



Newsletter



INTERNATIONAL TAX INSIDER

## **Private equity and beneficial ownership: will the Italian Supreme Court confirm a look-through approach?**

On 3 February 2022, the Second-Degree Tax Court of Milan issued a decision on a case dealing with interest payments by an Italian company to its Luxembourg parent company in the context of a foreign investment fund structure.

In particular, the Second-Degree Court ruled that (i) the WHT exemption granted by the Interest and Royalty Directive (“IRD”) applies also if the beneficial owner is not the direct recipient of the interests and (ii) the domestic WHT exemption granted - under certain conditions - to interests paid to foreign qualifying investment funds applies also if the fund is not the direct recipient of the interests.

If the look-through approach applied by the Second-Degree Court is confirmed by the Supreme Court, this could grant the WHT exemption on interests paid by an Italian company also in case of private equity or real estate fund structures, where the beneficial owner or the foreign qualifying fund are not the direct recipients of the interests.

### **Description of the case**

The case analysed by the Second-Degree Court deals with a Dutch investment fund (managed by a UK LLP) investing in an Italian company via a foreign holding structure (Master HoldCo, MidCo, and Lux HoldCo).

The Italian resident company paid interests to its Luxembourg parent company (Lux HoldCo) benefitting from the WHT exemption granted by the IRD. Italian tax authorities denied the WHT exemption arguing that the beneficial ownership requirement was not met at the level of Lux HoldCo.

Following the appeal of the Italian company, the First-Degree Court ruled in favour of tax authorities. However, the Second-Degree Court overturned the lower Court decision on the basis of two lines of reasoning.

Firstly, the Court stated that the WHT exemption granted by the IRD applies also if the beneficial owner is not the direct recipient of the interests, as indicated in point 94 of the CJEU Danish cases (joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), which reads as follows: “It should also be stated that the mere fact that the company which receives the interest in a Member State is not its ‘beneficial owner’ does not necessarily mean that the exemption provided for in Article 1(1) of Directive 2003/49 is not applicable. It is conceivable that such interest will be exempt on that basis in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union and furthermore satisfies all the conditions laid down by Directive 2003/49 for entitlement to such an exemption”. However, the Court specified that the Italian company did not provide adequate evidence to support that Master HoldCo qualifies as beneficial owner of the interests.

Secondly, the judges ruled that the domestic WHT exemption granted - under certain conditions - to interests paid to foreign qualifying investment funds applies also if the fund is not the direct recipient of the interests. The Court highlighted that this provision, which is aimed at easing access to foreign financing, is based on the same rationale of the IRD: eliminating double taxation. Therefore, the look-through approach applicable to the IRD must also apply to the domestic WHT exemption granted to foreign qualifying funds.

In conclusion, the Second-Degree Court confirmed that a look-through approach applies to the domestic WHT exemption on interests paid to foreign qualifying funds. Therefore, interests paid by an Italian company to its foreign parent company benefit from this domestic WHT exemption also if the Italian company is indirectly held by a foreign qualifying fund.

### **LED Taxand’s Take**

If the look-through approach applied by the Second-Degree Court is confirmed by the Supreme Court, this could have a relevant impact on foreign funds investing in Italy, granting to interest flows from their Italian investments a more certain and favourable tax treatment.

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