

## NEW REPORTING OBLIGATIONS FOR TRUSTEE AND/OR BENEFICIARIES RELATED TO ITALIANS



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### Italy and Trust

Since 1992, when the Hague Convention was ratified, Italy has been very active on trusts.

Several official interpretation and guidelines affecting trusts have been issued by the Italian Inland Revenue (“*Agenzia delle Entrate*”) since 2007, on both direct (i.e. circular 48/E/2007) and indirect taxation (i.e. circular 3/E/2008).

It is important to note that under Italian tax law, the trust is subject to the Italian corporation tax (IRES) and to a gift tax applicable on the funds transferred to the trust.

Recently, after the rewording of art.4<sup>1</sup> of Law Decree n° 167/90 (“167/90”), Italian tax residents are required **to disclose the value of foreign assets directly and/or indirectly owned.**<sup>2</sup>

Such requirement holds for the “*beneficial owner*” of the assets located abroad and held directly or through companies, trusts and/or other arrangements (i.e. insurance wrappers). The requirement refers to resident individuals and assimilated noncommercial entities (i.e. “*società semplice*” or trust). The old threshold (10.000 Euro of total assets value) for reporting requirements is no more applicable.

Clearly the new rules are to be considered in the general context of the fight against illegal offshore funds held by Italian residents. The new law distinguishes between assets held in cooperative jurisdictions (“*white list countries*”) and in non-cooperative jurisdictions (“*nonwhite list countries*”). **When assets directly or indirectly owned, are located in “non-white list countries”, the reporting obligation is set at the fair value**

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<sup>1</sup>According to **art.9, L. N. 97 issued on 6 august 2013**, also called “*legge europea*”, which has modified art.4 D.L. 167/90, individuals, non commercial entities (**such as trust**), “*società semplici*” and other assimilated entities ex art. 5 of Italian consolidate tax code - Presidential Decree N.917 issued on the 22nd December 1986 (hereinafter the “*Tuir*”), Italian tax resident that, during the tax period, hold foreign investments or foreign financial assets, liable to produce incomes taxable in Italy, have to declare them in the annual fiscal report “*Quadro RW - Mod. Unico*” (including non commercial trust as outlined by the Mod.Unico instructions). Furthermore, the above mentioned subjects have to follow the same reporting obligations, even if they don’t hold foreign investments or foreign financial assets directly, but they are “ultimate beneficiary” of those assets as introduced by the art. 1 co. 2 lett. u) of L.D. 21 November 2007 n. 231 (which has introduced the III Directive on Anti Money Laundering in Italy).

<sup>2</sup>The new legislation entered into force with an official deed dated December 18, 2013 and commented officially by **Circular 38/E of 23 December 2013** (“Circular 38/E”).

**of those assets.** This rule is therefore very hard on offshore structures and arrangements owned by Italian tax residents and it certainly adds new compliance obligations for banks, firms and other institutions. New details will be released in the **Italian Voluntary Disclosure Legislation, due to be presented by a decree in January 2014.**

### **New “look through” reporting obligations and trusts**

The new rules will deeply modify the habits of Italian taxpayers. The new regulations will be applicable **from tax year 2013.** This means that the deadline for reporting is **September 30<sup>th</sup>, 2014.**

**For the trusts** it is the responsibility of the **trustees to** duly inform any “*ultimate beneficiary*” about the assets of the trust. Actually, the Italian tax authority has introduced a **new concept:** the “**capital beneficiary**”. This is not related to income as used in the legislation regulating “transparent trust” and “opaque trust” (art. 73 of the Italian Consolidated Tax Code (“Tuir”)). It signals instead that for the taxpayer there is a new layer of attention; he/she now has to report foreign assets in his/her Italian tax return.

Trustees shall be aware where, according to Italian laws, there are one or more “*capital beneficiaries*”. The **test for the identification of a “capital beneficiary”** shall follow the III Directive on Anti Money Laundering as introduced in Italy (L.D. 21 November 2007 n. 231), that is, there is a “capital beneficiary” if:

- (i) Future or current beneficiaries have already been determined and they are also beneficiaries of 25% or more of the assets.
- (ii) Beneficiaries have not yet been determined, but there is a class of persons in whose main interest the trust has been established and or acts.
- (iii) A person (or more persons) exercises control in respect of 25% or more of the trust assets.

Circular 38/E clearly comments and explains how the Italian tax authority will interpret the legislation and it also finds a solution for discretionary trusts.

It is advisable to **assess and verify the specific trust** and the possible consequence for the application of circular 43/E/2009 and 61/E/2010<sup>3</sup>, mentioned in the new Circular 38/E. Italian tax authorities will check if the trust is fiscally interposed or not, with clear consequences on the ultimate beneficiary, which, anyhow, may be asked to disclose his or her indirect ownership of foreign assets through a domestic or offshore trust. Penalties depend on the value of the assets and whether the assets are located in a cooperative or in a non-cooperative jurisdiction. They range between 3% and 15% per year for white list jurisdictions (e.g. England) and from 6% to 30% per year for black listed jurisdictions (e.g. Switzerland).

### **Further attention to Italian tax residence and compliance**

The new rules are applicable to **Italian tax residents only.** Hence, attention shall be given to offshore trusts, trustees, protectors and beneficiaries which could potentially create issues of Italian tax residency. According to circular 38/E, for “*non-white list countries*”, trusts and/or individuals have to give **adequate proof of no Italian tax residence or they are deemed to be resident** and therefore obliged to disclose information in the RW section of the personal income tax return. This is the case of a “*capital beneficiary*”

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<sup>3</sup>See Alessandro and Luigi Belluzzo, *New guidance on trust taxation*, STEP Journal, April 2011.  
<http://www.step.org/new-guidance-trust-taxation>

tax resident in Monte Carlo or the case for a trust established in the Bahamas and run from Switzerland on the basis of a Swiss mandate or a similar arrangement.

An Italian resident trust, through its trustees, shall comply with these new obligations presenting the Italian tax return and the new type of RW session of the Italian personal income tax return.

Circular 38/E which is 60 pages long and very accurate in explaining how the taxpayer can be compliant with the new foreign assets reporting obligations. Because of the new reporting requirements, **anon resident trust** may anyhow expose **its capital beneficiaries** to the new tax obligations and therefore it is highly advisable that now clients carry out an analysis of their trust's tax residence and of their inclusion among capital beneficiaries, as defined by the new Italian rules.

For instance, in case of an Italian resident capital beneficiary of an offshore trust, the taxpayer has to disclose the value of the investments and of the assets of the trust in his/her tax return (RW section). This is fully coherent with the outcome of the recent G8 and Financial Action Task Force (FATF) guidelines. In investigating holdings of foreign assets, the Italian tax authorities will surely take advantage of the automatic exchange of information agreements now in force between various countries.

On December 2<sup>nd</sup> 2013 the **Bank of Italy** office issued a circular on **trusts and on how such entities are used for international and domestic planning**, giving guidelines to Italian banks and intermediaries, including Italian fiduciaries, on how to reinforce tests applicable to trusts raising the concern of abusing the law.<sup>4</sup>

### **Any room for trust and estate planning in Italy and/or for Italian resident?**

The clear answer is Yes! The trust as an estate planning tool is well known now by the Italian administration and no one doubts about its legitimate role on inheritance, governance or other legal issues. Consob, the Italian stock exchange regulator also commented about trusts on August 2<sup>nd</sup> 2013. The most problematic issue is tax: **Italian tax authorities have a very suspicious attitude towards the use of trust in international tax planning**. This is why it is now important to organize structures which are fully understandable and compliant.

Both direct and indirect taxation have a clear frame in Italy, although the tax residence test may still present some issues. **The new attitude is to make a clear distinction between the juridical and the tax effect of trusts, in order to avoid any misconduct**. The concept of fiscal interposition, as set in Circular 61/E/2010, applies both for domestic and offshore trust, but the new rules, as commented with Circular 38/E are applicable to Italian residents only. As it is within the reporting obligations, Italian tax authorities will certainly check trust deeds and other documents in order to find evidence for a reporting obligation. It is of utmost importance that both domestic and international trusts are considered not fiscally interposed, both under real and/or fictitious interposition. Probably it will be necessary to reorganize and adopt **new best practices** on trust deeds and documents drafting. The same should be said for the legitimate use of companies, trusts, foundations, insurance wrappers and other similar structures when an Italian is involved. A decision to take Italian tax residence and keep legally the structure in a (trust) friendly jurisdiction is also to be considered, depending on the general and particular aims of the structure.

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<sup>4</sup> [www.bancaditalia.it/homepage/notizie/uif/comunicato-02122013.pdf](http://www.bancaditalia.it/homepage/notizie/uif/comunicato-02122013.pdf)

For offshore structures, Italian taxpayers and foreign trust officers may find it useful to analyze the impact of the program for Voluntary Disclosure in Italy. This would have a double dividend: it would allow identifying past issues which are problematic for the present and it would allow Italian residents to look at the future in the comfort of a soft landing in full compliance.

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