotti all'estero, le imposte ivi pagate a titolo definitivo ..."). ↩

5. TUIR, Art. 168-ter paras 1 to 3, text at Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-ii/art168ter.html> ("Un'impresa residente nel territorio dello Stato può optare per l'esenzione degli utili e delle perdite attribuibili a tutte le proprie stabili organizzazioni all'estero"; "L'opzione è irrevocabile"; paras 3 to 5 amended by Legislative Decree No. 142/2018). ↩

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