

The identification of the tax residence of the trust

In this final segment dedicated to the tax residence of the trust, let's analyze the presumptions introduced by the legislator concerning trusts "located" in countries on the blacklist. As discussed in the previous section on identifying the tax residence of the trust, this determination generally follows the criteria outlined in Article 73 of the Italian Income Tax Code (TUIR) for companies and entities.

However, within Article 73, the legislator has introduced two specific legal presumptions regarding the residence of the trust. As highlighted in Circular 48/E/2007, these presumptions aim to "counteract possible phenomena of fictitious localization of trusts abroad with elusive purposes."

The first presumption, outlined in the third paragraph of Article 73, establishes that trusts and institutions with similar content established in blacklisted states or territories—where information exchange with financial administrations is not permitted—are considered residents in the territory of Italy, unless proven otherwise. This is applicable when at least one of the settlors and at least one of the beneficiaries are tax residents in Italy.

The provision is certainly not pre-eminent in terms of legislative technique. Firstly, the term "established" appears inappropriate: in literal terms, a trust established in a blacklisted country but managed in a whitelisted one would be penalized. Conversely, the mere establishment of the trust in a whitelisted country would be sufficient to avoid triggering the presumption, even if managed in a blacklisted state or territory.

To try to overcome the impasse arising from the literal wording of the law, Circular 48/E/2007 expresses itself as follows: "Essentially, for the purpose of attracting residence, it matters that a trust, characterized by elements connected to the Italian territory (a settlor and a beneficiary residing or properties located in Italy and transferred by an Italian subject), is 'established,' meaning it has formally fixed its residence in a country not included in the white list."

There is then the problem of establishing at what moment the tax residence of a settlor and a beneficiary attracts the tax residence of the trust in Italy.

According to the Agency's perspective, there is no need for concomitance from this point of view: the tax residence of the settlor matters in the tax period in which they made the disposition in favor of the trust, while the tax residence of the beneficiary can occur in a subsequent tax period. If possible, even worse is the formulation of the second presumption contained in the third paragraph of Article 73 of the Italian Income Tax Code (TUIR):

"Furthermore, trusts established in a state other than those listed in the decree of the Minister of Economy and Finance issued under Article 168-bis are also considered residents in the territory of the State when, following their establishment, a subject residing in the territory of the State makes an allocation in favor of

the trust involving the transfer of ownership of real estate or the creation or transfer of real property rights, even in shares, as well as destination constraints on them."

In this second case, emphasis is placed on the disposition within the trust located in a blacklisted country of properties (or real rights on them) located in Italy: it is the location of the properties that creates the territorial connection and justifies the residence of the trust in Italy.

Comparing the two provisions reveals differences that are not easily understandable.

Firstly, in this case, there is no reference to the possibility of providing contrary evidence, and therefore, the presumption would be absolute—a conclusion that is naturally difficult to accept. Indeed, Circular 48/E/2007 itself states that "in both cases of attracting non-resident trusts to Italy, the rule operates a relative presumption of residence; hence, the possibility remains for the taxpayer to demonstrate the actual tax residence of the trust abroad."

Curiously, a reference is made only to the trust and not to "institutions with similar content," as the first presumption does. The aim is to "intercept" situations where "foreign legal systems regulate institutions similar to trusts but assign them a different 'nomen iuris'," as can be the case, for example, with foundations that can be established in Liechtenstein.

Lastly, when speaking of trusts, even the reference to destination constraints on properties appears unclear and with low practical applicability.

Sergio Pellegrino

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Trust is illicit if it violates the principle of *donner et retenir ne vaut*

With the very recent provision dated October 8, 2014, the Court of Reggio Emilia, tasked with ruling on the legal feasibility of a request for a preventive arrangement filed by a company, established some interesting principles regarding trusts.

In the case at hand, the settlors of a trust, in the context of the preventive arrangement, had modified the respective founding document, stipulating that 100% of the proceeds from the alienation of the contributed assets would be allocated to financing the petitioning company, eliminating the figure of the second beneficiary.

In the case at hand, the founding document of the trust, governed by the Jersey Law, had not reserved for the settlors any of the powers listed in Article 9A of the aforementioned regulatory law, which at point 2a) provides for the possibility to "revoke, vary, or amend the terms of a trust or any obligation or part thereof arising out of it, in whole or in part"; additionally, this provision was not even mentioned in the founding document of the trust. Instead, the subsequent notarized document amending the trust relied on Article 37 of the aforementioned Law, a provision also referenced in the introductory document."ir ne vaut."

Despite this provision not providing directives on the extent of the modification powers, it characterizes the power to impact the trust's founding document as a fiduciary power: changes made by the trustee should normally align with the interests of the beneficiaries and be in accordance with the principle of good faith. In this specific case, however, the settlors had acted as if they had been endowed with a personal power, usable at will, arbitrarily, and to their own advantage. In fact, by amending the founding document, they had completely eliminated a beneficiary, thereby altering the purposes of the trust, which is an essential element of such an institution.

The Court, in the examined provision, noted that the power of "variation" of trust deeds is not, according to regulatory law, left to the absolute freedom of the settlor. In the case at hand, the "variation clause" in the founding document of the trust was generic because:

- It did not identify the purpose of the power granted to the settlors, nor did it limit such power.
- It did not specify the parts of the founding document subject to possible variations, nor did it clarify whether the same clause could concern essential parts.
- It did not require authorizations or consents.

In practice, the powers of modification are governed within defined and precise limits aimed at always protecting the beneficiaries of the trust.

The judges also asserted that, regardless of the merits' validity- to be examined according to the regulatory law- of the variations made by the settlors to the trust, to admit the legitimacy of such modifications, the arguments should have been accepted according to which the settlors are granted by the founding document the right to revoke, vary, or modify all provisions of the trust or any obligation or power that wholly or partially derive from it: "in practice- without even invoking Article 9A of the Jersey Law in the document and solely under Article 37- the settlors would have reserved all modification powers (and, consequently, direct intervention in management), in contrast to the traditional model of the trust that, among the foundations of its discipline, includes a strict prohibition of interference by the settlor (who, in English law, 'exits the scene')."

This approach leads to the non-recognition and therefore the non-existence of the specific trust in the Italian legal system, as established by the Court of Cassation with judgment No. 10105/14 ("an unrecognizable trust is entirely devoid of effects: it is tamquam non esset").

In conclusion, the Panel, echoing a principle already affirmed on January 9, 2014, by the Tribunal of Bologna in a similar case, ruled that the attribution to the settlors of an extremely broad power of interference- and such is the acknowledgment to them of the faculty to modify at will the founding document of the trust up to the point of changing its purpose or excluding beneficiaries- takes the instrument outside the scope of the Hague Convention, which stipulates that for a trust to be recognized, the assets must be "placed under the control of the trustee" (Article 2 of the Convention) or raises suspicion of simulation (sham), resulting in its non-recognition.

However, the founding document is devoid of effects because a recognizable trust in the Italian legal system cannot be entirely subject to the will of the settlors, under penalty of violating the principle "donner et retenir ne vaut," protected by the Jersey Law. In other words, the contribution of specific assets cannot allow the contributor to dispose of them in the future at their own discretion.

Luigi Ferrajoli

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