A digest of recent news

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Introduction

Our **March issue** gives ample coverage to the new criteria for defining residence in Italy for tax purposes, thoroughly amended from 2024. The extension of the possibility to sign fixed-term contracts for periods in excess of 12 months, even without specific provisions set by collective bargaining, and a recent ruling by *Corte Costituzionale*, confirming that dismissal may be null even without a regulation explicitly deeming it as such, are also examined.

Tax residence: new regulations

On the subject of **international mobility**, the tax regime aimed at promoting the transfer of the tax residence of workers residing abroad to Italy constitutes a very significant measure, even in organisational terms. In this perspective, **the notion of tax residence** is obviously crucial.

By virtue of the delegation conferred by Art. 3(1)(c) of Law No. 111/2023, Art. 1 replaces **Art. 2**(2) of the **Consolidated Income Tax Act** (TUIR), establishing, **as of 1 January 2024**, (1) that *'for income tax purposes, persons are deemed to be resident if they have their residence within the meaning of* Codice Civile (2) *or domicile in the territory of the State or are present there for the greater part of the tax period, including fractions of a day. For the purposes of the application of this provision, domicile means the place where the person's personal and family relationships are primarily developed. Unless proven otherwise, persons registered for the greater part of the tax period in the registers of the resident population are also presumed to be resident'.*

Considering that Art. 2(2) of TUIR, in force until 31 December 2023, provided that *'for income tax purposes, persons who for the greater part of the tax period are registered in the resident population registers or have in the territory of the State their domicile or residence pursuant to* Codice Civile *are deemed to be resident'*, **significant differences** emerge between the former and the current version of the aforementioned provision, as the new wording of the regulation:

a) Considers the possibility that the persons concerned may prove they are resident for tax purposes in another State, even they are registered for most of the tax period in the resident population registers. In fact, it is sufficient for the persons to prove that they have established residence - intended as habitual abode - or domicile elsewhere,

b) Offers a different definition of 'domicile' from that to be found in Art. 43(1) of *Codice Civile*, meaning *'the place where the person's personal and family relationships primarily develop*'. In this regard, it should be noted that this new criterion seems to attribute only secondary importance to the more concrete and objective economic interests of the taxpayer, favouring recourse to the more uncertain criterion of personal relationships,

c) Determines, as mentioned above, the definitive overcoming of the absolute presumption of residence in Italy for Italian citizens who are not enrolled in the Register of Italians Resident Abroad (AIRE), as well as for the foreign citizens who have established their residence in Italy, omitting the cancellation from the registry of the State of origin. Therefore, the current legislation relegates registration with AIRE to the rank of relative presumption, since, regardless of registration in that Registry Office, taxpayers must provide proof that they have actually established their tax residence in another State. For what is of interest here, the Legislator had, moreover, already resorted to this orientation by introducing Art. 16(5-ter), Legislative Decree no. 147/2015, which, for the purposes of the application of the special tax regime to inpatriate workers, had in fact reduced to a relative presumption the subjective requirement of registration with AIRE, admitting that the requirement of residence abroad for at least two tax periods (3) for the purposes of access to the special tax regime could be proved under the convention against double taxation on income, where in force.

Without prejudice to the foregoing, registration with AIRE still constitutes a relevant element of proof in relation to Art. 2(2-bis) of TUIR, by virtue of which an Italian citizen who has transferred his residence to a State with privileged taxation included in the list referred to in the Ministerial Decree of 4 May 1999 (black list) is deemed to be resident for tax purposes in Italy, unless proven otherwise. Since in such a case residence for tax purposes is presumed to be in Italy, the fulfilment of the obligation to register with AIRE pursuant to Art. 6(1) and (3) of Law No 470/1988 is certainly relevant, inasmuch as

(*) Starting from January 2023, and on a monthly basis until December, we will publish several articles on labour and employment law in Italy, with specific focus on news and current events, but without disregarding subjects and topics that - while not undergoing relevant amendments or improvements - may be useful knowledge for international employers.

Our focus will insist on providing more than a simple number of mere notions, but rather a compendium of usable knowledge, allowing employers to pursue HR policies and strategies that are not only fully compliant with - but also set to take full advantage of - current domestic regulations.

(1) Art. 7(1).

(2) Art. 43(2) of *Codice Civile*.

(3) Art. 16(1)(a), Legislative Decree n. 147/2015.

the fulfilment of said obligation attests to the intention of the persons concerned to establish an effective and prolonged relationship with the foreign State, without having their habitual residence in Italy or the centre of their interests there, in addition to their economic interests, including family, social and moral interests,

d) Continues to identify in the calendar year (1 January to 31 December) - instead of the tropical year (any uninterrupted 365-day period) - the condition for which a taxpayer may be considered resident for tax purposes in Italy, confirming that taxpayers are resident for tax purposes in Italy if they have resided there for the greater part of the tax period (i.e. 183 days in a year or 184 days in the case of a leap year). Therefore, a worker who transferred his or her tax residence to Italy after 1 July 2024 will be able to benefit from the favourable tax regime set forth in Art. 5 of Legislative Decree No. 209/2023, only from 2025, and for the 4 ensuing tax periods; (4) in fact, in such case, the income produced in Italy in the shorter tax period - i.e., during 2024 - and already subject to ordinary taxation in Italy on a definitive basis will be subject to the tax regime of the State from which the tax residence has been transferred, availing itself of the tax credit mechanism according to the tax regulations of the foreign State. The criterion of the splitting of the tax period (split year) according to the moment when the tax residence is actually transferred is only applicable when explicitly governed by treaty regulations,

e) Provides that fractions of a day shall also be taken into account in the calculation of the greater part of the tax period.

Thus, Article 2(2) of TUIR redefines - albeit partially - the criteria by which to ascertain whether tax residence is actually established in Italy. Whereas, until 31 December 2023, tax residence was ascertained when the individual was included in the registers of resident population or had actually established domicile or residence in Italy pursuant to the Italian Civil Code, as from 1 January 2024, tax residence in Italy is ascertained when the individual has been present in Italy for the greater part of the tax period. This criterion, which is sufficient in itself, is in addition to the criteria - distinct and alternative - already known to the legal system, i.e. (i) residence within the meaning of the Civil Code and (ii) domicile in the territory of the State, now understood, by virtue of the provisions of Art. 1, Legislative Decree No. 209 of 27 December 2023, as *'the place where the person's personal and family relationships primarily develop*'. (5)

It is worth noting that, while new regulations effectively downplay the relevance of **registration with AIRE** for Italian citizens resident abroad, other regulations introduce **harsh penalties** for Italian nationals resident abroad who fail to register with AIRE; as of 2024, an Italian worker residing abroad who is not enrolled in the Registry of Italians Resident Abroad (AIRE) (6) will be punished with an administrative fine ranging from EUR 200.00 to EUR 1,000.00 for each year of omitted enrolment. (7)

The **penalty** is **reduced** to one tenth of the minimum (therefore to EUR 20.00) on condition that:

- the declaration is made with a delay of no more than 90 days and
- the breach has not already been ascertained by competent authorities and, in any case, no administrative inspection activities of which the worker has formal knowledge have commenced.

Workers who transfer their residency abroad for periods of more than 12 months are required to register with AIRE. (8) The declaration of transfer of residency abroad must be submitted, also electronically, to the Municipality of civil registration within 20 days from the date of the actual transfer.

The assessment and the imposition of sanctions are notified by the Municipality of registration to the worker by 31 December of the fifth year following the one in which the breach occurred.

The Public Administration which, in the exercise of its functions, acquires relevant elements indicating that the worker is in fact resident abroad, notifies the Municipality of registration as well as the competent consular office.

The Municipality is required to inform the Revenue Agency of any changes made *ex officio* with regard to AIRE registration, in order to facilitate relevant tax audits. (9)

Fixed-term contracts: Extension of the deadline for specifying reasons for the individual contract

The **deadline** by which it will be possible to enter into a fixed-term contract for a duration exceeding 12 months for needs of ***i)*** technical, ***ii)*** organisational or ***iii)*** productive nature, in the absence of specific provisions set by collective labour agreements, has been **extended from 30 April to 31 December 2024**. (10)

The '**ordinary**' **regime** contemplates the possibility of entering into a fixed-term contract lasting more than 12 months:

(4) *Agenzia delle Entrate*, answer to query n. 136/2018 and query n. 34/2019.

(5) Contrary to Art. 2(2) of TUIR, Art. 43(1) of Codice Civile states that 'the domicile of a person is at the place where they have established the principal seat of their business and interests'.

(6) Acronym of Associazione Italiana Residenti Estero.

(7) Art. 11, Law no. 1228/1954, as amended by Art. 1(242-243), Law no. 213/2024.

(8) Art. 1(8), Law n. 470/1988.

(9) Art. 1(243), Law n. 213/2023.

(10) Art. 19(1), Legislative Decree no. 81/2015, as amended by Art. 18(4-bis), Legislative Decree no. 215/2023, converted by Law no. 18/2024.

a) in the cases provided for by the collective labour agreement applied by the employer, provided that it is signed by the trade union associations that are comparatively more representative at national level or by their company trade union representatives, or
b) for the substitution of other workers, temporarily absent from work.
Even in the absence of a specific provision set by the collective agreement applied by the employer, until 31 December 2024, the employer may therefore enter into a fixed-term contract for a period exceeding 12 months, provided that proven and specific needs of a ***i)*** technical, ***ii)*** organisational or ***iii)*** production nature are met.
In any event, the fixed-term employment contract may not exceed a duration of 24 months.

Corte costituzionale: null dismissals always entail the employee's reinstatement

Corte Costituzionale, in its **judgment no. 22/2024**, declared the **constitutional illegitimacy of Art. 2**(1) of **Legislative Decree 23/2015**, applicable to workers hired after 7 March 2015, in the part in which it limits the reintegration protection - i.e., the reinstatement of the worker in the workplace ordered by the judge - only to cases of nullity 'explicitly' provided for by law.
Corte di Cassazione, in raising the issue of constitutionality, had censured this limitation, with reference to Art. 76 of the Constitution, for violation of the delegation criterion established by Art. 1(7)(c) of Law No. 183 of 2014, observing that the exclusion of nullities, other than 'explicit' ones, did not find a correspondence in the delegation law, which recognised reintegration protection in cases of 'null dismissals' without any distinction.
The Constitutional Court found this censure well-founded, observing in particular that the directive criterion, in the part relevant in this regard, had marked the perimeter of the reinstatement protection of the employee in the workplace in the event of illegitimate dismissal, excluding it, in the negative, for 'economic' dismissals, and providing for it, in the positive, in the cases of null and void dismissals, discriminatory dismissals and specific cases of disciplinary dismissal.
The Court emphasised that the textual reference to 'null dismissals' contained in the directive criterion did not contemplate - and therefore did not allow - a distinction between explicit and non-explicit nullity, but envisaged a distinction only for unjustified disciplinary dismissals. The delegated legislature, on the contrary, introduced a distinction not only for the latter, but also within the scope of the cases of nullity provided for by law, differentiating according to the explicit (and therefore textual) nature, or not, of the nullity. Moreover, by providing for reinstatement protection only in cases of explicit nullity, it has left without specific regulation the 'excluded' cases, i.e. those of dismissals that are null and void for violation of mandatory rules, but without the express sanction of nullity, thus dictating an **incomplete and inconsistent discipline with respect to the design of the delegating legislator**.
It follows from the **declaration of the constitutional unlawfulness** of the aforementioned provision, **limited** to the **word** '**explicitly**', that the treatment of null and void dismissals is the same, whether the provision violated contains the express sanction of nullity or whether said sanction is not textually determined, provided that a prohibition of dismissal is prescribed when certain conditions are met.