

# Intangibles – zero remuneration and burden of proof: an Italian view

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**Federico Vincenti and Alessandro Valente of Valente Associati GEB Partners/Crowe Valente review the Italian Supreme Court’s intervention, as companies should anticipate a heavy burden of proof in tax disputes.**

This article is a follow up to the previous contributions of the authors on the DEMPE topic. As such, we outline a recent decision of the Italian Supreme Court with an impact for all those cases in which the trademark or intangible is not subject of a consideration within the group.

According to the Supreme Court in this recent decision – decision No. 37437 published on December 21 2022, the use of a trademark must not be presumed to have zero value. It follows that it is legitimate to think of the gratuitousness of the trademark as an exceptional situation. This exceptionality determines the taxpayer’s burden of proof that the gratuitousness corresponds to the normal value, i.e., that it is legitimate for the use of such a mark/intangible to take place without consideration.

In this case, the main objection raised by the tax authority concerned the absence of any remuneration to the parent company for the use of its trademark by the foreign Chinese subsidiary.

The company contested the position taken by the tax authority and endorsed the judgment of the second instance judges. According to them, the gratuitousness of the use of the trademark should be considered as an exceptional element with a consequent burden of proof on the taxpayer.

On the contrary, the company argued that the burden of proof should rest on the tax authorities, which should have verified whether the target market of the Chinese company's products could be influenced by the trademark.

It is therefore essential to reflect on the proper allocation of the burden of proof which, in the context of transfer pricing (TP), according to well-established Italian case law, is divided as follows:

- The tax authorities must prove only the existence of "transactions" between related companies at a price apparently lower than the arm's length price; whereas the taxpayer bears the burden of proving that such "transactions" took place at arm's length which should be deemed acceptable.

This principle, in which the taxpayer bears the heaviest burden of proof, must, however, also be read in light of the regulatory changes made by the Italian legislature (Law n. 130 published on August 31 2022). Since September 2022, the Italian legislature reviewed the Powers of the Tax Courts of First and Second Instance, providing that:

- The administration shall prove the violations challenged in court; and
- The court shall base its decision on the evidence that emerges from the trial and shall annul the tax decision if the evidence is lacking or contradictory. This also applies if the evidence is insufficient to demonstrate, in a punctual manner, the objective reasons on which the tax claim and the imposition of penalties are grounded.

The provision in question specifies - in substance - that the burden of proving the facts underlying the tax claim lies with the tax administration and such burden must be exercised at trial.

As such, these principles should apply to the allocation of the burden of proof in TP matters.

Indeed, in the application of the new principle, the administration should bear the burden of proving that the intra-group transactions subject to assessment took place at arm's length. This is without being limited to proving the existence of transactions between companies belonging to the same group, which took place at a price "apparently lower" than the normal price.

Since it is too early to verify the effects of the new law changes and considering recent case law and decisions, taxpayers need to be prepared to cope with the heaviest burden of proof.

To mitigate this risk and to have a proper trail of documentation, it is important for multinational companies to carry out a correct analysis of the DEMPE functions. This will allow them to proceed to the identification of transactions and the correct allocation of costs to be charged.

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