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Tax, Legal and Corporate Consultancy

NEWS

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Innovation, flexibility and expertise

ITALY: VAT PACKAGE, TERRITORIALITY OF SERVICES – NEWS FROM THE EU REGULATION 282/2011

On 15 March 2011 the Council of the EU approved the EU Regulation n. 282/2011 (published on the *G.U.U.E* n. 77 of 23 March 2011), whose object is a series of measures belonging to Directive 2006/112/CE, concerning subjective tax liability for VAT purposes and aiming at the implementation of the rules on territoriality provided by art. 7-ter, D.P.R. 26.10.1972, n. 633.

As one knows, from 1.1.2010, due to the implementing measures of Legislative Decree 11.2.2010, n. 18, the issue of territoriality of services was subject to significant changes since the place of taxation, for general performances, depends on the customer qualification for VAT purposes.

Due to the difficulties found in the examination procedure of the customer status, the

Regulation intervenes giving the criteria to distinguish the “business” customer (taxable person) from the “consumer” customer (private individual). The regulation came into effect on 12.4.2011 (the twentieth day after the publication on *G.U.U.E*), even if the measures effectiveness was delayed to next 1.7.2011, with the exception of particular types of services. Before getting to the heart of the EU Regulation, cited in the regulatory framework, it is appropriate to remember that, according to art. 7-ter, D.P.R. 26.10.1972, n.633, “general” services are relevant, with VAT purposes:

- In the customer’s Country if the customer is a taxable person;
- In the supplier’s Country if the customer is not a taxable person.

In order to identify the taxable person, one should consider the following: section 4 of the Implementing Regulation (EU) n. 282/2011 of the Council dated 15.3.2011, contains the measures related to the place where the performance takes place and more in details:

- Articles 17 and 18 are devoted to the customer status;
 - Article 19 refers to the customer quality;
 - Articles 20 -24 refer to “the customer’s place of establishment” ;
 - On the contrary, the following articles of Section 4 contain some clarifications on some specifically identified services.
- The “new” general rule provided by art. 7-ter, D.P.R. 633/1972 which, as previously mentioned, discriminates the place of taxation of the general services supplied according to the customer’s status, makes a distinction between the following two hypothesis:
- EU customer;
 - Non- EU customer.

In the first case, i.e. in case of a EU customer, he/she is to be considered as a VAT taxable person if he/she informed the supplier of his/her VAT identification number, which shall be verified according to art. 31, EU Regulation n. 904/10 dated 7.10.2010. In case the cus-

customer has not received his/her identification number yet but he/she informed the supplier that he/she applied for it, the latter should retrieve alternative evidence demonstrating the accuracy of the information provided by the customer, and applying ordinary commercial security measures (such as those related to identity or payment checks).

In case of a Non-EU customer, being a VAT verification not possible, art. 18, Regulation 282/2011 provides two "options" for the verification of the customer's status:

- Obtaining a certificate issued by competent foreign fiscal authorities according to the customer's residence, attesting that the customer runs a business which confers him/her the right to obtain VAT refunds according to Directive 85/560/CEE dated 17.11.1986;
- In the absence of the above cited certificate, the customer can demonstrate his/her own status as a VAT taxable person in case he/she has a VAT number demonstrating that his/her enterprise is operative in the customer's Country of establishment.

Art. 19, Regulation EU 282/2011, as mentioned above, is devoted to the verification of the customer's quality and in particular to the instructions related to the use of the service, which could occur in the customer's private sphere as well. For this purpose, the above cited art. 19 establishes that, with the exception of contrary information, the supplier can assume that the customer uses the services within the business he/she runs in case the customer reported his/her VAT identification number. Particular measures are provided for the following cases:

- The customer, as a taxable person, receives the service in order for him/her to use it within his/her private sphere or for his/her employees: in this case the supplier shall consider the customer as a private individual (except when the customer communicates his/her VAT number);
- The service is used both for private (although in favour of employees) and professional purposes: in this case the service is to be considered as fully supplied in favour of a taxable person provided that no illegal action is carried out.

As far as the customer's place of establishment is concerned, the regulation establishes as follows:

- Art. 20 clarifies that the supplier shall establish the customer's place of establishment according to the information supplied by the customer him/herself. For the status ve-

riification, the check of the information accuracy should occur in respect of the ordinary commercial security measures, such as those related to identity and payment checks;

- Art. 21 refers to "multiple" identification of the customer. More precisely, if the customer has, for instance, a firm organization in a State different from the one the headquarters of his/her business are, the supplier shall make a distinction depending on where the service is supplied;
- Art. 22 requires that the supplier evaluates the nature and the use of the supplied service. In particular, in case the supplier, according to the service nature and use, is not able to identify the organization where the service is supplied, he/she should check if the contract, the order and the VAT identification number assigned to the customer's member State and communicated by the customer, classify the organization as the service recipient. He/she should also make sure that the organization is the one that pays for the service supply;
- Art. 25 contains some measures which shall be respected in case changes on the customer's status occur, since his/her status can shift from that of a taxable person to that of a private individual or vice versa. In such situations the above cited rule establishes that only the circumstances existing at the time of the chargeable event shall be taken into account.

For further information contact:
massimiliano.re@fidinam.ch

UNITED KINGDOM: FINANCIAL BILL 2011

On 23 March 2011 the British Chancellor George Osborne presented the 2011/2012 Budget at the Parliament.

The aim of this Financial Bill – admitted Osborne himself – is allowing the United Kingdom to reach the most competitive fiscal system of the G20, in order to boost British economy, whose growth was lower than expected during the very last period, due to a deficit and inflation in constant rising. Most of the proposed measures, some of which are quite significant, are destined to come into effect right away, while some of the new entries will become executive from April 2012.

Getting to the heart of the law, some of the main announced measures are the following:

- **The ordinary corporate tax** will go from 28% to 26% with immediate effect and it will decrease by one percentage point during each of the following years aiming at reaching rate corresponding to 23% in 2014. Contextually the corporate tax for small enterprises will go from current 21% to 20%.
- As far as **the tax on capital gains** is concerned, the threshold for the implementation of the *Entrepreneurs' Relief* and of the corresponding 10% rate (the ordinary rate corresponds to 18%) has been increased from £ 5,000,000 to £ 10,000,000, in the event of gains accrued in the following cases of *asset disposal*:

- Gains generated from total or partial disposal of a business;
- Gains generated from the assets disposal carried out as a consequence of the cession of a business;
- Gains made by certain individuals involved in running the business.

It is to remember that the amount exceeding the above cited threshold is taxed according to the 18% ordinary rate. It is also to remember that total exemption is admitted if the annual amount of the accrued capital gains does not exceed £ 10,600.

- Starting from the year 2012 new rules concerning the **taxation of individuals** according to the principle of **remittance** will come into effect. The details will be established in the course of the year 2011 but it seems that those incomes and/or capital gains remitted to make investments in fruitful businesses (whose nature should be clarified by the legislator) will be tax-exempt. Changes are also predicted concerning the application of the annual tax due by those who opt to be taxed on a *remittance basis*:

- Those who have been living in the United Kingdom for less than 7 years should not pay any charges;
- Those who have been living in the UK for a period of time going from 7 years (calculated on a lapse of time of 9 years) to 12 years, should pay an annual charge corresponding to £ 30,000;
- Those who have been living in the UK for a period of time equal to or higher than 12 years, will be subject to an *annual charge* corresponding to £ 50,000.

This will be accompanied by an announced simplification of bureaucratic formalities linked to the administrative management of the individuals' status as well as by an exhaustive clarification of the concept of "residence", which has not been expressly explained by the English legislator yet.

- As far as **Controlled Foreign Companies (CFC)** are concerned, the entry into force of a new regulation, with interim changes applicable to the accounting periods starting on 1st January 2011 was anticipated. This will be followed by a complete reform coming into force in the year 2012 and whose details will be defined in the course of the current year.

Attention will be paid on the need to revitalize the competitiveness of English enterprises, preserving at the same time the effectiveness of tax collection.

In this sense one should also consider the possibility of a partial tax exemption for finance companies which could have access to a taxation corresponding to ¼ of the ordinary corporate tax (approx. 6.25%).

- A new tax regime for the **foreign branches of English companies** will be developed, according to which the latter will be able to opt for the exemption from English corporate tax on the incomes generated by foreign *branches*, whose losses will no more be deductible in the UK. This will occur irrevocably and will refer to the period going from the fiscal period following the date of *Royal Assent* to the Financial Law 2011.
- Starting from the year 2012 also new **anti-avoidance measures** will come into effect. These will be clarified in details in the course of the year 2011 and will aim at avoiding that treaties against double taxation concluded by the United Kingdom are used uniquely to avoid paying the due charges.

To this one should also add the intention, expressed by the English government, to collaborate even more intensely on the implementation of the guidelines related to the exchange of information delivered by the EU finance ministers in the year 2010.

- As far as **VAT** is concerned, no changes are predicted for rates (the standard rate is kept at 20%) but modifications are predicted only for the thresholds of registration and de-registration of taxable persons. The new threshold for the registration was raised to £ 73,000, while the one referring to de-registration was brought to £ 71,000.
- In the end, concerning **stamp duty**, the charge goes from 4% to 5% for the purchase of residential real estates whose value is higher than £ 1,000,000.

For further information please contact:
pilar.carisi@fidinam.ch

PANAMA AND USA: AGREEMENT BETWEEN THE REPUBLIC OF PANAMA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND FOR TAX COOPERATION AND THE EXCHANGE OF INFORMATION RELATING TO TAXES

On April 18th, 2011, has entered into force the Tax Information Exchange Agreement (TIEA) between Panama and the United States, signed November 30, 2010. The TIEA represents implementation by both governments of their shared policy to improve their tax information exchange transparency networks globally.

The TIEA will permit the United States and Panama to seek information from each other on all types of national taxes in both civil and criminal matters for tax years beginning on or after November 30, 2007.

During 2010, Panama has amended its domestic law to empower the government to obtain and exchange information to comply with international conventions (including TIEAs) even when such information is not of domestic tax interest. In addition, Panama has amended its law to address the practice of anonymous accounts known as "Bearer Shares" by requiring the law firms that incorporate businesses to conduct due diligence to verify the identity of the owners and to share that information with Panamanian authorities upon request.

For more information contact:
lidia.broseta@fidinam.ch

PANAMA AND SPAIN: CONVENTION BETWEEN THE REPUBLIC OF PANAMA AND THE KINGDOM OF SPAIN FOR THE AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVIASION WITH RESPECTO TO TAXES ON INCOME

Panama and Spain have ratified the Convention for the Avoidance of Double Taxation and Prevention of Fiscal Evasion, signed on October 2010. The Convention generally follows the OECD Model Convention.

With regard to individual income categories, the following tax rates have been agreed, which will limit the tax revenues of the source state for what concerns the payments made

in favour of company resident in the other contracting State (State of residence):

1. **Dividends:** the source state can impose the dividends, but the tax levied cannot exceed:
 - a. 10%, in general;
 - b. 5% if the effective beneficial owner is a company (other than a partnership) holding directly at least 40% of the capital in the company paying the dividends;
 - c. 0% if distributed to a company, whose capital is divided into shares or participations, holding directly at least 80% of the capital in the company paying the dividends provided that the company receiving the dividend is a company where at least one of the following conditions is satisfied:
 - i. listed on a recognized stock exchange;
 - ii. at least 50% participated by residents of one or both contracting states;
 - iii. participated by shareholders or participants resident in third countries holding less than 25% of the capital;
 - iv. participated by shareholders or participants holding more than 25% of the capital in the company paying the dividends resident in a third state that had concluded a tax treaty with the state of the company paying the dividends which includes equal or more favourable conditions than the ones referred in the article for dividends. By mutual agreement the competent authorities may extend the prior exemption to other companies under certain conditions;

2. **Interest:** the source state can impose interests but the tax levied cannot exceed 5%. However, in very exceptional cases, the interests shall be taxable only in the state of residence.

3. **Royalties:** the source state can apply a maximum of 5% tax on royalties. The definition of "royalties" includes software, films or tapes and other means of image or sound reproduction, drawings and the use, or the right to use, of industrial, commercial or scientific equipment.

4. **Capital gains:** gains derived from the alienation of shares or comparable interest in a company resident of the other state, who has held more than 10% of the vote, value or capital stock in such company for less than 12-months period prior to such alienation may be taxed in the source state.

Under the Protocol of the Convention a limitation of benefits clause is introduced according to which:

- both states are entitled to apply their domestic anti-abuse provisions;
- treaty benefits do not apply to non effective beneficial-owners;
- the Dividends, Interest and Royalties do not apply if the dividends, loans or rights to the royalties are created with the main purpose of obtaining treaty benefits.

Concerning the exchange of information the Protocol also contains an exchange of infor-

mation provision which provides, upon request, for the exchange of information that is foreseen relevant to the administration and enforcement of the domestic tax laws of the contracting parties, including information foreseen relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters.

In addition, the exchange of information shall

have effect for requests made on or after the date of entry into force, with regard to taxable periods beginning on or after three years prior to the date of the entry into force.

For more information contact:
lidia.broseta@fidinam.ch

FIDINAM LANDS IN HONG KONG

On 3rd of May Fidinam opened news offices in Hong Kong. The initiative came from the collaboration with the group Roger Kam & Co. & Co. and it is directed to Chinese and Southeast Asian companies aiming at proposing their competences on fiscal and international corporate planning. In this context there is evidence that many Asian economic operators are looking for people having legislative and fiscal competences and knowledge and that they are directing themselves towards export markets in the West. This represents a huge opportunity that Fidinam wants to seize. Specialization, life-long training on human resources and upgrading according to the changes in the legislative and fiscal context, allowed Fidinam to reach high levels of competence that the company wants to export to Asia, re-proposing, through the newly formed Fidinam R&T Consulting Limited of Hong Kong, the business model which had success in Switzerland and Europe. The joint venture also aims at delivering fiscal and corporate advice on the planning of cross-border investments from Asia to Europe and vice versa and offering their clients corporate businesses and trust services as well as local fiscal consultancy through the contribution of Fidinam in Switzerland and Europe and of Roger Kam & Co. & Co. in China. Fidinam R&T Consulting Limited relies on two Chinese fiscal consultants involved in the joint venture as well as on the professional contribution of Chinese partners belonging to Roger Kam & Co. & Co. and European partners belonging to Fidinam. Paolo Balen is the representative of Fidinam for this joint venture. Fidinam strongly believes that this initiative could develop a new section and allow a constant growth in the next few years. With the opening of the Hong Kong offices, Fidinam is now operative in Lugano where the headquarters are, Geneva, Zurich, Bellinzona and Mendrisio in Switzerland and abroad in Italy, Holland, Luxemburg, Spain, France, Monte Carlo and Liechtenstein. Roger Kam & Co. & Co., partner of the joint venture, has offices in Hong Kong, Shanghai and Shenzhen and is planning the opening of new offices in Beijing and Chengdu. The company is also a founding member of an accountant's network with operative offices in Japan, Taiwan, Indonesia, Malaysia, Singapore and Vietnam.



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Tax, Legal and Corporate Consultancy

Fidinam & Partners SA

Via Maggio 1
CP 6009
CH – 6901 Lugano
Tel. +41 91 973 17 31
Fax +41 91 973 13 65
www.fidinam.ch
fidinamnews@fidinam.ch

Lugano, Bellinzona, Mendrisio,
Geneva, Zug, Zurich
Amsterdam, Barcellona, London,
Luxembourg, Milan, Madrid, Monte Carlo,
Hong Kong, Sydney