Proceed with caution

Andrea Tavecchio and Riccardo Barone take stock of Italy's new tax-monitoring obligations

KEY POINTS

WHAT IS THE ISSUE?
Italy's *Legislative Decree no. 90/2017* has made some changes to the country's existing anti-money laundering law and fiscal monitoring rules, creating a number of uncertainties.

WHAT DOES IT MEAN FOR ME?
As regards trusts, the fiscal monitoring obligations on beneficiaries, settlors, trustees and protectors are not straightforward. The Italian Agency of Revenue has not released any official clarification, so cases must be analysed carefully.

WHAT CAN I TAKE AWAY?
How new provisions affect tax-monitoring obligations for those with a connection to a trust.

With its *Law Decree No. 167/1990* (the Decree), the Italian government introduced specific legislation on tax monitoring, pursuant to which Italian resident taxpayers are required to report any foreign investments and assets that can generate foreign-source income that is subject to taxation in Italy to the Italian Agency of Revenue (the Agency). The tax-monitoring obligations are fulfilled by filling out a special section of the annual income tax return referred to as the RW Form.

In recent years, the regulations on tax monitoring have been subject to important changes regarding, in particular, the subjective scope. These changes have not been combined with an update of the Agency's measure *2013/151663* (the Measure), which implemented the provisions related to tax monitoring, with the consequence that taxpayers and their professional advisors are now in a climate of interpretative uncertainty.

EUROPEAN LAW NO. 97 OF 6 AUGUST 2013

Until the 2012 tax year, tax-monitoring provisions under the Decree only concerned Italian individuals, non-commercial entities (including trusts) and partnerships resident in Italy that had investments or held financial assets abroad. Starting from the 2013 tax year, *European Law No. 97 of 6 August 2013* stepped up the tax-monitoring provisions referred to in the Decree, establishing that the above-mentioned taxpayers are subject to the tax-monitoring rules not only in the case of direct ownership of foreign assets, but also if they are beneficial owners of the investment, in accordance with the provisions of the anti-money laundering law *Legislative Decree No. 231 of 21 November 2007* (the AML Law).

With specific reference to the circumstances in which the beneficial ownership relates to foreign investments and financial assets held by trusts, the following persons could qualify as beneficial owners:

- if the future beneficiaries have already been determined: a natural person benefiting from 25 per cent or more of a trust's assets;
- if the beneficiaries have not been established: the class of persons in whose primary interest the trust is established or acts; or
- in any case: those who exercise control over at least 25 per cent of the trust's assets.

The inclusion of the concept of beneficial ownership, borrowed from Italy's pre-existing regulations, has prompted criticism in the context of tax monitoring.

MINISTERIAL CIRCULAR NO. 38/E OF 2013

In response, the Agency released some official clarifications by way of *Ministerial Circular No. 38/E of 2013* (the Circular) that may be summarised as follows:

- the title of beneficial owner may be held by both the beneficiary of the income and the beneficiary of the trust's assets;
- the scope of application of tax-monitoring legislation would be limited to the beneficiaries of a transparent trust or to subjects entitled to the right ('certain and current') to demand the assignment of income or assets from the trustee;
- with regard to cases where the beneficiaries have not been established, the term 'class of persons' does not permit the prompt identification of a party subject to the monitoring obligation, and therefore this criterion is inapplicable; and
- the beneficial ownership of a trust cannot be attributed to the trustee, since the latter administers the assets segregated in the trust and acts in accordance with trust regulations or the law and not in its own interest.

ITALIAN-RESIDENT TRANSPARENT TRUST

Moreover, the Circular clarified that the tax-monitoring rules under the Decree apply to both Italian-resident and non-Italian-resident trusts. In particular, where the foreign investments and assets are held by an Italian-resident transparent trust, the new rules establish that:

- if the Italian-resident beneficiaries benefit from less than 25 per cent of the total assets of the trust, and for this reason they are not considered beneficial owners, trusts are obliged to indicate in their income tax return the worth of the investments and the assets held abroad; and
- if the resident beneficiaries benefit from more than 25 per cent of the

assets, and so are the beneficial owners as defined by the AML Law, those beneficiaries are obligated to fill out the RW Form section of the income tax return. In cases where the beneficiaries are beneficial owners of the entire trust's assets, the trust itself is not obliged to fulfil the RW Form.

NON-ITALIAN-RESIDENT TRANSPARENT TRUSTS

With regard to non-Italian-resident transparent trusts:

- if the resident beneficiaries benefit from less than 25 per cent of the assets of the non-resident trust, without being considered beneficial owners pursuant to the AML Law, they are obliged to indicate in the RW Form the value of their portion of the trust assets; and
- if the resident beneficiaries benefit from more than 25 per cent, and are therefore considered beneficial owners of all the trust assets pursuant to the AML Law, they are obliged to indicate in the RW Form the amount of the investments and the assets held abroad by the trust (the so-called 'look-through approach').

Finally, in cases where the trust is irrevocable and discretionary (an opaque trust) no tax-monitoring obligations arise on the beneficiaries. However, opaque trusts that are resident in Italy for tax purposes have to complete the RW Form with reference to their foreign assets.

LEGISLATIVE DECREE NO. 90/2017

Legislative Decree No. 90/2017 (the 2017 Decree), in force since 4 July 2017 and transposing the EU's Fourth Anti-Money Laundering Directive, has, among other things, amended the internal regulatory provisions on adequate customer verification and identification of the beneficial owner. In particular, it now defines the beneficial owner as 'the natural person or persons, other than the customer, in the interest of whom or for whom, ultimately, the continuous relationship is established, the professional service is rendered or the transaction is performed'.[1]

This definition is supplemented by specific provisions for trusts, according to which the figure of beneficial owner of the trust should now refer to the settlor, the trustee or trustees, the protector or another person on behalf of the trustee, the beneficiaries or class of beneficiaries, and any other natural person who exercises ultimate control over the assets conferred in the trust through direct or indirect ownership or through other means.

The new concept of beneficial ownership is therefore more extensive than in the past, in that:

- it has been stripped of the 25 per cent threshold criteria, below which the position of the beneficiary was not, in principle, relevant; and
- all parties involved in the trust's life would now appear to be beneficial owners, regardless of the effective control of the trust.

The 2017 Decree also concerns the scope of tax monitoring, requiring the number of parties required to complete the RW Form to be extended to the beneficial owners of the investment in accordance with the AML Law, as amended by the 2017 Decree. Nevertheless, the Measure (which implemented the tax-monitoring rules) still refers to the definition of 'beneficial owner' contained in the previous wording of the AML Law. This gives rise to considerable operational uncertainties regarding the new tax-monitoring obligations, leading to two different theses:

- According to the first thesis, the legislator has expanded the tax-monitoring obligations to all trust 'holders' on the basis of the new anti-money laundering provisions, imposing the obligation to complete the RW Form on the settlor, trustee, protector and identified beneficiaries, regardless of whether the trust is transparent or not.
- According to the second thesis, the 25 per cent threshold of the trust fund has been abolished without involving the extension of the tax-monitoring obligations to parties who currently have no right to the assignment of income and/or trust assets, such as the trustee, protector, settlor and discretionary beneficiaries.[2]

It is the opinion of the authors that the second thesis is more compelling.

NON-APPLICABILITY

In the absence of official clarifications, it cannot be excluded that the Agency might hold the view that all trust 'holders' are now required to complete the RW Form. In case of challenges by the Agency, it seems reasonable to invoke the non-applicability of the Italian penalties arising in case of omission or erroneous fulfilment of the RW Form. Whatever the Agency's position, the facts of each case must be carefully studied to dispel the numerous uncertainties outlined above.

1 art.1(2)(pp) AML Law, as amended by the 2017 Decree
2 This position has also been taken by the Order of Chartered Accountants and Accounting Experts of Milan with a specific study document: www.odcec.mi.it/docs/default-source/default-document-library/per-consultare-il-documento-clicca-quic6fe1d714cc168548164ff0000ef0ce1.pdf?sfvrsn=0

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