

The permanent establishment in Italy

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Article 162 TUIR was amended in 2017 to follow the BEPS recommendations. A nonresident enterprise has a permanent establishment in Italy if it carries on its business there through a fixed place of business, including a place of management, a branch or an office. It also has one if a person acting on its behalf habitually concludes contracts, or habitually plays the principal role leading to contracts that the enterprise routinely concludes without material modification. Independent agents are excepted. The 2017 amendment also introduced an anti-fragmentation rule for preparatory and auxiliary activities and a provision on significant and continuous economic presence in Italy.¹ The Swiss-Italian double taxation convention of 1976 contains the older, narrower definition of the dependent agent, which requires an authority to conclude contracts in the name of the enterprise. Treaty definitions prevail over domestic law where they are more favourable to the taxpayer.²

For a Ticino company with Italian links, the risk of a permanent establishment arises in typical situations. Sales managers who live in Italy and negotiate with Italian or international customers from home offices or group premises in Milan may constitute a fixed place of business or a dependent agent. Board members or senior managers who work mainly in Italy may create a place of management. A warehouse in Italy used by the Swiss company for its own inventory may be a fixed place of business, unless its activity is purely preparatory or auxiliary. The large number of *frontalieri* in Ticino companies does not by itself create a permanent establishment, since they work in Switzerland. The growth of remote working after 2020 has nevertheless made the question of where employees actually perform their activities more delicate. Under a mutual agreement of 28 November 2023 between the Swiss and Italian authorities, *frontalieri* may work from home in their state of residence for up to 25 per cent of their working time without losing their status as cross-border workers.

This rule concerns the taxation of the employee and leaves the question of the employer's permanent establishment open.³

1 Esterovestizione and the new residence rules

The third line of attack is the most far-reaching. Under Italian tax law, a company formally established abroad that is in reality managed from Italy is a case of *esterovestizione* (literally "foreign dressing"). Such a company is taxed as an Italian resident on its worldwide income. Since the reform by Legislative Decree no. 209 of 27 December 2023, Article 73(3) TUIR treats a company as resident in Italy if it has its registered office, its place of effective management or its principal day-to-day management in Italy for the greater part of the tax period. The place of effective management is defined as the continuous and coordinated making of strategic decisions concerning the company as a whole, and day-to-day management as the continuous and coordinated performance of current management acts. The new rules apply from the tax period beginning on 1 January 2024.⁴ Article 73(5-bis) TUIR adds a rebuttable presumption of Italian residence for foreign companies that control Italian companies and are themselves controlled by Italian residents or managed by a board composed mainly of Italian residents.⁵ The criterion of principal day-to-day management is new and particularly relevant for Ticino. A Ticino company may take its strategic decisions at board meetings in Lugano while its daily operations are run by managers commuting from Como or working remotely from Varese. On the wording of the new rule, such a company could be treated as resident in Italy. The double taxation convention contains a tie-breaker rule that gives priority to the place of effective management in cases of dual residence. The Italian authorities and courts, however, interpret the place of effective management factually and pay close attention to where the managers actually work.⁶ The rule also affects Italian entrepreneurs who move to Ticino and keep their Italian companies, a situation that Chapter H.II examines.

Essentials. A Ticino distribution or trading company with Italian links must defend its profit on three fronts: the arm's length price of its purchases from Italy (Art. 110(7) TUIR), the absence of an Italian permanent establishment (Art. 162 TUIR and Art. 5 of the Swiss-Italian DTA) and its Swiss residence against the Italian rules on *esterovestizione* (Art. 73(3) and (5-bis) TUIR as amended by D.Lgs. 209/2023 with effect from 2024). The same facts about where decisions are taken and by whom determine all three questions.

2 Notes

1. TUIR, Art. 162(2)(f-bis), (4-bis), (5), (6) and (7), current text, Brocardi.it (above). ↩
2. Swiss-Italian DTA (above), Art. 5(4) (person with an authority to conclude contracts in the name of the enterprise) and Art. 5(5) (broker, general commission agent or other independent agent), <https://www.droit-bilingue.ch/de-it/0.6/0.67/0.672.945.41-5-8.html>. The convention with Italy is among the twelve Swiss conventions covered by the BEPS Convention: State Secretariat for International Finance (SIF), "BEPS Convention", <https://www.sif.admin.ch/en/beps-convention>. The consolidated text quoted here does not incorporate changes made by that Convention. See Chapter H.III. ↩
3. Accordo amichevole between the competent authorities of Switzerland and Italy, Bern and Rome, 28 November 2023, <https://www.estv.admin.ch/dam/it/sd-web/QG--v7dPRKF3/int-laender-it-dba-aa-2024-it.pdf> (home working of up to 25 per cent of working time without loss of cross-border worker status, applicable from 1 January 2024 until 31 December 2025 at the latest, pending a protocol amending the agreement of 23 December 2020). See Chapter H.I. ↩
4. Marco Bargagli, "In vigore nuove disposizioni in materia di residenza fiscale delle società", EC News (19 January 2024), <https://www.ecnews.it/fiscale/fisco-e-patrimonio/fisco-internazionale/in-vigore-nuove-disposizioni-in-materia-di-residenza-fiscale-delle-societa/>. ↩
5. Bargagli (above); TUIR, Art. 73(5-bis), Brocardi.it, <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-ii/capoi/art73.html> (paras 3 and 5-bis as amended by Legislative Decree no. 209/2023). ↩
6. Swiss-Italian DTA (above), Art. 4(3) ("Ort ihrer tatsächlichen Geschäftsleitung"; "sede della sua direzione effettiva"), <https://www.droit-bilingue.ch/de-it/0.6/0.67/0.672.945.41-4-7.html>. On the factual approach of the Italian Court of Cassation to the place of effective management see Chapter H.II. ↩

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