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Tax Alert

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Direct Tax

Dividends - Transitional regime and presumption of priority distribution of profit reserves- Reply no. 163/2022

First of all, it is recalled that the profits deriving from qualified shareholdings received by individuals outside the business regime, subject to the withholding tax or substitute tax of 26%, are subject, until the resolutions made by 31/12/2022, to IRPEF in part according to the changes in the IRES *ratione temporis* rates and, especially:

- **40%** of profits produced up to the current year at 31/12/2007;
- **49.72%** on profits produced from the year following the current one at 31/12/2007 and until the current year at 31/12/2016;
- **58.14%** on profits produced in the current year to 31/12/2017.

Since there are reserves of profits before 2018, there is a presumption that, regardless of the indication given in the resolution on the distribution of reserves, the reserves of profits produced **in the "older" years according to a FIFO** criterion are considered to be primarily distributed fiscally.

The Revenue Agency in the answer no. 163/2022, analyzing the provision of paragraph 1006 of art. 1 of Law no. 205 of 27 December 2017 (2018 Budget Law), which reads *"to the distributions of profits deriving from qualifying shareholdings in companies and entities subject to income tax of companies formed with profits produced up to the current year at 31 December 2017, approved from 1 January 2018 to 31 December 2022",* the pre-existing taxation regime continues to apply, stated that *"**the presumption of priority*** distribution ***of profits produced up to the current year to 31 December 2017 is applicable whatever the nature of the holding (qualified or non-qualified) and the recipient of profits,*** *even in cases where the application of the provision would be irrelevant to the tax treatment of dividends because they are subject to withholding tax at source* ".

Such an approach by the Agency would be based on the non-existence, in the various ministerial decrees and in the related explanatory reports (Dm 2/4/2008; DM 26/5/2017), an explicit reference to the application of the aforementioned presumption of tax distribution of dividends according to a FIFO criterion **only to qualifying shareholders**.

According to the Agency, moreover, *"using the presumption in question only with reference to shareholdings that could benefit from a more advantageous tax treatment does not seem consistent with the purposes of the provisions of the aforementioned ministerial decrees that aim to preserve the treatment prior to their issuance only to the profits that were produced under the previous tax regime. To this end, a presumption has been established that operates, in any case, in relation to profits and their production period and not in relation to the earners".*

The Financial Administration **with the answer to the question n.163 indeed overturned the scope of paragraph 1006 in comment and the decrees to which it refers (DM 2/4/2008; DM 26/5/2017) in the presence of distributions of operating profits and reserves formed with "recent" profits.**

In fact, as correctly stated in Assonime Circular no. 20/2010, the presumption of prior distribution of profits made before 2008 (now before 2018), should apply to the reserves attributed **only and exclusively to individuals who have qualified holdings and should not operate for the portion of profits attributed to different** subjects for which the normal civil and tax rules (Article 47, paragraph 1, of the TUIR) for the allocation of dividends would apply.

In fact, in the Explanatory Report to the D.M. 2 April 2008 it was specified that the regulatory intervention was based on the assumption that the percentages (taxation on 40%) had been determined, *"on the occasion of the 2003 reform, **starting from the assumption that the profits deriving from qualified shareholdings not held in the business year** and from qualified and non-qualified shareholdings held*

in the business year , the recipient natural person would be entitled to the marginal income tax rate and in such a way as to guarantee a total theoretical levy on the profits in question (and on the capital gains) (resulting, that is to say, from the combined company-shareholder taxation) equal to that marginal rate. Consequently, since the marginal income tax rate, in force on 1 January 2004, is equal to 45 percent, and placed a profit of 100 gross of IRES, the percentage of contribution to the total income of the profits distributable to the shareholder after the fulfillment of the IRES (equal to 67), had to be such as to guarantee an additional income tax levy equal to 12 ".
Therefore, following these systematic criteria, in raising the amount of the taxable taxable base from 40% to 49.72%, it was taken into account that the IRES rate had been reduced to 27.5%.
In the Explanatory Report it was very clear the motivation that had led to the forecast of the priority distribution of income accrued until 2007 (unlike what the Agency states in the reply to the question):: *"The different measure of competition to the formation of income applicable to profits produced up to the current year at 31 December 2007 and to profits produced after the aforementioned financial year,* ***made it necessary to introduce a presumption that allows to regulate the criterion of "exit" of the profits produced****. In this regard, it was envisaged that starting from the distribution resolutions subsequent to the one concerning the profit for the current year at 31 December 2007,* ***for the purposes of the taxation of the recipient*** (editor's note, or of the subjects to whom the partial taxation of dividends was applied or to qualified shareholders in relation to investments not held under the business regime and to qualified shareholders and not qualified for the shareholdings held in the business year) ***the dividends distributed are considered primarily formed with profits produced by the company or entity participated up to that year".***

Reply of the Revenue Agency no. 110/2022

The Reply of the Revenue Agency no. 110/2022 concerns the issue of the guarantee clauses with which the seller of a shareholding undertakes to indemnify the purchaser with respect to the occurrence of “contingent liabilities” that may arise in the acquired company, after the completion of the sales transaction.
The Reply includes this case in the context of price adjustments, applying to it the same tax regime associated with the earn-out clauses. Basically, in both cases the sums due to the purchaser represent an adjustment to the original purchase price of the shareholding. Therefore, the amount received by the purchaser after the reduction of the original purchase price of the shareholdings doesn’t constitute a “contingent asset”, even if it is charged to the income statement because of the accounting standards applied by the company, but it must be subject to the same fiscal discipline which regulated the contribution to the formation of the income of that component that is rectified. For IRES purposes, therefore, the amount is subject to the tax regime typical of adjustments to the price of shareholdings.
For IRAP purposes, on the other hand, by virtue of the principle of direct drive of the income statement results, the sums received - if they are included in a relevant item for the purpose of determining the value of net production - become significant in relation to the regional tax and must be taxed.
The Reply appears to diverge with the recent Decision of the Supreme Court no. 17011 of 13 August 2020, which, on the other hand, affirms the distinction in tax treatment between guarantee clauses, which generate fiscally relevant indemnities such as contingent assets, and earn-out clauses, which give rise to qualified payments - also fiscally - such as adjustments to the price of shareholdings.
The approach stated in Reply 110 is also reiterated in the even more recent Reply no. 132 of 21 March 2022, which confirms that the amount resulting from a guarantee clause in favor of the purchaser of an entire shareholding represents an adjustment to the original purchase price, not assuming relevance in determining the IRES tax base.

Book and/or tax step up of values: further comments provided by the Italian Tax Authority (ITA) and Assonime

The circular letters n. 22 of March 1st, 2022 of ITA and n. 12 of March 31st, 2022 of Assonime have somehow re-attributed interest to the book and/or tax step up of values provided by art. 110 of Law Decree n. 104/2020 after the restrictions settled by the Law n. 234/2021 (Financial Law 2022).

Art. 110, replicating a temporary provision (the book step up of values and the related tax step up of the higher accounting values) of previous similar laws, caught the attention thanks to the very low substitute tax (3%) and the extension (through the Financial Law 2021) of such provisions to goodwill and other intangibles (different from those representing "goods"). To reduce the (foreseeable) negative impacts on the taxes to be cashed, art. 1, p. 622 and following of the Financial Law 2022 has modified the provisions set forth for the tax deduction of the higher values attributed (due to the book and/or tax step up) to intangibles with an original tax depreciation over 18 years (essentially, goodwill and trademarks); in summary, the Financial Law 2022 has:

a) provided, starting from 2021, a tax depreciation period not shorter than 50 years
   or, as an alternative
b) allowed entities to keep the "normal" minimum tax depreciation period (18 years) by paying a substitute tax equal to the one provided by art. 176, p. 2-ter of Italian Corporate Income Tax Code (12% on differences up to € 5 mln, 14% on the excess and up to € 10 mln, 16% of amounts exceeding € 10 mln).

The ITA and Assonime have provided, also with different solutions, interpretations on the tax treatment of assets subject to book and/or tax step up.

Below are summarized the main interpretations.

The most interesting comment on the deprecion of assets covered by the Financial Law 2022 relates to the fact that the value stepped up for tax purposes represents a single asset; thus, in case of step up of an asset that had (at 31 December 2020) a preexisting tax value, two amortization plans apply:

- the amortization of the pre-existing tax (goss) value under the ordinary rules (generally, 1/18th of the original tax value) and
- the amortization of the stepped up value starting from 2021 (in 50 years or, in case of payment of the substitute tax by brackets, in 18 years).

Such criterion should not apply to assets different from those interested by the new rules provided by the Financial Law 2022; for those assets, indeed, the clarifications provided by the ITA in the ruling n. 106/2022 should apply, confirming the three alternatives for the tax step up (1. Increase in both the asset cost and the cumulated depreciation fund; 2) increase in the asset cost only; 3. Decrease in the cumulated depreciation fund).

Therefore, the tax value to consider for the application of the tax depreciation rates should be the tax value gross of the depreciations already deducted (in line with art. 110 of CIT Code).

In addition, another interesting point, representing a change of a previous ITA's interpretation, relates to the capital reserves subject to tax suspension in case of tax step up. In particular, ITA stated - in line with comments made by doctrine and Assonime - that the tax suspension does not change the nature of the reserve (as such, capital reserves under suspension are not re-qualified in profit reserves) due to its mere function of fixing the full tax debt in the higher values recognised. Therefore, capital reserves under suspension in case of tax step up keep their original nature and, thus, the repayment of the capital reserve under suspension does not imply a taxable event in the hand of the share/quota holder.

ITA has changed its restrictive interpretations also with ragard to the distribution scenario provided in recent rulings (n. 316/2019), where it stated that each kind of utilization of the reserves (from book step up) under suspension apart from the coverage of losses (included the omitted allocation in case of mergers/demergers), implies the full taxation in the case of distribution. The Circular n. 22/E, in line with the comments of Assonime, provides for the application of the ordinary taxation in case of distribution to the share/quota holders only.

Always with regard ti the taxation of reserves, ITA, in line with the Supreme Court's interpretation, changed its position on the tax base to be considered for the payment of the 10% substitute tax due for the recognition of reserve. For the book and/or tax step up of higher values (100, for instance), the taxpayer has to book to the net equity the book step up value net of the substitute tax (equal to 3), or to

put under tax suspension preexisting reserves (equal to 97). ITA has now clarified that the tax base for the substitute tax (10%) due to free such reserves is equal to the net value (97) of the mentioned net equity amounts.

OIC n. 10

The Organismo Italiano di Contabilità has published a document (still in draft) which aims to discipline the effects of revocation of tax revaluation performed in 2020.

The document states that entities that opt to maintain the 18-years period of amortization recognize a liability for the substitutive tax to pay corresponding to a reduction of net equity. In case of fiscal revaluation of goodwill, the liability corresponds with an increase of the item "Attività per imposta sostitutiva da riallineamento". The same treatment is applied to the part of substitutive tax to be recognized as a cost of the period.

The entities that, differently, opt within the date of approval of financial statements for the revocation of the tax revaluation shall recognize:

- A deferred tax liability (DTL) on the temporary taxable difference between the accounting value of the item and its fiscal value. The DTL recognised corresponds to a reduction in net equity;
- A tax asset corresponding to the amounts previously paid that, as a consequence of the revocation of tax revaluation, shall be reimboursed. The tax asset recognized corresponds to an increase in net equity.

Law 28 March 2022, n. 25

Law 28 March 2022, n. 25 (conversion of the Law Decree 27 January 2022, n. 4) has introduced the faculty, for entities which intend to reverse tax revaluations made in accordance with art. 110 of Law Decree 14 August 2020, n. 104, to eliminate the effects of the revaluation also for accounting purposes. The elimination of the effects of the revaluation is accounted for reducing the carrying amount of the asset to the amount that it would have had if the revaluation had not been done, canceling the reserve of revaluation and canceling the deferred tax liabilities, if any. The notes provide disclosure about the effects of such revocation.

The extraordinary duty against the household bill increase

As known, for the purposes of limiting the effects of the increase of the energy prices and tariffs, through article 37 of Law Decree March 23, 2022 no. 21 an extraordinary solidaristic duty on the energy enterprises has been introduced only for 2022. In particular it applies to the following enterprises:

- those carrying out in the Italian territory, for the subsequent sale of goods, the energy production activity;
- those carrying out the activity of methan gas production or extraction of natural gas;
- those reselling electrical energy, methan gas and natural gas as well as those carrying out the activity of production, distribution and trade of oil products;
- those which, for the subsequent resale, either permanently import electrical energy, natural or methan gas, oil products or introduce in the Italian territory said goods originating from other EU member States.

The enterprises which carry out the activity of organizing and managing of marketplaces dedicated to the trade of electrical energy, gas, green certificates and fuels are not subject to the duty payment.

According to what par. 2 of the above mentioned art. 37 provides, the taxable basis is represented by the increase of the balance of the ouput transactions and input transactions related to the period from October 1, 2021 to March 31, 2022 compared with the balance of the period from October 1, 2020 to March 31, 2021. For the purposes of the balance calculation, the total amount of the output transactions, net of VAT, and the total amount of the input transactions, again net of VAT, must be considered as reported in the periodic VAT settlement communications related to said periods.

The duty, not deductible from both the corporate income tax as well and the regional tax on the production activities, applies at a 10% rate whenever the above mentioned increase exceeds euro 5.000.000 and it is not due if same increase is below 10%; when said thresholds are exceeded, the duty, which is calculated and paid by June 30, 2022 according to art. 17 of Legislative Decree no. 241/97, must be applied to all the amount of the balance increase (including the portion of it up to 5.000.000).
For the purposes of the assessment, penalties, collection and litigation VAT rules apply if compatible.
This is briefly the duty regulation, whose nature is that of a tax which resembles the IRES surtax provided for in art. 81 of Law Decree no. 112/2008 i.e. the so-called Robin Hood Tax (which applied to the energy industry).
Its selectivity should not raise any concern with respect to its compliance with the Constitution if one considers the conclusion reached by the Constitutional Court, exactly, in relation to the RHT in the historical ruling no. 10 of 2015. In such ruling, as well known, the Court held to be legitimate a heavier taxation of entities which present an "unusual profitability", thus "applying to possible not recurrent margins, even if speculative, of the energy and oil industry".
However such conclusion was conditional upon the assumed coherence between the tax regulation and its goal, which in the case of the extraordinary duty at stake is represented by the need to tax only the excess earnings connected to the privileged position of the taxpayer activity.
Here the new tax presents some critical issues since the taxable basis is represented by the balance increase of output and input transactions related to a certain period measured on the basis of data resulting from the VAT settlement communications even if in said balance also output transactions which have nothing to do with the tax rationale may flow into. In this respect it is pointed out by certain commentators that the balance increase could indeed depend on M&A transactions (this is the case, for instance, of a share deal VAT exempted) or on costs which are out of the VAT scope, event not so rare in the energy industry such as, for instance, the losses accrued on derivatives (if considered out of the VAT scope). Well, in such cases the duty rationale fails to be fulfilled since it does not apply to the excess earnings originated by the privileged position of the enterprises of the particular industry.
The aforesaid without taking into account that the non deductibility of the new tax from the corporate income tax will likely be reconsidered by the conversion law as it is not compliant with what the Constitutional Court has held also recently (as to IMU see ruling no. 262/2020).
Nor said non deductibility could be explainable in our case in terms of proportionality and reasonableness to avoid undue deductions of expenses of doubtful inherence, or relevant assessment costs, or again to prevent from phenomena of tax evasion or avoidance (i.e. the only cases when the Constitutional Court allows limitations to the deduction of costs borne in the enterprise activity).

New possibility for the revaluation of company shares

Decree Law 17/2022, Article 29
Article 29 of Decree Law no. 17 of March 1, 2022 provides for the reopening of the terms for enfranchisement of the value of equity and land investments held by individuals and other IRPEF entities as of January 1, 2022.
There are two new elements:

- the amount of the substitute tax has become 14 percent;
- the deadline for the appraisal and payment of the first instalment of the substitute tax is set at June 15, 2022.

In this regard, with reference to equity investments in order to avoid some risks in the event of transactions with related parties, the insights offered by official and case law interpretations on the subject of leveraged cash out become important.
In the answer to questioning 156 of March 25, 2022, the Revenue Agency has deemed not elusive the partial transfer of shares previously revalued. In the case under examination, the transfer takes place to third parties, and the payment of the price will take place following the perception by the new shareholders of dividends distributed by the target company. The operation is characterized by economic purposes consisting in a gradual takeover of new shareholders which accompanies the realization of the share value by the vendor shareholders.

It should be remembered that the tax authorities have always had a negative assessment of leveraged cash out operations in which the sale of revalued shares served to transform capital gains (from dividends or withdrawal) into capital gains, judging positively those cases in which there is a total exit of the transferors from the shareholding structure with reference to the shares transferred (for example answer to question no. 4 of January 5, 2021).
Finally, with reference to LCO operations, it should also be remembered that sentence no. 25131 of September 16, 2021, issued by the Supreme Court, according to which the liquidation of the shares of shareholders no longer interested in the economic activity of the company represents a valid economic reason that excludes abuse of right.

Limitation to the carry-forward of tax losses pursuant to art. 84 (3) of the Presidential Decree 917/1986 also in case of transfer of the shares of the parent company | Tax ruling n. 39 dated 01.20.2022

The Italian tax authorities clarified, through a tax ruling (No. 39) dated 20 January 2022, that in the case of a change of the indirect owner of the majority of the shares of an Italian company, the limitations on the transfer of *tax attributes* (NOLs, excess interest expense and excess notional interest deductions) provided by article 84(3) of the Italian tax code may be applicable.
According to article 84(3), a transfer of shares through which the majority of the voting rights of an Italian company is transferred could trigger the potential forfeiture of Italian *tax attributes* if there is a change in the business activity carried out by the Italian company in the two years prior to or the two years after the year of the change in control. The carryforward limitations do not apply if certain criteria (i.e. “vitality test”) are met.
The Italian tax authorities rejected the interpretation proposed by the taxpayer and clarified that, although article 84(3) requires a change of the voting rights of the Italian company, a position that the limitation on the transfer of tax attributes should not apply in the case of an indirect change of control would be contrary to the intent of article 84(3). As stated in explanatory notes issued by the Italian government, the rationale behind the limitations under article 84(3) is to prevent the acquisition of Italian companies with the sole or main purpose of using their NOLs and other tax attributes. A conclusion that a change of the indirect control of an Italian company does not trigger the restrictions provided by article 84(3) would offer a clear way to circumvent these rules to taxpayers aiming to pursue tax-loss harvesting strategies.

Merger with LBO is not elusive if it is not a circular transaction | Supreme Court, Order no. 6623 of March 1, 2022

The Supreme Court has expressed its statement not only on the legitimacy of leveraged buy out operations, a well-established topic, but also on the absence of abuse of law when these operations are supported by valid economic reasons.
In practice, these solutions are adopted every time a third-party company is to be acquired by resorting to indebtedness that will be repaid over time by the resources of the acquired company: it is implicit, in this model, that there is a change in the corporate structure of the target company.
Abuse of right can be found when the entire sequence of operations does not lead to a change in the corporate structure (so-called circular operations) but is carried out only to obtain undue tax advantages.
Consideration should also be given to the recent response to questioning no. 142 of March 21, 2022, which deemed to be abusive a reverse merger with LBO in which the debt was not aimed at purchase (moreover, within the group), but at financing ordinary activities.

Supreme Court October 6th 2022, n. 27158 – Sale of shareholdings and the ban of the abuse of law principle

The question raised to the Supreme Court concerned two different and concomitant sales of shareholdings carried out by two Italian companies – which respectively owned a 34% shareholding (company A) and a 66% shareholding (company B) into another Italian company (company C) – towards the same purchaser, not belonging to the group (company D).

Even though the unit market value of the sold shareholding was equal to Euro 6,20, company A sold its shareholdings, meeting the pex requirements, to the unit price of Euro 9,80, whilst company B sold its shareholdings, lacking in the pex requirements, to the unit price of Euro 2,87.

The Italian Revenue Agency issued a notice of assessment by which, challenging an undue tax advantage overall enjoyed by the associated companies A and B, redetermined, in the hands of the latest companies, the unit sale price of the shareholdings in the company C in Euro 6,20. More in particular, the tax authorities redetermined, at the company A, a lower capital gain subject to pex, whilst at the company B they determined an higher revenue subject to the ordinary taxable regime.

The Supreme Court, by confirming the position of the Italian Revenue Agency, considered the tax advantages realized by the taxpayers as undue, since in contrast with the jurisprudential principle of the ban of abuse of law (please note that at the time of the facts art. 10-bis of L. n. 212/2000 was not entered into force yet), reckoning, in particular, the said sales of shareholding, carried out at a disproportionate consideration compared to the relevant market value, as lacking of economic substance since outside of a "normal market logic".

Indirect Tax | VAT

Credit Notes

Credit notes issued according to art. 26 of Presidential Decree no. 633 of 1972 ("VAT Decree") | Italian Tax Authorities Circular no. 20/E of December 29, 2021 and Assonime Circular no. 10 of March 15, 2022

Italian Tax Authorities provided clarifications on credit notes further to the law amendments occurred with Decree 73/2021 (applicable to bankruptcy procedures that have started after May 26, 2021).

We summarize here-below the main amendments:

- ***requirement for the issuance of credit notes* – par. 3-bis:** it is provided that the credit notes can be issued starting from the moment in which the bankruptcy procedure is opened and their issuance no longer depends on the participation of the supplier in the bankruptcy procedure;
- ***deadline to raise the credit note* par. 3-bis and 10-bis:** the credit note can be issued starting from the beginning/opening of the bankruptcy procedure and within the submission of the VAT Return related to the year in which the conditions to issue the credit notes have occurred. The VAT deduction can be exercised either through the monthly VAT computations related to the month in which the credit note has been raised or directly through the annual VAT Return of the related fiscal year. In the **Paragraph 10-bis** it is identified the moment – per each bankruptcy procedure – in which the purchaser can be considered subject to the insolvency procedure.
- ***purchaser obligations* - paragraph 5-bis:** in case of bankruptcy procedures listed under paragraph 3-bis lett. a), the insolvency administrator is not obliged to record the credit note issued in the VAT ledgers as debit VAT, being the VAT debit a cost for the Revenue Agency. However, if after the issuance of the credit note, the amount is totally or partially paid, the supplier has to raise a debit note and the purchaser has the right to deduct the related VAT;
- ***Missed credit note issuance and VAT recoverability* :** It has been pointed out that if the deadline to issue the credit note has expired, it is not possible to submit an Integrative VAT Return to recover the VAT paid. If, however, the omitted issuance of the credit note is not attributable to the supplier, it can ask for the refund procedure under art. 30-ter of the VAT Decree.

On the above clarifications, Assonime, with Circular no. 10 of March 15, 2022**,** highlighted certain difficulties related to the amendments of art. 26. Here-below their summary:

- ***bankruptcy procedures opened in December*** - the supplier should only have 4 months of the following year to raise the credit note (to be raised on time within the Annual VAT Return of the year in which the conditions occurred). It should be important to give taxpayers the possibility to raise the credit notes also at the end of the bankruptcy procedure;
- **possible use of the refund procedure under art. 30-ter** – Assonime outlines that the VAT refund procedure under art. 30-ter should not be used as a residual law provision to be claimed only when the taxpayer has no longer the possibility to raise the credit note, since the possibility to have the VAT refunded should be in any case recognized to taxpayers when there is no risk for the Revenue of VAT loss.

Transfer Pricing Adjustment

VAT treatment of the transfer pricing adjustment - Tax ruling no. 884 of December 30, 2021

Italian tax authorities provide important clarifications on the VAT treatment applicable to the transfer pricing adjustments.

The ruling has been submitted by a leader company in the fashion industry "Alfa", operating as sub-holding in a multinational group and having as main business:

- production and sale of clothes for the brand "Beta";
- handling foreign controlled companies, handling the retail Italian sector, and the wholesale all over the world. More in detail, for the retail sector the company sell to the controlled companies the finished product to be solda gain from each controlled company.

Italian tax authorities clarify that in order to ascertain the correct VAT treatment to be assigned to the TP adjustments it is needed to analyze if they constitute the consideration of an autonomous sale of goods or supply of services rendered by the company that receives the tp adjustments or an increase of the taxable base, according to art. 13 of the VAT Decree, of the first sale of goods carried out by Alfa.
In the case at stake the adjustments are made further to the analysis performed at year end under the tp policy and are only needed to let the companies of the group reaching the correct margin, as a consequence, they do not represent the sales carried out between the parties.
As clarified by Ruling answer no. 60/2018 tp adjustments influence the increase/decrease of the tax base if: a) there is a consideration for the adjustment; b) the sales to which the adjustment relates to can be individuated; c) a link is recognized between sales and the consideration.
In the case at stake the TP adjustments are not linked to the sales performed, therefore they are excluded from the application of VAT.

Intermediation activities in the sale of shares | Exempt transactions Art. 10, par. 1, n. 9) of Decree 26 October 1972, n. 633

VAT - exempt transactions - intermediation activities in the sale of shares – Ruling answer no. 852/2021

Italian tax Authorities provide clarification on the application of the exemption ex art. 10, par.1, no. 9) of Decree no. 26 October 1972, n. 633 in relation to the activity of intermediation in the sale of shares.
More in depth, the applicant company had intervened in the sale of all the shares held in a Danish company (operating in the management software for the handing of clubs and gyms). For such sale a broker (an independent third party) was involved, to identify potential buyers, managing the different stages of the contract and supporting the parties in order to conclude the deal. The consideration accrued by the broker was determined in proportion to the value of the share's sale and also invoiced by the broker without application of VAT, without mentioning the reverse charge mechanism or exposing the local VAT number of the broker (not VIES authorization and inactive VAT number). The applicant requested confirmation that the service received was a VAT exempt intermediary activity, under art. 10, par. 1, no. 9).
From a subjective point of view the broker was in a position of absolute independence from both contractual parties that have been put in direct contact. To define the correct VAT treatment, however of the services rendered, it is necessary to investigate the kind of services. Italian tax authorities recall Resolution 38/E, of 15 May 2018, with which it provided guidance on the conditions under which investment advisory services should be included within the scope of mediation services (exempt ex art. 10, par. 1, no. 9) or qualified as generic consultancy services subject to VAT). Accordingly, ITA confirm that investment advisory services where the advisory service provider is not involved in the negotiation and conclusion of the contract between the client and the party promoting the securities does not fall within the scope the application of the VAT exemption pursuant to art. 135, letter f) of VAT Directive 2006/112/EC, as it cannot be qualified as a trading/intermediation activity.

VAT | Regulation of contracts relating to financial derivatives - position of Italian tax authorities | ruling answer no. 1 of 3 January 2022 and Assonime circular no. 6 of 15 February 2022

Italian tax Authorities provided clarifications on the VAT treatment of differentials to be settled in execution of financial derivatives contracts related to the change in the electricity price. In detail, the case was as follows:

1. Alfa signs a contract to buy and sell electricity with Beta, purchasing energy at a fixed rate for a specific period of time to cover the risks arising from the fluctuation of the price. As provided in the contract, the parties agree to pay the differential arising from the fluctuation of energy price. Therefore, it could happen that Alfa has to pay the differential, as defined in the contract and to issue an invoice against Beta.

In the light of the above, the tax Authority notes that where the contract concerns the purchase and sale of electricity with payment of price differentials to cover the risk of fluctuation of the energy price there is a derivative finance contract (swap) which is that contract by which the parties mutually agree each other to pay a certain amount determined by an uncertain event. Once the calculations have been made following the agreed period, one of the contractors is obliged to pay the difference. Having said this, from a fiscal point of view, financial transactions (including those relating to financial instruments intended to cover the risks of changes in interest rates, exchange rates, stock exchange indices or market prices of goods) are covered by the exemption pursuant to art. 10 no. 4). The relevant taxable amount must be identified in the amount of the differential.

In Circular No. 6 of 15 February 2022, Assonime commented on this resolution. The position expressed in the resolution of 3 January lends itself to critical comments, both with regard to legal requirements and with regard to the right to deduct tax paid by the taxable person on the purchase of goods and services. In particular:

- the underlying need for such contracts is, in essence, to avoid that such quotations could cause the erosion of profit margins as a result of the increase in the price of raw materials or the contraction in the price of the products covered by the activity. In other cases, the coverage relates to risks linked to the evolution of currency or securities quotations. The hedging function, therefore, is frequent, if not prevalent, in these contracts and characterizes their legal cause. Such contracts are concluded by entities that intend to cover certain risks using professional intermediaries - who often assume the role of counterparties to the transaction and require a fee, usually called a premium, for the service rendered, which is the consideration for the transaction. The service remains that specified in the contract that sees as a lender the person who assumes the risk feared by the counterparty. The sum due, therefore, constitutes the object of the service, similar to what happens in insurance contracts in which the service is rendered by the insurance company that charges a premium as consideration, while any insurance reimbursement remains outside the scope of VAT, constituting a mere transfer of money, as such excluded from the taxation.
- restrictions on the right to deduct. art. 19-bis, to tell the truth, excludes that the percentage of deduction can be influenced by the exempt transactions referred to in art. 10, n. 4, but only if these transactions are not the object of the taxable person’s own activity or are ancillary to taxable transactions.

Indirect Tax | Customs

New Customs Tariff and new Harmonized System

On 1 January 2022 the new version of the **Harmonized System and the EU Customs Tariff** entered into force (Regulation (EU) 2021/1832, as amended by OJEU L414 dated 19.11.21 and subsequent amendments).
The EU Customs Tariff is based on the Harmonized Commodity Description and Coding System (HS), common at the first 6-digit level to all countries participating in the World Customs Organization.
The HS and the EU Tariff are **regularly updated** (the first every 5 years, the second every year) to take into account any changes made in the requirements related to statistics and trade policy as well as technological and commercial developments.
The new version of the HS introduces **several amendments**, mainly consisting in the recognition of **new products and the elimination** of those subject to **less relevant trade volumes**.
Consequently, the amendments made to the 2022 EU Tariff concerns an important number of Chapters.

Non-preferential origin (Delegated Regulation 2021/1934; Guidance on non-preferential rules of origin - March 2022; Mandatory fill-in of the non-preferential origin field in the Intrastat forms)

Hereby we summarize the main updates related to the **non-preferential origin of the goods**:

- EU Regulation 2021/1934 provided **clarifications on the application of specific rules** (e.g., processing operations not economically justified; minimal operations); moreover, since the Harmonized System has been amended in its 2022 version, relevant references in Annexes 22-01, 22-02 and 22-03 were edited accordingly.
- Consequently, the European Commission updated the **Guidance on non-preferential rules of origin**, clarifying certain provisions such as the ones related to packing materials, to the roll-up rule and to the determination of **origin for products not covered by Annex 22-01 of EU Reg. 2015/2446**.
- Determination No. 493869/2021 of the Italian Customs Agency ("ADM"), while providing the updated instructions for filling the Intrastat forms, made the information on the **Country of Origin** (as defined by the customs rules governing non-preferential origin) a mandatory field in the INTRA 1bis (supplies) forms.

Procedures for issuing circulation certificates (EUR.1, EUR.MED, A.TR)

With Circular no. 12 of March 29, 2022, and Notice of April 1, 2022, the Italian Customs Agency has established **the end of the procedure by which operators could obtain pre-signed movement certificates EUR.1/EUR.MED** (preferential origin) and **A.TR** (free circulation certificate in the UE-Turkey customs union). As of April 1, three different issuing methods will be applicable:

- **the ordinary one**, through which the exporters (or customs representatives), ask the certificate in the export declaration by submitting the printout to the competent office for stamping, signature and validation;
- **the simplified method,** granted to AEO operators authorized to the local clearance procedure, allows the print-out of the certificate, realized on pre-signed templates, upon request and demonstration of specific and objective operative needs;
- **The full digital method,** applicable only to certificates towards Switzerland.

While waiting for a full digitalization, the declaration of origin in the invoice is the recommended method.

Non EU established importer

With Circular n. 40 of 14 december 2022, the Italian Customs Agency provided operative clarifications regarding the cases of submission of an import customs declaration **by a subject not established in the EU**, specifying the requirements to act as an **importer** and as a **declarant**.

In particular:

- the non-established subject can act as importer and shall be identified with an EORI number;
- the non-established subject can submit the import customs declaration exclusively appointing a customs representative (established in the EU) who acts in his own name and for the account of the importer (**indirect representation)**;
- the **tax representative for VAT purposes** cannot submit a customs declaration on behalf of a non- established subject, since he can **exclusively act in the context of VAT obligations**. Moreover, the VAT number issued to the tax representative must appear in box 44 of the customs declaration.

AIDA re-engineering project for customs declarations

In the context of the modernization of the existing national customs systems, in order to align with the provisions of articles 6 and 278 UCC, the Italian Customs Agency has undertaken the so-called **AIDA re-engineering project.**

The complete release of the new import customs clearance systems is set for **June 9, 2022.**

The new system will allow, among others: **the incremental sending of customs declaration data**; **the increase of articles per declaration from 40 to 999**; **the possibility of requesting the release of goods by item** (instead of by complete declaration); and **the exchange of messages in XML extension via web services.**

This approach will also allow the **electronic dialogue** with external databases (Certex, Customs Decisions System, REX).

The exchange of data in the form of the new electronic messages for customs import declarations will represent itself the actual customs declaration, **eliminating the need (and possibility) to print the SAD.**

Dual-use items

On September 9, 2021, Regulation (EU) no. 2021/821 entered into force, revising the Union regime for the control of exports, brokering, technical assistance, transit and transfer of **dual-use items, (i.e., goods, software and technologies that can be used for both civilian and military applications**).

With this Regulation the **list of dual-use goods has been extended**, **new definitions** of "export", "re-export", "exporter" and "transit" **have been introduced**, a **new type of authorization** "for large projects" has been inserted, as well as two new general authorizations of the Union (intra-group export of software and technology: EU007, encryption: EU008); finally, an **Internal Compliance Programme (ICP)** for holders of a global authorization has been introduced as mandatory.

On January 7, 2022 Delegated Regulation (EU) no. 2022/1, which amends Reg. (EU) 2021/821 regarding the list of dual-use items, entered into force. By making few amendments, this Regulation has provided one of the **periodic updates to which the goods referred in the Annex I of Reg. (EU) No. 2021/821 are subject.** Substantive changes are expected for the next adjustment, scheduled by the end of the year.

As mentioned in Recital (30) of the Reg. (EU) 2021/821 regarding the introduction of electronic licensing procedure, it is relevant that **starting on July 1, 2022, the eLicensing system will become effective in Italy**. The eLicensing system will allow operators to apply for authorizations online.

Excise updates: taxpayer and taxable event (Legislative Decree no. 180 of November 5, 2021)

The **Legislative Decree of the 5 November 2021, n. 180**, transposing the Directive (EU) 2020/262, ammends the D. Lgs. n. 504 of 1995 - Excise Act (henceforth, TUA) - providing immediatly applicable amendments, as well as other modifications coming into force from 13 February 2023.

Among the changes, we highlight the definition of "**taxable event**", ruled by the new art. 2, paragraph 1, which identifies the arising of the tax liability for excise goods in the following events:

- in the time of manufacture, including, where applicable, the underground extraction;
- in the case of irregular importation or entry into the territory of the State.
- Moreover, we point out the introduction of two new subjects potentially obliged to pay the tax:
- the **certified consignor**: for intra-EU transport operations, even occasional, of excise goods already released for consumption in the territory of the State;
- the **certified consignee**: an entity authorised to receive from EU countries excise goods released for consumption in the territory of another Member State.

The entities intending to act as a certified consignee shall be authorised in advance by the Italian Customs Agency and must have the status of authorised warehousekeeper or of registered consignee.

For the certified consignor, on the other hand, no particular subjective requirements are required, because of the lower risk of avoiding the payment of excise duties.

Moreover, the new art. 2, paragraph 4, letter b-bis), establishes a **joint liability** among the authorised warehousekeeper, the registered consignor and the person who stores the products.

In relation to the irregular import and entry of goods subject to excise, the debtor of the excise duties is the same of the **customs duties.**

Global Employer Services

Supreme Court – Judge – 14th of February 2022 n. 5147 | Improper classification of income deriving by warrant transactions

1. Synthesis[1]

In the judgment no. 5147 filed on February 14th 2022, the Supreme Court examined a particular case of considerable complexity that looks letting arise a preliminary issue of improper classification of income. On the first side, the taxpayer claims the correct application of Article 60 of Legislative Decree no. 50/2017 by qualifying the emerging income as financial income (*carried interest*); on the other side, the Tax Authority assumes in the provided motivations the general principle referred to in Article 51 of the Italian Tax Code (TUIR) qualifying the emerging income as employment income as the conditions for invoking Article 60 of Legislative Decree no. 50 / 2017 or rather **real participation in risk capital** are missing.

2. The case of the judgement and the assessments of the Supreme Court

The present case concerns a transaction of warrants with enhanced property rights (so-called "carried interests") by a *manager* through a **loan** granted to him on the basis of agreements that provide for its repayment following the final execution of the divestment.
Specifically, Article 60 of Legislative Decree no. 50 of April 24th 2017, introduced a legal presumption under which the remuneration by way of *carried interest* received by employees or directors of investment funds should be included among the capital income (and not employment income) when three conditions stated by the law are jointly met.
According to the Supreme Court, the clause that "subordinates" the repayment of the financed capital to divestment (and therefore at a time after the payment of the proceeds linked to the *warrant*) would not be considered suitable to guarantee the alignment of interests between investors and management; therefore, the condition of the actual monetary disbursement (for the purposes of classifying the proceeds as financial income) could not be considered to exist, as indeed the debtor manager would not be subject to **any risk of investment loss** having to repay the sums financed at a later time after the receipt of the proceeds from *carried interest*. According to the Supreme Court, this circumstance is a sufficient condition to qualify the proceeds of the warrants received by the manager as employment income, pursuant to the Article 51 of the Italian Tax Code ("TUIR") as it would actually be a salary incentive and consequently taxable at a progressive rate.
According to the clarifications provided by the Tax Authority in the Circular Letter no. 25/E of October 16th 2017, there is an "actual disbursement" only if the manager assumes a substantial role as an investor, **participating in the risk of loss of the invested capital**. Otherwise, agreements that negatively affect the risk position of the manager to the point of completely neutralizing it, for example due to the occurrence of certain conditions (i.e. clauses that guarantee the employee the full return, in any case, of the invested capital) do not allow this requirement to be considered verified.
On the basis of the aforementioned administrative practice, the effective participation of management in the economic risk of the undertaking would not be found where financial instruments with *carried interest* are purchased with **loans granted** on particularly favorable terms that exclude entirely or partially the repayment of the subsidized capital (for example as a result of the waiver by the creditor or due to the presence of other clauses with analogues effects). In this case, in fact, by not participating in any risk of loss of the invested capital, the manager does not assume a substantial role of investor. Different conclusions can be reached in relation to financial instruments purchased by managers or employees with resources deriving from loans disbursed at interest rates lower than market rates; in this case, indeed, the Tax Authority has clarified that the requirement of participation in the investment risk can be considered

integrated, being understood that such loans provided in connection with the employment relation constitute an employee remuneration.

In the case examined in the judgement, the Supreme Court of Cassation, sharing the complaints of the Tax Authority and the reconstruction carried out by the Court of First Instance, considered correct to exclude the recurrence of an **actual monetary disbursement** for the manager likely to expose the investor to a risk of loss, as the repayment of the loan could have been requested from the manager only at the time of disinvestment and therefore at a time after the payment of the warrants proceeds. In this regard, from the reading of the judgement it is not clear if there were specific and additional elements evaluated by the Court of Cassation in the reconstruction of the contractual agreements that would exclude entirely or partially an effective obligation to repay the sums paid for financing the purchase of the warrant.

In conclusion, the Supreme Court confirmed the traceability of the dispute to the case of unfaithful declaration for tax evasion caused by the improper qualification of income of a financial nature instead of employment income in violation of Article 60 of Legislative Decree no. 50 of 2017.

[1] For the sake of completeness, it should be noted that the ruling in question also deals with the confirmation that an additional charge against the taxpayer, consisting of' the interposition of its personal holding company in the perception of a capital gain.

Supreme Court – Judge - no. 8286 of March 15th, 2022 | Tax residency requires proof of the center of vital interests

1. Summary

In terms of tax subjectivity of the Italian citizen residing abroad, pursuant to the combined provisions of Article 2 of the Italian Tax Code and Article 43 of the Civil Code, an Italian citizen who, despite residing abroad, establishes in Italy, for most of the tax period, his domicile, understood as the main place of business and economic interests as well as personal relations, has to be considered an individual subject to taxation in Italy, as inferable from presumptive elements and regardless of his registration with the AIRE (register of Italian citizens residing abroad). This is the principle of law reaffirmed by the Supreme Court, ordinance no. 8286 filed on March 15, thus consolidating the orientation on the matter.

2. The case of the Judgement and the assessments of the Supreme Court

The matter in question originates from the notification to an Italian citizen, registered in AIRE and residing abroad, of an assessment notice with which the Tax Administration requested higher taxes from him, considering him to be tax resident in Italy on the basis of the elements therein indicated. The Regional Court found that the documentation filed by the taxpayer had unequivocally demonstrated his foreign residence and that the inconsistencies reported by the Tax Administration, according to which a plurality of residences in the United Kingdom and Monte Carlo coexisted, could be considered overcome. Therefore, the Tax Authority filed an appeal to the Supreme Court complaining, with a single reason, the violation and false application of Article 2 of the Italian Tax Code and Article 43 of the Civil Code, as the appellate judge erroneously found that the documentation and the elements produced by the taxpayer prove an effective residence abroad. More precisely, the Tax Authority **recalled domestic and euro-unitary** jurisprudence, highlighting how they enhance p**ersonal and professional ties**, verifiable from the physical presence of the taxpayer and his family members in a State, the availability of a home, the place of exercise of professional activities and in any case from patrimonial interests. Furthermore, the same noted that, where there are conflicting indications, the same jurisprudence, operating a judgment of prevalence, has attributed **priority to personal ties over professional ones**, favoring the criterion of effectiveness. The Supreme Court found the complaint raised by the Tax Authority to be well founded, highlighting how the RTC did not comply with the rules and principles sanctioned in the aforementioned domestic and euro-unitary jurisprudence. The Supreme Court found that said jurisprudence stated that, pursuant to the combined provision, an Italian citizen who, despite residing abroad, establishes in Italy for most of the tax period, his domicile, understood as the main place of business and economic interests as well as personal relations must be considered taxable in Italy. Furthermore, it was found that what is valued is above all the presence of significant elements, such as the purchase of real estate, the management of business in corporate contexts, the availability of at least one home, and this regardless of registration of the Italian citizen in AIRE.

The Supreme Court observed how, erroneously, the Regional tax court ruling enhanced the elements provided by the taxpayer, which however are reduced to the sole registration with AIRE and the frequent attendance of socio-cultural and recreational clubs abroad. As highlighted by the judges of legitimacy, this ruling does not consider, however, a series of presumptive elements attached by the Tax Authority, such as the rental of a property in Italy for residential use, indicated by the taxpayer himself as his and his family's abode, or the rental, again in Italy, of two parking spaces, the various shareholding positions, including as legal representative in some companies based in Italy and lastly the income earned in Italy and resulting from the 770 forms of withholding agents (employers).
Therefore, it was concluded by the Supreme Court that the principles on the matter of tax subjectivity of the Italian citizen residing abroad were not correctly applied.

Tax Litigation

Supreme Court, sentence n. 7615 of 3rd March 2022 - Undue offsetting of tax credits - cases of non-existence and not entitlement

With this sentence, the Supreme Court ruled on the undue offsetting of tax credits in criminal cases (Legislative Decree n. 74/2000 Article 10-*quater*).

In particular, following the use in compensation - beyond the criminally relevant threshold - of credits deriving from research and development costs deemed non-existent, the preventive seizure aimed at confiscation was ordered: this provision was deemed illegitimate with a subsequent order, constituting duplication of the same constraint already imposed in another criminal proceeding against the same subject and for the same criminal offense.

Following an appeal by the Public Prosecutor, with this sentence the Supreme Court annulled this order, considering that the two proceedings concerned two different types of offense – respectively, the use in compensation of non-existent credits and credits not due - and therefore there could be no violation of the *ne bis in idem* principle. As far as this is of interest, it should be noted that the Criminal Supreme Court, in the motivation of its ruling, has incorporated the already consolidated orientation in recent tax case-law according to which undue compensation may occur when two distinct violations arise.

In particular (see Supreme Court, sentence n. 34445/2021) on an objective level, the credit is (i) not due when it exists and can be detected through the automated or formal control activity focused on the data shown in the tax return and the documents stored and exhibited by the taxpayer, (ii) non-existent when it is not real and is supported by false documentation. From the specific point of view of the subjective element of the crime and the guilt of the suspect, while for the hypothesis of undue compensation of credits not entitled it will be necessary to prove the taxpayer's awareness of the not usability of the credit in compensation, the case of non-existence of the credit is already, unless proven otherwise, a revealing index of the taxpayer's aim and willingness to pay his debts through the artificial creation of the credit. The sentence therefore assumes relevance since, in addition to applying the principles of the tax section in the criminal trial, it also clarifies the distribution of the burden of proof in both the criminal cases.

Revenue Agency, Provision of the Director n. 74913/2022 - Cooperative compliance regime - Competence for controls and methods of application

In order to consolidate the regime of cooperative compliance in the perspective of a progressive extension of the admitted taxpayers (for years 2022, 2023, 2024, taxpayers with turnover and revenues of not less than one billion euros, see Decree of the Ministry of Economy and Finance of 31st January 2022), the Provision in question assigns new powers to some regional structures of the Revenue Agency, updating the rules of the regime (Provision of the Director of the Revenue Agency of 26th May 2017, see Tax Alert of September 2021) and coordinating it with subsequent provisions which had already integrated the competences of some central and regional offices (see Directorial Act of 13rd January 2022).

The cooperative compliance office of the Taxpayers Division, Major Taxpayers and International Central Directorate - to which, for years 2022, 2023 and 2024, the controls and activities referred to in the aforementioned Provision of 26th May 2017 are exclusively attributed - will therefore be supported by the Major Taxpayers offices (responsible for taxpayers with a turnover, revenues and remuneration of not less than 100 million euros) existing in the Regional Directorates of Lombardy, Lazio, Campania, Emilia-Romagna, Piedmont, Puglia, Sicily, Tuscany and Veneto.

The support, by delegation, according to the directives and under the coordination of the cooperative compliance office, concerns the exercise of the investigative powers aimed at acquiring data and information useful for the substantial control of the tax returns (without prejudice to the already existing competence of the regional structures for the formal control of the tax returns based on the tax domicile of the taxpayers) and the carrying out of the analysis of the risk profile of the company.
With the new attributions, the active interaction role of the nine Major Taxpayers offices in the Regional Directorates is therefore strengthened.

Transfer Pricing

OECD Transfer Pricing Guidelines 2022 | Main changes

January 20th, 2022, a new version of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (or "OECD Guidelines") was published. The revised version basically incorporates and integrates into the document the recommendations already published in the last few years and relevant to: i) the application of the Transactional Profit Split Method, provided for within the report "*Revised Guidance on the application of the Transactional Profit Split Method*" approved in June 2018, ii) the treatment of Hard-to-Value Intangibles, already outlined in the "*Revised Guidance on the application of the Approach to Hard-to-Value Intangibles*" of June 2018, as well as iii) to the regulation of financial transactions set out in the report "*Transfer Pricing Guidance on Financial Transactions*" of February 2020.

The recently published version of the OECD Guidelines dedicates an entire new chapter, i.e. Chapter X, to financial transactions, clarifying, also by means of a reference to the general principles set out in Chapter 1, section D.1, ("*Identifying the commercial or financial relations*") - in turn supplemented by a description of the methods for determining the "risk-free rate" and the "risk-adjusted rate" - the aspects to be analyzed in order to correctly classify a financial transaction. The correct qualification of the transaction, a fundamental step in any transfer pricing analysis, is of particular importance with reference to financial transactions, as it makes it possible, for example, to determine whether a transaction should be actually regarded as an intercompany loan or as some other kind of non-remunerated payment, such as, for example, a contribution to equity capital. Another aspect regulated in the revised version of the OECD Guidelines is the assessment of the implicit benefits of belonging to a Group when determining the proper remuneration for financial transactions.

The revised version of the Guidelines also addresses Hard-to-Value Intangibles (or "HTVI"), analyzed in Annex II to Chapter VI, which, by essentially incorporating the recommendations already contained in the aforementioned 2018 report. In particular, in order to avert the risk of double taxation, the new Annex outlines the best practices that Tax Administrations may follow to assess the compliance with the arm's length principle of intra-group transactions involving so-called Hard-to-Value Intangibles. It recognizes the legitimacy of using *ex post* outcomes as presumptive evidence about the compliance of the transactions with the arm's length principle, provided that the information on which such *ex post* results are based could or should reasonably have been considered by the associated enterprises at the time the transaction was entered into, with the taxpayer having the possibility to rebut such presumptive evidence used by the tax authorities. Attention is also paid to the timing of any assessments since, in some cases, the elapsed time between the transfer of the HTVI and the final outcome of it may not correspond with the time limits laid down by internal regulations.

Furthermore, guidance is provided for applying the Transactional Profit Split Method (or "Profit Split") – the same already included in the 2018 report and transposed in Chapter II, Section C (paragraphs 2.114-2.151), as well as in Annexes II and III to Chapter II - in which the assumptions underlying the selection of this method are outlined in detail (i.e., unique and valuable contributions made by each of the parties, highly integrated nature of the transaction, sharing of economically significant risks/strict correlation between the risks borne). Particular focus is also put on the importance of the "analysis of the transaction" step, the outcome of which, in terms of functional analysis, must be consistent with the identified profit split factors, which, in turn, must be suitable to being measured in a reliable manner. It should be pointed out that, whilst the lack of closely comparable uncontrolled transactions should not *per se* justify the application of this method, the presence of comparable transactions is likely to indicate that the Profit Split may not be the most appropriate method. The revised section dedicated to this method also provides a guidance for determining the profits to be split and identifying the profit split factors, for which it provides an illustrative, though not exhaustive, list (i.e. assets or capital, fixed assets; costs; incremental sales; employee compensation; headcount; etc.).

Reporting obligation for TP adjustments under certain conditions | Resolution 78/E

Revenu Agency's Resolution 78/E of December 31, 2021 analyzes the correct application of the rules introduced by Legislative Decree 100/2020 or "Decree", which has transposed in the Italian legislation of EU Directive 2018/822 (so-called "DAC 6") on cross-border arrangements, with particular reference to the reporting obligations, for the purposes of DAC 6, of year-end transfer pricing adjustments (or "TP adjustments").

Pursuant to the Resolution, the adjustments made by parent companies resident in the territory of the State to the benefit of foreign subsidiaries resident in a jurisdiction which:

1) Does not impose any corporate tax or imposes corporate tax at a zero- or close-to-zero rate, or

2) Is included in the list of non-cooperative third-country jurisdictions, are a cross-border arrangement characterized by the hallmarks set forth in Annex 1 of the Decree, letter C) "Specific hallmarks related to cross-border transactions", i.e. arrangement that involves deductible cross-border payments made between associated enterprises (cf. Annex 1 of the Decree, letter C), point 1, letter b, sub 1) and sub 2));

Shall be subject to reporting obligations if:

- in relation to payments made towards associated enterprises resident in the jurisdictions referred to under point 1), both the criterion of the tax reduction (potential advantage of a fiscal nature that can be expected from the arrangement) pursuant to art. 6, c.1 of the Ministerial Decree of November 17, 2020 ("Ministerial Decree") and that of the main benefit, recurring when the tax advantage which may derive from the implementation of the arrangement/s prevails over the extra-tax benefits, pursuant to art. 7, c.2 of the Ministerial Decree, are satisfied.
- in the case of payments made to associated enterprises resident in the jurisdictions referred to in point 2), the criterion of tax reduction is satisfied.

In other words, in the Resolution under analysis, the Tax Agency takes an opposite position to that of the companies which had filed the ruling request, which, starting from the assumption that TP adjustments are nothing more than an adjustment to the transfer prices originally applied within the group and have no other objective than that of achieving a profitability in line with arm's length principle, were inclined to consider such adjustments exempt from the reporting obligations under DAC 6.

In summary, in the opinion of the tax authorities, transfer pricing policies are to be qualified as a cross-border arrangements, so that, if the hallmarks and conditions provided for by the Decree and the Ministerial Decree were met, TP adjustments would entail a reporting obligation for the taxpayers within the meaning of the abovementioned provisions.

Government Incentives

Provision of the Italian Revenue Agency 15 February 2022 - "New Patent box regime"

(*art. 6, Law Decree October 21th 2021, No. 146*)

The provision of the Italian Revenue Agency' Director dated February 15th, 2022 defines the requirements for the application of the regime, provided for by Art. 6, Law Decree October 21th 2021, No. 146, and the procedures for exercising the option concerning the higher deduction equal to 110% of research and development costs (**New Patent Box**).

More in detail, the new regime is applicable by companies who qualify as investors. An investor is the entity who owns the right to use the eligible intangible assets and who carries out the investments in the relevant activities within the framework of his own business activity, bearing the costs, assuming the risks and making use of any results.

Exercising the option allows a 110% increase in the expenses incurred by the investor in carrying out the relevant activities relating to the following intangible assets used, directly or indirectly, in carrying out the business activity:

a) software copyright;
b) industrial patents - including patents for invention, biotechnological inventions and their supplementary protection certificates - utility model patents, and patents and certificates for plant varieties and topographies of semiconductor products;
c) legally protected designs and models;
d) two or more intangible assets among those indicated in the points from a) to c), that are complementary, such that the realization of a product or a family of products or a process or a group of processes is subordinated to the joint use of the same.

The perimeter of the eligible activities includes the industrial research and experimental development (art.2), technological innovation (art. 3), design (art. 4) as defined by the Ministry of Economic Development Decree of May 26th, 2020, and the activities of legal protection of intangible assets' rights.

The communication also specified that the following expenses are relevant for the purposes of determining the basis of calculation:

a) personnel expenses (employees or self-employed), directly involved in carrying out the relevant activities;
b) depreciation, the capital amount of lease agreements, rent and other expenses relating to tangible and intangible assets used in carrying out the eligible activities;
c) consultancy expenditure and equivalent services relating exclusively to the relevant activities;
d) expenses for materials, supplies and other similar products used at all times in research and development activities;
e) expenses relating to the maintenance of rights on eligible intangible assets, their renewal on expiry, their protection, also in associated form, and those relating to activities for the prevention of counterfeiting and the management of disputes aimed at protecting the rights themselves.

In the fiscal year in which one of the eligible intangible assets obtains an intellectual property right, the 110% increase can be applied to the expenses incurred in carrying out the relevant activities which have contributed to the creation of the asset, provided that such expenses have not been incurred by the investor beyond the eighth fiscal year preceding that in which the property right is obtained (hereinafter "***bonus mechanism***"). In this case, the abovementioned expenses - except for those referred to in point e) - and the expenses necessary to obtain the patent are eligible.

The Provision indicates the content of the proper documentation for the purposes of "*Penalty protection*". More in detail, Section A of the document shall contain, in relation to each fiscal year of application of the new patent box regime, the following information:

- the company's shareholding structure also in relation to associated companies and extraordinary events;
- relevant activities, nature of investor and any activity carried out with associated companies;
- significant activities commissioned from independent third parties;
- organizational model of the company;
- technical report;
- functions, risks and assets of the company.

In Section B, on the other hand, the information useful for calculation of the benefit:

- eligible expenses incurred with reference to each intangible asset;
- identification of the tax changes directly and indirectly referable to the intangible assets.

The documentation must be signed by company's legal representative or his delegate by means of electronic signature with time stamp to be affixed by the tax return's filing date.

It should also be noted that the existence of the proper documentation must be indicated in the tax return relating to the fiscal year for which the taxpayer benefits from the higher deduction.

The option for the new regime must be indicated in the tax return relating to the fiscal year to which it refers and has a duration of five years, is irrevocable and renewable.

Entities who have exercised the option for the "old" patent box (art. 1, par. 37 and 45, Law December 23rd 2014, No. 190), for fiscal years prior to the one running as of October 22th 2021, may choose alternatively to adhere to the new regime. In this case a specific communication shall be sent, to the Italian revenue Agency, in order to irrevocably express the intention to waive to the old patent box's option.

The subjects who have submitted an application for access to the procedure, in accordance with the special rules provided for in art. 31-*ter*, Presidential Decree No. 600/1973 or an application for renewal, and have signed a prior agreement with the Revenue Agency at the conclusion of said procedures, as well as those who have adhered to the regime of calculation in the tax return (OD option) pursuant to art. 4, Legislative Decree No. 34/2019 are excluded from the abovementioned possibility.

These subjects, that have exercised the option for the old patent box and have also exercised the OD option, can continue to benefit from the previous patent box regime until its natural five-year expiring date. For these entities, there is no obligation to exercise the subsequent annual OD options.

For all other entities, who do not fall within any of the above-listed situation, the exercise of the option for the New Patent Box determines the cancellation of the option for the previous regime.

Furthermore, taxpayers may not exercise the option for the Old Patent Box, not even with respect to complementary assets, as from the fiscal year running as of December 28th, 2021.

Transition 4.0 Plan

(art. 10, Law Decree January 27th, 2022, No. 4, converted into Law March 28th, 2022, No. 25, entered into force on March 29th, 2022)

In order to promote ecological transition processes with a significant impact on employment, made through complex and long term investments, art. 10 of Law Decree No. 4/2022, amending art. 1, par. 1057-*bis*, of Law December 30th, 2020, No. 178, extends the tax credit for investments in new tangible assets for the amount exceeding €10 million to investments included in the National Recovery and Resilience Plan aimed at achieving ecological transition objectives identified by decree of the Minister of Economic Development, in agreement with the Minister of Ecological Transition and the Minister of Economy and Finance. Therefore, without prejudice to the application of the rate of 20% of the cost for investments up to €2.5 million and 10% for investments from €2.5 million to €10 million, the tax credit is recognized to the extent of 5% of the cost up to a maximum amount of €50 million. This provision is limited to such investments made from January 1st, 2023, to December 31th, 2025, or by June 30th, 2026, in the event of booking of the investment by December 31th, 2025.

Extension of deadlines for the delivery of tangible assets ordered by December 31st, 2021, in order to benefit from the tax credit for investments in new tangible asset

(*Art. 3-quarter, Law Decree December 30th, 2021, No. 228, converted into Law February 25th, 2022, No. 15, entered into force on March 1st, 2022*)

Article 3-*quarter*, Law Decree No. 228/2021 extended to December 31st, 2022, instead of June 30th, 2022, the deadline for the delivery of standard new tangible assets and qualified under "Industry 4.0" plan new tangible assets, for which the 20% has been paid within the same date. This extension allows to benefit from the tax credit for investments in new tangible assets provided for by par. 1054 and 1056, Law December 30th, 2021, No. 178, to both "standard" and qualified tangible assets delivered by December 31st, 2022 and booked by December 31st, 2021.

Tax credits related to the purchase of electricity

(art. 15 Law Decree January 27th, 2022, No. 4, art. 4 Law Decree March 1st, 2022, No. 17 and art. 3 Law Decree March 21th, 2022, No. 21)

The legislator has introduced a series of incentive for certain companies, in order to provide partial refund for the extra costs arising from the exceptional rise in energy costs.

More specifically, pursuant to Art. 15 of Law Decree No. 4/2022, "energy-intensive company" as defined by the MISE Decree of December 21th, 2017, whose costs per kWh of the electricity component, calculated on the average cost for the last quarter of 2021 and net of taxes and any subsidies, have suffered an increase in the cost per KWh of more than 30% relative to the same period of 2019, are entitled to a tax credit in relation to the first quarter of 2022, equal to 20% of the expense incurred for the energy component purchased and actually used in the same period. Art. 4 of Law Decree No. 17/2022, as amended by Law Decree No. 21/2022, has extended this incentive to the second quarter of 2022, recognizing a tax credit equal to 25% of the expense incurred for the energy component purchased and actually used in the same period. Tax credit is also recognized in relation to expenditure on electricity produced by energy-intensive company and self-consumed by them in the second quarter of 2022. In this case, the increase in the cost per KWh is calculated with reference to the change in the unit price of the fuels purchased and used by the company to produce energy and determined with regard to the conventional price of energy.

Finally, art. 3 of Law Decree No. 21/2022 introduced a tax credit for companies other than "energy-intensive companies" equipped with electricity meters with available power equal to or greater than 16.5 kW, equal to 12% of the expense incurred for the purchase of the energy component actually used in the second quarter of 2022, provided that the price of the same, calculated on the basis of the average referred to the first quarter of 2022, has suffered an increase in cost greater than 30% of the average price referred to the first quarter of 2019.

Tax credits may be used for offsetting other tax liabilities up to December 31st, 2022, and may only be transferred, for the full amount, to other subjects, including financial institutions and other financial intermediaries, with the possibility of two further transfers exclusively in favor of qualified parties with the obligation to obtain a certification. Tax credits are not relevant for IRES and IRAP purposes and may be combined with other incentive regarding the same costs, up to the limit of the cost incurred.

Finally, we would like to point out that with the recent resolution of the Revenue Agency 13/E/2022, the tax code "6960" (reference year 2022) was created for offset the credit for "energy-intensive companies" provided for by art. 15 of Law Decree of January 27th, 2022, No. 4 for the energy component purchased and actually used in the first quarter of 2022.

Tax credits related to the purchase of natural gas

(Art. 5 Law Decree March 1st, 2022, No. 17 and art. 4 Law Decree March 21st, 2022, No. 21)

In order to deal with the exceptional increase in the cost of natural gas, the legislator has also introduced a series of incentive in favor of certain companies.

Specifically, art. 5 of Law Decree of March 1st, 2022 introduced for companies with a intensive use of natural gas, operating in one of the sectors defined in Annex 1 to the Decree of the MiTe of December 21st, 2021, No. 541, which have consumed in the first quarter of 2022 a quantity of natural gas for energy uses not less than 25% of the volume of natural gas indicated in art. 3 of the same decree (equal to at least 1 GWh/year), net of the natural gas used in thermoelectric, a tax credit in the amount of 20% of the expenditure incurred for the purchase of the same gas in the second quarter 2022, for energy uses other than thermoelectric uses, provided that the reference price of natural gas, calculated as an average, referred to the first quarter of 2022, has suffered an increase of more than 30% of the corresponding average price referred to the same quarter of the year 2019.

Art. 4 of Law Decree No. 21/2022 extended this tax credit, under the same conditions, also to companies other than the gas-intensive companies.

Tax credits may be used for offsetting other tax liabilities up to December 31st, 2022, and may only be transferred, for the full amount, to other parties, including financial institutions and other financial intermediaries, with the possibility of two further transfers exclusively in favor of qualified subjects with a compliance certification requirement. Tax credits are not relevant for IRES and IRAP purposes and may be combined with other incentive to the same costs, up to the limit of the cost incurred.

Tax credit for research and development activities under Article 3, Law Decree December 23rd, 2013, No. 145 - Clarifications about investor

(Law Principle No. 17, December 31st, 2021 – Italian Revenue)

The Italian Revenue Agency confirmed that the R&D tax credit is for the benefit of the "investors", i.e. companies that invest resources in R&D activities, bear the relevant costs, assume the risks, and benefit from any results. On the other hand, the tax credit is not available to those entities that carry out such activities, but do not bear the related costs and the risks of the investments, nor acquire the benefits of the research. Based on this principle, the Tax Authorities have clarified that an entity, which is institutionally entrusted by law with the performance of activities subject to a public regulatory system, and which provides a financing mechanism of the activities totally deriving from the charging of a fee to consumers, cannot be considered an "investor" and therefore cannot benefit from the tax credit. In this case, indeed, the risk is fully covered by the specific components of the fee, since the potentially eligible activities are comprised within the institutional tasks assigned, and subject to remuneration.

FSI

Exemption from withholding tax on interest deriving from medium/long-term loans granted by UK banks following the Brexit | Article 26, paragraph 5-bis of Presidential Decree 600/1973 | Ruling no. 839 of 2021

In Ruling no. 839 of 2021 Italian Tax Authorities have confirmed that the withholding tax exemption provided for by article 26, paragraph 5-bis of Presidential Decree no. 600/1973 is not applicable to banks established in the United Kingdom.

In this regard, under the mentioned paragraph 5-bis the 26% standard withholding tax does not apply on interest stemming from medium-long term loans granted to Italian companies – among others – by: (i) banks established in an EU Member State; (ii) foreign institutional investors, even if not subject to tax, established in countries providing for an adequate exchange of information with Italian Tax Authorities and subject to supervision therein.

In the present case, Claimant is a bank established in the UK asking for the application of the mentioned exemption with reference to interest income collected on a medium/long-term loans granted to an Italian company.

Firstly, the UK Bank deems that the aforementioned withholding exemption applies although the financial institution is no longer resident in the EU (due to the Brexit), by virtue of the Trade and Cooperation Agreement ("TCA"), whose purpose is to encourage trades and relationship between the UK and the EU.

Alternatively, the Claimant is of the opinion that the exemption provided for by paragraph 5-bis, applies since the UK Bank may be qualified as an "institutional investor" resident in a country providing for an adequate exchange of information with Italian Tax Authorities.

With reference to the first point, Tax Authorities note that, although the TCA promotes a strong partnership between the EU and the UK, under such provisions the United Kingdom may not be considered as an EU Member State. Therefore, based on the literal meaning of article 26, paragraph 5-bis of Presidential Decree no. 600/1973, the exemption under analysis cannot be applied to the present case.

Tax Authorities do not agree also with the second option proposed by the Claimant – i.e. the qualification of the UK Bank as an "institutional investor". In a nutshell, even if non-EU institutional investors may benefit from the withholding exemption at hand, the non-EU banks may not, since they are not expressly mentioned for such exemption by article 26, paragraph 5-bis.

In light of the above, Italian Tax Authorities conclude that pursuant to article 26, paragraph 5-bis of Presidential Decree 600/1973, the exemption from domestic withholding tax cannot be applied to the UK bank.

VAT treatment of the exchange of differentials over commodity swap | Italian Tax Authorities Resolution no. 1/E/2022 and Assonime Circular letter no. 6/2022

With Resolution no. 1/E, published on January 3, 2022, Italian Tax Authorities provide some clarifications in relation to the VAT treatment of the exchange of differentials over commodity swap derivatives.

The Revenue Agency recalls a recent judgment of the Supreme Court and specifies that swap does not represent a mere exchange of cash flows, whereas it should be regarded as "the risk at execution of an agreement based on certain variables".

Based on this definition, Italian Tax Authorities would qualify the exchange of differentials as the remuneration for a swap contract, namely as the taxable base of a VAT exempted transaction pursuant to art. 10, no. 4) of Presidential Decree no. 633 of 1972.

With Circular letter no. 6 of 2022, Assonime points out that Italian Tax Authorities has wrongly qualified for VAT purposes the swap agreement as a REPO agreement, where this latter however represents a financing transaction (and not a derivative contract).
Being swap agreements aimed at covering risks linked to certain indexes (e.g. interest rates, FX, commodities), possible credit and debt positions cannot be defined when parties enter into such an agreement. In this respect, due to the lack of certainty regarding the amounts to be exchanged by parties entering into a swap agreement, Assonime notes that such transactions may not fall within the application of VAT.
Finally, Assonime outlines that in case swap agreements would be considered as VAT exempted transactions, adverse impact on the computation of the VAT pro-rata could be envisaged, depending on the Country where the party resulting in a debt position is established. In particular, if this latter is resident in Italy, the VAT pro-rata deduction would be lower, whereas if the party resulting in a debt position is resident in a non-EU Country the opposite effect should be identified – since the general principle of non-recoverability of input VAT linked to transactions not subject to VAT does not apply. In addition, if the party resulting in a debt position is established in an EU member State, no impact should be envisaged in relation to the VAT pro-rata, although input VAT specifically linked to such transactions cannot be recovered.

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