INTERNATIONAL ASSIGNMENT POLICIES – TAX AND SOCIAL SECURITY ASPECTS

PAOLO SINISCALCO
FOUNDER OF SINISCALCO & PARTNERS

MILAN

"Globalisation is not something that we can hold off or turn off. It is the economic equivalent of a force of nature, like wind or water", William J. Clinton said.

WORDS THAT ARE NOW TRUE MORE THAN EVER, in a world facing a complex geopolitical situation, once again shivering from the first gusts of the winds of war. A war the likes we might not have seen in a long time, one in which the enemy was just a short time ago seated on the other side of the table of economic rather than military negotiations, and rather than threats exchanged plans for mutual economic prosperity. In such a situation, surrounded by the countless unknowns and with the threat of supply chain disruptions, or further economic sanctions, Italian entrepreneurs and enterprises look with renewed interest towards the United States, a market that may yet prove itself stable and full of new opportunities. At the same time, U.S. businesses look around the world in the hope of finding new reliable sources of industry and products to replace supply chains that are now defunct, and many begin to turn to the Italian market for its unique array of exports.

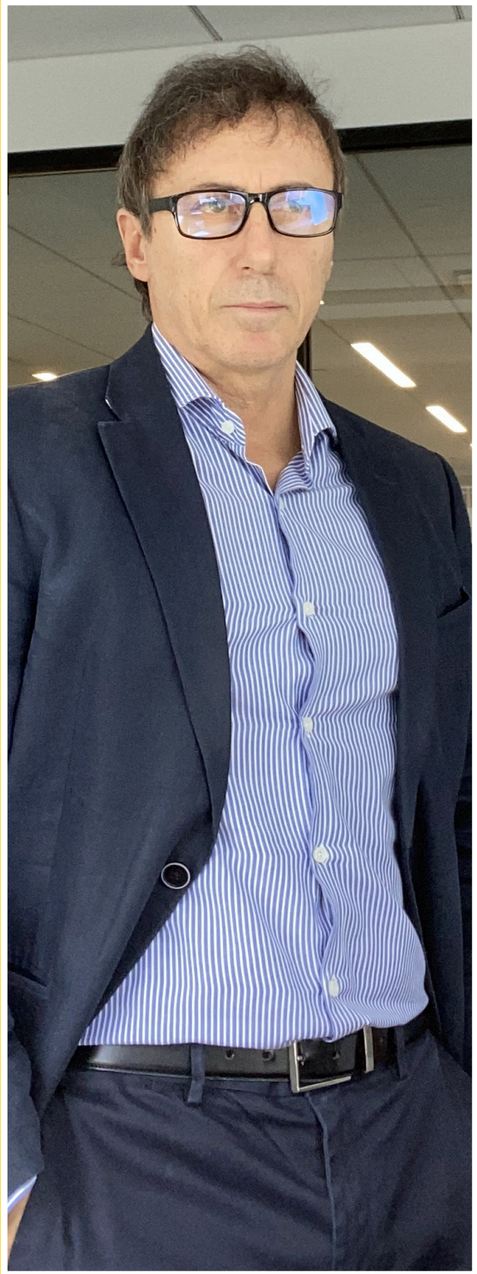
During the last months I'm observing an increase in the phenomenon of cross border mobility of employees, by means of which employees of a company ("home company") are asked to work for a certain period of time for another company of the same group, located in a different State ("host company").

ACCORDING TO INTERNATIONAL CONTRACT LAW AND PRACTICE, in order to regulate this phenomenon, multinational groups are used to implementing one or more types of international assignment policies. These policies are adopted and respected by the entire group and concern several aspects, including the purpose and duration of the assignment, as well as the remuneration determination and the benefits recognized during the assignment period.

As part of the international assignment policy, a tax clause is usually adopted in order to define the agreements between the home company, the host company and the employee(s), as to the distribution or allocation of the tax burden connected to the employee's income produced during the assignment period abroad.

Under international contract practice, the types of tax clauses currently most widespread can be traced back to the following four categories: "tax equalization", "tax protection", the "net to net approach" (or guaranteed net) and "laissez faire". Each of these different clauses has both ad-vantages and disadvantages in relation to the costs of the international assignment, the related obligations, the equal treatment of employees and the administrative burdens resulting from the adoption of a specific tax clause.

1. "Tax equalization" is the most widespread tax clause, especially in multinational groups where global mobility is highly developed. It aims to ensure the tax neutrality of international assignment, ensuring that the tax impact – as well as often the social security contribution – on the employee is equivalent to what the worker would have suffered if he had remained in his own State. Therefore, the employee will not obtain (or should not obtain) any advantage, nor will he suffer (or should not suffer) any tax disadvantage due to the assignment.
2. The application of the "tax protection clause" involves fewer administrative obligations and costs. It provides that the employee in international assignment shall be protected only in relation to any burden exceeding the amount of taxes that he would have suffered at personal level if he had remained in his State of residence (or hiring).
3. The "net to net approach" (or "guaranteed net") provides for the calculation of the net employment income due to the employee in his home country to be "grossed up" from a fiscal point of view, based on the tax rates of the host country.
4. According to the so called "laissez faire clause", the employee remains completely liable for the taxes due both in the home country and in the host State, having to personally fulfill the tax obligations in both States.



THESE POLICIES ARE ADOPTED AND RESPECTED BY THE ENTIRE GROUP AND CONCERN SEVERAL ASPECTS (...)

GIVEN THIS GENERAL FRAMEWORK on the negotiation issues related to the tax and contribution bur-dens in intercompany relations, we can now analyze the relationship between Italy and the United States and the related regulatory framework. Art. 15 of the Double Taxation Convention ("Dependent Personal Services") establishes as a rule the concurrent taxability in both States for incomes derived from employment carried out in a Contracting State by a resident of the other State, unless the conditions set out in paragraph 2 occur. Said conditions refer to physical permanence and allocation of the employee's remuneration burden in one or in the other State; in these cases, in fact, the residence State has exclusive power to tax.

IN RELATION TO THE SOCIAL SECURITY ISSUES connected to international assignments between Italy and the United States, reference should be made to the bilateral Agreement on social security stipulated in 1973 (amended by the Additional Agreement of 1984) and the related Administrative Protocol of 22 November 1977. In particular, Art. 7 of the Agreement Part II ("Provisions relat-ing to applicable law") establishes that, in case of temporary employment of a resident of a State in the other State, the domestic contribution regime continues to apply (i.e. the residence or the hiring country). Otherwise, cases of overlapping of the two social security contribution systems can be resolved by referring to the citizenship of the worker or, for dual citizens, to the option of the latter.

IN CARRYING OUT OUR PROFESSIONAL ACTIVITY, we assist Clients in relation to the planning and management of the negotiation dynamics underlying the transfer of the workforce of companies with cross border profiles, in coordination with the applicable regulatory and conventional disciplines.