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Tax Alert

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Direct Tax

The Tax System Reform Enabling Law

Structure

On October 5, 2021, the Council of Ministers approved the Tax System enabling law bill, which is one of "*the actions envisaged by PNRR to give an answer to the structural weaknesses of the Country thus essential part of the recovery to be activated thanks to the European funds*" (explanatory report wording).

It is a reorganization of certain important portions of the tax system based on two sets of guidelines: on the one hand those general listed in art. 1 and on the other hand those related to the specific actions provided for in articles from 2 to 9.

As to the general guidelines listed in art. 1 (entitled "Mandate to the Government to reorganize the tax system and proceedings"), they are the following:

"*stimulus to the economic recovery through the increase of the efficiency of the taxes structure as well as the reduction of the tax burden borne by the incomes deriving from production factors*";

"*rationalize and simplification of the tax system also with reference to*: *1) taxpayers fullfillments to reduce the compliance costs and those concerning the management and administration of the tax system; 2) identification and removal of micro-taxes for which the taxpayers compliance costs are high compared to the poor State revenue by finding the appropriate revenue compensation when implementing the present law*";

"*safeguard the tax system progressiveness*";

"*reduction of tax evasion and tax avoidance*".

The specific reorganization actions regard: personal income tax – IRPEF (art. 2), IRES and business income taxation (art. 3), VAT and excise and consumption taxation (art. 4), gradual removal of IRAP (art. 5), real estate registry (art. 6), redesign of the IRPEF municipal and regional surtax (art. 7) national tax collection system (art. 8) and coding (art. 9).

Personal income taxation

As to the main action provided for by the enabling law bill id est that related to the personal income tax, the reorganization is based on the following "areas" guidelines: (i) the "*gradual and tendentious evolution of the system towards a fully dual model*" in which the proportional taxation will be restricted, as to taxpayers other than the IRES ones, to the "*incomes deriving from the use of capital, also in the real estate market, as well as the incomes directly deriving from the use of capital in the business and professional activities*"; (ii) the gradual reduction of the effective average rates applicable to the labor incomes with the particular goal to promote the labor offering and the participation in the labor market of young persons and income second earnings (still belonging to the female gender, the business activities and the surfacing of taxable bases; (iii) the gradual reduction of the excessive variations of the effective marginal rates; (iv) the reorganization of tax expenditures; (v) the harmonization of the savings taxation regulations by containing the room for tax avoidance; (vi) the transformation of the municipal and regiona income taxes in surtaxes (to such pillar art. 8 of the bill is dedicated also covering of the distribution between the municipalities and the Government of the revenues deriving from real estate taxes including those applicable to the real estate transfer).

The basic idea is that of confirming the current plural and multiple model (*Plural Income* Taxation) of IRPEF in which vis a vis its ordinary application on labor incomes (mostly employment incomes) and pensions it goes with a high fragmentation of the type of income subject to several forms of substitute taxes, unrelated (this is the case, for example, of the financial incomes, the withholding tax on rentals, business and professional incomes subject to a proportional substitute tax up to 65.000 Euro of fees and revenues, foreign source incomes of new resident individuals, real estate capital gains, so-called repatriates regulation, productivity bonuses, etc.).

Along such direction the bill of law moves with the envisaged rationalization of the dual system by providing for the alignment of the tax burden of the incomes deriving from the use of capital (even if aimed at acquiring real estate), including those "mixed" deriving from professional and business activities directly referred to said use (if earned by taxpayers other than the IRES ones), at the same time providing for the gradual reduction of both the effective average rates with a particular attention to the labor incomes and those deriving from business activities and the excessive variations of the effective marginal rates (where average and marginal effective rates, it reads art. 2, par. 1, lett. b), means "*those deriving from the IRPEF application considering nor substitute regulations or tax allowances other than those related to the different nature of the incomes*").

As to the progressivity, however permanently resized by the confirmation of the dual model made by the enabling law, it ends up to being entrusted to rates, deductions and allowances, hence more in general to the tax expenses, otherwise called *tax expenditures*, concept, as well known, of uncertain perimeter.

Indeed, art. 2 of the bill of law pays a particular attention to the effective average rates (also for the purposes of mitigating the tax burden on labor) and to the variations of the marginal effective rate as well as to the re-design od deductions and allowances with particular respect to their effects in terms of tax fairness and efficiency. So, clearly, with the intention of remedying to the unstable evolution of the IRPEF progressivity, which depends on, among other things, the high jump of rate between the second and the third income bracket and on the circumstance that the allowances decrease when the income grows up and on the fact that, overcome the no tax area, the local income taxes are applicable on the overall income, including the portion not subject to the State income tax. On the tax expenditures side, the reorganization should allow to cut the several deductions from the taxable base, many of which do not have any relationships with the ability to pay (meaning not to reduce it) and which stand for political-electoral reasons, by keeping only those allowances having either an almost mandatory character or social relevance.

Moving to the harmonization of the savings taxation regulations, also with the goal to contain tax avoidance, this is an action proposed as a result of a preliminary parliamentary survey for the purposes of strengthening the canalization to the real economy in compliance with the goal to stimulate the growth. The starting point, confirmed by no. 1 of lett. a) of art. 2 of the bill of law, where it is provided the application of same proportional rate to incomes deriving from the different types – static, dynamic or "sintetiche" – of the capital utilization, would however appear that of a confirmation of the removal from the progressivity of savings without ruling out keeping a form of incentive for the treasury bills.

<u>VAT and excise tax</u>

As to VAT, lett. a) of art. 4 of the enabling law draft, provides the rationalization of the tax structure with particular reference to the number and the level of the rates as well as the distribution of the taxable bases among the several rates "*for the purposes of simplifying the tax management and application, countering erosion and evasion, increasing the efficiency degree for consistency with the European harmonized tax regulation*".

In this area an ample space for manoeuver is allowed given that the action regarding the rates and the taxable bases distribution among same does not seem to be the only permitted. The simple circumstance that the rationalization of the VAT structure, in fact, must be particularly oriented to said sectors, does not necessarily mean that other type of actions are not permitted, especially if aimed at erasing clear asimmetries between the domestic and European regulation.

As to the excise and consumption taxes, lett. b) of art. 4 of the draft of law provides for the adjustment, "*consistently with the European Green Deal and the harmonized excise tax regulation, of the structure and rates of the excise taxation on both energy products and*

electricity, with the goal to contribute to the gradual reduction of climate-change gas emissions as well to promote the utilization of renewable and environment friendly energy sources".

It is clear in such provision the link with the so-called ecological transition and the environmental taxation as well as with the programmed (at the European level) reduction up to the elimination of the CO2 net emissions. In this respect the Italian Government together with the other member States Governments, once approved the several proposals on the subject, will have to adopt, through an enabling law, all the relevant European directive proposals, providing a set of measures and actions aimed at implementing the ambitious climate European goal.

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Principle of Law no. 15/2021 | Subject: Clarifications on foreign tax credit and Patent Box relief

With the principle of law no. 15 dated November 5, 2021, the Italian Tax Authorities ("ITA") provided some clarifications about the determination of the foreign tax credit under Article 165, Italian Income Tax Code (also "IITC") for the beneficiaries of the Patent Box relief.

In particular, ITA confirmed that the tax credit for income produced abroad is granted to the extent that such income is included within the total income declared in Italy – pursuant to Article 165, paragraph 1, IITC. In addition, pursuant to paragraph 10 of Article 165, IITC, if the foreign income is only partially taxable in Italy – as is the case for royalties tax relief under the Patent Box regime – the credit must be reduced accordingly.

Moreover, further indications have been provided with respect to the ratio between foreign income and total income provided by Article 165, paragraph 1, IITC to determine the amount of the credit. In this respect, ITA states that foreign income, different from business income, must be considered "gross" of the costs incurred for its production (Circular no. 9/E/2015). In this regard, indeed, the "track and tracing" system applied to determinate the amount of the benefit from the Patent Box relief, pursuant to Article 11 of the Inter-ministerial Decree dated July 30, 2015 (s.c. "Patent Box Decree"), is not reliable method for the foreign tax credit purposes.

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Ruling no. 695/2021 | Subject: The contribution of the subsidiary's shares stops the holding period for the I/R Directive exemption

With its answer to the ruling no. 695 dated October 11, 2021, the Italian Tax Authorities ("ITA") clarified that the contribution of subsidiary's shares interrupts the minimum holding period (of at least one year) relevant for the WHT exemption on intra-EU royalties provided for by Article 26-*quater* of Presidential Decree No. 600/1973 (which transposes the Interest-Royalties Directive).

In the case at hand, an Italian company – also "ITACo" – controlled by a Spanish company paid royalties to the latter for the use of patents and know-how, without the application of the WHT tax – as per the exemption regime pursuant to Article 26-*quater*, Presidential Decree no. 600/1973. Following a reorganization of the Group to which the companies belong, the Spanish parent company contributed its equity investments in ITACo (and the intangible assets that gave it the right to receive royalties) to another Spanish company (also "NewCo") which took on the role of direct parent company of the Italian company. In line with the previous approach adopted, the Spanish company intended to pay the royalties without application of WHT, regardless of the contribution incurred and without waiting for the 1-year holding period.

Having regard to 1-year holding period, ITA stated that it is not possible for the NewCo to inherit the holding period accrued by the previous Spanish parent company. This approach reflects the conclusions already provided by ITA with reference to the requirements of the Parent-Subsidiary Directive (see ITA Resolution No. 109/E dated July 29 2005).

However, once the 1-year holding period of the new owner will be met, it will be possible to proceed with a WHT refund request.

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Ruling no. 694/2021 | Subject: Cross-border transfer of CFC's legal seat (LUX to CH) – exit tax and assets' tax values

With its answer to the ruling no. 694/2021, the Italian Tax Authorities (ITA) stated that (i) the transfer of a CFC's legal seat from one foreign country to another is treated as a change in the company's tax regime; and that (ii) the Italian exit tax does not apply, since there is no transfer of the legal seat outside the Italian territory. It confirms the indications provided in the draft Circular on CFCs open to consultation until last August 6.

In the case at hand, the taxpayer – a natural person – asked the ITA about the treatment of the transfer of the registered office of a Luxembourg company (to which the Italian CFC rules are applicable) from Luxembourg to Switzerland, indirectly controlled by the same taxpayer (together with other family members). The transfer took place in a "legal continuity" regime – i.e. no new Swiss Company was established.

According to ITA, the Italian exit tax (Article 166, IITC) is not applicable, since there is no transfer of the legal seat outside Italy. On the other hand, it is necessary to verify whether in the foreign State of destination the CFC still meets the conditions for the application of Article 167 of IITC, since it could be subject to a different tax regime or tax burden. Moreover, the Italian exit tax is not relevant neither (i) for the calculation of the s.c. "virtual tax rate" under Article 167, par. 4 of IITC – which is necessary in order to determine whether the foreign tax level falls (or not) within the CFC regime; nor (ii) for the transparency taxation of the foreign subsidiary.

Lastly, ITA clarified that the tax values of the foreign subsidiary must be determined pursuant to the Ministerial Decree no. 429/2001 provisions. In this regard, the tax values of the Swiss Company's assets will be the same as the ones attributed in Luxembourg before the transfer of the legal seat – without attributing relevance (if any) to the higher tax values recognized in Switzerland.

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Pillar 1 and Pillar 2 | Rome G20 Outcomes (30-31 October 2021) and EU Developments

The G20 Rome Leader's Summit held on 30-31 October 2021 approved the statement signed on 8 October 2021 by 136 out of 140 countries (became 137 out of 141 with the inclusion of Mauritania at the beginning of November) of the Inclusive Framework (the excluded Countries are: Kenya, Nigeria, Pakistan and Sri Lanka) on the two-pillar solution to address the tax challenges arising from the digitalization of the economy. The approval by the G20 in Rome officially starts the path for the implementation of the measures in 2023.

The Inclusive Framework statement updates the previous version: the rate of the Global Minimum Tax is confirmed equal to 15% (in the previous formulation it was "at least" 15%). Moreover, having regard to the Amount A of Pillar 1, the amount of extra-profit (exceeding the 10% threshold) that will be reallocated to market jurisdictions will be equal to 25%.

The statement contains a detailed implementation plan according to which: (i) Model rules to give effect to the global minimum tax regime (Pillar 2) will be developed by the end of November 2021; and (ii) a Multilateral Convention (MLC) on Amount A is expected to be signed by mid-2022, with a view to allowing it to come into effect in 2023.

The agreement allows the permanence of the Digital Services Taxes ("DSTs") implemented so far by some countries (including Italy) until the entry into force of the provisions of Pillar 1, but at the same time no newly enacted DSTs or other similar measures will be imposed from October 8, 2021.

Moreover, on October 21, 2021, Austria, France, Italy, Spain together with the UK and the US signed a transitional agreement to regulate unilaterally implemented DSTs pending the new multilateral solution. According to the agreement, taxpayers will be granted a credit for amounts paid during the transitional period (from January 1, 2022, until the agreement implementing Pillar 1 comes into force - or until December 31, 2023, whichever comes first) equal to the DST amount paid in excess of the Pillar 1 liability owed by the taxpayer in the first year after implementation.

On the EU side, the intention to proceed with the implementation of Pillars 1 and 2 is confirmed. With respect to Pillar 2, if OECD finalizes its model rules on time, European Commission ("EC") would seek to propose a Directive on 22 December already. With reference to Pillar

1: no EU Directive should be expected before Q3 2022, given that the OECD will only agree on multilateral instruments in summer 2022. The EC has not yet decided whether a Directive for Pillar 1 would be at all needed, as the OECD agreement might be directly binding for the signatory countries.

Lastly, a lot of question marks remain about the EU digital levy. Mr. Angel re-iterated EC's promise to the European Parliament (EP) to propose it in 2021 still, but EC will have to assess if this is feasible. The OECD agreement does establish a ban on unilateral digital taxes, but OECD's tax Director Pascal Saint-Amans appears to leave the door open for a sort of "VAT top-up" for online services and goods.

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Italian tax Authority (ITA): ruling n. 761 dated 3 November 2021(recovery of exceeding accounting depreciation)

With the recent ruling n. 761, the ITA has confirmed the correct criterion for deducting the depreciation charged, in previous periods, in excess of the maximum tax relevant amount and therefore subject to an addback in the tax return.

The interpretative doubt (not among the most significant), represented in a ruling request, concerned the correct identification of the moment in which it is allowed to deduct (with a decreasing udjustment) the depreciation quotas exceeding the tax one, in the presence of a prospective change - extension - (pursuant to IAS 16) in the useful life of the assets. The ITA has specified that the principles already provided regarding the tax ricovery of the misalignment deriving from the exceeding statutory devaluation through an increase in the tax amortization quota up to the maximum allowed under the specific amortization tax rates (see Circ. n. 26/2012 and Ris. n. 98/2013) - apply also to the misalignment object of the request for ruling, which arises from the different timing of the statutory depreciation compared to the tax depreciation.

Therefore, in line with the approach proposed by the taxpayer, the ITA has specified that the recovery of the exceeding amortizatio - to be made through decreases for IRES purposes - must take place in the first tax period in which there is is "capacity" for the deduction of an additional tax amortization rate, up to the maximum amount calculated in application of the specific rax rates. Such interpretation is consistent with the provisions of art. 83 of the Italian Tax Code (TUIR) for tax recognition of the amounts posted to P&L with those of the following art. 109, co. 4, relating to the prior booking (in the relevant tax period or in previous periods) of negative income components.

This is a consolidated position of the ITA: in principle, the expenses charged to the financial statements (including the OCI for IAS / IFRS adopters) or to net equity represent a plafond of amounts to be deducted (trough negative tax adjustments in TAX periods of accounting depreciations lower than the amounts allowed for tax purposes.

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Italian Revenue Agency - Ruling n. 722/2021 – The commercial undertaking requirement for pex purposes at the company's liquidation stage

The question raised to the Italian Revenue Agency concerns the check of the commercial undertaking requirement – provided, for pex purposes, by art. 87, par. 1, lett. d), of the Italian Tax Code – at a participated company gone into liquidation, specifically keeping into account the rule sets forth by art. 87, par. 2, of the Italian Tax Code, according to which the named requirement must "*unceasingly sussist, at the moment of the realization, at least from the beginning of the third tax period preceding the named realization*".

The Italian revenue Agency, reminding to its Letter Circular of March 16th, 2005, n. 10/E, has generally argued that, in the hands of a company gone into voluntary liquidation, the said triennial requirement has to be verified relying on the beginning of the liquidation stage and not with regard to the moment in which the shareholding is realized.

More in particular, the Agency, referring to its Letter Circular n. 7/E of 2013, specified that the beginning of the liquidation stage does not coincide with the moment in which the participated company formally went into liquidation, but, on the contrary, with the moment in which the latest company put in place the preparatory activities related to the closing down of the enterprise.

According to the Italian revenue Agency such “preparatory activities” essentially consist in the cutting of the business structure, realized, for example, by the sale of the significant assets and/or by the dismissal of employers.

The above being stated, the Italian revenue Agency argued that, in connection with the case at issue, the temporal requirement sets forth by art. 87, par. 2, of the Italian Tax Code must be checked with regard to the three tax periods preceding the one in which the actual liquidation of the participated company has come.

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Supreme Court June 30th 2021, n. 18436 – Nature of art. 110 par. 7 of the Italian Tax Code

In the case at hands the Italian Revenue Agency issued a notice of assessment challenging the infringment of the Italian transfer pricing rule provided by art. 110 par. 7 of the Italian Tax Code.

The taxpayer argued the wrong application of the latest provision since the Italian Revenue Agency would not have found any evidence regarding a tax advantage enjoyed by the same taxpayer.

The Italian Supreme Court rejected the thesis of the taxpayer by the following arguments.

The art. 110, par. 7, of the Italian Tax Code del Tuir is a structural provision, and not an anti-avoidance one, arising from free competition principle sets forth by art. 9 of the Ocse Model tax convention geared to tackle the transfer pricing practises (switching of the taxable basis among companies belonging to the same group subject to different domestic tax disciplines) in itself.

For this essential reason the evidences given by the Italian tax authorities must not concern the tax advantage enjoyed by the taxpayer, but, properly, the existence of transactions, among related companies, carried on to a price different from the market one, whilst the taxpayer is burdened to demonstrate that the price agreed by the parties is compliant with transfer pricing rules.

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The non-proportional demerger cannot be challenged by the Italian tax authorities

Non proportional full demerger followed by donation of shares - Resolution No. 741 dated October 21th 2021.|Non proportional double demerger followed by donation of shares - Resolution No. 746 dated October 27th, 2021

The ITA have considered the scenarios described in the two resolutions to be non-abusive.

The resolution No. 741 concerns a generational transition organized as follows:

- consolidation of the ownership of the company’ shares on a single party;
- non-proportional spin-off into three separate companies, each wholly owned by the sole shareholder;
- donation of the bare ownership in each of the beneficiary companies to one of the three sons of the shareholder.

According to the ITA, such sequence of operations is considered to be non-abusive, as it does not provide the achievement of any undue tax advantage and it is not implemented in avoidance of any tax provisions or of the general principles of the tax system.

The resolution No. 746 dated October 27th, 2021 regards the non proportional spin-off of two companies, each owned in the same proportion by two brothers. In this context, the two companies are each split into two new companies, each having one of the current shareholder of the demerged company as a sole shareholder (100%).

Subsequently, the plurality of shareholders will be reconstituted in the companies resulting from the operation, by means of a donation of shares to each of the son of the original shareholders.

In this context, it is worth noticing that the demergers must be congruous: according to the ITA, “*the judgment of non-abusiveness, under direct taxes perspective, requires that the absence of cross adjustments between shareholders is merely for the purposes of simplification, without determining a lower tax burden than would be the case in the presence of such adjustments*."

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Capital gains arising from the shareholdings contributions do not generate NID base

Capital gains arising from the shares contribution recorded in the Profit and Loss Accounts – Resolution No. 732 of October 19th 2021

The facts represented by the taxpayer regard a company, which applies international accounting standards and which has recorded in its Profit and Loss accounts the capital gain deriving from a contribution of shareholdings, subsequently allocating the profit of the year to equity reserves.

For the purposes of determine the NID base, the ITA considered the contribution of shares to be equivalent to the contribution in kind of a business (or going concern). More in detail, in relation to the contribution in kind of a business, the NID Ministerial Decree (please see Article 5, paragraph 8, letter b), of the Ministerial Decree of August 3, 2017,) clarified that the equity reserves formed with profits "*deriving from capital gains recorded as a result of contributions in kind of companies or going concern*" are considered irrelevant for the purposes of the NID base calculation.

Therefore, regardless of the accounting rules adopted, under NID perspective, the contribution of shareholdings is considered to be equivalent to the contribution in kind of a business. As a consequence, any unrealized capital gain recognized in case of such contributions should not to be considered in the computation of the equity increase eligible for NID purposes.

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NID tax credit: request and utilization methods

Measure No. 238235 of September 7th, 2021 – Operating procedures for the NID tax credit communication

With the measure No. 238235 dated September 7th, 2021, the Italian Tax Authorities ("ITA") approved the procedures, the contents and the terms for submitting the communication for the utilization of the NID tax credit for the FY 2021 (please see Article 19 of the Law-Decree No. 73 of May 25th, 2021).

The communication must be submitted to the ITA, in electronic form, either directly by the beneficiary of the deduction or through the party which is responsible for the transmission of the tax returns. The submission is admitted starting from November 20th 2021 and until the expiration of the ordinary deadline for the submission of the tax return referring to the FY following the one in progress as of December 31st, 2020.

Within 30 days from the date of submission, the ITA shall notify the approval or the denial of the NID tax credit.

After the notification of the ITA approval of the tax credit, the tax credit may be used starting from the day following (i) the payment of the cash contribution or (ii) the waiver or offsetting of the credit or (iii) the resolution of the shareholders members to allocate all or part of the year's profits to reserves.

As an alternative to the use in compensation, the tax credit can be claimed for reimbursement in the tax return or can be transferred to other parties.

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Indirect Tax | VAT

Communication of the cross-border transactions' data (so called esterometro) – abolition from january 1, 2022 – electronic submission through sdi system

Italian tax authorities' Provision no. 293384, dated October 28, 2021 – Amendments to Provision no. 89757 dated April 30, 2018

According to Budget Law 2021 (Law December 30, 2020, no. 178) starting from January 1, 2022, Esterometro communication - provided by art. 1, par. 3-bis of Legislative Decree August 5, 2015, no. 127 - will be removed and the data of supplies/purchases of goods and services issued to and received by foreign taxpayers will be submitted electronically, in Xml format, through the SdI system.

Technical specifications issued as annex to Provision no. 89757 dated April 30, 2018 are amended as below:

- for transactions carried out towards subjects not established in Italy (foreign taxpayers) transactions' data are submitted within the terms of issuance of the invoices or documents certifying the receipts, by indicating as "recipient code" of the Xml file the conventional value (XXXXXXX);
- for transactions received from foreign taxpayers (not established in Italy) transactions' data are submitted by the fifteenth day of the month following that of receipt of the document proving the transaction or of execution of the transaction, by transmitting to the Interchange System different XML files with the codes <DocumentType> TD17, TD18 or TD19.

The communication is optional for all operations for which a customs bill has been issued and those for which electronic invoices have been issued or received.

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Declarations of intent – habitual exporters regime

Procedures for the implementation of anti-fraud measures provided by par. from 1079 to 1081 of art. 1, Law December 30, 2020, n. 178, for the invalidation of declarations of intent already issued and the prevention of issuance of new irregular declarations of intent - Provision no. 293390 of October 28, 2021

Italian tax authorities established the procedures – effective starting from January 1, 2022 – related to the identification of the risk analysis and control criteria, the invalidation procedures of the letters of intent already issued and the inhibition to issue new irregular letters of intent through the electronic procedures.

The scope is assessing the requirements for obtaining the qualification of habitual exporter pursuant to art. 1 par. 1 letter a) of Decree no. 746/1983, by also cross-checking the data included in the declarations of intent with the information available in the databases held by the Tax Authorities.

More in detail, the risk assessment by the Italian Tax Authorities will be focused on:

- analysis of critical issues and irregularities on the letter of intent's data;
- evaluation of particular risk elements identified on the position of the legal representative of the company;
- identification of risk elements related to the tax position of the company, with particular reference to omissions and/or irregularities with payments or return fulfilment;
- risk identification of transactions included in the plafond.

Furthermore, with reference to the electronic invoicing, starting from 1 January 2022, the supplier/provider who has received a declaration of intent, in addition to the indication of the specific code "N3.5" in field 2.2.1.14 "Nature", will be required to fill in section 2.2.1.16 "OtherManagementData" of the .XML file, as follows:

- field 2.2.1.16.1 <TypeData> must be indicated the word 'INTENTO';
- field 2.2.1.16.2 <TextReference> must report the receipt protocol of the declaration of intent and its progressive number separated by the sign "-" or by the sign "/";
- field 2.2.1.16.4 <ReferenceDate> must indicate the date of the e- receipt, issued by the Tax Authorities, containing the protocol of the declaration of intent.

In the event of negative outcome of the analysis and control activities, declarations of intent issued irregularly are invalidated at the moment of electronic verification of the submission. At the same time, Italian Tax Authorities inform the issuer on the negative outcome and on the invalidation of the letter of intent, via certified email, and he will be prevented to submit further letters of intent (even the supplier is informed). The habitual exporter can prove to ITA its regular position and in such a case, ITA will proceed in removing the invalidation carried out.

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Split payment - publication of lists 2022

Publication on the website of the Italian Government (Finance Department) of the lists of entities required to apply the split payment mechanism for the year 2022.

The Department of Finance of the MEF has published the lists for the year 2022 of the subjects required to apply the split payment mechanism. The lists are updated as of October 20, 2021.

In this regard:

- the update of the lists is continuous during the year and it is possible to report any missing or incorrect inclusions;
- the date of inclusion in the lists is fundamental and has constitutive effect, the company is considered as subject to the split payment mechanism starting from the day in which it has been included in the list.

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Electronic trasmission of daily recepits

Postponement to 2022 of the obligation to prepare cash registers for the new electronic route for sending the data of the daily receipts – Provision no. 228725 dated September 7, 2021

The obligation to be compliant with the new electronic route for the electronic transmission of daily receipts (version 7.0) has been extended to January 1, 2021 (old deadline October 1, 2021). Until the end of the year it will be possible to use the old version (6.0) for data transmission, given the difficulties of adaptation. The postponement has been provided due to COVID-19 emergency and it takes into account the requests carried out by all the associations. Consequently, to purchase an electronic cash register or to adapt the existing one, traders, professionals, shopkeepers, and operators have more time. The new technical specifications provide for a more detailed detection of the daily receipts, allowing to differentiate amongst several amounts (returns and cancellation transactions, pre-payments for supplies not delivered, considerations not paid for supplies of services rendered, receipts linked to an invoice).

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Quick fixes

Legislative Decree November 5, 2021, no. 192, published in the Italian Official Gazette no November 30, 2021 - transposing Directive (EU) 2018/1910 – Quick Fixes

After almost 2 years of delay Italy has transposed EU Directive 2018/1910 dispositions on intra-EU transactions. In detail, on 30 November 2021 it has been published on the Official Gazette Legislative Decree no. 192/2021 on Quick Fixes.

The Legislative Decree introduces new articles in Law Decree August 30, 1993, no. 331:

- call-off stock: new art. 38-ter and 41-bis are introduced to Law Decree August 30, 1993, no. 331, for the Intra-EU purchases and sales under call-off stock agreements. Such transactions won't be considered as transfer of own goods but will benefit of a suspensive regime until the moment in which the ownership of the goods passes to the purchaser (withdrawal of the goods from the warehouse) by avoiding the obligation for the seller to ask for a VAT registration in the country of arrival;
- chain transactions with the intervention of 3 or more parties and only one physical delivery of goods: art. 41-ter will be introduced, by defining the transaction to which the transport must be ascribed; consequently, such transaction will be considered as the exempt Intra-EU supply. Generally speaking, the exempt Intra-EU transaction is the one carried out towards the promoter of the chain, unless he communicates its VAT registration number in the country of origin of the goods (in such a case, the Intra-EU supply will be the one carried out by the promoter);
- requirements of the Intra-EU supply: art. 41, par. 2-ter will introduce substantial requirements to the Intra-EU supplies: the customer, in addition of being a taxable person, must have a VAT registration number in an EU Member State different from the one of origin of the goods. Submission of the Intrastat Form also becomes a substantial requirement.

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Invoicing mistake – credit notes – right to refund – requirements

Credit notes issued according to art. 26, par. 3 and art. 30-ter, Presidential Decree no. 633 of 1972 – Tax ruling no. 762 of November 4, 2021

Italian tax authorities provide important clarifications on credit notes issuance and VAT refund under art. 30-ter. In detail, an Italian taxpayer Alfa issued during 2019 invoices with VAT (duly paid to the Revenue) towards company Beta, which did not paid them and did not recorded them on their purchase VAT register, not deducting the related VAT (Beta did not agree on the amount invoiced). After a settlement agreement signed on 2021, the parties agreed an amount to be paid to Beta and therefore, Alfa asked to ITA how the invoices issued during 2019 should have been treated and if credit notes under art. 26 could have been issued. In case of negative answer, Alfa asked the possibility to start the procedure provided by art. 30-ter to have the refund of the VAT paid to Revenue in 2019. ITA clarified that:

- the issuance of a credit note under art. 26 represents the principal and general method to remediate the errors and mistakes occurred during invoicing process;
- if it is objectively impossible issuing such credit note, it would be possible (under certain requirements) to benefit of the VAT refund procedure provided by art. 30-ter. ITA clarified that art. 30-ter cannot be used to remediate to the guilty expiry of the deadline to proceed with the issuance of a credit note (one year), but it must be used as a residual disposition.

As a further clarification, ITA mentioned that the right for the VAT refund ex art. 30-ter (2 years from the payment) must be acknowledged each time an error occurrs but if there is no VAT leackage for the Revenue (i.e. each time debit VAT has been paid).

In the case at stake, VAT has been paid by Alfa and BETA did not deduct it, therefore ITA recognized the possibility to have the VAT refunded according to art. 30-ter.

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Global Employer Services

Special Tax Regime for Impatriate – Ruling answer no. 683 of October 7th, 2021

Return to Italy due to the natural expiry of the assignment abroad - Continuity with the job position prior to expatriation.

The Tax Authority, with the Ruling answer no. 683 of October 7th, 2021, confirmed again that, in the event of return after an assignment abroad, the special tax regime does not apply in the absence of the requirement of "working discontinuity", in line with what is stated by the Circular Letter of the Tax Authority no. 33 of 2020.

The circular no. 33 of 2020 of the Tax Authority specified that the special tax regime does not apply in the event of **the assignment abroad** with subsequent return in the presence of the same contract and with the same employer. Otherwise, in the hypothesis in which the work carried out by the expatriate constitutes a "new" work activity by signing a new employment contract, different from the contract in force in Italy before the assignment, and therefore the expatriate's role would be different than the previous one, he will be able to access the benefit starting from the tax period in which he will transfer his tax residence to Italy. The benefit does not apply if the individual, even in the presence of a "new" contract for the hiring of a "new" corporate role at the time of return, could be in a situation of "continuity" with the previous work position carried out in the territory of the State before expatriation.

In this specific case, the return to Italy on January 31st, 2021 took place at the time of natural end of the extension of the assignment period and the related contractual provisions, together with those referred to the "new "contract to be stipulated with another company of the same group, leads to consider that the job position assumed upon return is in substantial" continuity "with the previous job position.

Therefore, the Tax Authority concludes that the requirement of "working discontinuity" is not met and, in its absence, the access to the mentioned special tax regime must be considered excluded.

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Smart working – Ruling answer n. 626 of September 27th, 2021

Non-resident employee – Working activity performed in smart-working regime in Italy with a stay of more than 183 days - Taxability of income in Italy

The Tax Authority, with the Ruling answer **no. 626 of September 27th, 2021,** considered taxable in Italy the employment income received by a tax resident abroad, who, due to the COVID emergency, carries out the working activity in Italy, in smart working mode, for a Luxembourg Company.

This case concerns an employee of a company based on Luxembourg, not resident for tax purposes in Italy, who, from March 2020 to date, has carried out her working activity in Italy under the smart-working regime. The situation in exam is the one, in which, presumably, a subject, while physically moving to Italy, maintains his own center of **vital interests** in the foreign Country (family or prevailing economic and social relationships).

In general terms, art. 3 paragraph 1 of the Italian Tax Code provides the taxation of non-resident individuals solely for the incomes **produced in the territory of the State.** These latter are identified in accordance with art. 23 paragraph 1, lett. c) of the Italian Tax Code, which institute that *"income from employment rendered in the territory of the State"* is considered to be produced in Italy.

The domestic provisions must align with the conventional provisions on the taxation of employment income. Specifically, art. 15, paragraph 1 of the Italy-Luxembourg Double Taxation Treaty provides for the employment income exclusive taxation in the Country of residence, unless the activity is carried out in the other State; in this case, the income is taxed in both countries.

However, the concurrent taxation principle finds a limit in art. 15 paragraph 2 of the same Treaty, which provides, the exclusive taxation in the State of residence also for incomes related to an employment activity exercised in the other Country, upon the **joint occurrence** of the following three conditions:

- the recipient is present in the Country where the working activity is carried out (in this case, Italy) for a period not exceeding 183 days in the course of any fiscal year;
- the remuneration is paid by or in behalf of an employer who is not a resident of the Country where the working activity is carried out (it must not be an Italian employer);
- the remuneration is not borne by a permanent establishment or by a fixed base that the employer has in the State where the working activity is carried out.

In this specific case, the Authority concludes that it cannot be applied the paragraph 2 of art. 15 of the Italy-Luxembourg Treaty, which excludes the concurrent taxation of both States under certain conditions, as the individual declared that she had stayed in Italy for more than 183 days in the concerned period; the three listed conditions have to be applied jointly. In fact, the absence of at least one of them excludes the exemption in the State where the working activity is performed.

Therefore, the working activity carried out in Italy in 2020 is also fiscally relevant in Italy and the resulting double taxation will be resolved through the recognition of the tax credit.

The conclusions of the Tax Authority are similar to those expressed in the Ruling answer no. **458 of 2021**; basically, the application of art. 15 of the Treaty would be related to the actual physical presence of the person in the State **regardless of the contingencies related to the emergency state**, which led to the forced stay in the State, in the absence of specific agreements.

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Special Tax Regime for Impatriates and Smart working – Ruling Answer no. 621 of September 23rd, 2021

With the Ruling Answer **no. 621 of September 23rd, 2021,** the Italian Tax Authority returns to the issue of compatibility between the fruition of the special tax regime for impatriates and the execution of the working activity in a *smart working regime.*

This case concerns a situation, raised by an Italian employer, of a Dutch employee to whom the special tax regime has been applied starting from January 2020. However, due to the pandemic situation, the latter decided to return to the Country of origin while continuing to work remotely for the Italian employer.

The Tax Authority confirms the approach already expressed in previous rulings based on the enhancement of the physical presence of the employee, denying in this specific case, the entitlement to the tax benefit. In fact, for working activity performed under *the smart working regime*, the employment income is considered to be produced in the State where the individual is physically present, regardless of the nationality of the employer. This also applies in the case of temporary transfers between different Countries determined by company policies due to the COVID-19 emergency.

In this case, considering the criterion of physical presence, the tax benefits for impatriates provided by Article 16 of Legislative Decree 147/2015 were denied, since:

- the individual worked physically in Italy for only 76 working days and operated from another State remotely for the remaining working period.
- consequently, the requirement of performing the working activity **prevailing on** Italian territory is not met.

Consequently, if the individual physically works in Italy for only 76 days, and operates remotely from another State for the remaining working period with the same employer, cannot benefit from the special tax regime for impatriates stated by the Article 16 of Legislative Decree 147/2015, which is **linked** to the performance of the working activity prevailing on **the Italian territory,**

On the contrary, in line with the principle expressed in ruling no. **596/2021,** the Tax Authority has confirmed that the favorable regime can be applied in the case of employees who transfer their residence to Italy to carry out their working activity for foreign companies in *smart working regime.*

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Sums attributed to shareholders of simple partnerships – Ruling Answer no. 754 of October 28th, 2021

With the Ruling answer no. **754** of October 28th, 2021, the Tax Authority intervened on the tax regime applicable to the sums attributed to the members of a simple partnership following the sale of a **revalued shareholding** given the further extension expiring on November 15th 2021 in relation to the tax benefits introduced by the Law no. 448 of 2001. Following the guidelines expressed in the previous ruling answers of the Tax Authority n. **689 and 691** the Tax Administration has focused on the **non-taxability** of the profits distributed to the shareholders.

Concretely, the Ruling answer analyzes the case of a natural person who owns 80% of a simple partnership, which holds a 20% quota in a Corporation. The tax cost of the 20% shareholding has ben redetermined and the sale value of the same did not exceed that of the appropriate appraisal report drawn up. Subsequently, the proceeds of the sale are **distributed to** the shareholders of the simple partnership and the latter is liquidated **and extinguished.**

Before expressing its opinion, the Tax Authority recalls the civil and fiscal discipline of the simple partnership and the types of income achievable by the same, including the methods of attribution to the shareholders.

In fact, simple partnerships cannot carry out commercial activities according to the provisions of **Article 2249** of the Italian Civil Code and determine their income as the sum of the individual categories of income indicated in Article **6** of the Italian Tax Code.

In other words, the income produced by the simple partnership is classified depending on its **source** and contributes to the total income as a sum of the income belonging to each income category net of deductible expenses, with the exclusion of income subject to withholding tax or substitute tax and exempted income.

The total income of the company is then **charged for transparency, pursuant to Article 5** of the Italian Tax Code, directly to each shareholder in proportion to their share of the profits and regardless of the actual perception of the same.

The Tax Authority observes that for this case there is a clear distinction between the moment of **taxation** of the income of the business partner and the moment of the **material perception** of the same: it follows that the attributions of income already taxed represent mere asset movements, without any relevance for tax purposes.

Regarding the profits already attributed for transparency to the shareholders of the companies referred to in art. 5 of the Italian Tax Code, in fact, the subsequent distributions determine exclusively an indirect effect that consists in **the reduction of the fiscally recognized cost** of the participation (Article 68, paragraph 6 of the Italian Tax Code).

Otherwise, the presence of exempt income or subject to substitute taxation or withholding tax for the simple partnership means that these amounts **do not contribute to** the total taxable income of the company (and to the relative imputation for transparency). Moreover, the subsequent distribution of the same does not suffer any taxation and does not even **affect** the tax cost of the participation.

This principle must be coordinated with the hypotheses of dissolution of the social relationship provided for by **Article 20-bis** of the Italian Tax Code and which produce participation income. These refer the income deriving from the sums attributed to the shareholders in the event of liquidation of the **company** and determined according to **Article 47,** paragraph **7** of the Italian Tax Code.

During liquidation, it is clarified the non-relevance of any attributions of amounts (properly documented) not contributing to the determination of total income of the simple partnership because they are **exempt** or subject to substitute **taxation** or withholding.

Therefore, distributions to shareholders of sums deriving from the sale of unlisted shareholdings that have been previously revalued pursuant to **Article 5** of Law 448/2001 and that have achieved a different financial income equal to zero pursuant to Article **67** of the Italian Tax Law are not taxed.

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Failure to fill out the RW form - Order of the Supreme Court no. 31626 of 2021

Failure to fill in the RW form (declaratory framework aimed at communicating investments abroad) can be subject to amends through a supplementary declaration. This form, in fact, is only a part of the declaration model, and, therefore, its absence does not represent a failure in filling out the declaration to the extent that the tax declaration has been submitted and does not constitute an autonomous tax model. This is affirmed by the Supreme Court in order no. 31626 of November 4, 2021.

The case originates from the contestation issued by the Italian tax authorities against a taxpayer for the lack of filling out the RW form relating to the 2006 tax year, in relation to some transfers with Switzerland and the United Kingdom, in favor of a Canadian company.

The taxpayer contested the measure before the tax court, claiming to have rectified the infringement, prior to notification, by means of a supplementary declaration containing the correct data of the RW form.

The decision of the Supreme Court seems to finally dispel the doubts that have long revolved around the autonomy of the RW form, with particular reference to the approach taken by some offices despite the published clarifications.

In this regard, the ministerial practice already in force with **Circular 11/E/2010** had considered amendable through the tax return, the failure to fill out the RW form. This circular was, in fact, recently recalled by **Resolution no. 82 of December 24, 2020**, which, in response to a specific question, explained, confirming the previous clarifications provided, that when the annual declaration is submitted within the terms "it is permitted to fill in and send only the front page and the RW form even after the 90-day deadline".

In light of the Supreme Court's ruling and the ministerial practice, the RW form can therefore be regularized in view of the following sanctions:

- In case the RW form is submitted **within 90 days** from the normal expiry date of the deadline for the submission of the declaration, the specific penalty for the RW form amounts to **EUR 258** (art. 5, paragraph 2, last sentence of DL 167/1990), to which the reductions foreseen in case of voluntary compliance are applicable, in addition to the penalty for the failure to make the payment, (art. 13 Dlgs 471/1997), if such a case has produced substantial effects on the taxes due through the IVIE and IVAFE forms.
- In case the RW form is submitted **after 90 days** from the normal expiry date of the deadline for submission of the declaration, the sanction for failure declaration applies (article 1, paragraph 2 of Legislative Decree 471/1997), adding here the specific sanctions provided for the RW form (article 5, paragraph 2 of Legislative Decree 167/1990), from **3% to 15%** of the undeclared amounts, or from 6% to 30% for Black - List countries. The reductions foreseen in the event of a diligent settlement are applicable.

It should be noted that, based on **Resolution no. 82 of December 24, 2020**, the penalty system form for declaratory violations of the RW framework is considered independent from that, consequently, foreseen for violations of the IVIE and IVAFE assets, which, depending on the timing of regularization, should fall, independently, under the cases of lack of payment or false declaration.

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Tax Litigation

Revenue Agency, Directorial Provision n. 275852 of 18 October 2021 - facilitated definition of the amounts due after automated control of tax returns

The Provision in question governs the methods to carry out and make effective the facilitated definition of the amounts due after automated control of the tax returns for the tax periods in progress as of 31 December 2017 and 31 December 2018, introduced by Legislative Decree n. 41 of 22 March 2021 (Article 5, paragraphs 1 to 9).

This measure, reserved to those with a VAT number active as of 23 March 2021 who, due to the Covid-19 epidemic, in 2020 suffered a reduction in turnover greater than 30% compared to the previous year, is carried out with the payment of taxes, related interests and social security contributions, excluding penalties and additional amounts, with the methods applicable to the collection of sums due after automated controls (Articles 2 and 3-*bis* of Legislative Decree n. 462/97).

The effectiveness of the definition is subject to the compliance with the conditions identified in the Communication of the European Commission of 19 March 2020 C(2020) 1863 ("*Temporary framework for State-aid measures to support the economy in the current emergency of COVID-19*"): in order to certify the compliance with the conditions, taxpayers who intend to accept the proposed definition submit the appropriate self-declaration by 31 December 2021. If the proposed definition is not received by the taxpayer in time, the self-declaration can be submitted by the end of the month following that of payment of the sums due or of the first installment.

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Collection measures aimed at encouraging the recovery of economic and social activities

With reference to the measures in question and in continuity with our previous comments, the Legislative Decree n. 146 of 21 October 2021 (containing "*Urgent measures in economic and fiscal matters, to protect work and for non-postponable needs*") has provided (Articles 1, 2, 3): (i) relieve from the effects of the terms expiration for facilitated definitions "rottamazione-ter" and "saldo e stralcio" (Legislative Decree n. 119/2018; Legislative Decree n. 34/2019; Law n. 145/2018) for which the payment of the installments to be paid for 2020 and on 28 February, 31 March, 31 May and 31 July 2021 is considered timely if made in full by 30 November 2021; (ii) for notices of payment notified from 1 September to 31 December 2021, the extension of the payment term to 150 days; (iii) the extension of the installments in case of delayed payment plans.

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Budget Law for year 2022 (draft) - Governance and remuneration of the collection national Service

The Council of Ministers approved on 28 October 2021 draft of the Budget Law for the financial year 2022 and the multi-year budget for the three-year period 2022-2024.

Among the measures in tax matters, in addition to the provision of a governance role of the Revenue Agency towards the Revenue Agency - Collection department in the view of the expected incorporation of the second in the first and for the purpose of a greater efficiency and effectiveness of the system, it is established that, for transactions following 1 January 2022, the remuneration of the

collection service, up to now partly borne by the taxpayer, is covered by a budget allocation to be paid by the State (Article 17 of Legislative Decree n. 112/1999; Supreme Court sentence n. 120/2021).

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Supreme Court, 30 September 2021 order n. 26523 - Partial correction - Requirements for the application of the ius superveniens (Legislative Decree n. 34/2019)

With the sentence in question, the Supreme Court ruled on the case in which the taxpayer, in the act of voluntary correction for a late payment of tax for the year 2007, had paid - within the deadline to benefit from the reduced penalty - the tax, the penalty and the interests but, the latter, to an extent lower than that due: the Revenue Agency had rejected the correction, not deeming the new provision on partial correction to be inapplicable (Article 13-bis of Legislative Decree n. 472/97, introduced by Legislative Decree n. 34/2019), while the judges had deemed it correctly carried out since the interests still due could be claimed by the Office.

The Supreme Court, as a result of regulatory and case-law recognition, found that the new art. 13-*bis*, rule of authentic interpretation, expressly admits partial or split voluntary correction, extending the operating scope of the same (Sentence n. 6593/2021): the correction is feasible in case of split payment of the tax due, to be carried out also in relation to a part of the tax due or in relation to late payments made with different deadlines, provided that interests and penalties related to the part or single fractions of the late paid tax debt have been paid.

Given the interpretative nature and retroactive efficacy of the rule, the judges note its direct applicability also in the dispute examined as rule (i) intervened after the appeal before the Supreme Court (with the effect that the appellant - Revenue Agency - had not been able to take into account the changes that occurred); (ii) relevant to the issues dealt with in the appeal or to the correction in presence of non-integral payments.

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Supreme Court, 20 October 2021 order n. 29036 - Nature of the partial assessment

In the ruling in question, although with reference to a particular issue (no challenge allowed of the deed of acceptance given by the taxpayer to the findings of a report of verification pursuant to the previous Article 5-*bis* of Legislative Decree n. 218/97) the principle according to which the partial assessment "*is characterized by the challenge of a greater tax debt, without any valuation activity emerging by the financial administration, a profile which, instead, pertains to the ordinary assessment deed*": according to the judges, in fact, "*the reason of the partial assessment, indeed, is found in the need to allow the recognition of a contributory capacity that emerges ictu oculi*".

These principles, although to be contextualized in the specific case relating to the previous deflationary institute, may constitute an interesting reference considering the regulatory evolution that has seen the weakening of the distinction between the types of assessment (ordinary and partial).

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Supreme Court, 30 September 2021 order n. 26515 - Non-existent operations and right of deduction

The ruling in question concerns cases relating to year 2004 in which, with reference to the challenge of undue deduction of VAT on a real estate sale operation due to unfair conduct (the parties to the operation belonged to the same business organization; the sale was aimed at creating a tax advantage for the purchaser; the seller, based in Luxembourg, had not paid the VAT), the judge of the appeal had disregarded the tax burden of the Revenue Agency as (i) the seller had made the full payment of VAT following a tax transaction, for which there was no loss to the Treasury; (ii) if the deduction of VAT had been denied, an unlawful duplication of tax would have

occurred. The Agency challenged the sentence since the symptomatic elements of the abusive nature were not detected and the seller paid the VAT only after the notification of the challenged deed and not spontaneously.

As a result of a review of the jurisprudence, the Supreme Court found that the principles of VAT neutrality and proportionality of the obligations imposed on taxpayers require to recognize the right of deduction, even for a transaction not actually carried out, where the seller has paid the tax in full as a result of a tax transaction as part of an agreement with creditors, thus definitively eliminating the risk of loss of tax revenue: for this purpose, the fact that the payment took place subsequently is not relevant upon notification of the assessment, being in any case suitable to avoid the risk of a loss for the Treasury.

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Supreme Court, 22 September 2021 order n. 25632 - criminal judgement and tax trial

The sentence in question focuses on the relevance, in the tax trial, of the criminal judgment (irrevocable favorable sentence) that occurred during the course of the case, denied by the Revenue Agency according to which the binding effect is produced only in respect of those who have been party to the criminal judgment (the Revenue Agency had not participated to the trial) and, in any case, could never operate automatically in the tax process. The Supreme Court affirmed the binding effect as: (i) there are no procedural preclusions for the production of an irrevocable criminal sentence, which can be acquired and used for the decision even *ex officio*; (ii) the factual assessment, carried out in a criminal case, binds the civil judge; (iii) there was no "automatic" and uncritical extension of the criminal judgment, but an explicit assessment performed by the judges on the identity of the facts subject to criminal proceedings and of the controversial facts in the tax field; (iv) the Revenue Agency had not dealt with this specific *ratio decidendi*, nor had it showed or proved that the facts on which the criminal and tax assessments were based were not the same.

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FSI

Services provided to an asset management company in relation to the establishment and management of an AIF – VAT exemption – Ruling no. 631 of 2021

With the Ruling no. 631 published on 29th September 2021, the Revenue Agency provided some clarifications in relation to the VAT treatment applicable to certain services provided to an asset management company (hereinafter "Management Company" or the "Claimant") which would establish and manage alternative investment funds (hereinafter "AIFs" or "Funds") according to Art. 1, let. m-*ter*) of Legislative Decree no. 58/1998 ("Finance Consolidated Act") – namely, closed-ended funds reserved for institutional investors.
In the present case, the Claimant has not been authorized by the relevant authorities to carry out the collective asset management activity yet.
This noted, the Management Company has entered into a service agreement with an external advisor which assists the Claimant in defining the AIFs management and marketing strategies.
With reference to the aforementioned services, an *una-tantum* fee (so-called "Retainer Advisory Fee") and a "Success Fee" depending on the size of the AIFs shall be due by the Management Company to the advisor.
In order to define the correct VAT treatment applicable to the aforementioned services, the Claimant recalls the previous judgements of the CJEU, according to which: "*the concept of 'management' of a special investment fund within the meaning of Art. 135(1)(g) of the VAT Directive covers not only investment management, involving the selection and disposal of assets under management, but also administrative and accounting services – such as computing the amount of income and the price of units or shares, the valuation of assets, accounting, the preparation of statements for the distribution of income, the provision of information and documentation for periodic accounts and for tax, statistical and VAT returns, and the preparation of income forecasts*".
The Revenue Agency, referring to its previous clarifications, confirms that the exemption set forth by Art. 10, paragraph 1, no. 1 of the VAT Decree may be in principle applied to the above services, as these are connected to – and relevant for – the Fund's management activity performed by the Management Company.
Notwithstanding the above, such a VAT exemption becomes applicable as soon as the Claimant will be authorized by the relevant authorities to act as a AIFs management company. In this respect, Italian Tax Authority deems that only when the authorization is obtained by the Claimant the services under analysis fall within the scope of the VAT exemption, being these regarded as services related to the management of Funds. On the contrary, unless the aforementioned authorization is obtained, the services provided by the advisor would not be related to the management of AIFs and therefore the VAT exemption under the mentioned Art. 10 does not apply.

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Simple Investment Company (SiS) – qualification as collective investment scheme and tax relief for startups and innovative small and medium-sized enterprises (SMEs) - Ruling no. 661 of 2021

With the Ruling no. 661, published on 5th October 2021, the Revenue Agency provided some clarifications in relation to the qualification for tax purposes of the so called 'simple investment companies' (hereinafter "*SiS*"), regulated by Art. 1, paragraph 1, let. i-*quater)* of Legislative Decree no. 58/1998 ("Finance Consolidated Act"). In addition, the Italian Tax Authority clarifies certain aspects in relation to

tax relief applicable to investments made by *SiS* in the startups and innovative SMEs equity, pursuant to Art. 29 of the Law Decree no. 179/2012 and Art. 4 of the Law Decree no. 3/2015.

In the present case, the Claimant set up a *SiS* in order to collect financial resources aimed at supporting startups and the high value entrepreneurship. In particular, the *SiS* deed provides that:

- *SiS* directly manages its own assets;
- such assets are invested in SMEs/startups not listed on regulated markets;
- the economic proceeds are reinvested by the Claimant in its institutional activities;
- two categories of shares are issued (cat. A reserved for the Claimant and cat. B for other investors).

With reference to the qualification of *SiS*, the Revenue Agency firstly refers to the definition of collective investment scheme according to Art. 1, paragraph 1, let. k), of the Finance Consolidated Act, which main features are:

- raising and managing capital from a number of investors;
- investing raised capital in accordance with a defined and independent investment policy for the benefit of investors.

In light of the above, given the definition of *SiS* under the aforementioned Art. 1, paragraph 1, let. i-*quater)* of the Finance Consolidated Act, the Revenue Agency highlights that *SiS*:

- are defined by the Finance Consolidated Act as alternative investment funds (AIFs), set up as SICAF;
- directly manage the assets collected;
- have equity not exceeding Euro 25 million;
- have as exclusive business purpose to invest in startups/SMEs not listed on regulated markets;
- does not use leverage;
- shall have a minimum share capital equal to that provided for joint stock company.

As the *SiS* under analysis meets the aforementioned requirements and it is subject to prudential Bank of Italy and Consob supervision, the Revenue Agency confirms that the *SiS* may be qualified as a collective investment scheme under Art. 73 of the Italian Tax Code and, therefore, it should be considered as an exempted entity for corporate income tax ("IRES") purposes.

In relation to the tax relief allowed for investments in the equity of startups and innovative SMEs – namely a deduction for IRES purposes equal to 30% of the amount invested – the Revenue Agency firstly outlines that such investments (i) can be made either directly or indirectly through a collective investment schemes and (ii) shall be held for at least 3 years.

In case of indirect investments through collective investment schemes, the Revenue Agency recalls that in order to benefit from the above mentioned tax relief:

- collective investment schemes shall be considered as "qualified schemes", meaning that at least 70% of the total value of the assets – as resulting from the annual management report or financial statements of the fiscal in year in which the investment is made – shall be invested in startups or innovative SMEs (herein after "assets test") ;
- date of subscription of the units issued by collective investment schemes shall be considered.

This noted, the Revenue Agency clarifies that the Claimant may benefit from the tax relief applicable to investments made in startups and innovative SMEs in the fiscal year in which the abovementioned asset test is satisfied, although the investor has already subscribed the collective investment scheme units in previous fiscal year.

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Art. 113, paragraph 5 of ITC - Disapplication of the PEX regime with reference to participating financial instruments - Ruling no. 727 of 2021

With the Ruling no. 727, published on 18th October 2021, the Revenue Agency provided some clarifications in relation to the tax treatment of participating financial instruments ("PFIs") issued by a financial institution ("Beta") and acquired by a bank as a creditor ("Claimant") within a pre-bankruptcy agreement procedure ("agreement").

In the present case, the Claimant deems that the participation exemption regime (PEX) under Art. 87 of the Italian Tax Code ("ITC") is not applicable to the PFIs issued by Beta and acquired by the Claimant, pursuant to Art. 113, paragraph 5 of ITC.

Recalling clarifications already provided (see Circular no. 42/E of 2010), the Revenue Agency firstly points out that the rationale behind the mentioned Art. 113 of ITC is to avoid any tax adverse tax consequences in the acquisition of shareholdings within credit recovery procedure.

This noted, please consider that based on the agreement Beta's activities have been separated into:

- ongoing business;
- assets subject to a liquidation procedure for the benefit of creditors – qualifying as a "segregated assets" pursuant to Art. 2447-*bis* ff., of Italian Civil Code.

In order to determine the correct tax treatment applicable to the aforementioned PFIs, the Italian Tax Authority recalls the Art. 44, paragraph 2, let. a) of ITC, which defines 'securities similar to shares' as those financial instruments whose remuneration entirely consists of the participation to the economic results of (i) the issuing company or (ii) the specific business in relation to which such securities have been issued.

Having regard to the foregoing, based on the information provided by the Claimant the Revenue Agency notes that:

- under the mentioned agreement segregated assets are identified for the sole benefit of creditors receiving the PFIs. In particular, creditors holding the PFIs will receive the proceeds stemming from the liquidation of segregated assets, which are kept as separated from proceeds stemming the ongoing business;
- segregated assets will be managed by Beta in the exclusive interest of the creditors receiving PFIs;
- the remuneration of the PFIs totally consists of the participation in the economic results deriving from the liquidation of segregated assets.

On these bases, the Italian Revenue Agency concludes that:

- the aforementioned PFIs can be qualified for tax purposes as 'securities similar to shares', provided that such securities are available for trade;

participation exemption regime provided for by Art. 87 of ITC can be not applied under the aforementioned Art. 113 of ITC.

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