

The legal instruments

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The procedure of *accertamento con adesione* is governed by Legislative Decree no. 218 of 19 June 1997. It allows the taxpayer and the tax office to agree on the amount of an assessment. Administrative penalties are then reduced to one third of the statutory minimum, and the assessment becomes final when the agreed amount is paid.¹ Under Article 13-bis of Legislative Decree no. 74/2000, full payment of the tax debt, including administrative penalties and interest, reduces criminal penalties by up to one half and excludes ancillary penalties. In its current version, amended in 2024, the payment must be made before the close of the first-instance trial, and payment by instalments agreed in a settlement procedure can lead to a suspension of the proceedings.² The settlement does not by itself extinguish the criminal proceedings for *omessa dichiarazione*, which are decided by the criminal courts on their own terms. The reports consulted for this chapter do not mention a trial or a conviction of the individuals named in 2018, who are presumed innocent. The tax law questions behind the settlement arise under two provisions. Article 162 of the Italian Consolidated Income Tax Act (*Testo unico delle imposte sui redditi*, TUIR) defines the permanent establishment of a non-resident enterprise under domestic law. Article 5 of the Convention between Switzerland and Italy for the avoidance of double taxation of 9 March 1976 defines it for treaty purposes as a fixed place of business through which the business of an enterprise is wholly or partly carried on.³ A Swiss principal company does not have a permanent establishment in Italy merely because it buys from Italian manufacturers or because a group company in Italy designs the products it sells. It can have one if it carries on its business through a fixed place in Italy, for example offices where its employees habitually conclude contracts. It can also have one through a dependent agent in Italy who habitually exercises authority to conclude contracts in its name. The facts that determine this question are factual and internal: who decided on purchases and prices, who negotiated with customers, where the persons with authority actually worked and whether the board of the Swiss

company exercised real control. These are the same facts that determine the residence of the company under the Italian concept of *esterovestizione*, discussed below.

The transfer pricing question is governed in Italy by Article 110(7) TUIR, which since its reform in 2017 refers directly to the arm's length principle, and by the Ministerial Decree of 14 May 2018 that implements it.⁴ An Italian manufacturer that sells to a related Swiss principal must be able to show that its remuneration corresponds to what an independent manufacturer would have earned. If the Swiss principal earns a large residual profit, the Italian authorities will ask whether the Italian side's contribution, for example design, brand management or quality control, has been fully remunerated. The Kering settlement covered both questions, which shows that the line between a transfer pricing adjustment and a permanent establishment finding is often a matter of negotiation in practice.

1 Notes

1. Legislative Decree no. 218 of 19 June 1997, Disposizioni in materia di accertamento con adesione e di conciliazione giudiziale, Art. 2(3) (assessment by agreement not subject to appeal) and Art. 2(5) (penalties at one third of the minimum), Brocardi.it, <https://www.brocardi.it/disposizioni-accertamento-adesione-conciliazione-giudiziale/titolo-i/capo-i/art2.html>. ↩
2. Legislative Decree no. 74/2000 (above), Art. 13-bis(1), current text as amended by Legislative Decree no. 87 of 14 June 2024, Brocardi.it, <https://www.brocardi.it/legge-sui-reati-tributari/titolo-iii/art13bis.html> (reduction "fino alla metà", no ancillary penalties, payment "prima della chiusura del dibattito di primo grado", including payment by instalments after "procedure conciliative e di adesione all'accertamento"). ↩
3. Presidential Decree no. 917 of 22 December 1986 (TUIR), Art. 162(1), Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-i/art162.html>; Convention between the Swiss Confederation and the Italian Republic for the avoidance of double taxation and for the regulation of certain other questions in respect of taxes on income and capital of 9 March 1976, SR 0.672.945.41, Art. 5(1), <https://www.droit-bilingue.ch/de-it/0.6/0.67/0.672.945.41-5-8.html>. See Chapter H.III. ↩

4. TUIR, Art. 110(7), Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-ii/capo-ii/sezione-i/art110.html> (current wording: conditions and prices "che sarebbero stati pattuiti tra soggetti indipendenti operanti in condizioni di libera concorrenza e in circostanze comparabili"). ↩

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