

The tax dimension: the hidden permanent establishment

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The most expensive sanction in recent practice has been fiscal. Under Article 162 of the Consolidated Income Tax Act (*Testo unico delle imposte sui redditi*, TUIR) and Article 5 of the Swiss-Italian double taxation convention, a foreign enterprise has a permanent establishment in Italy if it carries on business there through a fixed place of business or through a person who habitually concludes contracts on its behalf, or acts for the conclusion of contracts that the enterprise concludes without substantial modification. The treaty is narrower than the Italian statute: Article 5 paragraph 4 of the convention requires a person who has an authority to conclude contracts in the name of the enterprise and habitually exercises it in Italy. Italian tax authorities have argued that a Swiss bank whose relationship managers travel regularly to Italy, meet clients there, prepare and negotiate investment decisions and receive instructions has a hidden permanent establishment (*stabile organizzazione occulta*) in Italy.¹ If the argument succeeds, the bank owes Italian corporate income tax (IRES) and regional tax on productive activities (IRAP) on the profits attributable to its Italian business. It is also exposed to penalties for failing to file returns and, for its managers, to criminal liability for the omitted return under Article 5 of Legislative Decree No. 74/2000.

In March 2019 Forbes Italia reported that the Agenzia delle Entrate, the Italian tax administration, was sending questionnaires to foreign banks about the way in which they managed their relationships with Italian clients. The questionnaires sought to establish whether the banks had a permanent establishment in Italy, which would make them liable to IRES, IRAP and Italian value added tax. The article noted that many relationships had been conducted remotely, without the client ever visiting the bank, even to sign the contract.² The theory links market access and tax. The same facts that constitute abusive activity under Article 166 TUF (meetings, advice and the collection of instructions in Italy) also provide

the evidence of a permanent establishment, and a bank that settles the tax claim accepts in substance that it carried on business in Italy.

Essentials. The Italian sanctions for unauthorized cross-border services are cumulative. The relationship manager risks imprisonment of one to eight years under Article 166 TUF. The bank risks administrative sanctions, corporate liability under Legislative Decree No. 231/2001 for laundering or tax offences committed in its interest, and taxation of its Italian business as a hidden permanent establishment. In Switzerland the bank risks FINMA measures for a breach of the guarantee of proper business conduct.

1 Notes

1. TUIR (Presidential Decree No. 917 of 22 December 1986), Art. 162 para. 1 (fixed place of business) and para. 6 (person who "abituamente conclude contratti o opera ai fini della conclusione di contratti senza modifiche sostanziali da parte dell'impresa"), <https://www.brocardi.it/testo-unico-imposte-redditi/titolo-iii/capo-i/art162.html>; Convention between Switzerland and Italy of 9 March 1976, SR 0.672.945.41, Art. 5 para. 4 and 5, <https://www.droit-bilingue.ch/de-it/0.6/0.67/0.672.945.41-5-8.html>. On the Italian theory see the SUPSI seminar announcement (above), which refers to the Italian authorities' broad interpretation of the "personal permanent establishment". ↩
2. "Banche estere nel mirino del fisco: i correntisti devono temere?", Forbes Italia, 7 March 2019, <https://forbes.it/2019/03/07/banche-estere-nel-mirino-del-fisco-i-correntisti-devono-temere>. ↩

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