



BATINI COLOMBO SAOTTINI

# ITALIAN LEGAL ENTITIES

OPPORTUNITIES FOR FOREIGN COMPANIES

The incorporation of an Italian legal entity by a foreign Company usually reflects a transition from doing business with Italy to doing business in Italy.

Indeed, Italian legislation recognizes said transition and allows such entities to establish various levels of presence in Italy, from a Representative Office (RO) to a Branch and eventually to a Limited Liability Company.

## REPRESENTATIVE OFFICE (RO)

The Representative Office is substantially treated in the same way by various national laws; so it is convenient to analyze the Representative Office's characteristics according to the Italian law, only to check, from time to time, how foreign countries regulate its elements in detail.

The current Italian legislation does not contain a representative office's of a foreign company in Italy (or bureau de liaison) definition, for which the interpretative practice refers to the OECD Model.

Thus, a Representative Office is considered a fixed place on Italian soil engaged purely and exclusively for promotion and advertising, information gathering, scientific research and marketing purposes.

Consequently, the representative office must only have preparatory or auxiliary function for entering into the Italian market, and is unable to carry out productive or commercial activities.

Summarizing, the representative office has to perform only the company's promotional activity, without exerting any direct business activity (production or sale), constitute a mere cost center and its manager has no power to decide or to bind the company in dealings with third parties.

Supposed and effectively fulfilled these requirements, the Representative Office is not subject to any tax burden, given that the Office has no income, while its costs are generally fully deductible for the foreign parent company.

But when the representative office, despite its formal name, conducts productive or commercial activities, it may be interpreted as a permanent establishment of a foreign company, with the effect of becoming taxable subject in Italy.

The Italian tax authority has clarified that the Representative Office is not taxable for the Local Income Tax (IRAP) in the event it is not a permanent establishment (Circ. No 188 / E of 16.07.98 and No. 263 / E, 12.11.98) .

Then it should be noted that the Legislative Decree dated 12.12.03 No 344 introduced in the new consolidated text of the Italian Income Tax Law (Tuir), at art. 162, a general definition of permanent establishment to rely in all cases in which Italy has no Convention against double taxation with the country of destination; definition that also follows the concept already established by international agreements which deal with the OECD Convention Tax Model.

Art. 162, co. 1, of Italian Tuir (just like already art. 5, par. 1 of the OECD Model) identifies the permanent establishment as a "fixed place of business in which the enterprise is wholly or partly carried on."

In this sense, there could be a permanent establishment even if this last one carries on only one of several stages of the economic enterprise, as productive, commercial, financial, etc., in case they are qualitatively and quantitatively significant in relation to the typical activity of the enterprise.

The Representative Office is, as we have seen, a mere cost center (usually fully deductible for the parent company) that produces no income and who, not being classified as an establishment, not subject to the obligations provided for branches.

In Italy the representative office has no obligation to register in the Companies Register and file articles of incorporation or Financial Statements.

The installment is simply reported to the Companies Register for registration in the so-called Inventory of Economic and Administrative (REA), after obtaining a Tax Code from the local Tax Office. The application must be made by legal representatives of the foreign company, including a special attorney indicated on purpose. The tax code application can also be made abroad at the local Italian Consulate or Embassy.

Finally it should be noted that normally, in different jurisdictions, a firm that opens an office in a foreign country has the right to for VAT refund paid for the Office installment and maintenance.

## AGENDA

1. Obtain Tax Code (or Fiscal Code, "Codice Fiscale) for the foreign Company and for the RO's Legal Representative in Italy;
2. Sign the installment act in front of a Local Notary.
3. Register the RO in the Register of Enterprises – "Registro delle Imprese" at the local Chamber of Commerce just for REA number (not VAT).
4. The process's completion usually takes about 2 weeks (depending on how fast required documents are provided by Client).

## BRANCH

The branch and the branch of a foreign company - the term branch is often used indiscriminately- are anything more than separate units, but not legally autonomous companies, within which the legal and economic activity is conducted with organizational autonomy and decisional freedom seen in the headquarter of the same company.

Therefore, the Italian branch of a foreign company allows this last one to act in Italy with a more agile, flexible and cost effective structure if compared with the ones related to a subsidiary. Moreover, the foreign company, through the branch, can play in Italy the same entrepreneurial activity carried on abroad : not the same if the foreign company, instead of a branch, opens in Italy a Representative Office, which can not perform any productive activity.

Regarding the internal organization of a branch, a distinction must be made between a branch and a foreign company's subsidiary. Indeed, the branch is generally managed and represented by a permanent representative who, on behalf of the company, keeps relations with third parties.

A subsidiary, however, in principle, is managed and legally represented by the Board of Directors and Legal Representative of the foreign company, even if, in fact, frequently the parent company is widely involved in the subsidiary control.

Note that, for tax purposes, the branch is considered a permanent establishment and therefore is a tax payer. This implies obligations related to:

- a) accounting and bookkeeping,
- b) financial statement's filing (just for tax purposes),
- c) parent company financial statement sworn translation submission to the local Chamber of Commerce,
- d) VAT and tax returns filing and submission to Italian Tax Authority.

## AGENDA

1. Obtain Tax Code (or Fiscal Code, "Codice Fiscale") for the foreign Company and for the Branch's Legal Representative in Italy;
2. Provide a Copy of the Installment Deed and Memorandum of Articles of Incorporation of the foreign company. The copy must be authenticated by a notary public in the country of residence of the foreign company, legalized by the Italian consulate (or by the Notary with the apostille stamp), if necessary, and translated into Italian, with a sworn translation.
3. Provide an original certificate of incorporation, issued by the State Administration of the nationality of the foreign company (eg, Chamber of Commerce, Business Register etc.) certifying that the foreign company is validly incorporated and existing. This certificate must indicate the legal representative of the foreign corporation and must be translated into Italian with a sworn translation or issued by the local Italian Consulate or Embassy.

4. Copy of the legal document that testifies that the foreign company headquarter wish to open a branch in Italy (which, depending on the order of the foreign company, can be a resolution, or a determination, a meeting minute, etc.). BCS provides a sample accepted according to local requirements:

- I. Branch's legal address in Italy;
- II. Complete personal data of the appointed Legal Representative;
- III. Powers granted to the branch's Legal Representative.
- IV. Other useful information.

All documents listed above must be authenticated by the foreign Notary Public and legalized with the apostille stamp.

5. Sign the branch installment act in front of an Italian Notary (this can be done also by a BCS professional with an appropriate Power of Attorney).
6. Register the Branch in the Register of Enterprises – "Registro delle Imprese" at the local Chamber of Commerce and obtain the VAT number (both done by the Notary's office).

The process's completion usually takes about 2 weeks (depending on how fast required documents are provided by Client).

## LIMITED LIABILITY COMPANY

Italian Law prescribes two forms of limited liability companies:

- a) S.r.l. società responsabilità limitata. This is a limited liability company
- b) S.p.A. società per azioni. This is a joint stock company

## INCORPORATION

Both S.p.A. and S.r.l. are limited liability companies, but only in the first case the share capital is divided into shares, which are embodied in stock certificates, while in the S.r.l. the capital is divided into quotas. The Deed of Incorporation of an S.r.l. or an S.p.A. consists of a Certificate of Incorporation and by-laws (or Memorandum of Articles of Incorporation) and the following details must be provided:

- I. All data identifying each quotaholder and the part of capital subscribed by each of them.
- II. The company name and address of the legal office.
- III. The purpose of the company .
- IV. The Corporate capital .
- V. Name of those who have the power to represent the company and those who have to audit it.
- VI. The costs borne by the company for the Incorporation

The minimum capital requirement for an S.r.l. is € 10.000,00 and for an S.p.A. is € 120.000,00. At least 25% of the subscribed capital must be deposited in a Bank escrow account in Italy before the Deed of Incorporation is executed. In the case of a sole quotaholder/shareholder, Italian law requires that the entire capital is fully paid-in at the time of the incorporation. The Bank will issue a deposit certificate to be attached to the Deed of Incorporation.

The registration in the Register of Companies is done by a Notary, who files the incorporation deed. Once the Company is registered it acquires its legal status according to art. 2331 of the Italian Civil Code.

To effect the public registration of a S.r.l. in the Register of Companies, each director or the sole director must sign a Chamber of Commerce form, which should be deposited within 30 days off the date the Notary signs the incorporation deed.

The foreign quotaholders and their legal representatives shall elect tax domicile in Italy and shall apply for a Tax Code (Codice Fiscale) in Italy.

## MANAGEMENT

Italian Limited companies can be managed by one or more directors, the number of whom is not restricted by law. The first directors are appointed in the Deed of Incorporation. Thereafter, they are elected in an ordinary quotaholders/shareholders meeting. Directors can be quotaholders/shareholders or not. Italian law does not require to directors to be Italian nationals or resident.

After incorporation, the new company must apply for a VAT number and adhere to certain fiscal requirements. These matters are handled traditionally by a Chartered Accountant to be nominated by the new company. The Chartered Accountant makes sure that the new company meets the various fiscal requirements, maintains all accounting records and books and prepare the annual financial statements and all Tax Returns.

## ACCOUNTS AND AUDITING REQUIREMENTS

Pursuant to Art. 2477 of the Italian Civil Code, the board of statutory auditors, composed of 3 (three) statutory members and 2 (two) alternate members, is not compulsory when the company's capital is less than €120,000 and when the company's accounts have not reached certain levels set forth in Art. 2435-bis of the Italian Civil Code. The board of auditors may be appointed upon the incorporation of the company. For appointment following the incorporation, a resolution of the quotaholders'/shareholders' meeting is required. Even if the company has a capital of only €10,000 (ten thousand Euro), founders, in view of the importance of the company, may wish to appoint such board upon incorporation. The Auditors' fees according to applicable law, are proportional to the company's capital.

Limited are required to draw up annual accounts, including a Balance Sheet, a Profit and Loss Statement and an Integrative Note, which after presentation by directors and confirmation by statutory auditors are approved by an ordinary quotaholders'/shareholders' meeting of the company within 120 days from the end of its financial year. This period may be extended to 180 days in some particular cases. Thereafter the company's financial statement needs to be submitted to the Register of Companies. The Italian Civil Code contains detailed rules for the compilation of annual accounts. In particular, by means of a law enacted in April 1991, the provisions of the IV and VII E.U. directives have been fully embodied in the Italian legislation. Therefore, annual accounts, in Italy, have to be drawn up on the basis of said law, which is fully harmonised with those applied in the other E.U. countries. IFRS can be adopted by the Limited with certain characteristics.

## AGENDA

1. Obtain Tax Code (or Fiscal Code, "Codice Fiscale") for the Newco's Shareholders (Individual or foreign Company): some additional fulfillments are required if one or more of the Shareholders are Foreign Companies;
2. Open an escrow bank account in the Newco's name.
3. Deposit the share capital in the escrow bank account (the share capital will be free for use immediately after incorporation completion at the Register of Enterprises).
4. Prepare the company deed and bylaws – "Atto Costitutivo" and "Statuto".
5. Sign the deed of incorporation in front of a Local Notary (a special power of attorney can be issued to BCS' professionals).
6. Register the Newco in the Register of Enterprises – "Registro delle Imprese" at the local Chamber of Commerce.
7. Register the Newco and employment books with the INPS office (Istituto Nazionale di Previdenza Sociale or "Social Security Administration").

8. Obtaining a fiscal code for the Newco – “Codice Fiscale” and VAT number – “partita IVA” (VAT: Value Added Tax).

Register the Newco's trading activity at the Italian Tax Office.

The process's completion usually takes about 3 weeks (depending on how fast required documents are provided by Client).

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