Rivista Telematica di
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***Italian tax regime of capital gains from the disposal of real estate realized by non-Italian residents: considerations and outstanding issues*(*)**

Regime fiscale delle plusvalenze “immobiliari” realizzate da soggetti non residenti in Italia: riflessioni e punti aperti

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Abstract

This contribution analyzes the changes introduced by the 2023 Italian Finance Law (no. 197 of 29 December 2022, the “Law”) on the taxation of capital gains from the disposal of real estate realized by non-residents, under domestic and treaty rules. As a result of the amendment of article 23 of the Italian Income Tax Code, capital gains realized by a non-resident entity from the sale of shareholdings in companies’ resident for tax purposes abroad which derive more than 50% of their asset value directly or indirectly from real estate situated in the Italian territory, are characterized as Italian-source income. These changes have been introduced to combat tax arbitrage practices through the sale of shareholdings in real estate companies instead of direct sale of the real estate. The new rules are consistent with the provisions of article 13(4) of the OECD Model Tax Convention, as updated in 2017 on conclusion of the work on the BEPS Project (see also article 9(4) of the OECD Multilateral Instrument - MLI – not yet transposed in Italy) which, in order to combat tax avoidance practices, has amended the traditional criteria for the attribution of taxing rights between the source State and the recipient’s state of residence. The new rules refer to similar provisions in force in other foreign pieces of legislation, such as the U.S. Foreign Investment in Real Property Tax Act of 1984 (FIRPTA), which provides for the taxation of capital gains realized by non-residents from the indirect sale of real estate.

Keywords*: Law no. 197/2022, capital gains, “real estate" companies, land-rich provision, OECD Model, Multilateral Convention (MLI), source State*

Abstract

Il contributo analizza le novità introdotte dalla Legge di Bilancio 2023 (*i.e.* L. 29 dicembre 2022, n. 197, di seguito Legge) in tema di tassazione delle plusvalenze “immobiliari” realizzate da soggetti non residenti, in un’ottica domestica e pattizia. Per effetto della modifica all'art. 23 TUIR sono qualificati come redditi prodotti nel territorio dello Stato, e quindi ivi imponibili, le plusvalenze che un soggetto non residente ritrae dall'alienazione di partecipazioni in società fiscalmente residenti all'estero, il cui valore è rappresentato direttamente o indirettamente per più del 50% da beni immobili situati nel territorio italiano. Come specificato dall’Amministrazione finanziaria, tali modifiche normative sono state introdotte per

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contrastare fenomeni di arbitraggio fiscale realizzati attraverso la cessione di partecipazioni in società immobiliari, in luogo della cessione diretta degli immobili. La novella normativa risulta coerente con quanto previsto dal paragrafo 4 dell'art. 13 del Modello di Convenzione OCSE, come aggiornato nel 2017 all'esito dei lavori del Progetto BEPS (cfr. anche art. 9, comma 4, della Convenzione Multilaterale OCSE – MLI - non ancora recepita in Italia) che, al fine di contrastare pratiche elusive, ha modificato i tradizionali criteri di ripartizione della potestà impositiva tra lo Stato della fonte del reddito e quello di residenza del soggetto percipiente. Le nuove disposizioni richiamano previsioni similari vigenti in altri ordinamenti esteri, come ad esempio quelle statunitense del *Foreign Investment in Real Property Tax Act of 1984* (FIRPTA) che assoggettano ad imposizione le plusvalenze realizzate da soggetti non residenti a seguito della cessione indiretta di immobili.
Parole chiave: Legge n. 197/2022, capital gains, plusvalenze immobiliari, Modello OCSE, Convenzione multilaterale (MLI), Stato della fonte

SOMMARIO/TABLE OF CONTENTS: **1.** Introduction. - **2.** The new rules. - **3.** Coordination with treaty rules. - **4.** The double tax treaties concluded by Italy (and the OECD Multilateral Instrument, MLI). - **5.** Conclusive comments.

1. Article 1(96) through (99) of the 2023 Italian Finance Law[1] (the "Law") introduced significant changes with effect from 1 January 2023, regarding the place of taxation of capital gains derived by non-residents from the sale of shareholdings in real estate companies (cf. ASSONIME, Circular no. 23 of 1 August 2023*;* LI J. - AVELLA F., *Article 13: Capital Gains, in Global Tax Treaty Commentaries,* IBFD *online Books*, 2017; SIMONTACCHI S., *Taxation of Capital Gains under the OECD Model Convention: With special regard to Immovable Property,* Alphen aan den Rijn, *dovrebbe essere la sede di kluwer law international*, 2007*).* The new rules – which have given rise to a new type of taxable income included among "*miscellaneous income*" – supplement the provisions of article 23 of the Italian Income Tax Code with regard to non-resident taxpayers[2] and provide for the taxation in Italy of capital gains from the sale of interests in companies with real estate mainly located in Italy, even if the disposal relates to interests in a non-resident company. As specified in the Technical Report to the Law, the legislative change is consistent with article 13(4) of the OECD Model Tax Convention, as amended on 21 November 2017, according to which the Source state has concurrent taxing rights if 50% of more of the asset value of the company whose shares or other interests are being sold directly or indirectly derives from immovable property (i.e., land-rich

1 Law no. 197 of 29 December 2022, *Italian budget for financial year 2023 and multi-year budget for the three-year period 2023-2025*, published in Italian Official Journal no. 303 of 29 December 2022, Ordinary Supplement no. 43.
2 Before the change, under domestic legislation the "real estate" element was immaterial for the purpose of characterizing the shareholding the disposal of which by a non-resident entity was treated for tax purposes as a sale of securities.

provision). As pointed out by experts, the legislative change «*manages to avoid that the failure by Italy (as Source state) to claim its taxing rights in accordance with the new paragraph 13(4) of the OECD Model tax convention – a provision shared at multilateral level – solely results in transferring to the shareholder's state of residence exclusive taxing rights on income which has a strong connection* (“connessione qualificata”) *with* [the Italian] *territory, where the real estate is located*». During the parliamentary approval process, it has been specified that property which constitutes the company's stock-in-trade (i.e., real estate the production or exchange of which constitutes the company's core business) and real estate used to carry on business are not taken into account for the purpose of determining the relevant thresholds for taxation in Italy of capital gains from the sale of real estate. Furthermore, capital gains realized by non-resident UCITS established in EU/EEA Member States with which Italy has put in place an adequate exchange of information system, as well as income from the sale of securities traded in regulated markets, fall outside the scope of the new rules.

2. The Law has amended the taxation of capital gains from the sale of interests in resident and non-resident companies and entities by non-resident entities which derive most of their asset value from real estate situated in the Italian territory. Effective 1 January 2023, paragraphs 96 and 97 of the Law introduced paragraph 1-*bis* into article 23 of the Italian Income Tax Code and paragraph 5-*bis* into article 5 of legislative decree no. 461/1997. Specifically, paragraph 1-*bis* of article 23 of the Italian Income Tax Code provides that income (“*redditi diversi*”, literally miscellaneous income) from the sale of shares or other interests in non-resident companies and entities which, at any time during the 365 days preceding the sale, derive more than half of their asset value directly or indirectly from real estate situated in Italy, is regarded as Italian-source income[3]. This provision does not apply to the sale of securities traded in regulated markets. Furthermore, capital gains from the sale of shares held in non-resident entities not traded in regulated markets, which mainly derive their asset value from real estate located in Italy, are not eligible for the exemption pursuant to article 5(5) of legislative decree no. 461/1997, which applies to capital gains from the sale of non-significant shareholdings or other interests in resident and non-resident companies and entities if realized by “qualifying” persons, as identified by article 6(1) of legislative decree no. 239/1996. In practice, under paragraph 97 the exemption does not apply if the capital gains originate from shareholdings in resident and non-resident companies and entities which mainly derive their asset value from real estate located in Italy. The asset value of non-resident companies and entities shall not include real estate which

3 The Italian expression “*partecipazioni in società ed enti non residenti*” (shareholdings and other interests in non-resident companies and entities) is based on the wording of article 13(4) of the OECD Model Tax Convention, “*shares and comparable interests, such as interests in a partnership or trust*”, in order to encompass any form of interest in companies, partnerships, entities or contractual arrangements, including trusts, consistently with the terms of Action 6 of the BEPS Project (2015 Final Report).

constitutes the companies' stock-in-trade and real estate which is used by said companies and entities to carry on business. Furthermore, as mentioned, the new rules do not apply to the UCITS identified by article 1(633) of law no. 178 of 30 December 2020, i.e. non-resident UCITS established in EU/EEA Member States with which Italy has put in place an adequate exchange of information system pursuant to the UCITS Directive or not compliant with the UCITS Directive but whose manager is subject to supervision in the foreign state of establishment in accordance with the AIFM Directive.

Before analyzing the coordination of the legislative change with tax treaty rules, we would like to provide a brief overview of two issues of particular interest. The Italian tax legislation regulates different forms of sale of shareholdings which may give rise to capital gains. For example, pursuant to article 9(5) of the Italian Income Tax Code, unless otherwise provided, the provisions concerning sales also apply to transactions for consideration involving the creation or transfer of non-possessory rights in property, and to contributions to companies. Thus, the consideration realized for the creation of an easement to the benefit of third parties on a property is treated, for income tax purposes, in the same way as a sale of property. Moreover, from a tax perspective, contributions are treated in the same way as sales: the contribution, or the sale, of equity interests may give rise, under certain conditions, to a capital gain subject to the relevant tax regime.

A second issue of interest – which would deserve detailed considerations under domestic and treaty law but falls outside the scope of this contribution – concerns the possible consequences of corporate reorganizations carried out by non-resident entities which own property in Italy, a matter which has been analyzed in some recent rulings by the Italian Revenue Agency. Ruling no. 294 of 14 April 2023 has given some thoughts to the matter and confirmed the applicability of the principle of *tax neutrality* (under article 172 of the Italian Income Tax Code) also to mergers between non-EU resident companies – in the case at issue, a merger between two Israeli group companies. Furthermore, rulings nos. 91/2023 and 157/2023 provided clarifications on the VAT treatment of the *transfer of goods located in the Italian territory* as part of corporate reorganizations between non-resident entities – i.e., merger by absorption between a Belgian company (surviving company) and a Dutch company (Merged company) owning a stock of goods located in Italy which, as a result of the merger, would be transferred to the surviving company.

3. Purpose of the new rules is to fill a gap in domestic legislation with regard to the treatment of Capital Gains, dealt with by article 13(4) of the OECD Model Tax Convention, whose origin can be dated back to the UN Model tax convention[4],

4 AA.VV., *United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries*, UN-library, 2015, 160: «*Article 13 (4) of the United Nations Model Convention provides taxing rights over "gains from the alienation of shares of the capital stock of a company, or of an interest in a partnership, trust or estate, the property of which consists directly or indirectly principally of immovable property situated in a Contracting State" to that State. The United Nations Commentary notes that the provision: is designed to prevent the avoidance of taxes on the gains from*

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which to our knowledge was the first to lay down this provision. In particular, Paragraph 4 (cf. paragraphs 28.3 to 28.13 of the Commentary to Paragraph 4), as amended by Action 6 of the BEPS Project (cf. *Action 6, 2015, Final Report, Section A, Paragraphs 41-44)*[5], provides that «*Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust*, [our emphasis] *may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State*». Therefore, this Paragraph provides that the taxing right in the Source state applies whenever in any of the 365 days prior to the date of the sale the company mainly derives its value from real estate located in the territory of either Contracting State. Satisfaction of this condition will be ascertained by comparing the value of such property to the value of all real estate owned by the company, without taking into account debts and other liabilities. Where this condition is met, taxation will apply on the entire capital gain from the disposal of the interests in the non-resident company, regardless of whether they derive part of their value from other assets.

Paragraph 28.7 of the Commentary on Art. 13 (pertaining to Art. 13(4)) points out a possible limitation on the scope of the provision: (cf. SIMONTACCHI S., *op. cit.*) «[...] *some States consider that the paragraph should not apply* [...]. *where the immovable property from which the shares derive their value is immovable property (such as a mine or a hotel) in which a business is carried on* [Omissis]. *The exception mentioned in the Commentary, however, seems to cover only cases in which more than 50% of the value of the shares is derived from the sole immovable property in which the business is carried on. Thus, for example, if the immovable property in which the business is carried on represents 49% of the value of the shares, the holding of other immovable property that represents 2% of the value of the shares would be sufficient to fall outside the scope of the exclusion, thus allowing Art. 13(4) to be applied. A similar exception was introduced in 2001 in Art. 13(4) of the UN Model)*».

The current article 13 (i.e. the 2017 version of the OECD Model and the 2021 version of the UN Model) can be viewed as more consistent with the goal of allocating taxing rights according to the value creation principle developed by the

the sale of immovable property. Since it is often relatively easy to avoid taxes on such gains through the incorporation of a company to hold such property, it is necessary to tax the sale of shares in such a company […]. *In order to achieve its objective, paragraph 4 would have to apply regardless of whether the company is a resident of the Contracting State in which the immovable property is situated or a resident of another State* […]. *In order to fulfill its purpose, paragraph 4 must apply whether the company, partnership, trust or estate owns the immovable property directly or indirectly, such s, through one or more interposed entities*».

5 Action 6 of the BEPS Projects suggested the introduction of the following changes to Double tax treaties: *i*) extend the scope of article 13(4) to cover gains from the sale of interests not only in companies but also in other entities, such as partnerships or trusts; *ii*) the introduction of a testing period (i.e., 365 days before the sale) to ascertain whether the relevant threshold value was attained not only at the time of the sale but at an earlier time as well.

BEPS Project. The value creation principle is not a new principle per se, but a derivative of the economic allegiance theory. It emphasizes the relevance of substantive nexus between the gain or income and the taxing jurisdiction and permits, arguably, the use of specific anti-avoidance rules to align taxing rights and the source or economic origin of the income by looking through corporations or other legal intermediation. Article 13(4) and UN Model (2021) articles 13(4), 13(5) and 13(6) are such rules. As highlighted by the BEPS Project, improper use of tax treaties is an important issue. Article 13(4) of the OECD and UN Models and article 13(7) of the UN Model (2021) are, in effect, anti-abuse rules. Article 13(5) of the UN Model (2021) can also be viewed as a base-protection rule as it secures taxing rights for the situs state in respect of value-creating activities carried out by a company resident in the situs state.
Paragraph 4 allows the taxation of the entire gain attributable to the shares or comparable interests to which it applies even where part of the value of these shares or comparable interests is derived from property other than immovable property located in the source State. The determination of whether shares or comparable interests derive, at any time during the 365 days preceding the alienation, more than 50 per cent of their value directly or indirectly from immovable property situated in a Contracting State will normally be done by comparing the value of such immovable property to the value of all the property owned by the company, entity or arrangement without taking into account debts or other liabilities (whether or not secured by mortgages on the relevant immovable property). Before 2017, paragraph 4 applied only in the case of the alienation of shares but the Commentary provided that States could extend its scope to cover also gains from the alienation of interests in other entities, such as partnerships or trusts, that did not issue shares, as long as the value of these interests was similarly derived principally from immovable property. In 2017, the reference to “comparable interests” was added for that purpose. At the same time, the paragraph was amended in order to cover situations where the shares or comparable interests derive their value primarily from immovable property at any time during the 365 days preceding the alienation as opposed to at the time of the alienation only. This change was made in order to address situations where assets are contributed to an entity shortly before the sale of the shares or other comparable interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in a Contracting State.

4. We set out below some considerations on the double tax treaties entered into by Italy (see Table 1).
In general terms, the treaties entered into by Italy (with some exceptions, such as the Italy/Chile double tax treaty) do not provide that the test according to which 50% or more of a company’s asset value should consist of real estate may be met also at any time during the 365-day period prior to the sale of the shareholdings or other interests. Furthermore, a number of Treaties (such as those, for instance, with

Armenia, Azerbaijan, the Philippines, Finland, France, Hong Kong, India, Ukraine, Uruguay, Saudi Arabia) contain clauses similar or identical to the new paragraph 1-bis of article 23 of the Italian Income Tax Code which, however, were not effective before the legislative change under analysis due to non-satisfaction of the territorial condition, which has now been introduced by the new legislation.

The double tax treaties entered into with Canada and the Philippines are characterized by a broad scope of application which covers also interests in partnerships, trusts, and estate for succession purposes. Furthermore, the Treaties entered into by Italy with the United States, Israel, India, Canada, China and the Philippines do not provide for a percentage (e.g., 50%) over and beyond which the provision applies; in particular, these Treaties allocate the primary taxing right to the Source state if the company's assets mainly (or wholly, as is the case for the Italy/US tax treaty, or essentially as is the case for the tax treaties with the Philippines or China) consist of real estate.

As regards the OECD Multilateral Instrument (*MLI*), not yet incorporated into Italian legislation, in article 9 Italy has decided to elect the option to supplement or amend a provision corresponding to that of paragraph 13(4) mentioned by all treaties entered into by Italy, provided that the other contracting state decides to elect the same option. Article 9 provides that «*Gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction [i.e. the source State] if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction*». This article, whose goal is to amend the double tax treaties with regard to the taxation of capital gains from the sale of real estate companies, does not constitute a minimum standard but an optional provision which pursuant to the principle of reciprocity is applicable only if both parties agree to it.

5. The rationale of the provisions under analysis – which reflects article 13(4) of the OECD Model Tax Treaty as amended on 21 December 2017 on conclusion of the work on the BEPS Project, is to put on the same tax footing capital gains from the sale of shareholdings or other interests in companies which own real estate mainly located in Italy and capital gains from the direct sale of real estate. As a result of the change, capital gains realized by non-resident entities from the sale of interests in unlisted companies the value of which mainly derives from the ownership of real estate in Italy, other than real estate used as stock-in-trade or in the course of a business activity, are taxable in Italy. The common denominator between the two types of transactions is territoriality; however, the rules do not apply to the sale of equity interests traded in regulated markets.

As worded, the rule raises interpretive issues: for example, as regards the determination of the valuation method to be adopted for the real estate, it is unclear whether reference should be made to the mark-to-market value or to the book value;

in our opinion, the mark-to-market value would be preferable for several reasons (the Tax Authorities have taken a similar interpretive stance on the matter of the Participation Exemption, clarifying that the comparison must be made between the mark-to-market value of the real estate and the mark-to-market value of the company's total assets. As stated in Circulars nos. 36/E/2004 and 7/E/2013, the valuation of the assets to be taken as basis to determine whether real estate accounts for 50% or more must be made at mark-to-market values and no at book values. That is the reason why the comparison must be made between the mark-to-market value of both real estate and total assets).. Using the mark-to-market value would be more onerous on the company, as it would require assessing the value of the company's or entity's assets on a daily basis (since the rule refers to the value of the company or entity "*at any time during the 365 days preceding their sale*"). The difficulties increase if indirectly owned real estate has to be taken into account, as in this case it would be necessary to monitor the value of all the assets held through the ownership chain; moreover, if there are assets whose value is not clearly established (for instance in markets which provide daily quotations), the mark-to-market valuation is subject to different interpretations which may trigger disputes.
As for book values, while one the one hand they could provide greater certainty and fewer administrative burdens on the companies and entities concerned, on the other hand they may not accurately reflect the real value of the company or entity, especially if the financial statements are not properly adjusted to take into account certain methods of presentation which could affect the analysis, such as, for instance, the use of depreciation directly reducing the cost of the asset in the balance sheet.
Furthermore, for the purpose of ascertaining whether fifty per cent or more of the company's or entity's assets consists of real estate, reference should be made not only to the real estate directly held by the company but also to that it owns indirectly, i.e. through its subsidiaries; for consistency, we believe that first real estate subsidiaries and then the ultimate parent company should be taken into account, checking whether the sum of the mark-to-market value of the shareholdings in the real estate companies and the property directly held by the ultimate parent exceeds 50% of the Group's Enterprise Value as a whole.
As regards the taxation of capital gains realized by non-residents, the 2024 Italian Finance Law (article 1(59) of Law no. 212 of 30 December 2023) introduced some major changes to the Participation Exemption regime, which can now apply, if the relevant conditions are met, also to residents of EU/EEA Member States which allow an effective exchange of information and have no Italian permanent establishment. Although significant, this legislative change could give rise to some issues: in our view, the fact that the new tax regime has not been extended to companies resident in non-EU States with which Italy has put in place an adequate exchange of information system, but only to those resident in EU/EEA member states with the same arrangement, triggers interpretive questions as to its consistency

with the fundamental principles of EU law, and in particular the principle of the free circulation of capital[6].

6 In our view, such overly circumscribed scope of application is in conflict with the principle of the free movement of capital (see Italian Supreme Court decisions nos. 21454, 21475, 21479, 21480, 21481, 21598 of 2022 and no. 20787 of 2023).

Table 1 – Some examples of double tax treaties entered into by Italy (article 13); article 9 of the MLI

Taxation of capital gains from the sale of shareholdings in companies which mainly invest in real estate pursuant to the Double Tax Treaties entered into by Italy		
Country	**Article**	**Treaty provision**
Chile	**Art. 13 (4)**	(4) Gains derived by a resident of a Contracting State, from the alienation of shares, comparable interests or other rights may be taxed in the other Contracting State if, (a) the alienator at any time during the 365 days preceding such alienation owned, directly or indirectly, shares, comparable interests or other rights representing 20 percent or more of the capital of a company that is a resident of the other Contracting State, or (b) at any time during the 365 days preceding the alienation, these shares, comparable interests or other rights derived more than 50 percent of their value, directly or indirectly, from immovable property, as defined in Article 6, situated in that other State. Any other gains derived by a resident of Contracting State from the alienation of shares, comparable interests or other rights may also be taxed in the other Contracting State but the tax so charged shall not exceed 16 percent of the amount of the gain. Notwithstanding any other provision of this paragraph, gains derived by a pension fund that is a resident of a Contracting State from the alienation of shares, comparable interests or other rights shall be taxable only in that State.
Hong Kong	**Art. 13 (4)**	Gains derived by a resident of a Contracting Party from the alienation of shares of a company deriving more than 50% of its asset value directly or indirectly from immovable property situated in the other Contracting Party may be taxed in that other Party. However, this paragraph does not apply to gains derived from the alienation of shares quoted on a stock exchange of either Contracting Party or any other stock exchange as may be agreed between the competent authorities.
Israel	**Art. 13 (4)**	Gains from the alienation of shares of the capital stock of a company the property of which consists, directly or indirectly, principally of immovable property situated in a Contracting State may be taxed in that State.
United States	**Art. 13 (4)**	Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident.
Sweden	**Art. 13 (5)**	The provisions of paragraph 4 shall not affect the right of a Contracting State to tax, according to its own legislation, any gain

		from the alienation of shares in a company the main assets of which consist of immovable property situated in that Contracting State, provided the alienator is an individual resident of the other Contracting State, who a) is a national of the first-mentioned Contracting State; b) has been resident in the first-mentioned Contracting State during any part of a five-year period immediately preceding the alienation; and c) at the time of the alienation alone or together with a closely related person had a decisive influence on the company.
Uruguay	**Art 13 (4)** **Art 13 (5)**	(4) Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State. (5) Gains from the alienation of shares or other corporate rights in a company or trust, which entitles the owner of such shares or interests to the enjoyment of immovable property situated in a Contracting State, may be taxed in that State.
BEPS Project	**Action 6**	**Preventing the Granting of Treaty Benefits in Inappropriate Circumstances** **Par. 41.** Article 13(4) allows the Contracting State in which immovable property is situated to tax capital gains realised by a resident of the other State on shares of companies that derive more than 50 per cent of their value from such immovable property. **Par. 42**. Paragraph 28.5 of the Commentary on Article 13 already provides that States may want to consider extending the provision to cover not only gains from shares but also gains from the alienation of interests in other entities, such as partnerships or trusts, which would address one form of abuse. It was agreed that Article 13(4) should be amended to include such wording. **Par. 43.** There might also be cases, however, where assets are contributed to an entity shortly before the sale of the shares or other interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in one Contracting State. In order to address such cases, it was agreed that Article 13(4) should be amended to refer to situations where shares or similar interest derive their value primarily from immovable property at any time during a certain period as opposed to at the time of the alienation only.
MLI	**Art. 9**	**Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property*** Paragraph 1. Provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may

		be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction (or provided that more than a certain part of the property of the entity consists of such immovable property (real property)): a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions. *** Observations** 1. Article 9 of the MLI incorporates the proposed changes contained in Action 6 of the BEPS Project; 2. Article 9(4) reproduces the same wording as article 13(4) of the OECD Model Tax Convention as amended by Action 6 of the BEPS Project, which provides as follows: "For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction". This Paragraph constitutes an optional provision and applies only if both contracting states opt in. 3. Among the Reservations and in the Option provisionally stated at the time of the signature of the MLI, Italy opted for the application of article 9(4), disclosing the Covered Tax Agreements which already contain similar provisions (see, for instance, the double tax treaties with Armenia, Azerbaijan, Barbados, Canada, China, Estonia, Finland, France, Hong Kong, India, Israel, Kenya, Mexico, New Zealand, Pakistan, the Philippines, Romania, Saudi Arabia, Sweden and Ukraine). **Since the applicability of paragraph 4 is conditional on "reciprocity"**, in order to ascertain the actual impact of the rule on the double tax treaties entered into by Italy it must be checked from time to time whether the other contracting states expressed their will to apply the same provision.

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