1. (Tax) residence in the domestic context

1.1. Civil law, corporate law and other non-tax areas

The connecting factors applicable for private international law purposes to companies formed abroad were originally provided under Art. 2505, civil code, according to which: “companies formed abroad, having their place of management or main object of business within the territory of the State are subject to all provisions of Italian law, including those with respect to the requisites for the validity of the articles of association”.

Art. 73, Law 31.05.1995 No. 218 – Italian Statute on Private International Law – repealed the above mentioned provision.

Pursuant to the current version of Art. 25, § 1, Legislative Decree No. 218 of 1995 “companies, associations, foundations and any other legal person, public or private, provided or not with associative nature, shall be governed by the law of the State in which the incorporation process has been completed. However, Italian law applies if the place of management of the person is located in Italy, or if its main object of business is located therein”.

Therefore, the connecting factors of the companies are currently provided for by the Italian Statute on Private International Law, which attributes primary importance to the place of incorporation, making reference, for entities and persons formed abroad, to the additional criteria of the place of management and principal place of business.

Apart from private international law, the concept of company’s seat is also relevant for other areas of law. It may be challenged by all third persons interested in claiming that the company’s seat is located in a place different from the one formally stated (for example, in a bankruptcy proceeding, the debtor, one or more than one creditors, the public prosecutor).
First of all, company’s seat is relevant for civil law purposes, where Art. 46, civil code provides that “whenever under the law certain consequences are dependent upon residence or domicile, with respect to legal persons regard is had to the place in which their legal seat is established. In cases in which the legal seat established according to Article 16 or shown by the register does not correspond to the real one, third persons can also consider the latter as the legal seat of the legal person”.

Secondly, company’s seat is relevant for company law purposes, in order to identify on a territorial basis the company’s register competent for the registration of the company.

Thirdly, company’s seat is relevant for international procedural law purposes, in order to identify the court having jurisdiction for legal proceedings related to company’s activities.

Fourthly, company’s seat is relevant for bankruptcy law purposes, in order to identify the court having jurisdiction for bankruptcy proceedings. More specifically, Art. 9, Italian Bankruptcy Act (Royal Decree No. 267 of 1942) states that the court located in the place in which the company has its principal seat as the one competent for opening insolvency proceedings. In this respect, the jurisprudence stated that Italian courts have jurisdiction even in case in which a company incorporated in Italy and which subsequently moved its registered office abroad does not carry out abroad a genuine entrepreneurial activity and has not moved abroad the center of its managing and administrative activity, having the move of the sole registered office a purely formal nature. The same conclusions apply in case of intra-EU move: the presumption provided under EC Regulation No. 1346 of May 29, 2000 according to which the place of company’s registered office is presumed to be the center of its main interests can be rebutted only proving that the move has been only fictitious, as in such case the courts of the State of destination shall not have jurisdiction.

1.2. Tax law.

1.2.1. The notion of residence for tax purposes and its importance.

Art. 73, § 3, Presidential Decree No. 917 of 1986 (so called Consolidated Tax Act, hereinafter CTA) qualifies “companies and other legal persons having in Italy their
registered office or place of management or main object of business for most part of the taxable period” as resident entities for income tax purposes.

The structure of the provision at hand largely resembles the rule provided under Art. 2, § 2, CTA in respect of the tax residence of individuals.

However, unlike Art. 2, § 2, CTA which refers to the concepts of residence and domicile provided under Art. 43 of the civil code, Art. 73, § 3, CTA does not refer to the aforementioned Art. 46 of the civil code. More specifically, already the original wording of Art. 73 (id est, in the wording of Art. 87 CTA applicable before the tax reform provided by Legislative Decree No. 344 of 2003) showed a reference to other civil law provisions, namely to Art. 2505 of the civil code, with the sole differences of the reference to the “most part of the taxable period” and the irrelevance of the distinction between domestic and foreign companies.

More specifically, the alignment between Art. 2505, civil code and the CTA took place when the reference to the ‘administrative office’ originally made under Art. 2 of the Presidential Decree No. 598 of 1973 was changed with the reference to the ‘place of management’ so making the language relevant for tax purposes uniform with Art. 2505, civil code.

Therefore, it can be argued that the concept of company residence relevant for tax purposes, unlike that of individuals (which is closely linked to civil law concepts), ‘depends’ upon private international law concepts. We will see, however, that the interpretation of company residence elaborated by the jurisprudence coincides with the ‘real seat’ referred under Art. 46 of the civil code.

As for the relevance of the tax residence in Italy, it determines the taxation on a worldwide basis.

Moreover, the residence of the payer also constitutes a connecting factor for taxation in Italy of income from capital paid to non-residents (Art. 23, § 1, let. b), CTA).

1.2.2. The reversed burden of proof.

Italian tax law contains a rebuttable presumption in order to determine the tax residence of companies (art. 73, §§ 5-bis and 5-ter, CTA) (1).

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1 Law Decree no. 262/06 (converted by law no. 296/06) introduced in art. 73, § 3, CTA, other two presumptions concerning the residence of the trust, based respectively: a) on the residence in the State of at least one of the settlors and at least one of the beneficiaries, or b) on the attribution to the trust, after its...
Such provisions require, respectively, that “unless otherwise proven, the seat of companies and entities which control, pursuant to art. 2359, § 1, civil code, other companies or entities listed in art. 73, § 1, lett. a) and b), CTA, (i.e. Italian resident companies and other entities), is deemed to exist within the Italian territory if either: a) they are controlled directly or indirectly, pursuant to art. 2359, § 1, civil code, by other Italian resident taxpayers; or b) their board of directors or equivalent management body is composed mainly by Italian resident directors” (§ 5-bis), and that “in order to ascertain the control defined in § 5-bis, the situation existing at the end of each financial year of the foreign entity controlled must be evaluated. For the same purposes, with respect to individual taxpayers, reference shall also be made to the voting rights held by relatives, as defined in art. 5, § 5, CTA” (§ 5-ter). Such presumption is aimed at avoiding the use of holding companies fictitiously located in States granting most favorable tax regimes, as the participation exemption regime. More specifically, it is aimed at avoiding cases participations in Italian companies held by companies fictitiously located abroad which can sell such participations benefitting from a full tax exemption regime under the applicable double tax convention in force with the holding company’s State.

The Italian Association of Chartered Accountants challenged such provision before the EU Commission. However, the EU Commission considered it consistent with EU law, since the tax administration declared (note No. 39678/2010; note No. 157356/2010) that: 1) albeit such rule simplifies tax audit activities performed by the tax authorities, they shall nonetheless still prove the fictitious foreign residence; 2) the taxpayer suffers no limit in proving his real foreign residence providing evidence that strategic decisions, contracts and financial operations are actually taken and implemented abroad (for example showing the decisions of the management board, the receipts of airline tickets and the invoices for expenses); 3) it cooperates with the authorities of other EU States to determine the actual location of the POEM.

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establishment, by a person resident in the territory of the State, of the ownership (or other right in rem) of an immovable property, or the creation of restrictions on the use of the same kind of property. On that discipline, G. FRANSONI, La disciplina del trust nelle imposte dirette, in Riv. dir. trib., 2007, p. 247 ss.; ID., La residenza del trust, in Corr. trib., 2008, p. 2582 ss.; Ris. Ag. Entrate, 6 agosto 2007, no. 48/E, § 3.1.
1.2.3. The relationship between the criteria used by art. 73 CTA and the relevance of additional criteria.

The criteria set out by art. 73, § 3, CTA, are not subject to a hierarchical order and they are fully alternative. It follows that a taxpayer, in order to be considered resident in Italy, must fulfil only one of them for more than 183 days during the taxable period.

The following criteria are not relevant:

- the place of incorporation, since the country in which the company was formed is completely irrelevant;
- the place where senior employees work, unless, as we will see, these criteria constitutes a hint to prove the existence in Italy of the administrative office and / or of the main object;
- the place where the accounts are held, although we will see that case law sometimes makes reference to such place as an element possibly supporting the existence of the tax residence in Italy;
- the residence or the nationality of the shareholders, unless companies’ decisions are taken by fictitious directors and attributable to Italian resident shareholders;
- the place where corporate assets are, since, as described below, the reference to the "main object" contained in art. 73 CTA allows to give relevance to the place where the activity usually takes place and not to the place where the goods are physically located.

There are no special rules to determine the tax residence of the digital economy enterprises.

1.2.4. The criteria set out in Article 73 CTA.

1.2.4.1. Registered office.

The definition of the registered office location does not give rise to issues, as it is normally identified with the place indicated in the articles of association, pursuant to art. 2328, no. 2, civil code. In other words, this is the place resulting as registered office in the register of enterprises (2).

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(2) On the notion of residence, please see the following monographs: G. MARINO, La residenza nel diritto tributario, Padova, 1999; G. MELIS, Trasferimento della residenza fiscale ed imposizione sui redditi, Milano, 2009; S. DORIGO, Residenza fiscale delle società e libertà di stabilimento nell’Unione Europea, Padova, 2012.
1.2.4.2. Place of management.

There is no legislative definition for the place of management, so reference must be made to case law and literature.

According to the literature, the place of management is the place where the so-called highest management is located. It is the place in which the fundamental decisions related to the life of the company are taken. Such interpretation is coherent with the interpretation given to the concept of POEM at international level. In such context, attention is paid not to the day by day decisions, but to “the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made” (OECD Commentary, para. 24). It is an interpretation that is coherent with the circumstance that, in the actual CTA, the expression ‘place of management’ replaced the expression ‘administrative office’, originally contained in the former Presidential Decree no. 598/1973.

Case-law supports such interpretation, making also reference to the notion of ‘real seat’ referred under Art. 46, civil code.

The following principles arise from the analysis of the most recent case law:

- Supreme Court, Tax Chamber, February 7, 2013, no. 2869: the definition of place of management shall coincide with that of the real office as defined by civil law rules, i.e. it is the place where administration and management activities are performed and shareholders’ meetings are held; it is therefore the place destined to be, or permanently used as, the location in which all bodies and offices of the company are established for both internal and external relationships for the purposes of carrying out the business and providing their input to such activities; it is the place in which the direction and management of the business are performed and in which the relevant decisions are taken;

- Supreme Court, Tax Chamber, October 23, 2013, no. 24007: the place of management is the place where the most important decisions are taken and processed; it is the site from which the corporation’s strategy comes from; as far as third parties are involved, pursuant to Art. 46, civil code, the real seat is the place where administrative activities and management decisions are actually taken and in which administrative bodies and employees operate. This place constitutes, therefore, the place dedicated or
permanently used by corporate bodies and offices to work together and with third parties in view of the fulfilment of the business;
- **Supreme Court, Criminal Chamber, February 13, 2014, no. 6995**: the place of management is the place where the direction and the supervision of all the activities are performed; if the directors are resident outside Italy, but they perform their duties through agents operating in Italy, the company will be resident in the place where the aforementioned agents implement the decision taken by the directors. The place of management, as opposed to the legal seat, coincides with the ‘real seat’, *i.e.* it is the place where administration and management activities are performed, where board of directors meeting are held; in other words, it is the place normally or permanently used by the corporate bodies to perform all the relevant activities and such place is relevant also for third parties; it is the place in which decision are taken (Supreme Court, Tax Chamber, February 7, 2013, no. 2869);
- **Supreme Court, Criminal chamber, October, 30, 2015, no. 43809**: the place of management coincides with the place where decisions are taken and the business activity is performed, *i.e.* where the directors reside, where the shareholders’ meetings are called and held, where those who have the power to represent the company reside, the place destined to and permanently used for internal and external relationships for the performance of business or for taking corporate decisions and in which administrative bodies and employees operate.

It should also be noted that the case-law sometimes stresses the difference between ‘wholly artificial arrangements’ and ‘real and effective companies’, stating that only in the first case foreign fictitious residences must be counteracted.

Thus, for example:
- **Supreme Court, Tax chamber, February 7, 2013, no. 2869** (*idem*, Supreme Court, Criminal chamber, January, 17, 2014, no. 1811): it is relevant to assess whether the transfer of seat is real or fictitious, *i.e.* whether the transaction is or is not a purely artificial arrangement, consisting in the creation of a legal structure that does not play a genuine economic role;
- **Supreme Court, Criminal chamber, February 13, 2014, no. 6995**: Italian tax rules must be interpreted and applied in accordance to the ECJ jurisprudence, in order not to hinder freedoms enshrined in the EU Treaties and, in particular, the freedom of
establishment. The ECJ has indeed made clear that the circumstance that a company has been created in one Member States to benefit from a more favorable legislation does not constitute an abuse of the freedom of establishment and that the national measures restricting such freedom may otherwise be justified where they specifically counteract wholly artificial arrangements which do not reflect economic reality (see ECJ, judgment of 12 September 2006, case C-196/04 Cadbury Schweppes, §§ 35, 37); 

- **Supreme Court, Criminal chamber, October 30, 2015, no. 43809:** in the case of a corporation whose registered office is abroad but it is controlled by an Italian entity, in accordance with art. 2359 civil code, the assessment of its real seat can not only be based on the place where the strategic decision or administrative directives are taken. Such place cannot *per sé* be the seat (legal or administrative) of the Italian parent company. In this case, on the contrary, it is necessary to ascertain whether or not the foreign subsidiary is a real entity that conducts business in accordance with its deed of incorporation or articles of association. In order to assess whether or not the foreign company is fictitious, reference must be made to the criteria stated in Art. 162 CTA to define the term ‘permanent establishment’ or to criteria drawn up by ECJ case law in order to identify conduit companies or wholly artificial arrangements. Indeed, it is fully lawful to perform an activity in another Member State, even if it is a low-tax jurisdiction, provided that the controlled foreign company has its own substance (Case C-196/04 of 12.09.2006).

Such line of reasoning is not fully convincing, since the EU Court of Justice case-law does not prohibit the possible conflicts between linking rules adopted unilaterally. According to the ECJ, such rules can be defined as “quasi-restrictions” and should be solved through harmonization/positive integration measures (rather than by purely negative integration measures) (3).

The issue is absolutely relevant since the qualification of the fictitious foreign residence as a case of abuse of law would remove any criminal relevance to such conduct.

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3 On the need to distinguish suggestions coming from the ECJ jurisprudence that does not consider an economic site *per sé* as a symptom of an abusive exercise of an economic freedom, from the elements of the tax residence (in particular, the place of management), please see A. BALLANCIN, *Note in tema di esterovestizione societaria tra i criteri costitutivi della nozione di residenza fiscale e l’interposizione elusiva di persona*, in *Riv. Dir. Trib.*, 2008, p. 975 ss. On the contrary, in favour of the need to respect the formal evidence coming from the registered office, if the foreign company is not a mere artifice, please see S. DORIGO, *Residenza fiscale delle società e libertà di stabilimento nell’Unione Europea*, cit., p. 237 ss.
1.2.4.3. The main object of business

As far as the main object of business is concerned, it is commonly intended as the business activity mainly carried out to achieve the business scope; hence, it is not the place in which the company’s decisions are formed, but that in which they find effective implementation.

The tax legislator has also adopted such notion, qualifying the main object of business as the essential activity aimed at directly realizing the primary scopes indicated in the law, in the articles of association or in company by-laws (art. 73, § 4, CTA).

It is clearly a matter involving a factual assessment, the determination of which might be problematic in case the company carries out the business in different States, since it must be ascertained effectively in which of them the predominant activity is carried out. The predominance shall be ascertained in relation to quantitative – e.g., the gross revenues, the localization of valuable assets, the headcount in each State – and qualitative parameters in case the main object of business is particularly complex. In such a case, the possible ancillary nature of the activity performed in respect of the “typical” one performed by the enterprise must be taken into account. Instead, the management itself cannot be intended as an activity, since that element falls within the notion of ‘place of effective management’.

Reference cannot be done to the location of the assets owned. Finally, it seems that the current case-law of the Supreme Court on tax residence has clearly gathered the

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4 A. SANTA MARIA, Le società nel diritto internazionale privato, Milano, 1970, p. 99 ss.; E. SIMONETTO, Società costituite all’estero od operanti all’estero (artt. 2498-2510), in Commentario al C.C., a cura di Scialoja e Branca, Bologna - Roma, 1976, p. 393; C. SACCHETTO, La residenza fiscale delle società, in Gazz. val. comm. int., 1988, p. 123; R. LUPI – S. COVINO, Sede dell’amministrazione, oggetto principale e residenza fiscale delle società, Dialoghi di diritto tributario, 2005, p. 927 ss. With reference to case-law, see Rome Civil Court of first instance, May, 2, 1963, in Giust. civ., 1964, I, p. 698 ss., according to which the main object is the place where the enterprise objectively carries on its activity; Italian Supreme Court, 26 May 1969, no. 1857, in Foro it., 1969, I, c. 2538 ss. Under the tax case-law, Italian Supreme Court., Criminal chamber, January, 17, 2014, no. 1811, according to which “The Court of first instance has then upheld that in Italy is located the main object of the Company on the basis only of the formal data of the existence of an Italian concession and from the fact that the relevant market is the Italian one. Such opinion cannot be shared, since the formal data of the “nationality” of the concession or the relevant market does not fall within the meaning of the main object arising from the law and the interpretation provided by the tax courts. The main object is defined as the effective activity performed, that, in case of (…), is embodied in the management of the online gambling platform, whilst the concession only represents a condition to carry out such activity (…). Finally, it seems that art. 73 CTA was misapplied, being per tabulas that the main object of the Company is the management of the gambling platform and that the effective activity is not carried out in Italy, but it is wholly carried on abroad and by foreign entities”.
difference between the object of the business and the assets owned, since it has stated, *inter alia*, that, in order to identify the object of the business, it is more relevant the place in which the management is present, rather than the place in which the main assets owned by the company are located (Supreme Court, Criminal chamber, February 23, 2012, No. 7080, Supreme Court, Criminal chamber, January 17, 2014, No. 6995/2014).

Therefore, the main point to verify is whether or not the foreign taxpayer carries out its activity in Italy.

Some difficulties arise with respect to the relationship between the object of the activity and the main assets owned by the taxpayer in case a real activity lacks, like it happens for shell companies whose assets are formed by immovable properties placed within the territory of the State or by shareholdings in Italian companies or by assets leased to Italian companies (*e.g.*, trademarks).

Starting from the real estate companies, it seems that the proper methodological approach is to examine the consolidated case-law in the field of taxation concerning the relationship between the notion of permanent establishment and the ownership of immovable properties (*5*).

Indeed, the permanent establishment also implies the concept of ‘activity’, thus, if it may be excluded that a given ‘activity’ represents a ‘permanent establishment’, *a fortiori* it can be excluded that it might represent a ‘tax residence’ of the foreign taxpayer (since it would meet the ‘sole or main object’ requirement). Instead, whereas the activity performed would fall within the notion of ‘permanent establishment’, it might raise the further question if the permanent establishment itself may represent the ‘tax residence’ of the foreign taxpayer, once that certain conditions are met.

Having said that, the scholars have denied that an immovable property might represent a permanent establishment, at least in the case in which it constitutes a mere capital investment (*6*).

The Italian Supreme Court, in turn (*7*), has stated that a permanent establishment does not occur when the activity of the taxpayer consists in the mere property management.

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(e.g., capital investment), or when the immovable property is ancillary to a business activity as well as it is, in itself, the object of the business activity. In particular, the main object is not deemed to be existent on the sole fact of the ownership of an immovable property – that may be relevant for the sole purpose of fixing the place in Italy – but because the activity is carried out through the disposal of the immovable property, which shows that a permanent establishment exists, or because the immovable property is one of the assets of the activity (e.g., the seat of the business activity) or because it is necessarily implied by the activity, whose object is the immovable property.

Indeed, where the assets of the taxpayer are exclusively formed by real estate located in Italy, the main object exists in Italy if they represent the means through which the business activity is carried out by the foreign taxpayer, and the activity is a complex and coordinated set of acts placed in the territory of the Italian State.

In such a case, the ‘discrimen’ with the existence of a permanent establishment would come to be drawn from the existence of qualitatively similar situations, but quantitatively different, performed in the territory of other States (8).

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7 Italian Supreme Court, November 27, 1987, no. 8820, in Riv. dir. fin. sc. fin., 1988, II, p. 105 ss.

Against the characterization as a “main object” in the case of one or more immovable properties owned within the territory of the State through which the taxpayer carries on only a property management activity, see also M. ANTONINI, Brevi riflessioni in merito alle interrelazioni tra rapporti di controllo, oggetto principale e stabile organizzazione, cit., p. 137 ss.

According to the Italian Supreme Court, December 10, 1974, no. 4172, the set-up of a company abroad, owned at 90% by an Italian resident company, with the sole aim to acquire an immovable property located in the territory of the State, does not imply that such company is subject to the Italian law, if the registered office, the place of effective management or the main object, as based on the deed of incorporation or other official documents, are not located in Italy and it cannot be demonstrated that there is not a matching between the findings and effective status. In particular, the Italian Supreme Court states that “to prove that the seat of the company is de facto situated in Italy, it is not sufficient to sustain that one of the directors (although having full powers) is resident in Italy and, to establish that in Italy is located the main object of a complex company, carried out clearly around the world, it is not sufficient to infer that the transaction realized in Italy would not be followed by other transaction”.

In addition, the Italian Revenue Agency in the resolution August 6, 2007, no. 48/E, § 3.1, concerning the tax residence of the trust, dealing with the relationship between the main object and the ownership of immovable properties, has stated that “the criterion (the main object) is strictly bound to the type of the trust. If the object of the trust (asset constrained to the trust) is a compound of real estate wholly located in Italy, the assessment of the tax residence is quite easy; instead, if the immovable properties are located in different States it has to be adopted the predominance criterion. In case the assets of the company are formed by financial assets or by mixed assets, the object shall be ascertained on the basis of the effective and real activity performed”. On such matter, see also G. FRANSONI, La residenza del trust, in Corr. trib., 2008, p. 2585. The Author states that, since the nature of the activity of the trust qualifies the entity as a non-business entity, it becomes irrelevant the fact that the income derives from immovable properties.
In other words:

a) if the taxpayer carries out a business activity in Italy by means of an immovable property (e.g., supply of real estate services and services ‘connected’ to the exploitation of the real estate, by employing *ad hoc* personnel) and such activity is mainly or exclusively localized in Italy, it will be possible to state that the taxpayer is fiscally resident in Italy;

b) if the taxpayer carries out the business activity by means of the immovable property and such activity is not mainly or exclusively localized in Italy, it will be possible to state that the taxpayer is fiscally resident abroad, but it has in Italy a permanent establishment;

c) if the taxpayer carries out the property management activity of the immovable property, getting the profits of such activity (e.g., income from lease of immovable properties), it will be possible to state that the taxpayer is not resident and it does not have a permanent establishment in Italy.

It goes without saying that ‘the disposal’ – in a broader meaning – of an immovable property to third parties should take the form, in relation to point a) and b), of a real ‘active management’ of the immovable property. Therefore, it implies the examination of the agreements signed with third parties in relation to such ‘disposal’, as well as it implies to verify if such activity may be qualified as a real business activity.

A more delicate concern is the case in which the foreign company has, as sole object, the ownership of participation in Italian resident companies - topic similar to the one previously examined regarding the relationship among the parent company and its subsidiaries.

Reference cannot be made to the case in which the subsidiary is qualified as resident abroad, since the company’s ultimate decision is expressed by the non-resident parent company. Instead, reference can be made to the case of a non-resident taxpayer qualified as resident in Italy by virtue of the participation held in an Italian company – being such participation the sole asset owned – whose business activity is carried out in Italy, performing an activity consisting in the receipt of dividends and in the attendance to the shareholders’ meeting of the subsidiary.

located in the territory of the State whereas the institutional activities (e.g., charitable activities) are performed abroad.
The scholars clearly agree for the negative solution, believing that the reference to the main object of business is misleading in a case such as the one at stake (9). Indeed, if the object must be intended as the activity performed, no doubt may arise about the difference between the activity (i.e., management of the holdings) and the asset (holdings) upon which the activity is performed. In similar cases, the object of the activity is the management of an asset of ‘second-degree level’, i.e. the participation, and it does not allow to give relevance neither to the place in which the subsidiary is resident, nor to the place in which the assets are located. In this respect, the rebuttable presumption of Art. 73, § 5-bis, CTA, dealing with the case of the holding companies, only gives relevance to the place of effective management criterion, excluding the relevance of the main object (or, at least, it is of doubtful relevance).

The tax residence cannot be based on the mere residence of the subsidiary in case of financial management companies, including holding companies which merely own shares and receive passive income (the so-called ‘static holding companies’), without performing a financial activity, consisting in the management and coordination of subsidiaries and/or carrying out ancillary activities to the subsidiaries’ advantage, which is the object of the so-called ‘dynamic holding companies’.

Finally, Art. 73, § 4, CTA, lays down that the exclusive or main object of a resident entity is determined on the basis of the articles of association or of the statute, if existing in form of a public or private deed or authenticated or registered deed. The meaning of such provision, debated for long time on the point if it gives prevalence or not to the form, whereas existing, over the substance, has to be analyzed in light of the non-profit entity legislation as amended by the legislator (see Legislative Decree No. 460 of 1997), which has added to the word “entity” the adjective “resident”. In this respect, it has been clarified that the assessment of the formal data takes relevance solely to verify the business nature of the entity qualified as resident, whilst it is irrelevant for the assessment of the main object as requirement of the tax residence.

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1.2.5. Ruling.
As regards to the possibility to obtain a ruling concerning the residence of companies, it should be noted that the Italian Tax Authorities have already excluded this option on the base of the recent reform of the rulings in tax matters (Legislative Decree No. 156 of 2015). The Italian Tax Authorities stated that the assessment of the requirements for the qualification of an entity as resident in Italy for tax purposes constitutes a matter of fact and it can be evaluated by the Tax Authorities only during the assessment and not through an interpretive ruling (see Italian Tax Authorities Circular, December 2, 1997, No. 304; and Italian Tax Authorities Resolution, December 3, 2008, No. 471/E).
This position was also confirmed as a consequence of the above mentioned reform, that, in the Italian Tax Authorities’ view (see Italian Tax Authorities Circular, April 1, 2016, No. 9/E), excludes, from the so-called ruling “qualificatorio”, all hypothesis characterized by a manifest and undisputable relevance of factual profiles (detectable by the Tax Authorities only at the time of assessment), in which the mere existence of a fact must be evaluated. The residence of entities other than individuals (Art. 73, CTA), both in terms of its constitutive elements, and in terms of residence’s rebuttable presumptions, falls among these cases.

1.2.6. Place of effective management: insights.
In general, even by scholars, major relevance is attributed to the strategic decisions rather than to the “day to day” decisions. However, since the case-law includes a rather extensive notion of “administrative office”, assimilating it to the real seat in accordance with Art. 46, civil code, it cannot be ruled out that the “day to day” decisions are relevant if they show the existence of a permanent establishment in the sense of Art. 46, civil code.
As far as groups are concerned, the will of the parent company is relevant only if it involves essentially the “decision-emptying” of the subsidiary (company). In other words, if the subsidiary is effectively managed by the parent company, the place of management of the former coincides with the place of management of the latter and the subsidiary will be resident in the same place where the parent company is resident; otherwise, the subsidiary will be resident somewhere else.
This principle is well expressed in the judgment of the Italian Supreme Court, October 30, 2015, No. 43809. In particular, according to the court, in case of companies with controlled foreign registered office in accordance with Art. 2359, civil code, the identification of the place, from which the managerial impulses or administrative directives take origin, may not constitute the exclusive criterion of assessment of the effective place of management in the event that it is identified with the seat (legal or administrative) of the Italian parent company. In similar cases, it must be ascertained if the foreign subsidiary is or not a real entity carrying out business in accordance with its articles of association or company by-laws. So, one thing is the management and the coordination activities of the parent company – which may not be relevant for the residence of the subsidiary, representing only a mode of so-called “Group Policy” – another thing is the daily exercise of management activity by the subsidiary itself, which is able to define the residence of the subsidiary company if it is an entity legally and economically real and indisputable in its actual existence.

1.2.7. Burden of proof and tax assessment.

As regards the burden of proof, it rests on the Tax Authorities, unless a case of reversed burden of proof occurs pursuant to Art. 73, §§ 5-bis and 5-ter, CTA (see Italian Supreme Court, March 14, 2000, case No. 1156). The proof consists in demonstrating where the effective will of the company was “formed” and not simply where it was “formalized”.

In their assessment activities the Italian Tax Authorities makes wide use of the instruments of international cooperation. However, it is not known whether or not there are cases of mutual agreement or arbitration procedures for tax residence, since such information has not been published yet.

1.2.8. Tax residence, tax evasion and tax avoidance.

The theme of the “transfer” of residence raises many problems posed at the boundary among legitimate tax savings, tax avoidance and tax evasion.

In general, nothing prevents the taxpayer to transfer abroad his tax residence, even when this is done solely for tax reasons.
It is a completely legitimate behavior from a legal point of view, that for tax purposes can be qualified as “legitimate tax savings”.

An individual (or a company) can freely decide where to settle and where to produce income. So if the taxpayer intends to do it in a place where this can be done with the least tax burden, such decision can certainly not be prohibited.

It is a principle also stated at European level, where the European Court of Justice affirmed the taxpayer’s right to establish himself in a certain State even on the basis of mere tax reasons, until such settlement does not lead in a construction “wholly artificial” (10). It is, perhaps, a corollary of the right of Member States to establish the most appropriate level of taxation for their economic system, respecting only one limit: the chosen level of taxation must have a generalized character and must not result in forms of unfair competition or State aid.

However, the transfer of residence may constitute a hypothesis of tax evasion and sometimes of tax avoidance.

In particular, it has evasive nature if the individual maintains one or more constitutive elements of the tax residence in the departing country, but, at the same time, declares himself as tax resident in another State and thus conceals in the first State his status (or rather, quality) of tax resident.

Therefore, a taxable event occurs, but the individual hides a part of his taxable incomes to the tax administration, in particular he hides the incomes that do not constitute the object of income tax return, since they are gained by a taxpayer not actually resident or since they are subject to substitutive regimes destined only to non-residents.

Sometimes, such transfer may simply lead to the declaration of residence elsewhere, and sometimes it can be accompanied by further initiatives to hinder the tax administration’s assessment activities.

In order to counteract these forms of tax evasion, our legal system provides legal presumptions operating in the field of tax residence, both for individuals (Art. 2, § 2-bis, CTA), and for company (Art. 73, §§ 5-bis and 5-ter, CTA).

These presumptions do not disown tout court the effects of the transfer of tax residence in a low-tax State (which, in the case of Art. 73, § 5-bis, it is a circumstance not even taken in consideration by the law), but avoid the tax authority from demonstrating, in a

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10 See, European Court of Justice, September 12, 2006, case C-196/04, Cadbury Schweppes.
trial, complex factual situations underlying the concept of tax residence and so suffering
the effects of the burden of proof’s rules.
Therefore, the artificial transfer of residence abroad, if it hides the conditions to be
taxed in Italy (or rather, the linking rules with the Italian territory), may indeed be
qualified as a hypothesis of real tax evasion.
The transfer of residence is a hypothesis of tax avoidance when the individual actually
transfers his tax residence abroad losing any constitutive element required by the
internal notion (i.e. foreign residence prevails on the basis of a Double Taxation
Convention existing with the State of destination), in order to take advantage of the
asymmetry or of the shortcomings of the tax system provided by the status of resident or
not resident.
In this respect, however, the existence of an exit tax for individuals performing business
activities appears itself sufficient to counteract the more important hypotheses of tax
avoidance.

1.2.9. CFC rules, conduit companies and Treaty abuse.
The domestic CFC legislation allows to allocate income from a controlled company
resident in a black listed country to its Italian resident controlling company
If both the presumption of residence and the CFC regime are the same time applicable, a
logical priority to the rule of the residence should be recognized, because it defines an
element of the taxable event (or rather, it defines its territorial extension). So, in that
respect, it appears correct the conclusion reached by the tax authorities, according to
which the presumption of foreign entity’s residence in Italy superseded the provision of
The further statement contained in the same act of the tax authority, according to which,
once it is given evidence of the residence abroad, the provisions of art. 167, CTA are
applied to the controlled company, appears correct. In such a case the effective location
of the administrative headquarters of the foreign controlled company outside the State -
and therefore its independent decision-making and management - does not exclude that
its income should be considered in the economic availability of resident controlling
company (on the relationship between CFC and relocation's abroad companies, see also
With regard to the conduit companies, it does not exist a specific provision to counteract them. However, pursuant to Art. 37, §§ 3 of Presidential Decree No. 600/1973, the tax assessment can charge to the real taxpayer the incomes, that only apparently are gained by other individuals, when it is proved, on the basis of serious, precise and concordant assumptions, who is the effective holder. The theory prevailing in doctrine – initially accepted by the Court (see Italian Supreme Court, cases No. 3979/2000 and No. 8671/2011) – that considers this disposition applicable only to fictitious intervention’s phenomena, has been contrasted by a recent case lax (see Italian Supreme Court, case No. 12788/2011) which refers the same provision also to real interposition’s cases. Therefore, the conduit companies may be disregarded by the tax authorities on the basis of those decisions, allocating the relative incomes directly to the resident taxpayer.

Conduit companies can be counteracted not only with such provision, but also moving from the principles on treaty abuse. In this respect, Tax Authorities – in accordance with the Commentary clarifications on the abuse of the conventions (see the comment to Art. 1, §§ 9.5.) – in cases concerning the taxation of capital gains, in which the foreign company has been created in order to enjoy undue tax benefits in the absence of valid economic reasons, will apply the avoided tax treatment (imposition of capital gain in the source state), rather than the conventional provisions (see Italian Tax Authorities Circular, March 30, 2016, No. 6/E).

More general considerations on the abuse of law in cases of “conduit companies”, i.e. without of effective activities and a real structure, have been formulated by the Italian Tax Authorities in the Circular No. 32/ E/2011.

1.2.10. Residence for withholding tax purposes and for VAT purposes.

The same concept of tax residence of art. 73 CTA is applied for the purposes of the withholding tax, whose application is differentiated depending on whether the recipient is resident or not in the State.

For VAT purposes, the article 7-ter, Presidential Decree no. 600/1973, in terms of territoriality for the supply of services, refers to entities established in the State. In such provision, ‘established subject’ (Art. 7, § 1, let. d), means a taxable person domiciled in the State, or resident here only for tax purposes, who has not established the domicile abroad, or a permanent establishment, in the territory of the State, of a person who has
established both his own domicile and residence abroad, only as regard to the transactions it has made or received. For entities other than natural persons, “domicile” shall be considered the place where the registered office is located and “residence” the place where the effective establishment is located.

Italian law identifies the place of business with the registered office, which takes priority over the effective establishment. However, the Italian Tax Authorities (Italian Tax Authorities Circular, July, 29, 2011, No. 37/E, § 2.1.4.) made clear that the registered office determines the place of establishment of the taxable person ‘unless elements in the opposite sense arise’, so, in the event of discrepancy between the registered office and the effective establishment, prominence should be given to the latter. It is an interpretation in line with the European law.

In this regard, it must be noted that EU directives do not specify the meaning of ‘establishment’; they merely solve the situation when an entity is “established” in more than one EU country. In particular, Article 21, Regulation 2011/282/EU, states that the supply of services to a taxable person, or to a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and if the taxable person is established in more than one country, that supply of services shall be taxable in the country where that person has established his business.

The ‘establishment’ requires, therefore, the existence of a connecting factor, which can be defined by the place of business, by the existence of a permanent establishment or, in the absence of both, by his domicile or habitual residence.

As for the notion of ‘seat of business’ – used by art. 44 of the Directive, according to which the place of supply of services rendered to a taxable person acting as such is the place where that person has established his business – reference must be made to article 10 of the Regulation 282/2011, according to which “for the application of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of taxable person is established shall be the place where the functions of the business’s central administration are carried out. 2. In order to determine the place referred to in paragraph 1, account shall be taken to the place where essential decisions concerning the general management meets. Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take
precedence. 3. The mere presence of postal address may not be taken to be the place of establishment of a business of a taxable person”.

The Regulation also transposes the EU Court of Justice’s case law, which, in the judgment of 28th June 2007, C-73/2006, has held that “the place where the taxable person has established his business is the place where the functions of its central administration are exercised” (11).

2. (Tax) residence in an international (cross-border) context.

2.1. Residence in (tax) treaties

2.1.1. The Italian practice.
The Italian practice regarding conventions on double taxation is substantially in line with art. 4 of the OECD Model in relation to the used criteria. In some conventions, it has been given importance also to the place of incorporation (Russia; United States; Estonia; Lithuania). It is an integration that is not necessary, but at least desirable, since it is believed by the Doctrine that the wording “any other criterion of similar nature” refers to the “substantive” connection criteria and not merely to the “formal” ones, so it cannot be interpreted as including, in the absence of an express agreement, the criterion of nationality or the place of incorporation (12).

In other conventions, it has been made reference to still several criteria, such as the head office (Turkey; China) or the main office (Japan; Korea) (13), even though the meaning of these expressions is not always clear.

2.1.2. The expression “liable to”.
As regards to the expression “liable to tax”, it creates many problems of interpretation, even in light of the term “person” which is connected to.

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11 M. PEIROLO, Fondato sulla sede dell’attività il luogo di stabilimento ai fini IVA, in Corriere tributario, 2011, p. 3682 ss.
13 E. MARELLO, La residenza fiscale nelle Convenzioni internazionali, in Giur. It., 2009, c. 2586 ss.
In fact, we are used to interpret the expression “to be liable to” in the sense that effective taxation is not required, but only the theoretical possibility of taxing the income of that subject is sufficient. Therefore, “persons liable to tax” should be considered those who do not have taxable income as a result of the carrying forward of previous losses or compensation with operating losses attributable to other income categories, or for which there is a specific tax exemption for an income component - the so-called “tax exempt entities” and “non-profit organizations” (14).

The situation is more complex for partnership, for which many countries apply the so called pass-through approach according to which shareholders are considered the true taxable persons. In this respect, several conventions state that partnerships are considered residents of a contracting State to the extent that the income from these partnership is taxed in the hand of them in that State or in the hand of their members or beneficiaries (15). The OECD Commentary must also be integrated by the report ‘The application of the OECD Model Tax Convention to Partnerships’, according to which, in the case of transparency (i.e. the pass-through approach) the partners have to request conventional benefits and the fact that the partnership is considered a taxable person in the other State is not, in principle, an obstacle to the application of the treaty benefits (16). The Italian tax author has stated (Italian Tax Authorities Circular, December, 23, 1996, No. 306/E), with reference the quality of “person”, in case of application to partnerships, pension funds and trusts of the conventions against double taxation signed by Italy, that “if there is an express reference, both in affirmative and negative sense, in the same conventions, it does not pose any problem”, deeming sufficient as proof of the taxation a certificate of the tax authorities of these States certifying the quality of being a taxable person”. In conformity see also Italian Tax Authorities Circular, May, 6 1997, No. 104/E.

So, the Italian tax authorities does not require the actual taxation, but rather the quality of “taxable person” for the purposes of the conventions.

15 See S. MAYR, La nuova Convenzione Italia-USA per evitare le doppie imposizioni in materia di imposte sul reddito, in Boll. trib., 1986, p. 438 ss.
2.1.3. Anti-avoidance clause: LOB’s clause

Amongst the Double Taxation Conventions signed by Italy, LOB’s clause can be found in the 1999 treaty with the United States (17).

Article 2, of the Protocol of the Convention, states that the Treaty benefits, according to the Convention, are available in whole or, in certain cases, partially, or as in the amount calculated by the competent tax authority, only after passing various tests relevant to disclose the existence of a sufficient link between the resident of a contracting State that requires to use the Treaty benefits and the same contracting State.

Amongst these tests, the “publicly traded test” requires that every share of the class or classes of the shares that represent more than 50% of voting rights and the value of a company must be traded on a recognized stock exchange.

For the entities, other than legal persons, that otherwise cannot use Treaty benefits, other two tests are applied: the ownership test and the base erosion test.

Regarding the ownership test, the individuals must have, directly or indirectly, at least 50% of each class of the shares or another beneficial interest in the company for at least half of the days of the taxable period. In order to meet this test, it is also required that, in case of indirect ownership, every indirect owner satisfies at least one of the conditions.

The base erosion test imposes that at least 50% of the person’s gross income for the tax year is paid or produced, directly or indirectly, from persons who are not resident in a contracting State, in the form of payments that are deductible for income tax purposes in the resident State of the person. For base erosion test, the payments of a person’s permanent establishment that are located in another State, are not relevant.

If a resident in a contracting State does not satisfy any dispositions mentioned in the above tests, the resident person is still allowed to use Treaty benefits in relation to specific items of income if he satisfies the requirements of the “active trade or business test”. It happens if the resident conducts business or affairs in his State of residence or if the income he gains is directly connected with, or incidental to, the business or affair, or

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if the business or the affair are in close and substantial relationship with the activity performed in other States where incomes are gained.

At the end, if a person resident in a contracting State does not satisfy the requirements of none the above tests, Treaty benefits can be granted only if the competent authority of the State, in which benefits are required, agrees it at its discretion.

LOB’s clauses are also in the Double Taxation Conventions with Azerbaijan (18), Estonia (19), Latvia (20), Lithuania (21), Qatar (22), Kazakhstan (23), Kuwait (24) and Iceland (25).

These seem less complex than that one in the Double taxation Convention with the United States, because such clauses only provide that: “notwithstanding any other provision of this Convention, a resident of a contracting State shall not receive the benefit of any reduction in or exemption from taxes provided for in this Convention by the other contracting State if the main purpose or one of the main purposes of the creation or of the existence of such resident or any person connected with such resident was to obtain the benefits under this Convention that would not otherwise be available”.

2.1.4. Anti-avoidance clause: Beneficial Owner

The Conventions entered into by Italy, sometimes contain also beneficial ownership clause (Australia, Belgium, Canada, France, Luxemburg, Netherlands, etc.).

With regard to such clause, it must be noted that a definition of beneficial ownership does not exist in domestic law. In the international treaties, Italy therefore refers to the OECD Model and its Commentary (26).

In particular, according to Italian financial administration, this expression designates a subject that not only resides in the contracting State, but also receives the payments such as the final beneficiary and not such as an intermediary, for example agents,

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20 Italy-Latvia Double Tax Convention, May, 21, 1997, art. 30, § 1.
21 Italy-Lithuania Double Tax Convention, April, 4, 1996, art. 30, § 1.
22 Italy-Qatar Double Tax Convention, October, 15, 2002, art. 29, § 1.
23 Italy-Kazakhstan Double Tax Convention, September, 22, 1994, art. 29, § 1.
25 Protocol to Italy-Iceland Double Tax Convention, September, 10, 2002.
delegates or trustees of another subject (Resolution, April 21, 2008, No. 167/E; Resolution, May 6, 1997, No. 104/E; Circular, December 23, 1996, No. 306/E). The purpose is to avoid the interposition by another subject in order to obtain the benefits of the Convention. So the company must have the ownership and availability of the income received.

2.1.5 Tie breaker rule.
In general, with respect to article 4(3), Italy Double Taxation Convention are in line with the OECD Model Convention. In any case, it must be highlighted in the application of the above mentioned paragraph that Italy, in 2002, has made an observation, according to which, in the determination of the location of the effective official residence, it is necessary to give relevance to the place where the financial activities of the entity are processed or done (27).

Anyway, generally speaking, the observations pose the typical uncertainties regarding the efficiency of the act they refer to, i.e. the OECD Commentary, especially because such Commentary may be qualified as a supplementary tool of interpretation (28).

In this case and in first instance, it seems that the observation created by Italy is not in line with the interpretation of the residence as the place in which decisions are taken by “the top management”, with the effect to make useless the use of the supplementary tools of interpretation (therefore the observations itself).

In second instance, in the case in which the Italian observation would be considered fully applicable (at least for the treaties stipulated after that), with the consequence that such observation is applied in good faith, the “tie breaker rule” would not be operative,

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27 Paragraph 25, 2005 Commentary: “Italy does not adhere to the interpretation given in paragraph 24 above concerning the “most senior person or group of persons (for example, a board of directors)” as the sole criterion to identify the place of effective management of an entity. In its opinion the place where the main and substantial activity of the entity is carried on is also to be taken into account when determining the place of effective management”. In the 2008 version, such observation has been modified in the following sense: “As regards par. 24 and 24.1, Italy holds the view that the place where the main and substantial activity of the entity is carried on is also to be taken into account when determining the place of effective management of person other than an individual”.

28 Regarding to this observation, it was put forward by the doctrine (G. MAISTO, The Observations on the OECD Commentaries in the Interpretation of Tax Treaties, in Bulletin of International Bureau of Fiscal Documentation, 2005, p. 14 ss.) the thesis that the efficacy of the observation could be assimilated to the “unilateral declarations” known in the international law, when the Nations participant to the OCSE sign the convention against the double taxation. In that moment, such observation would implicitly be accepted and legitimized by the intervention of plenipotentiaries to the final phase (intervention that lacks at European level). In such moment, the other State, being aware of the observation, might oppose to it.
putting the localization of the primary activities, in Italy on the same level of the place of management, i.e. the place of effective direction. Such consequence appears to be a clear violation of the ratio of the Conventions – being also difficult to use the mutual agreement procedures to solve such a case – and appears not in line with the most recent changes proposed to the OECD Commentary.

In third and last instance, such a solution would not be aligned to the domestic law, where the place of management and the main object represent distinct criteria.

Therefore, the opinion is that the Italian observation is without concrete effects.

Regarding the interpretation of the POEM notion, the law states that it has the same meaning of the ‘place of management’ of the Art. 73, § 3, CTA and, consequently, it has the same meaning of the “effective base” required by the civil Code (Italian Supreme Court, February 7, 2013, No. 2869).

Regarding the proposal to abandon the tie breaker rule base on POEM in favour of the mutual agreement procedure, I believe it is a wrong position, because it leaves to the tax administration of the Nations the widest discretion, prohibiting – also in consideration of the regular dysfunction of the mutual agreement procedure – any concrete possibility of finding a solution in the cases of double residence, which represents the base requirement to make the convention applicable.

There is no doubt that the definition of the place of effective direction would present strong margins of uncertainty, but the place of “effective direction” expresses the location where taxable values are created with a consequence that, if an adjustment must be found, in our opinion, the only one is to integrate the notion of POEM and not to ‘substitute’ it.

In this sense, the choice of a “tie breaker rule” based on a hierarchical criteria, as the one applicable to individuals, would be, on one hand, a more balanced choice on significant profiles and, on the other hand, it would represent a significant guarantee for the tax payer of a sufficient level of certainty to resolve a potential fiscal conflict that, otherwise, would be solved by Tax Authorities of the contracting States that are, certainly reluctant to renounce to the localization in their own territory of a taxpayer on the base of the ordinary national criteria.

In other words, the tie breaker rule was created not for the benefit of the fiscal administration, but for the benefit of the tax payer, because the assignment of the
residence to only one State represents the condition, for the taxpayers, to access to the treaty benefits.

If the solution must be found through a mutual agreement procedure, significant guarantees must be assured to the taxpayers, as the fact the procedure must be concluded in a reasonable term and an arbitral procedure starts if States do not find an agreement.

2.2. Tax implications of the cross-border change of residence.

The tax implications arising from the transfer to Italy of the residence of a commercial enterprise are regulated under art. 166-bis CTA, which was introduced by Legislative Decree No. 147 of 2015.

Such implications vary according to whether the enterprise was previously established in a ‘white list’ or in a ‘black list’ country.

In the first case, the fiscal value of the assets and liabilities transferred to Italy is determined at arm’s length.

In the second case, the arm’s length value still applies, but such value has to be determined through an international ruling procedure (Art. 31, Presidential Decree No. 600 of 1973). In case there is no agreement, either because it is not requested or because it is not reached, the lowest value among purchase cost, book value and arm’s length value is taken into account for assets, whereas the highest one is considered for liabilities.

Both companies and individuals exercising a business activity are subject to an ‘exit tax’, regulated under Art. 166 CTA, if their residence is transferred abroad. No exit tax is levied on individual shareholders, who can therefore transfer their residence abroad without the capital gains related to their participations are deemed as realized and consequently taxed.

The exit tax was introduced in 1995 and subsequently modified in accordance with the European Court of Justice case law. According to the Italian legislation, the assets pertaining to the business or to the business complex are taxed on the basis of their arm’s length value, unless they are attributed to a permanent establishment located in Italy.
If the residence is transferred to a Member State of the European Union or to a State within the Economic European Space which is included in the white list and with which a convention on mutual assistance for the recovery of tax claims comparable to the one regulated under the Council Directive 1010/24/EU has been concluded by Italy, the taxpayer may opt for the suspension of the taxation.

2.3. Policy issues.
Tax residence of companies has received particular attention not so much by public opinion and political debate as by the Tax Authorities, that especially, in the last decade, carried on a remarkable assessment activity in order to counteract tax evasion achieved through companies’ relocation abroad (as well as through fictitious permanent establishments).

Although such activity is certainly lawful, it has nevertheless raised doubts at an international level because of its criminal consequences, since, as suggested (29), a case of tax fraud could occur.

Instead, there has been and there is still a discussion about the transfer of companies abroad, with regard not only to the several small and medium enterprises of Northern Italy, but mainly to the transfer abroad (to the United Kingdom and to The Netherlands) of the FIAT group. The transfer abroad of the FIAT Group has received particular media attention, also because the FIAT had been the recipient, over the years, of a significant amount of public funds. Anyway, the issue also concerns the various enterprises, especially small and medium enterprises, that moved to adjacent countries (Austria, Slovenia, Switzerland, etc.) and to non-adjacent countries (United Kingdom, etc.).

The discussion has concerned essentially the need to set up strategies aimed at attracting new enterprises in Italy and preventing the existing ones from transferring abroad, by improving especially the tax system (with lower tax rates, more certainty concerning the levying of taxes, new approach by the Tax Authorities, milder fiscal penalties, etc.) and the labour market (with the jobs act, etc.).

The political debate has also involved the taxation of digital enterprises. It has not been still addressed the problem of their tax residence, but only the possibility to introduce the concept of ‘virtual’ permanent establishment in the context of the digital economy or the possibility to consider the ‘consumption’ as a criterion according to which split the profits between the residence State and the consumption State.

2.4. Personal position
In my opinion, the provision regarding the tax residence of companies could be revised in order to eliminate the ‘main object of business’ criterion, as it causes problems at an international level and overlaps with the concept of ‘permanent establishment’.

As a matter of fact, since, in accordance to art. 162 CTA, a fixed place of business is deemed to be a permanent establishment if the business of the enterprise is “wholly or partly carried on” through it, a provision according to which a company is a tax resident if it carries on its main activity in Italy cannot be logically compatible with a definition of ‘permanent establishment’ which relies on the carrying on of the (even whole) business in Italy.

Actually, making an anatomic comparison, in an international and comparative perspective, tax residence is based on the “head”, which is one and central, whereas the permanent establishment represents the “arms”, namely the activities which are (wholly or partly) carried on in one or more States. On the contrary, the Italian legislation creates a mixed situation, since it uses the concept of ‘activity’ both for the purposes of ‘residence’ and of ‘permanent establishment’.

It seems clear, therefore, that, by eliminating the ‘main object of business’ criterion, Italian legislation would be in line with the comparative and international perspective according to which the place where the activity is carried on is relevant solely for the purposes of ‘permanent establishment’.

Giuseppe Melis
*Full Professor of Tax Law*
*LUISS University, Rome*