THE OPINION - ANGELA MONTI*

BANKS AND THE ITALIAN TREASURY: THE RISK OF NOT RESPONDING

The Ticino Bank Association, despite urging banks to undertake a case-by-case assessment of activities carried out during the period spanning 2013-2017 involving Italian clientèle, as advised by its Monegasque counterpart, hypothesises that it is lawful not to answer questionnaires issued by the Italian Revenue Police. This assumption is essentially grounded in the consideration that negotiations which led Swiss authorities to impose the collaboration of Swiss banks in voluntary disclosure proceedings remain unresolved and that numerous points require definition, especially those regarding the issue of access to banking activities.

Although an Mutual Agreement Procedure between central authorities of respective states is desirable, we ask ourselves whether the solution of awaiting snail-paced diplomacies may be doing more harm than good, exacerbating a potential clash with negative consequences.

We believe that it is important to distinguish on a case-by-case basis, as suggested by the Ticino bank association, reserving the panorama of operability available to Italian clientèle via Swiss institutes, in an array of services ranging from the total absence of operability, except for occasional product presentation meetings at events open to the public, right up to the existence of legal entities in Italy where Italian clientèle can meet with bank staff.

In theory one principle stems from the Convention between both countries for the prevention of double taxation: interests from Italian subjects to subjects who are resident in Switzerland should be considered capital income and are taxable in Italy to the full extent, 12.5%, on the condition that they are not issued by a stable organisation (art. 11 paragraphs 1, 2 and 3 of the Convention).

Based on the aforementioned hypothesis, the taxation of interests can, and in our opinion must be distinguished from taxation of stable hidden organisations, even if the captiousness of questions in the questionnaire at hand is irrefutable. An initial request for "a summary of capital incomes generated in Italy per year from 2013 to 2017" is followed by a request for "the total and nature of amounts Italian clients have been charged for commission" and "methods for the management of Italian clientèle" and if this was not enough, "personal data of relationship managers operating in Italy".

It is evident that if the first question can theoretically apply to the sole application of convention regulations on the taxation of interests accrued by foreign banks devoid of any stable organisation in Italy (hidden or evident), then the others regard the different profile of the existence or otherwise of a permanent establishment in Italy.

As for commissions accrued in interest generating financial relations, the truth is that there is a discrepancy between convention regulations and domestic Italian law, insofar as in the latter they are considered an item of taxable income in Italy, while they are excluded from convention regulations. If the belief is that convention regulations should prevail over domestic law, one possible solution in line with regulations and "tactically" more suitable may be to respond to the first question of the questionnaire and reserve a different decision for other questions, based on the aforementioned case-by-case approach.

This is a careful approach, considering the particularly onerous consequences should Italian Financial Administration be faced with confirmation of ruling no. 41/2018 in revenue and penal

judgements, which also provides clarification in operative terms on payment methods of the tax in Italy.

Therefore, after carefully examining documentation in its possession, it is probably in the interest of Swiss institutes to favour the Italian Treasury's activity. Failure to respond or responding with incomplete or untruthful information may result in a loss of the opportunity to pursue claims in successive phases of inspection, even more so before the revenue judge, while also enabling Italian financial administration to proceed with preliminary quantification of untaxed capital income.

Lastly, it is also important to note that a distinctively uncollaborative attitude in the first question contained in the questionnaire may have negative consequences in penal terms. Indeed it is impossible to forget that presumably Italian Administration already has evidence to this effect, insofar as voluntary disclosure procedures and relative annexes were what triggered the issuing of questionnaires in the first place by the Italian Revenue police, the operational arm of public ministries, insofar as the amount of interests accrued by a bank for mortgages and advanced payments (including a simple lombard), are easily identifiable by simply reading bank statements. In this way there is a risk of contestation of revenue crimes of omission or untruthful declaration and self-laundering of relative profits (with reference to self-laundering, for the year 2016 onwards). In our opinion, the threat of such economic and image damage does not sit comfortably with a wait-and-see approach.

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