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XXIV Ciclo

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Commercio elettronico diretto e imposizione sui redditi: beni immateriali e "dematerializzazione" dell'attività d'impresa.

Abstract

The research aims to study some tax implications involving the electronic commerce (hereinafter e-commerce) and their relationships with the goods digitization (i.e. a digital representation of goods: digitizing means capturing an analog signal in a digital form) and the intangibles.

Particularly, our analysis is circumscribed to the e-business entirely carry out by the web.

First of all, in Chapter 1 we clarify the meaning of the above mentioned items from a direct taxation perspective and we give an overview about the main characteristic of e-commerce and the main legal and economic implications of the so called new economy.

Particularly, we enucleate the concept of intangible relevant in Italian income tax law and we give emphasis to the difference between intangibles and tangibles (i.e. digital goods).

In addition, we point out a misunderstanding committed by some scholars and the OECD about the main difference existing between intangibles and digital goods. The misunderstanding probably comes from a bad interpretation of roman law (see *Institutiones* by Gaius) that distinguish between *res que tangi possunt* and *res que tangi non possunt.* It could be that intangible property is often so closely connected with tangible property that it is difficult to draw a clear distinction between the two items. On the other hand, no universal definition of intangible property exists. For these reasons, we have looked for the concept of intangible good in Italian income tax

Anyway, we notice that even if a digital good (i.e. a good that is stored, delivered and used in an electronic format) is not perceptible without electronic means such as personal computers and modems, it is a tangible property with a physical form consisting of bytes (a sequences of electrical impulses). On the contrary, intangible property is generated by a creative process or by human conceptual endeavour (such as literary, dramatic, musical, artistic and scientific works) that is capable of legal protection, e.g. by way of copyright, patent, registered design, trademark, etc. Besides, compensation for the use of intellectual property is in general referred to as a royalty (see Chapter 4). Last but not least, the intangible property became perceptible when it manifests itself by a "tangible" form, such as a digital good.

In chapter 2 we examine fiscal policies adopted by USA and EU both in direct and indirect taxation and we analyze some suggestions formulated by the OECD in the Commentary on the Model Tax Convention in order to regulate e-commerce. Since the Ottawa conference (1998), the question is to establish not only "where" to tax the electronic transactions (this is the problem involving the existence of a genuine link between income comes from on line transactions and a given Country) but also "how" to tax it. E-commerce does not required intermediaries in foreign countries to be able to conduct business there and requires far less human intervention, if any, than that otherwise required to trade by in a traditional manner. In addition, the market-penetration is unlimited and knows no borders and the e-business activity is transacted on a non-face to face basis (therefore the seller and the consumer may not know each other).

These characteristics of e-commerce make more difficult to apply to taxpayers engaging in e-commerce rules concerning the taxation of income on the basis of the principle of residence (by reference to the place of formation, the place of the registered office or the place of effective management). Indeed, parameters established in the tax treaties for the purpose of apportioning tax powers among States in case of conflict (usually based on the "place-of-effective-management" principle) are overridden in the e-commerce because of the managing bodies can be located in different jurisdictions and be totally mobile during the year.

In theory, It is possible to follow the so called "*Revolutionary approach*" or the *"Status quo approach"*. The first way implies that e-commerce needs new taxes and a new fiscal system because of their distinctive features. So, some Scholars have proposed the implementation of the "*Bit Tax*", based on the volume of data transferred. Anyway, the OECD, the USA and the EU are opted for the *"Status quo approach"* because of the relevant cost involving the implementation of a new tax and/or a new fiscal system and in order to prevent some legal problems that could cause the *Revolutionary approach*. For example, the implementation of the "*Bit Tax*" should probably forbidden by art. 401 of the Council Directive 2006/112/EC, that prevent Member States from introducing taxes on turnover.

In chapters 3 and 4 we examine the main issues concerning the tax treatment of income obtained electronically.

Particularly, we analyse the permanent establishment involved in e-commerce from a conventional and an Italian perspective.

To start with, in the Chapter 3 we examine the so called "basic rule" (contained in Article 5 of the OECD Model Tax Convention) concerning the material permanent establishment, the "positive list" and the personal permanent establishment.

After that, we consider whether the web server, the internet service provider (hereinafter ISP) and the web site could be regarded as a fixed and permanent place of business in the country where they are located and/or they sell goods or supply services on the internet.[1]

The OECD commentary states that a distinction must be made between a computer or server (which can constitute a permanent establishment) and the software used by that computer (which cannot constitute a permanent establishment). This distinction is quite important because the entity that operates the server hosting the website is normally different from the entity that carries on business over the Internet (by an hosting agreements). In the OECD opinion, a website does not in itself constitute tangible property and, therefore, It cannot be

[1] Specially, the OECD Commentary on Article 5 (in relation to the definition of "permanent establishment") was introduced so as to take account of the elements which define new forms of commerce. This was not modified by the following commentaries on the Model Tax Convention

deemed a "place of business" if this is defined as facilities, equipment, or machinery capable of constituting a permanent establishment.

We demonstrate that this conclusion is incorrect because the web site is a part of the domain name, that consist of tangible and intangible elements. In addiction, we reveal that the web site files are byte sequences that consist of electrical impulses starting from the hard disk drive of the server.

So, the domain name could be considered a fixed and "tangible" (i.e. physical) place of business located on the hard disk drive of the server.

In addition, we accomplish some additional reflections about the configurability of the space located from the ISP to the internet content provider (hereinafter: ICP) as a fixed place of business of the ICP.[2]

In the second part of the Chapter 3, we examine rules concerning the profit attribution to the permanent establishment involved in e-commerce.

Particularly, the OECD delves into the permanent establishment constituted by a stand-alone computer server performing automated functions (in particular: online processing of transactions and transmission of digitised products) with a lack of either human or artificial intelligence,[3] while It neglects the permanent establishment provided with an artificial intelligence (i.e. It does not examine the "cybernetic" fixed place of business).

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[2] In order to determine whether a server to constitute a fixed place of business it must be permanent, in that it must be located in a certain place for a sufficient length of time. What counts is whether, in fact, it is moved from one place to another rather than whether or not it can be moved. In this regard, a server used for e-commerce can be a permanent establishment regardless of whether or not there are personnel to operate that server, where no personnel are required for the operation assigned to the server. When determining whether or not the server installed by a given company in a country constitutes a permanent establishment of that company, it is particularly important to analyze whether the company engages in business activities specific to its corporate purpose through that server or whether, on the contrary, it only engages in activities of a preparatory or auxiliary character (such as advertising, market research, data gathering, providing a communications link between suppliers and customers,…). The OECD commentary states that the ISP does not generally constitute a permanent establishments that engage in e-commerce on websites since ISPs are not (usually) agents of a dependent status for non resident companies.

[3] See OECD, *Attribution of Profit to a Permanent Establishment involved in Electronic Commerce Transaction*, A Discussion Paper from the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits, February 2001, par. 140 *«The computer server in the permanent establishment is only performing low-level automated support functions that make up only a small proportion of the functions necessary to act as a full function retail outlet/distributor or as a full function service provider. The level of profit earned is likely to be commensurately low and be very significantly less than that earned by full function retail outlet/distributors or full function service providers.».*

On the last case, there is not an “automatic” (i.e. algorithmic) machine because the so called smart software entails a certain degree of the autonomy to make a decision on contractual activity.

We stress that smart software acts and reasons (in some measure) like a human being because It uses the “heuristic method”, that consist in strategies using readily accessible, though loosely applicable, information to control problem solving in human beings.

We notice that It could have some impact in order to increase profits attributable to the permanent establishment applying the traditional arm’s-length principle to valuing intercompany transactions and dealings between the permanent establishment and the head office (see the Commentary on the Article 7 of the OECD Model Tax Convention).

In Chapter 4 we examine characterization of income that comes from payments related to goods protected by intellectual or industrial property laws.

The Commentary on the OECD Model Tax Convention characterizes as business profits (instead of royalties) almost all payments made for all intangible goods delivered electronically, on the ground that the subject-matter of those transactions are copies of images, sounds or text rather than the right to exploit them commercially.

The commentary on the OECD Model Tax Convention published in July 2008 take the novel view that payments made under arrangements between a software copyright holder and a distribution intermediary do not constitute a royalty if the rights acquired by the distributor are limited to those necessary for the commercial intermediary to distribute copies of the software.

Thus, since distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights (without the right to reproduce the software), payments in these kinds of arrangements would be dealt with as business profits.

In OECD Model Tax Convention, income derived from the grant of the right to use software is not expressively characterized as a royalty. On the other hand, Italian legislation contains a list of the items which are deemed royalties, but does

not include expressively the software (i.e. the amounts paid for the use of, or the right to use, rights on computer programs).

Therefore, in Chapter 4 we analyse also some relevant cases in order to establish if the transfer of software involves a copyright (i.e. a scientific or literary work) or a digital good protected by the copyright and when a transaction produces royalties or technical fees.