

Tax residency for individuals

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1. Introduction

Assessment of an individual's tax residence: Domestic tests vs OECD tests

➤ Domestic test:

1. Day counts
2. Habitual abode
3. Place of exercise of main professional activity
4. Registration as resident with a Municipality
5. Center of Life / Main center of interests and affairs / Main home
6. Statutory Residence Test
7. Lawful permanent resident (green card) test

➤ OECD Model Treaty tie-breaker rules:

1. Permanent home
2. Center of vital interests
3. Habitual abode
4. Citizenship

2. Definition of tax residency in Italy

According to Art. 2 of the Italian Tax Code, an individual is considered tax resident in Italy if, for more than 183 days in a fiscal year:

- the individual is registered in the Registrar of the Italian Resident Population (*Anagrafe Nazionale delle Popolazione residente*);
- the individual has a ‘residence’ in Italy (habitual abode); or
- the individual has a ‘domicile’ in Italy (principal centre of business, economic and social interests, e.g. the family).

If **only one** of these conditions is met the individual qualifies as tax resident for Italian tax purposes.

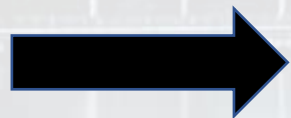
The first condition is merely formal: the individual is qualified as Italian resident even if the place of “residence” or “domicile” is abroad (ex. In Hong Kong)

 Being registered may trigger challenges from the Italian Tax Authorities

2. Definition of tax residency in Italy

Territorial principle of taxation for non-residents:

An individual who is registered with the Registrar of the Italian Resident Population for less than 183 days in a calendar year is generally considered a non-resident for tax purposes (although other factors have to be taken into consideration) and is thus subject to taxation only on Italian source income (Territorial principle).



That is why the AIRE registration is very important!

2. Definition of tax residency in Italy

AIRE registration

An Italian citizen transferring to a foreign jurisdiction shall register with the Registrar of the Italian resident abroad, the Anagrafe Italiani Residenti Estero (AIRE). In Hong Kong this can be done at the Italian Embassy/Consulate once obtained a valid Hong Kong working visa.

Date of Efficacy of AIRE registration

The AIRE registration takes effect from the date of filing the request to the local Embassy/Consulate as stated by Art. 6(9)bis of the Law 470/88 (see also Reply from Agenzia Entrate dated 18.7.2019 n. 270)

2. Definition of tax residency in Italy

Anti-abuse rule: Reverse proof

According to Article 2 (2-bis) of the Italian Tax Code, an Italian citizen transferring its residency in a black list jurisdiction, is deemed to be resident in Italy even if he/she is no longer registered in the Registrar of the Italian Resident Population, unless otherwise proven by the individual.

Hong Kong and Singapore are still included in the black list as stated by the Ministerial Decree 4 May 1999

2. Definition of tax residency in Italy

Timing of acquisition of tax residence

Split year treatment: no split year treatment under domestic law; split year treatment under income tax treaty only if specific provision (e.g. treaty with CH)

3. Tax residency in Hong Kong

Definition

- There is no domestic definition of tax residency under the IRO. A person's residence is not relevant in determining liability to Hong Kong salaries tax under the domestic law.
- Where it is necessary to determine an individual's residence, such as for the purpose of tax treaty, an individual would generally be considered tax resident if he/she
 - ordinarily resides in Hong Kong or
 - stays in Hong Kong for more than 180 days during a year of assessment or for more than 300 days in two consecutive years are considered tax resident.
- In particular, Hong Kong included a definition of tax resident for individuals under Art. 4(1)(a)(i) and (ii) of the Tax Treaty with Italy:
 - an individual who ordinarily resides in Hong Kong;
 - An individual who stays more than 180 days in a year or more than 300 days in two consecutive years.

3. Tax residency in Hong Kong

Certificate of Resident Status application in Hong Kong

- A Document to prove of resident status for claiming DTA benefits.
- Validity: 1 year (3 years for DTA with the PRC)
- Eligible persons:-
 - Individual who ordinarily resides in Hong Kong;
 - ✓ Objective factors, e.g.: days stayed, frequency of visiting, length of stay, permanent dwelling, property for residence, carrying business, relatives residing in Hong Kong.
 - Individual who stays more than 180 days in a year / more than 300 days in two consecutive years.
- Submission of application form (IR1314B for non-PRC DTA partner)
- Required information:-
 - Particulars of applicant
 - Details of employment / business operation in Hong Kong during the calendar year of claim
 - Nature and amount of income derived from the treaty party
- Processing time: 21 working days, further information may be requested

4. OECD Model Treaty: Tie-breaker Rule

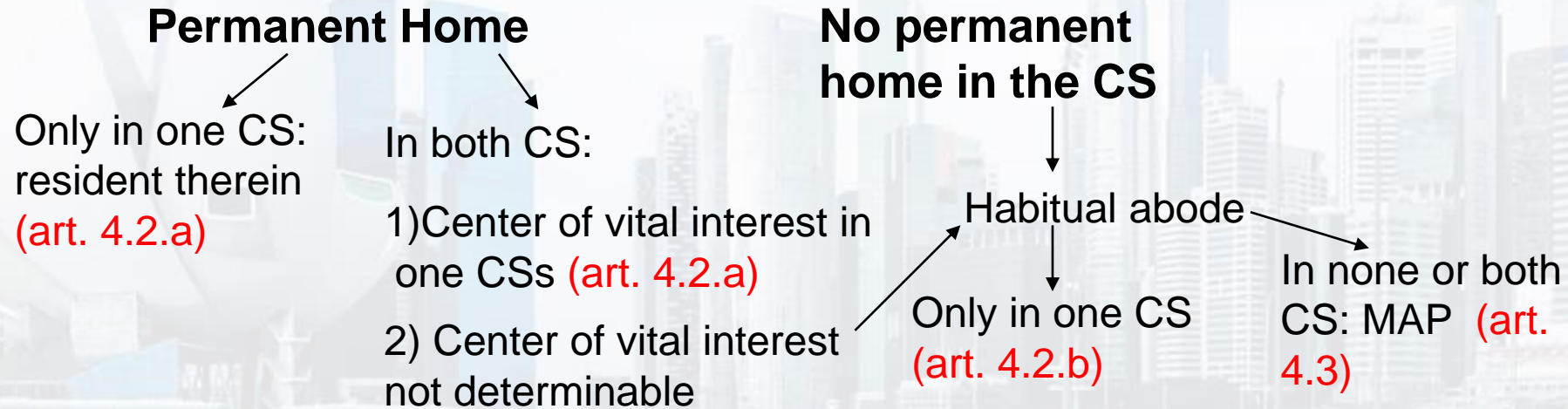
Residency of individuals: Art. 4(2)

1. Permanent home (Is the State where the individual owns or posses a home)
2. Centre of vital interests (Personal and economic relations, but personal relations must receive special attention)
3. Habitual abode (Is the State in which the person stays more frequently)
4. Mutual agreement: Art. 4(3)

4. OECD Model Treaty: Tie-breaker Rule

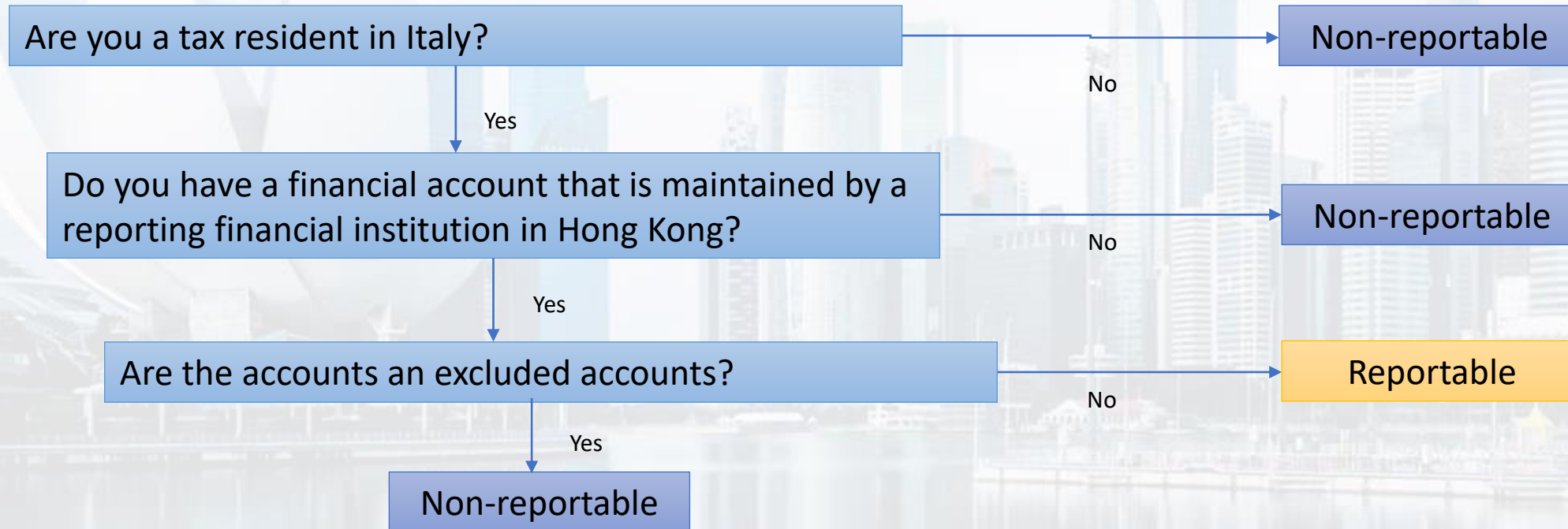
Residency of individuals

Apply tie-breaker rules (art. 4.2)



5. Exchange of Information AEOL – A quick check

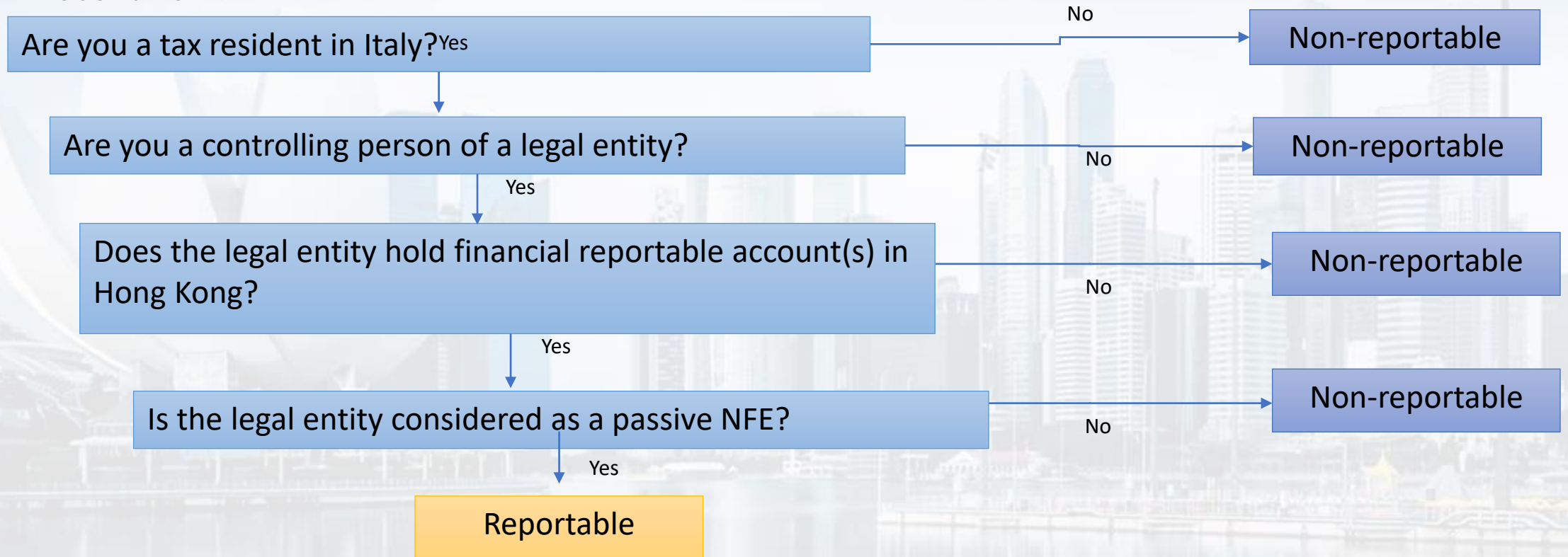
➤ Scenario 1



5. Exchange of Information

AEOI – A quick check

➤ Scenario 2:



6. Disputes with Italian Revenue Authorities

Italian tax residence and reporting obligations

- An individual who is **tax resident in Italy** (see slide no. 3) is required to pay taxes to Italy on all the incomes wherever produced (irrespective the incomes arise in Italy or in another Country).
- To achieve that aim, the Italian Tax Laws, require the resident individual to file the Italian annual tax return and **to declare**
 - (i) value of the financial investments held abroad (in the section named “RW”)
 - (ii) value of the real estates investments held abroad (in the section named “RW”)

and to calculate (and pay)

 - (iii) the property tax on financial investments held abroad (so called “IVAFE” – rate 0,2%)
 - (iv) the property tax on real estate owned abroad (so called “IVIE” – rate 0,76%)
 - (v) the individual income taxes on incomes (included those produced outside Italy)

6. Disputes with Italian Revenue Authorities

Italian tax residence, violation of reporting obligations and tax fines

➤ **Violation of duty to declare**

- (i) value of the financial investments held abroad (in the section named “RW”)
- (ii) value of the real estates investments held abroad (in the section named “RW”)

➤ **Tax Fines**

3% - 15% of the undeclared values, if held in a jurisdiction not included in the Black List

6%-30% of the undeclared values, if held in a jurisdiction included in the Black List (Hong Kong, Singapore)

moreover

this violation triggers a rebuttable presumption that those investments are formed by incomes not taxed, consequently their entire value is subject to the individual income tax

moreover

tax fines for the "failure to declare" or "unfaithful declaration" are doubled as follows:

180 - 360% of the tax amount not declared (in case the tax return has been filed)

240 - 480% of the tax amount not declared (in case the tax return has NOT been filed)

6. Disputes with Italian Revenue Authorities

Italian tax residence, violation of reporting/paying obligations and tax fines

➤ **Violation of duty to declare and pay**

- (iii) the property tax on financial investments held abroad (so called “IVAFAE”)
- (iv) the property tax on real estate owned abroad (so called “IVIE”)
- (v) the individual income taxes on incomes wherever produced

➤ **Tax Fines**

tax fines for the "failure to declare" or "unfaithful declaration" are applicable as follows:

90% - 180% of the tax amount not declared (in case the tax return has been filed)

120% - 240% of the tax amount not declared (in case the tax return has NOT been filed)

moreover

the above-mentioned sanctions are **increased by 1/3** when the violations under point (v) relate taxable incomes which have been produced outside Italy (for example in Hong Kong or Singapore)

6. Disputes with Italian Revenue Authorities

Violation of reporting/paying obligations and criminal fines

➤ **Violation of duty to declare and pay – criminal fine for "unfaithful declaration"**

Filing an unfaithful tax return may trigger the application of a criminal fine when the taxpayer:

- (i) in order to evade income or value added tax, fills in the annual tax return relating to these taxes, taxable items for an amount lower than the actual amount or non-existing deductible expenses, when together:
- (ii) the tax amount evaded **exceeds**, with reference to any one of the individual taxes, **100.000 euros**, and
- (iii) the total amount of taxable items subtracted from taxation, also by the indication of non-existing deductible expenses, is **higher than ten percent** of the total amount of the active elements indicated in the tax return, or **exceeds two million euros**

It is provided the **punishment by imprisonment** ranging between 2 years to 4 years and 6 months and the **confiscation** of the assets constituting the profit or price of the crime or of other assets for a value corresponding to such price or profit

6. Disputes with Italian Revenue Authorities

Violation of reporting/paying obligations and criminal fines

➤ **Violation of duty to declare and pay – criminal fine for “failure to declare”**

The failure to submit the tax return may trigger the application of a criminal fine when the taxpayer:

- (i) in order to evade income or value added tax, fails to submit, when required to do so, annual tax return relating to these taxes, and
- (ii) the tax amount evaded exceeds, with reference to **any one** of these taxes, **50.000 euros**

It is provided the **punishment by imprisonment** ranging between 2 years to 5 years and the **confiscation** of the assets constituting the profit or price of the crime or of other assets for a value corresponding to such price or profit

6. Disputes with Italian Revenue Authorities

Remedies to tax challenges – Active Repentance

➤ Active Repentance regime

in case the taxpayer realizes that he was qualified as Italian resident for certain fiscal years, it is possible to clear the above-mentioned violation through the voluntary payments of taxes due. Fines can be reduced as follows:

- to 1/10 of the minimum fine if the payment is made **within 30 days** after the deadline
- to 1/9 of the minimum if errors/omissions are amended **within 90 days** from the date of the omission or error or within 90 days from the deadline for filing the declaration in which they occurred
- to 1/8 of the minimum fine if the amendment is made **within the deadline** for filing the tax return **for the year in which the violation** was committed or within one year after the omission or error
- to 1/7 of the minimum fine if the amendment is made **within the deadline** for filing the tax return **for the year following** that in which the violation was committed or within two years after the omission/error
- to 1/6 of the minimum fine if the amendment is made **after the deadline** for filing the tax return **for the year following** that in which the violation was committed or after two years after the omission/error
- to 1/5 of the minimum fine if a tax audit report is notified to the taxpayer

6. Disputes with Italian Revenue Authorities

Remedies to tax challenges – Defensive explanatory deed

➤ Filing a defensive explanatory deed to Italian Tax authorities

In case of notification of information requests/questionnaire, start of a tax audit or the release a tax audit report challenging the Italian tax residence of the taxpayer, the latter can **file a defensive deed** to the Italian Tax Authority, to demonstrate that the individual taxpayer was effectively resident outside the Italian territory during the fiscal years under scrutiny and effectively resident in another Country (such as Hong Kong).

If such proof is given, **Italy loses any right to tax** the individual on incomes produced outside the Italian territory.

This is the reason we strongly recommend to prepare a set of documents useful to provide such a prove.

7. Conclusions

Tax Issues and remedies

!! Mere registration in the Registrar of the Italian Resident Population (for more than 183 days)

- triggers the tax residence in Italy
- Italian Tax Authorities have the right to tax in Italy all the incomes wherever produced by this individual

!! Anti-abuse rule reverses the proof of residence on the taxpayer moved to a black listed Country

- Italian Tax Authorities can consider the tax residency in Italy unless the taxpayer does not prove the opposite by means of specific factual circumstances occurred during the challenged fiscal years
- In case of failure to provide this prove Italian Tax Authorities have the right to tax in Italy all the incomes wherever produced by this individual

7. Conclusions

Tax Issues and remedies

Remedies

- check whether the individual has correctly fulfilled its formal and substantial tax duties in Italy (AIRE)
- check whether there is a risk the individual can be qualified as Italian tax resident under Italian domestic Tax Laws, in relation to his peculiar situation
- prepare a set of documents, which can prove the effectiveness of the tax residence outside Italy
- prepare a defensive deed, which can explain the factual circumstances collected in the set of documents, with the aim to demonstrate that the tax residence of the individual is outside Italy pursuant to the provisions set forth by the relevant Tax Treaty
- evaluate whether to carry out an active repentance in case violations to Italian Tax Laws arise from the above mentioned checks

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