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Eligible for Italian Consolidation
Regime**

by Gianluca Queiroli and Roberto Succio

Reprinted from *Tax Notes Int'l*, August 29, 2005, p. 801



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Italian tax authorities on August 12 issued Resolution 123/E, ruling that a Netherlands holding company is eligible for Italy's tax consolidation regime. The company, which controls several Italian subsidiaries and is in turn controlled by an Italian parent company, had transferred its residence to Italy by transferring its management offices there. (For tax purposes, an entity is considered an Italian resident if its legal seat or management office is located in Italy for at least 184 days in a single tax year.)

Controlling entities are subject to article 117, paragraph 1, and article 120, paragraph 1, of the Italian Tax Code (ITC). They provide that companies opting for the consolidation regime must have a corporate form similar to those provided by Italy's tax consolidation legislation — namely, a joint stock company, limited joint stock company, or limited liability company (SpA, SapA, and Srl, respectively).

The regional tax office had said the subholding company was not eligible for the domestic consolidation regime because, although resident in Italy, it did not have any of those corporate forms. On appeal, Italian tax authorities — after examining the Dutch corporate tax legislation — held that a Dutch BV, such as the subholding company, has a legal form and structure similar to the corporate forms allowed under Italy's consolidation legislation. The tax authorities therefore ruled in the subholding company's favor in Resolution 123/E, allowing the taxpayer to opt for the domestic consolidation regime as a controlled corporation.

The resolution seems reasonable in light of article 293 of the EC Treaty, which states that if the main

site of an independent entity is transferred from one EU country to another, the autonomy of the company must be guaranteed. Furthermore, the European Court of Justice, in its November 5, 2002, decision in *Überseering* (C-208/00), held that if a corporation is founded in an EU member state, it must be considered like an independent "person" in every other member state.

According to the new text of the ITC, under Italy's domestic tax consolidation rules Italian companies that belong to the same group can opt to consolidate their taxable base with that of the Italian parent. The consolidation covers the entire taxable base of the controlled corporation, regardless of the percentage of shareholding owned by the parent, and allows for the offsetting of taxable income realized by certain group members with tax losses generated by others.

Also, transfers within consolidated corporations of goods other than fixed assets and those generating gross receipts can benefit from a tax deferral regime, no capital gain is realized by the transferor, and the tax basis of the goods is the same in the hands of the transferee as it was in the hands of the transferor.

Companies must satisfy numerous conditions to qualify for the tax consolidation regime, as detailed below:

- The parent must be an Italian resident corporation or an Italian permanent establishment of a corporation resident in a country with which Italy has concluded a double tax treaty. If the parent is an Italian PE of a

nonresident corporation, all participations in the controlled corporations must be connected to the PE.

- The controlled corporations must be Italian residents subject to the ordinary corporate income tax (IRES) regime without benefiting from any reduction of the tax rate.
- From the beginning of each tax period, the parent must own, directly or indirectly, the majority of votes for the ordinary shareholders' meeting of the controlled corporation or participate, directly or indirectly, with a percentage higher than 50 percent (excluding

nonvoting shares) in the profits and share capital of the controlled corporation.

- The parent and the controlled corporations must have the same financial year (that is, the same tax period) and must jointly exercise the option for the consolidation regime. The option is irrevocable and lasts for three tax periods. ◆
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