COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Italy
TAX DISPUTES

Contributor

Maisto e Associati

Marco Cerrato

Partner | m.cerrato@maisto.it

Paola Marzetta

Partner | p.marzetta@maisto.it

This country-specific Q&A provides an overview of tax disputes laws and regulations applicable in Italy.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

ITALY
TAX DISPUTES

1. Is it necessary for a taxpayer to register with the tax authority? Are separate registrations required for corporate income tax and value added tax/sales tax?

Natural person: Tax Code is attributed by the Municipalities (through the tax authorities database called “Anagrafe Tributaria”) at birth when a person is registered to the National Register of the Resident population or in case of non-resident person upon request to the tax authorities (e.g., in case of purchase of real estates in Italy). VAT code has to be requested only in case of entrepreneurial and professional activity relevant for VAT purpose.

Companies and other entities: Tax code and VAT code have to be requested to the tax authorities when incorporated under Italian civil law or, in case of foreign companies, when a relevant economic activity starts in the territory of the State.

Taxpayers are identified for tax purposes through the Tax Code (“Codice Fiscale”) for Direct taxes purposes and through a VAT Number (“Partita IVA”) for VAT purposes.

2. In general terms, when a taxpayer files a tax return, does the tax authority check it and issue a tax assessment – or there a system of self-assessment where the taxpayer makes their own assessment which stands unless checked?

Tax returns are checked by the tax authorities every year through automatic controls in order to verify the formal correctness of the data included in the tax returns on the basis of a data crossing process. In addition, tax returns on a sample basis (identified on the statistic tax risk analysis) are subject to a formal control that verifies the material correspondence of some data included in the tax returns with supporting the relevant documentation. Finally, tax returns can be checked during a general tax audit that might start by the issuance of a Questionnaire or by the visit at the premises of the taxpayer by tax authorities.

3. Can a taxpayer amend the taxpayer’s return after it has been filed? Are there any time limits to do this?

Taxpayers can amend the tax returns filed within the term of the statute of limitation, also when a Tax Report or a Questionnaire has been served (see reply 6); the taxpayer is not allowed to amend the tax return after a tax assessment has been issued on the same item to be amend.

If higher taxes arise following the amendment of the tax return, taxpayers can pay the relevant taxes, interest and penalties due for the unfaithful filing of the tax return through a self-voluntary regularisation (so called “ravvedimento operoso”). In case of voluntary regularisation minimum penalties applies; penalties can be reduced depending on when the regularisation takes place compared to when the original declaration was filed (e.g., reductions range from 1/10 to 1/5 of the minimum penalty respectively if the tax return is amended after 90 days from the filing of the tax return or after the service of a tax audit report).

When the taxpayer amends the tax return the statute of limitation will restart with respect to the item of the income that has been amended.

4. Please summarise the main methods for a tax authority to challenge the amount of tax a taxpayer has paid by way of an initial assessment/self-assessment.

The tax authorities can challenge the income and correspondent taxes declared by the taxpayer through the following different methodologies: (i) analytic methodology (e.g., checking the accounting records an tax register during the visit of the taxpayer’s premises),

(ii) inductive methodology (e.g., through presumptions even if these latter are not “serious, precise and consistent”) and (iii) analytic-inductive method (mix of the above-mentioned methods).

In addition, tax returns can be challenged also through the so-called synthetic methodology (e.g., statistical indicators).

5. What is the procedure where a taxpayer has not registered so is unknown to the tax authority (for example a newly incorporated company or a foreign company operating through a permanent establishment?)

In case of unknown taxpayers, tax authorities mainly use the inductive or the synthetic methodology. In particular, through the inductive methodology income is determined on the basis of statistic indicators/statistics analysis that are relevant for the activity carried out by the taxpayer; through the synthetic methodology natural person’s income is determined on the basis of a calculation that consider expenses borne, assets held (i.e., buildings, cars, etc.) and increases of assets occurred during the relevant period.

6. What are the time limits that apply to such challenges (disregarding any override of these limits to comply with obligations to relief from double taxation under a tax treaty)?

The statute of limitation of the tax authorities’ power of assessment is (i) in case of omitted tax return (e.g., unknown taxpayer), 7 years from the 31 December of the following year in which the tax return should have been filed and (ii) in case of unfaithful tax return, 5 years from the 31 December of the following year in which the tax return has been filed.

7. How is tax fraud defined in your law?

Administrative tax law does not provide for a definition of tax fraud that comes up from the jurisprudence. Generally, the concept of that fraud is utilized almost in case of non-existent transactions.

The concept of tax fraud is provided for criminal law purposes in case of use of documents concerning non-existent transactions or use of other artifices for the purposes of filing the tax return.

8. How is tax fraud treated? Does the tax authority conduct a criminal investigation with a view to seeking a prosecution and custodial sentence?

In case of a tax fraud, tax authorities apply higher penalties(135-270% of the higher taxes assessed vis-à-vis 90-180%). Tax frauds generally trigger a criminal exposure.

Criminal tax investigations are conducted by the tax police (not by tax authorities) appointed by criminal authorities (e.g., criminal prosecutor). These investigations are generally conducted also in order to seek a prosecution and custodial sentence.

9. In practice, how often is a taxpayer audited after a return is filed? Does a tax authority need to have any justification to commence an audit?

In general terms the audit activity is at tax authorities’ discretion and is almost based on a risk analysis criterion; therefore, there are not predetermined rules on how and when a taxpayer should be audited.

For the large business taxpayers (i.e., taxpayers whose yearly revenues are equal or exceed 100 million euro) the law provides that in principle – based on the outcome of a specific risk analysis – they could be audited every fiscal year.

10. Does the tax authority have to abide by any standards or a code of conduct when carrying out audits? Does the tax authority publish any details of how it in practice conducts audits?

The tax authorities follow the rules under the Taxpayers Rights Chart (Law No. 212/2000), which provides for the rights of the taxpayers vis-à-vis the tax authorities. The tax authorities shall inform the taxpayers of their rights at the beginning of the audit.

The Ministry of Finance and the tax authorities issue general guidelines on the promotion of compliance, the risk analysis and the audit activities addressed to different categories of taxpayers (e.g., large, medium and small taxpayers, etc.). Moreover, the tax authorities issue statistical reports on the audit activities carried out each year.

11. Does the tax authority have the power to compulsorily request information? Does this extend to emails? Is there a right of appeal against the use of such a power?

The tax authorities have the power to request information and documentation, also by visit the taxpayer's premises and request and seizure any relevant documents, including e-mails. If the information and documentation requested is not delivered by the taxpayer, the latter cannot subsequently be allowed to use such information and documentation for defensive purposes (e.g., during the tax litigation) unless the failure to deliver was depending on force majeure causes.

The use of the above powers could be challenged only by appealing against the tax assessment as the outcome of the information request process.

The powers to request and collect information and documentation are broader in case of criminal investigation; in such latter case, the said investigations are carried out by the tax police.

12. Can the tax authority have the power to compulsorily request information from third parties? Is there a right of appeal against the use of such a power?

The tax authorities have the power to request to third parties to deliver books and records or other documentation, as well as information from clients and suppliers, related to the taxpayer under audit; in such context, the attorney-client privilege is always granted.

The use of such power could be challenged only by appealing against the tax assessment.

In case of criminal investigation, the power to request information is broader.

13. Is it possible to settle an audit by way of a binding agreement, i.e. without litigation?

An audit can be settled (without litigation) through a settlement agreement ("Accertamento con adesione") with a redetermination of the claim and a reduction of the penalties applicable to 1/3 of the minimum, calculated on the redetermined claim. The settlement agreement is binding in relation to the fiscal year assessed (both for the taxpayer and the tax authorities); however, the tax authorities could start a new audit if the first assessment settled was partial, new elements to ground the previous claim arise and the additional income assessable is more than 50% of the income settled and in any case higher than Euro 77.768.

14. If a taxpayer is concerned about how they are being treated, or the speed at which an audit is being conducted, do they have any remedies?

During the audit, the taxpayer can address claims to the Taxpayer's Guarantor ("Garante del contribuente"), which is a monocratic body regulated by the Taxpayers Rights Chart (law no. 212 of 2000), appointed by the President of the Tax Courts of second level, whose task is protecting the rights of the taxpayer and guaranteeing a trusted relationship between taxpayers and tax authorities. The Taxpayer's Guarantors can make recommendations to the tax authorities in respect of the mentioned Taxpayers Rights Chart and report cases of particular importance to the competent authorities.

However, the Taxpayer's Guarantors cannot exercise binding powers.

After the assessment is issued, any relevant irregularities can be challenged only by appealing against the tax assessment.

15. If a taxpayer disagrees with a tax assessment, does the taxpayer have a right of appeal?

The taxpayers always have the right to appeal against the assessment within 60 days from the service of the tax assessment before the Tax Court of first level.

In particular, taxpayers, within 60 days from the service of the deed of assessment, must serve the deed of appeal to the competent Tax Office and within the following 30 days must deposit the appeal to the relevant Tax Court of first level.

In any case, the taxpayers can also file a revocation request ("Istanza di autotutela") to the tax authorities, in order to ask the amendment or cancellation of the assessment. The filing of the self-protection request does not suspend the mandatory term to file the appeal.

16. Is the right of appeal to an administrative body (independent or otherwise) or judicial in nature (i.e. to a

tribunal or court)?

In case of appeal, the competent authority is the Tax Court. According to the law enacted on September 16, 2022 and reforming the tax justice (Law No. 130/2022), Tax Courts of first and second instance will be progressively composed by professional judges.

In any case, the taxpayers can also file a revocation request("Istanza di autotutela") to the tax authorities – which is an administrative body – in order to ask the amendment or cancellation of the assessment.

17. Is the hearing in public? Is the decision published? What other information about the appeal can be accessed by a third party/the public?

The hearing is oral and public upon the request of one or both parties (e.g., taxpayer and tax office). The decision is deposited within 30 days from the hearing (this deadline is not mandatory and, therefore, can be disregarded). Decisions are published. Other information concerning the appeal (not included in the decision) can be accessed by third parties only in case a legitimate interest occurs.

18. Is the procedure mainly written or a combination of written and oral?

The procedure is almost written but both parties might request the oral hearing. In general, there is no more than one hearing.

19. Is there a document discovery process?

There are no discovery rules similar to those applicable in common law jurisdictions. However, during the appeal procedure, parties shall submit the documents they want to use to support their defence within the deadline of 20 days before the hearing.

Documentation requested by the tax authorities during the audit and not delivered by the taxpayer cannot be used in the appeal, unless the taxpayer deposit the requested documentation attached to the appeal declaring that lack of the delivery was due to force majeure causes.

20. Are witnesses called to give evidence?

Based on the law reforming the tax justice (Law No. 130/2022) witnesses are admitted testifying according to the Tax Courts discretion for the purposes of the decision and even without the agreement of the parties.

The testimony is written according to rules provided by the civil procedural code.

21. Is the burden on the taxpayer to disprove the assessment the subject of the appeal?

During the appeal against a tax assessment, the tax office shall prove the grounds of the assessment (which shall contain motivation of the claim) and the taxpayer shall disprove it.

As to the appeal concerning the request of reimbursement, the burden of proving the right to the reimbursement is only upon the taxpayer.

22. How long does an appeal usually take to conclude?

There is not a timing provided by law and it depends on the stage of the appeal and on the single court involved. Based on the most recent statistical data provided by the Ministry of Finance and by the Supreme Court, the judgement on average ends within 9 years: 1.5 year for the first instance court's judgement, 2.5 year for the second instance court's judgement and 5 years for the Supreme Court judgement.

23. Does the taxpayer have to pay the assessment pending the outcome of the appeal?

Provisional payments are due as follows:

- 1/3 of the higher taxes assessed and interest pending the tax litigation before the Tax Court of first instance;
- up to 2/3 of the higher taxes, interest and penalties in case of unfavourable decision of the Tax Court of first instance;
- 100% of the amounts assessed in case of unfavourable decision of the Tax Court of second instance.

In order to avoid the provisional payments, the taxpayer can ask for a suspension of the collection before the relevant Tax Court. The request can be filed together with the appeal as well as after, but no later than the first hearing. The suspension is granted by the Tax Court if the taxpayer demonstrates: (i) "fumus boni iuris", i.e. the arguments of the appeal are well grounded prima

facie and (ii) there is “periculum in mora”, i.e. a well-founded risk that the taxpayer may suffer by paying the amount requested. At its discretion the Tax Court, in order to grant the suspension may, also request a bank or insurance guarantee.

Finally, after the decision of the Tax Court of second instance, pending the appeal before the Supreme Court, taxpayer can request the suspension of the provisional payment (due in case of unfavourable decision) before the Tax Court of second instance; the suspension is granted if the taxpayer proves the periculum in mora only and the taxpayer is entitled to the suspension (without any discretion of the Tax Court) in case of a bank or insurance guarantee.

24. Are there any restrictions on who can conduct or appear in the appeal on behalf of the taxpayer?

In case of appeal against assessments for higher taxes exceeding Euro 3.000, taxpayers shall be represented before the Tax Courts by a registered professional (attorney, accountant, labour consultant, etc.). Before the Supreme Court taxpayers can be represented only by an attorney that is included in a special register before the Supreme Court.

25. Is there a system where the “loser pays” the winner’s legal/professional costs of an appeal?

In principle, the system where the “loser pays” the winner’s legal/professional costs of an appeal apply, even if said costs shall be paid only when a final judgement occurs. The rule “loser pays” can be derogated by the Tax Court; generally, the judges decide for a compensation of the litigation expenses in case of particularly complex litigation or in case of an agreement between the parties.

The amount of legal/professional costs is determined discretionally by the judges and does not depend on the costs actually borne by the parties.

26. Is it possible to use alternative forms of dispute resolution – such as voluntary mediation or binding arbitration? Are there any restrictions on when this alternative form of dispute resolution can be pursued?

In case of litigation concerning a tax assessment claiming higher taxes up to Euro 50.000, mediation is mandatory before the filing of the appeal to the Tax Court of first instance. The body in charge for the mediation is the litigation department of the tax office that issued the tax assessment. If an agreement is reached with the tax office within 90 days from the service of the appeal, the litigation in Court cannot start.

After the filing of the appeal, the dispute can be judicially settled before the hearing of both first instance and second instance Tax Courts. If a settlement agreement is reached the litigation terminates.

In case of international double taxation, dispute resolution procedures provided by the double tax treaties, the Arbitration Convention and the EU dispute resolution Directive apply.

In case of MAP according to the double tax treaty – considering the absence of an obligation for the competent tax authorities to reach a result – taxpayer has, in any case, to start a litigation before the Tax Court. In case of MAP based on Arbitration Convention and EU dispute resolution Directive – considering the obligation for the tax authorities to reach a result – taxpayer might not start a litigation before the Tax Court.

In connection with all the above mentioned MAPs if an outcome is reached by the competent tax authorities and taxpayer accept the result, the latter must waive the pending tax litigation.

27. Is there a right of onward appeal? If so, what are all the levels of onward appeal before the case reaches the highest appellate court.

There are three levels of appeal: (i) Tax Court of first instance (deciding on the merit of the assessment), (ii) Tax Court of second instance (deciding on the merit again) and (iii) Supreme Court (highest court deciding on the conformity of Tax Court of second instance decision to the law).

28. What are the main penalties that can be applied when additional tax is charged? What are the minimum and maximum penalties?

The main penalties that can apply when additional tax is charged are: (i) 90-180% of the higher tax in case of unfaithful tax return, (ii) 120-240% of the higher tax in case of omitted tax return and (iii) 30% in case of omitted payment; (iv) 135-270% of the higher taxes if

the violation is committed by using false invoices or documentation for fraudulent transaction in case of unfaithful VAT return.

The above penalties related to the tax return violations are increased of 1/3 in case foreign income is assessed.

Maximum penalties can be increased up to 50% in case the same violation is committed in more fiscal years.

29. If penalties can be mitigated, what factors are taken into account?

Penalties can be mitigated in the following main described circumstances.

Taxpayer that regularized the violation committed through a self-voluntary regularisation (so called "ravvedimento operoso") can benefit of the reduction of penalties applicable. In particular, the extent of the said reduction of the minimum penalty depends on the timing of the regularisation (reductions ranges from 1/10 to 1/5).

In case the taxpayer and tax office, before the appeal, reached a settlement agreement, penalties are reduced to 1/3 of the minimum applicable.

Moreover, the taxpayer can settle the penalties levied in the tax assessment by paying – within the term to appeal -1/3 of the levied penalties but in case of a favourable outcome of the litigation penalties paid cannot be reimbursed.

Furthermore, if an agreement is reached during the mediation (mandatory procedure before the filing of the appeal to the Tax Court of first instance in case of litigation concerning a tax assessment claiming higher taxes up to Euro 50.000) penalties are reduced to 35% of the minimum applicable.

After filing the appeal, if a judiciary settlement occurs before the hearing penalties are reduced to 40% of the minimum if the appeal is pending before the Tax Court of first instance or to 50% if the appeal is pending before the Tax Court of second instance.

Lastly, the tax offices and Tax Courts can reduce (or cancel) penalties in case of specific circumstances provided by law such as evident disproportion between higher taxes and penalties, objective uncertainty in the application of the law, force majeure.

30. Within your jurisdiction, are you finding that tax authorities are more inclined to bring challenges in particular areas? If so, what are these?

Italian tax authorities are more inclined to raise challenge items in the following areas: (i) transfer pricing, (ii) permanent establishment; (iii) withholding tax on dividends, interest or royalties (on the basis of alleged absence of beneficial ownership status of the recipient); (iv) tax residence and (v) VAT frauds.

Contributors

Marco Cerrato
Partner
m.cerrato@maisto.it

Paola Marzetta
Partner
p.marzetta@maisto.it