The New Italian Transfer Pricing Provision Concerning Unilateral Corresponding Adjustments

On 30 May 2018, the Revenue Agency published the regulation implementing the new rules on unilateral corresponding adjustments. The article discusses the specifics of the regulation, highlighting the opportunities arising from the new procedure and the most critical aspects.

1. Introduction
The Italian transfer pricing legislation was significantly revised by Law Decree of 24 April 2017, No. 501 (the Law Decree). The new provision amended paragraph 7 of article 110 of the Italian Income Tax Code1 (article 110(7)),2 and it modified the domestic rules on corresponding adjustments, which were previously allowed only following the conclusion of a mutual agreement procedure (MAP). In particular, the Law Decree introduced a new rule (article 31-quater) aimed at broadening the conditions under which corresponding adjustments can be recognized. Indeed, a corresponding adjustment may now be granted – in addition to cases in which a MAP was concluded – (i) as a result of transfer pricing adjustments deriving from activities of international cooperation of which the results have been shared between the participant states; and (ii) upon formal application by the taxpayer to the Revenue Agency following a final transfer pricing adjustment made in compliance with the arm's length principle in a foreign state (if such state has concluded a treaty with Italy that provides for adequate exchange of information). Following a public consultation held on 21 March 2018 by the Italian Ministry of Economy and Finance together with representatives of the Revenue Agency and the Italian Tax Police, the final version of the regulations implementing the new rules on unilateral corresponding adjustments was released on 30 May 2018 (the Regulation).3

2. New Regulation on Corresponding Adjustments
As mentioned in section 1., the Law Decree introduced a new rule aimed at broadening the circumstances under which corresponding adjustments can be made.4 In particular, the new provision modified the domestic transfer pricing rule providing for the possibility to obtain a corresponding adjustment “only in execution of agreements concluded with the competent authorities of foreign States pursuant to the mutual agreement procedures”.5

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1. See IT: Presidential Decree 29 September 1973, No. 600, art. 31-quater; para. 1. letter e), which reads as follows. “The downward adjustment of income referred to in article 110(7)2 of the Italian Income Tax Code approved by Presidential Decree No. 917 of 22 December 1986 can be granted: (a) within the implementation of the agreements concluded with the competent authorities of the foreign States following the mutual agreement procedures laid down by the international conventions for the avoidance of double taxation on income or by the Convention 90/436/EC of 23 July 1990. (b) at the conclusion of the controls carried out within the framework of international co-operation activities whose results are shared by the participating States; (c) following a request by the taxpayer to be submitted in accordance with the terms and conditions laid down in regulations issued by the Director of the Revenue Agency, with respect to a final upward adjustment and in accordance with the arm's length principle made by a State with which a Convention for the avoidance of double taxation on income is in force, which allows an adequate exchange of information. This is without prejudice, in any case, to the right of the taxpayer to request the initiation of the mutual agreement procedures referred to in letter (a), where the conditions are satisfied.”


3. The text of the provision reads as follows. "7. Income components arising from transactions with non-resident companies which directly or indirectly control the enterprise, are controlled by it or are controlled by the same company controlling the enterprise, are determined by making reference to the conditions and to the prices which would have been agreed between independent parties operating under conditions of free competition and in comparable circumstances, if it results in an increase in income. The same provision applies even if it results in a decrease in income, in accordance with the terms and conditions referred to in article 31-quater of the Presidential Decree No. 600 of 29 September 1973. A Decreto of the Minister of Economy and Finance, on the basis of best international practices, may draw up the guidelines for the application of this paragraph." 4. See IT: Presidential Decree 29 September 1973, No. 600, art. 31-quater, para. 1, letter e), which reads as follows: “The downward adjustment of income referred to in article 110(7)2 of the Italian Income Tax Code approved by Presidential Decree No. 917 of 22 December 1986 can be granted: (a) within the implementation of the agreements concluded with the competent authorities of the foreign States following the mutual agreement procedures laid down by the international conventions for the avoidance of double taxation on income or by the Convention 90/436/EC of 23 July 1990. (b) at the conclusion of the controls carried out within the framework of international co-operation activities whose results are shared by the participating States; (c) following a request by the taxpayer to be submitted in accordance with the terms and conditions laid down in regulations issued by the Director of the Revenue Agency, with respect to a final upward adjustment and in accordance with the arm's length principle made by a State with which a Convention for the avoidance of double taxation on income is in force, which allows an adequate exchange of information. This is without prejudice, in any case, to the right of the taxpayer to request the initiation of the mutual agreement procedures referred to in letter (a), where the conditions are satisfied.”

5. The unofficial English translation of the Regulations is provided in the Appendix at the end of this article.

6. This amendment is consistent with Recommendation No. 4 of the EU Joint Transfer Pricing Forum (EU JTPF). A coordinated approach to transfer pricing controls within the EU. JTPF/013/2018/EN. Moreover, the EU JTPF clarified that “[i]t should yet be recognized that in the transfer pricing field, tax administrations do not always share a common interest. This is because, to prevent double taxation, a well-founded primary (upward) adjustment by one tax administration should be followed by a corresponding (downward) adjustment by the other.”

7. On the basis of the previous domestic provision, Italy reserved the right to insert a provision into its treaties according to which adjustments can be made under art. 9(2) (corresponding adjustment) only in accordance with the procedure provided for by the mutual agreement article of the relevant treaty (see OECD Model Tax Convention on Income and on Capital: Commentary on Article 9(2) (21 Nov. 2017, Models IBFD)). It should be noted that the reservation made by Italy is still in place. In light of art. 31-quater, the reservation to art. 9(2) should be considered superseded, and Italy is expected to withdraw it in the next revision of the OECD Model. Moreover, as highlighted by the OECD in the Mutual Agreement Procedure (MAP) Peer Review Report on Italy, “[a]ccess to MAP should be provided in transfer pricing cases regardless of whether the equivalent of article 9(2) is included in Italy’s tax treaties and irrespective of whether its domestic legislation enables it to do corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Italy states it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments. In relation hereto, the introduction and paragraph 4.2.2 of Italy’s MAP Guidance mentions disputes on the correct application of the arm’s length principle between associated enterprises and the
The current amended text of article 110(7) now refers to article 31- 4 as a result of transfer pricing adjustments deriving from activities of international cooperation of which results have been shared between the participant states; and (ii) upon formal application by the taxpayer to the Revenue Agency following a final transfer pricing adjustment made in compliance with the arm's length principle in a foreign state, subject to specific conditions, which are described in section 2.1.9

With regard to the procedure under point (ii), the Regulation clarified that it should be considered the initial phase of a MAP, aimed at quickly defining cases in which a foreign primary adjustment is manifestly in line with the arm's length principle.10

The Regulation is applicable from 30 May 2018 (i.e. the date of its publication on the website of the Revenue Agency) in relation to primary adjustments made in a foreign country for which, until the same date, no application for a MAP has been filed. It is therefore possible to file a request for a corresponding adjustment also with reference to primary adjustments carried out before the entry into force of the provision under analysis, to the extent that the deadline for opening the MAP has not expired (see section 2.1.3.).

2.1. Conditions for filing the request for a corresponding adjustment

According to article 31- 4, the request for a corresponding adjustment can be filed following a final primary adjustment "in accordance with the arm's length principle made by a State with which a convention for the avoidance of double taxation on income is in force, which allows an adequate exchange of information". Therefore, there are basically four conditions for filing the requests: (i) the adjustment should be made by a state; (ii) the adjustment should be final; (iii) the adjustment should follow the arm's length principle; and (iv) the adjustment should be made by a state with which a convention against double taxation is in force, and that convention must provide for an actual exchange of information with Italy.

2.1.1. Primary adjustments made by a state

The first condition for filing a request for a unilateral corresponding adjustment is that the primary adjustment was made by a state. Reference is therefore exclusively made to cases of tax assessment in a foreign jurisdiction.

It is not clear whether the above condition could be interpreted in a broad sense, including also bona fide taxpayer-initiated adjustments, such as self-adjustments of the tax return in order to align it with the results of audits performed in previous years or with the results of an advance pricing agreement (APA) under a roll-back procedure.

However, considering that the new corresponding adjustment procedure should be considered the initial phase of a competent authority procedure, the answer is to be found in cases in which a competent authority procedure could be activated. In that respect, the Commentary on Article 25 of the OECD Model as amended following the result of BEPS Action 14, points out that access to a MAP should be granted also in the case of "bona fide taxpayer-initiated adjustments which are authorised under the domestic laws of some countries and which permit a taxpayer, under appropriate circumstances, to amend a previously filed tax return in order to report a price in a controlled transaction, or an attribution of profit to a permanent establishment, that is, in the taxpayer's opinion, in accordance with the arm's length principle".

Therefore, if the procedure set out in article 31- 4 is simply the initial phase of a MAP, the new procedure should be made available to the taxpayer in all cases in which the MAP is allowed. This implies that access to the unilateral adjustment procedure should be granted not only in the case of a tax assessment made by a state, but also in cases of adjustments spontaneously carried out by taxpayers in tax returns in order to align the intra-group prices with the arm's length conditions. This interpretation is consistent with the purpose of the provision, i.e. to decrease the number of competent authorities' procedures when these issues can be unilaterally solved.12 Nevertheless, such wider interpretation could be limited by the second requirement of article 31- 4, namely that the

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10. As clarified by the explanatory and technical reports to the Law Decree, the introduction of this new provision is designed to align Italy with the OECD recommendations (see OECD, Making Dispute Resolution Mechanisms More Effective: Action 14 – 2015 Final Report (OECD 2015), International Organizations’ Documentation IBFD), as well as to reduce the time required for the assessment of MAP requests and the overall number of MAPs, thereby improving the efficiency of the public administration without placing an excessive burden on businesses.

11. Moreover, in accordance with art. 25(2) of the OECD Model, the Revenue Agency had already put forward the possibility of unilateral granting of refund or relief in the event of a foreign adjustment. The Circular of the Revenue Agency of 5 June 2012, No. 21/E states: “[S]hould double taxation arise from an assessment notice issued by a foreign tax administration, the Revenue Agency will consider whether room exists to grant a refund or tax relief to the resident taxpayer, as the foreign assessment is clearly consistent with the [double tax convention] provision at stake.” Considering the limits under the previous transfer pricing legislation to grant unilateral adjustments, the reference should be deemed to concern cases of double taxation prevented by the relevant tax treaty other than transfer pricing cases.
adjustment is final. Indeed, one may argue that a self-adjustment made by the taxpayer in the tax return is not final, as it is still subject to the scrutiny of the tax authorities of the state of residence. On the contrary, the rollback of the results of a unilateral APA or the self-adjustment made by the taxpayer for aligning the tax return with the results of a tax audit (for example, before a tax assessment is served) may be considered differently when, based on the domestic legislation of a state, they could not be further challenged by the tax authorities.

### 2.1.2. The definitive nature of the adjustment

According to article 31-\textit{quarter}, a requirement for applying for the unilateral adjustment procedure is that the primary adjustment is final. The draft Regulation initially provided that the adjustment had to be final when the taxpayer submitted the application. Indeed, according to the draft Regulation, the taxpayer had to attach to the application the certificate issued by the foreign tax authority showing the definitive nature of the primary adjustment.

Following the comments made during the abovementioned public consultation, the Revenue Agency revised its interpretation and established that the adjustment should be final at the end of the procedure, when the Italian tax authorities recognize the unilateral adjustment. On the basis of this new interpretation, the certificate (or appropriate equivalent documentation attesting the definitive nature of the primary adjustment) must be submitted by the end of the procedure in the case of recognition of the unilateral adjustment.

The proposed interpretation is in line with the rationale of the provision. Indeed, it is appropriate that the adjustment is final when the unilateral adjustment is granted to avoid any risk of double non-taxation. As for the other way around, requiring that the adjustment is final when the request is filed could, in some cases, jeopardize the possibility to open a MAP in the case that the unilateral adjustment is not accepted by the Italian tax authorities.

### 2.1.3. The arm’s length nature of the adjustment

An additional condition required for applying for unilateral adjustment is the arm’s length nature of the primary adjustment. It is not clear whether such requirement should result directly from the reasoning of the assessment made by the other state or whether it could be supported by the taxpayer with an economic analysis carried out on purpose in order to file the Italian application. This could be the case of adjustments agreed on in a settlement contest (in which the negotiation component could prevail over the technical reasoning) or in cases of adjustments carried out by non-OECD member countries. For example, if an adjustment is made on the basis of a safe harbour but the result is, nonetheless, at arm’s length, the possibility to access the corresponding adjustment procedure should not be precluded, to the extent that the taxpayer is able to prove the arm’s length nature of the adjustment.

Such interpretation seems to be in line with the wording of article 2(4) of the Regulation that – although it does not specifically address this issue – requires the taxpayer to indicate, in the application, “all the elements of law and of fact that allow to evaluate that the upward adjustment, carried out in the foreign country, is in conformity with the arm’s length principle”.

### 2.1.4. Existence of a tax treaty providing for effective exchange of information

The last condition required by article 31-\textit{quarter} for filing a request for a corresponding adjustment is that the primary adjustment is carried out by a state with which Italy has a tax treaty in force providing for actual exchange of information. The rationale of this requirement is to allow the Italian tax authorities to verify the information provided by the taxpayer concerning the primary adjustment.

On the basis of the wording of the provision, it seems that adjustments made by states that have only concluded a tax information exchange agreement (TIEA) with Italy are excluded. Such a choice could be justified, considering that the Regulation requires the activation of a MAP, an option that is clearly not available in the absence of a tax treaty.

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14. For example, this could be the case of an advance pricing agreement that includes a roll-back provision, according to which the taxpayer commits to adjusting previous tax returns and the tax authority cannot further challenge the transfer pricing applied.

15. It is not clear from the wording of the regulation as to which characteristics and minimum content such a certification should have. In addition, the taxpayer may have difficulty in obtaining such certification directly from the foreign authority. In the case that the taxpayer cannot obtain such document, it would be more appropriate for the Italian authority to liaise with the foreign authority in order to obtain confirmation of the definitive nature of the adjustment under an exchange-of-information procedure. See M. Antonini & R.A. Popotti, La nuova procedura di eliminazione delle doppie imposizioni da rettifiche di transfer pricing in uno stato estero, 27 Corriere Tributario p. 2089 (2018).

16. For example, if the adjustment is granted when the foreign assessment is under internal court litigation, the cancellation of the claim could determine double non-taxation.

17. For example, this is the case of treaties that impose, under art. 25, “that an adjustment of taxes pursuant to that article may be made only prior to the final determination of such taxes”, therefore requiring the start of an internal litigation together with the MAP application. See para. 6 of the Exchange of Note to the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (21 Oct. 1988), Treaties IBFD.

18. This is for states outside the European Union for which the arbitration convention is not available.
2.2. The procedure phases

2.2.1. Submission of the application

The procedure starts by filing an application to the Revenue Agency. As mentioned above (see section 2.1.1.), since the procedure is actually the initial phase of a MAP, the taxpayer must indicate the legal instrument under which the request is made (e.g. a MAP provided for by the conventions concluded by Italy with other states to avoid double taxation on income, by the Arbitration Convention or by other legal instruments governing the resolution of international disputes as incorporated into Italian domestic law).

The application must contain the elements required for the activation of the MAP pursuant to the legal instrument selected by the taxpayer. In addition to these elements, the Regulation provides that the application should also include a clear indication of the object, i.e. the request for the elimination of the double taxation generated by an upward adjustment, which is final and in conformity with the arm’s length principle, carried out by the tax authority of the foreign state with which a treaty against double taxation on income is in force. If, at the time of submission of the application, the primary adjustment carried out by the foreign state is not yet final, the application must indicate the stage at which the adjustment process is and the possible circumstances, depending on which the upward adjustment will become final. Also according to the Regulation, the taxpayer should enclose, as an attachment, a courtesy translation in Italian or, alternatively, in English, of the tax deeds issued by the foreign tax authority from which the primary adjustment arises and all the elements of law and of fact that allow for the evaluation of whether the upward adjustment, carried out in the foreign country, is in conformity with the arm’s length principle.

The application must be filed within the time limits set by the legal instrument for the resolution of international disputes indicated therein. For example, if the application is filed on the basis of the Arbitration Convention, the deadline for filing the request is 3 years from the moment at which the tax assessment is served.

2.2.2. Admissibility of the application and conclusion of the procedure

The application should be declared admissible within 30 days of its receipt if all the requirements provided for by the Regulation are met. If, instead, the application is declared inadmissible due to the absence of one of the above-mentioned elements (see section 2.2.1.), the Revenue Agency will notify the applicant about the missing information and grant an additional 30 days to complete the request. In this case, the 30 days for the declaration of admissibility start from the date of receipt of the supplementary documentation requested. The request is declared definitively inadmissible when the applicant does not proceed within the time limit to supplement the request or when the additional documentation produced within the same time limit is considered not sufficient to carry out the procedure. During the scrutiny of the information contained in the application, the Revenue Agency will also assess whether the adjustment was made by a state with which a convention against double taxation on income is in force that allows for adequate exchange of information.

Following the confirmation of admissibility, the Revenue Agency examines the contents of the application and the related documentation. The Revenue Agency may request further documentation or invite the taxpayer for a meeting in order to get additional information.

Article 5 of the Regulation provides for the resolution of the procedure in two cases. The first occurs when the taxpayer fails to provide the requested documentation within the time limit indicated by the tax authorities without a justified reason. In this regard, the authors believe that the termination should refer only to the unilateral procedure set out by article 31- quater, while the MAP set up with the application should remain in force. The second case of termination of the procedure occurs when the taxpayer is liable to serious penalties related to the object of the procedure. In that regard, the question arises as to whether this exclusion from the procedure relates to serious penalties (eventually) applied in the other state following the primary adjustment. The answer should be affirmative, as the serious penalties “related to the object of the procedure” are, in principle, applied by the foreign tax authorities to the primary adjustment, even if the rationale of the provisions is not fully clear.

Indeed, the rule resembles the one contained in article 8 of the Arbitration Convention, according to which a state shall not be obliged to initiate the MAP or to set up the advisory commission when legal or administrative proceedings have resulted in a final ruling giving rise to an adjustment of transfers of profits for which one of the enterprises concerned is liable to a serious penalty. Nevertheless, such a rule is normally applied by the state of residence of the enterprise receiving the primary adjustment and not in the state of residence of the related party claiming the secondary adjustment, as in the case at hand.

20. The information required for activating a MAP under a tax treaty or under the Arbitration Convention are listed in IT: Circular Letter 21/E, issued on 5 June 2012 by the Revenue Agency.
21. The draft Regulation provided that the deeds issued by the foreign tax authority should be attached to the application. According the final version of the Regulation, the taxpayer is required to attach the translation of the deeds, allowing the Revenue Agency to request a sworn translation in Italian of the aforementioned documents, if deemed appropriate.
22. It should be noted that the Regulation does not clarify whether the taxpayer may resubmit the application within the time limits provided for by the legal instrument chosen by the taxpayer.
23. In the case of a meeting, minutes with a summary of the discussion are drafted by the Revenue Agency.
24. Indeed, such exclusion is not provided for in the context of a MAP.
25. The Italian definition of serious penalties, as set forth in the annex to the Arbitration Convention, describes “penalties laid down for illicit acts, within the meaning of the domestic law, constituting a tax offence”. For further reference, see Circular Letter No. 21/E.
Once all the documentation related to the application has been analyzed, the Revenue Agency issues a deed following which the unilateral corresponding adjustment is either granted or rejected. Article 4(1) of the Regulation provides for a deadline of 180 days for issuing the above-mentioned deed without clarifying the implications of a potential failure to deliver such a decision by the deadline. Based on the wording of article 4(2), it seems that the 180-day period is not mandatory. This may, in fact, hinder the effectiveness of the procedure.

If the corresponding adjustment is granted, upon receipt of the certification attesting the definitive nature of the primary adjustment, the Revenue Agency will inform the foreign competent tax authority and issue a provision requesting the local office to perform the downward adjustment. If, on the contrary, the corresponding adjustment is denied, the MAP under the legal instrument indicated in the application will be automatically activated based on article 6 of the Regulation (see section 2.1.3.). The Regulation makes it clear that the unilateral corresponding adjustment procedure is optional and that the taxpayer may always request the immediate activation of a MAP under the relevant tax treaty or under the Arbitration Convention.

It is unclear whether the taxpayer is entitled to appeal against the final deed issued by the Revenue Agency in the case of rejection. In this regard, two different interpretations may be identified. According to the first one, rejection by the Revenue Agency may be considered a refusal to refund taxes already paid. In such a case, the final deed could be considered one of the measures against which an appeal by the taxpayer is allowed (see article 19, letter g) of Legislative Decree no. 546 of 1992). With a different approach, the final deed may be considered as not being subject to appeal by the taxpayer. According to this interpretation, the final deed would be merely characterized as a measure expressing the opinion of the Revenue Agency in the conclusion of the initial phase of the MAP (which, in any event, remains open and continues).

3. Conclusion

The new Italian unilateral corresponding adjustment provision is a significant step forward towards simplifying and speeding up the procedures for elimination of double taxation, and it aligns the Italian legislative framework with the OECD recommendations. However, the success of the procedure will depend on how the Regulation will actually be implemented by the Revenue Agency, above all with reference to the overall timing and duration of the procedure, as well as the cases that will be admitted (if limited to tax assessments or extended to some cases of unilateral corresponding adjustments).

26. It is worth noting that the 180-day term does not differ significantly from the average term employed by the Italian competent authority from the opening of the MAP to the date at which the position paper is presented to the other competent authority, which is equal to 4.31 months. Instead, the average time for Italy to conclude a MAP on transfer pricing issues is 10.9 months (for cases initiated as from 1 January 2016). See OECD, Mutual Agreement Statistics for 2017 (OECD 2017).

27. The draft Regulation provides that the Revenue Agency may suspend the term of 180 days to complete the analysis in cases in which it intends to request further information from the foreign competent authority.

28. As in the case of the MAP, the final deed is issued even if the taxpayer suffers a tax loss in the fiscal year. In this case, the deed will clearly indicate the greater loss incurred by the taxpayer.

29. For example, this could be the case when the taxpayer believes that the primary adjustment is contrary to the arm’s length principle.

30. IT: Association of Italian Joint-Stock Companies (Assonime), Risposta alla consultazione pubblica in materia di prezzi di trasferimento, relativa...
Appendix

Regulation for the implementation of the rules provided for by article 31- quater, paragraph 1, letter c) of the Decree of the President of the Republic of 29 September 1973, No. 600, introduced by article 59 of the Decree Law of 24 April 2017, No. 50, converted by the Law of 21 June 2017, No. 96. 33

THE DIRECTOR OF THE REVENUE AGENCY
by virtue of the competences attributed to him by the law provisions indicated below in this regulation

PROVIDES THE FOLLOWING

1. Definitions and scope of application

1.1. For the purposes of the application of this regulation, taxpayer means an enterprise resident in the territory of the State, classifiable as such according to the provisions in force concerning income taxes, which meets, in relation to non-resident companies, one or more of the conditions indicated in paragraph 7 of article 110 of the Italian Income Tax Code approved with Decree of the President of the Republic of 22 December 1986, no. 917 (hereinafter TUIR) or which operates in a foreign State through a permanent establishment. A taxpayer means also a non-resident enterprise that carries on its business in the territory of the State through a permanent establishment, qualified as such in accordance with the provisions in force concerning income taxes.

1.2. The taxpayers referred to in point 1.1 may access the procedure, governed by this regulation, in order to obtain the recognition in Italy of a downward adjustment of the income in response to an upward adjustment, final and in accordance with the arm’s length principle, carried out by a State with which a Convention against double taxation on income is in force that allows an adequate exchange of information, in application of the second sentence of article 110 paragraph 7 of TUIR.

2. Access to the procedure

2.1. To access the procedure, the enterprises referred to in point 1 shall file an application to the Office for Advanced Agreements and International Disputes (hereinafter the Office) of the Revenue Agency, Via Cristoforo Colombo, 426 c/d. Rome.

2.2. The application, besides containing the elements referred to in point 2.4, must indicate, pursuant to and for the purposes of point 6.1, the legal instrument for the resolution of international disputes of which it is requested the activation (mutual agreement procedure provided for by the Conventions to avoid double taxation on income, or by the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises with final act and statements, made in Brussels on 23 July 1990, enforced by law of 22 March 1993, no. 99, or by other legal instruments governing the resolution of international disputes as incorporated into domestic law). The application must be filed within the time limits set by the legal instrument for the resolution of international disputes indicated therein.

2.3. The application referred to in point 2.1 may be alternatively:

a) sent by certified e-mail, as per Decree of the President of the Republic of 11 February 2005, no. 68 to the following address: dc.accordi@pec.agenziaentrate.it;
b) written on plain paper and sent through registered mail with acknowledgment of receipt;
c) written on plain paper and handed over directly to the Office which issues a certificate at the time of receipt.

In cases under b) and c), copies of the application and of the related documentation are also produced in electronic form.

2.4. The application must contain the elements required for the activation of the mutual agreement procedure pursuant to the Conventions to avoid double taxation on income, or by the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises with final act and statements, made in Brussels on 23 July 1990, enforced by law of 22 March 1993, no. 99, or by other legal instruments governing the resolution of international disputes as incorporated into domestic law and must, in any case:

a) clearly indicate the object, i.e. the request for the elimination of the double taxation generated by an upward adjustment, final and in conformity with the arm’s length principle, carried out by the tax authority of the foreign State with which a Convention against double taxation on income is in force. If, at the time of submission of the application, the upward adjustment carried out by the foreign State is not final yet, the application must indicate the stage at which the adjustment process is and the possible circumstances, depending on which the upward adjustment will become final;
b) enclose, as an attachment, the following documentation, aimed at proving the possession of the requirements of letter c), paragraph 1 of article 31- quater of the D.P.R. 29 September 1973, no. 600:

i. a courtesy translation in Italian or, alternatively, in English of the tax deeds issued by the foreign tax authority from which the upward adjustment arises. The Office reserves the right to request a sworn translation into Italian of the aforementioned documents, if deemed appropriate;
ii. all the elements of law and of fact that allow the evaluation of whether the upward adjustment carried out in the foreign country is in conformity with the arm’s length principle;
c) be signed by the legal representative of the company or by another person with powers of representation.

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33. Authors’ translation.
3. Admissibility and executability of the application

3.1. The application is declared admissible within 30 days of receipt if all the requirements referred to in point 2.4 are met, with a communication sent by the Office to the applicant through a certified e-mail. The communication can be sent through ordinary e-mail to the e-mail address indicated in the application if it is destined for non-resident persons who do not have a domicile in the territory of the State.

3.2. Within the same time limit, the application is declared to be non-processable if the Office ascertains the lack of any of the elements referred to in point 2.4. The Office communicates to the Applicant the impracticability and grants a deadline of 30 days to complete the request. In this case, the terms set out in point 3.1 for the declaration of admissibility start from the date of receipt of the supplementary documentation requested.

3.3. The application is declared inadmissible when there is a lack of the elements referred to in point 2.4 and the applicant does not proceed within the time limit referred to in point 3.2 to supplement the request or when the additional documentation produced within the same time limit referred to in point 3.2 is considered insufficient for carrying out the procedure.

3.4. The Office, within the analysis of the case, assesses whether the adjustment was made by a State with which a Convention against double taxation on income is in force that allows an adequate exchange of information.

4. The conduct of the procedure

4.1. The Office, after completing the preliminary activity referred to in point 3, proceeds to examine the application and the related documentation and, in order to verify the completeness of the information provided and to make any request for further documentation, may invite the company to appear through a legal representative or an attorney. About this activity, carried out through a hearing, a report has to be drawn up, a copy of which is handed over to the Applicant. The proceeding ends within 180 days of receipt of the request.

4.2. At the end of the scrutiny by the Revenue Agency, the procedure ends with the issuance of a motivated statement of the Office of recognition or non-recognition of the downward adjustment of the income in response to the upward adjustment carried out by the foreign State.

4.3. In the case of recognition, the Office informs the tax authority of the foreign State of the corresponding downward adjustment. The procedure, after the obtaining of the certification issued by the foreign tax authority or of equivalent suitable documentation certifying the final nature of the upward adjustment carried out, is finalized with an order of the Director of the Revenue Agency that orders the downward adjustment of the income in the amount of the upward adjustment carried out definitively in the other State and communicates this to the competent office of the Revenue Agency, which carries out all the necessary formalities.

5. Causes of termination of the procedure

5.1. A cause of termination of the procedure aimed at issuing the statement referred to in this regulation is the omitted filing, without a justified reason, in accordance with the terms communicated at the time of the request or the different time limit agreed with the Office, of the documentation and/or clarifications necessary for the continuation of the investigation.

5.2. The procedure can also be terminated in the event of the Office’s subsequent knowledge of elements and information regarding facts and circumstances by which it is definitively established that the taxpayer is liable to serious penalties related to the subject of the procedure.

6. Relationships with mutual agreement procedures and final provisions

6.1. The application referred to in this regulation determines the activation of the procedure for the resolution of international disputes provided for by the legal instrument indicated in the application referred to in point 2.2. If the procedure referred to in point 4 ends with the non-recognition of the downward adjustment of the income referred to in point 4.2, the downward adjustment or, in any case, the elimination of the double taxation can be obtained through the execution of the agreements concluded with the competent authorities of the foreign states within the corresponding procedure for the resolution of international disputes, as provided for by article 31-quater, paragraph 1, letter a).

6.2. If the taxpayer does not intend to request with the application referred to in paragraph 2 (the unilateral downward adjustment referred to in article 31-quater), there remains, in any case, his right to directly activate the procedure for the resolution of international disputes provided for by the Conventions to avoid double taxation on income, or by the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises with a final act and statements, made in Brussels on 23 July 1990, enforced by the Law of 22 March 1993, no. 99.

6.3. This regulation is applicable from the date of its publication on the website of the Revenue Agency in relation to upward adjustments made abroad for which, on the same date, no application for a mutual agreement procedure has been filed.

Reasons

Article 59 of the Decree-law of 24 April 2017, no. 50 converted into the Law of 21 June 2017, no. 96, inserted article 31-quater into the Decree of the President of the Republic of 29 September 1973, no. 600. The letter c) of the article 31-quater establishes, in the hands of taxpayers subject to final upward adjustments compliant with the arm’s length principle, carried out by States with which Conventions against double taxation on income are in force that allow an adequate exchange of information, the right to access a procedure aimed at the issuance by the Revenue Agency of an appropriate act that recognizes in Italy a downward
adjustment of the income according to article 110, paragraph 7, second sentence of the TUIR.

The same rule provides for the issuance of a regulation by the Director of the Revenue Agency for the identification of the terms of execution and of the time limits of the procedure.

Normative reference

a) Competences of the Director of the Revenue Agency
Legislative Decree of 30 July 1999, no. 300, on the reform of the organization of the Government, pursuant to article 11 of the Law of 15 March 1997, no. 59 (article 57; article 62; article 66; article 67, paragraph 1; article 68, paragraph 1; article 71, paragraph 3, letter a); article 73, paragraph 4); Statute of the Revenue Agency, published in the Official Gazette no. 42 of 20 February 2001 (article 5, paragraph 1; article 6, paragraph 1); Administration regulations of the Revenue Agency (article 2, paragraph 1);
Decree of the Minister of Finance of 28 December 2000.

b) Reference legislation
Decree of the President of the Republic of 29 September 1973, no. 600: Common provisions on tax assessment of income (article 31-quater);
Decree of the President of the Republic of 22 December 1986, no. 917: Italian Income Tax Code (article 110, paragraph 7);
Conventions against double taxation signed and ratified by the Italian State;

The publication of this regulation on the website of the Revenue Agency shall replace the publication in the Official Journal, pursuant to article 1, paragraph 361 of the Law of 24 December 2007, no. 244.

Rome, 30 May 2018