Kluwer International Tax Blog

Transfer Pricing: Glass Always Half-full and Half-empty

Piergiorgio Valente (Crowe Valente/Valente Associati GEB Partners; Link Campus University, Rome) · Tuesday, September 6th, 2016

A considerable increase of transfer pricing disputes could be observed in Italy over the last decade.

Notwithstanding the rising trend of proceedings activated by the Tax Authorities and further scrutinized by the Italian Courts, there is not – to date – a jurisprudential orientation such to provide the interpreter with the necessary guidance in the reconstruction of intercompany transactions. The (perceived) uncertainty of the subject-matter led to some difficulties in the creation of a uniform jurisprudence, and disputes were frequently settled through a line of reasoning, which was not necessarily aligned to the OECD's arm's length principle.

However, the position generally adopted by Italian Judges is that the normal value (i.e., arm's length) must be determined on the basis of OECD Guidelines.

Rulings on transfer pricing issued in the last few years by Italian Judges involved various themes. Among them, first and foremost, the Tax Authorities' challenges as to the selection and application of transfer pricing methods, comparability analyses developed by taxpayers to support intercompany policies, the analysis of special transactions, such as financing and intercompany services, as well as transactions concerning intangibles.

Two frequently debated issues refer to transfer pricing proceedings and the burden of proof, as well as documentary duties multinational companies have to comply with, whenever required, to adequately support transfer prices applied in transactions with subsidiaries, so as to ensure compliance with the principle of "*normal value*".

The compilation of documents entails a number of critical factors, given that the differences – both legislative and economic – existing in the various States of residence of group companies, do not facilitate the collection of adequate data/information, particularly where identification of comparable transactions is rather complex (as is the case for certain kinds of intangibles).

With regard to this specific topic, the Supreme Court confirmed its position pursuant to which the burden of proof, involving non-compliance of the principle of "*normal value*" in transactions with subsidiaries located in different States, falls on the Tax Authorities. In particular, Judges stated that the burden of proof – to establish the existence of the precondition for a tax assessment such to restate tax at a higher amount – rests with the Tax Authorities, which are obliged (in this case) to compare transaction prices with the ones identified in transactions between independent parties (Ruling No. 11226/2007).

The Italian Supreme Court's position is based on the observation of prevalent rules as well as on generally accepted OECD practice, both of which compel the Tax Authorities of Member States to shoulder the burden of proof, without laying it on taxpayers under audit.

In other cases (Ruling Nos. 15282 and 15298 of 21 July 2015), the Judges asserted that transfer pricing legislation aims to essentially curb the economic phenomenon, in and of itself, leaving aside the need to evidence a higher domestic taxation. It follows that the Italian Revenue Office has no need to prove any avoidance function, but only the existence of transactions between associated companies; conversely, it is indeed taxpayer's duty, according to general rules of the proximity of evidence, to prove that transactions were carried out under "*normal value*" conditions.

"*The burden of proof resting with the Italian Revenue Office is strictly limited to substantiating the existence of transactions between/among associated companies and the evident gap between the agreed consideration and the market consideration (normal value), since this burden is not extended to prove the avoidance function of the operation*". On the other hand, "*taxpayer has the burden to prove – by force of the principle of proximity of evidence – (…) not only the existence and relevance of deducted costs, but also any other element that allows the Revenue Office to deem that the transaction did indeed take place at market value*" (Supreme Court, Rulings Nos. 15005 of 17 of July 2015 and 27087 of 19 December 2014).

One might rightly assert that Italian jurisprudence on matters of transfer pricing has acknowledged and upheld the logical course endorsed by the OECD and also contained in Italian Circulars Nos. 32/1980 and 2/1981.

In view of the considerations stated above, it is rather easy to understand the reasons why Italian Judges – more often than not – disregarded and/or refuted a great number of claims advanced by the Italian Tax Authorities.

This entry was posted on Tuesday, September 6th, 2016 at 3:47 pm and is filed under EU/EEA, OECD, Transfer Pricing
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.