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Direct Tax

The Transitory rules for dividends from qualified shares I Agenzia delle Entrate n. 454/2022

Law 205/2017 amended the taxation rules for dividends from "qualified" shareholdings, also providing (Article 1 paragraph 1006) a transitional regime for distributions of profits formed until the fiscal year 2017, resolved by December 31, 2022,

More precisely, the paragraph 1006 provides that the transitional rule applies "*to distributions of profits deriving from qualified shareholdings in companies and entities subject to corporate income tax formed with profits produced up to the current fiscal year as of December 31, 2017, resolved from January 1, 2018 to December 31, 2022.*"

Specifically, the transitional regime of taxation of dividends received by individuals can be summarized in the following measures of the taxable percentage for IRPEF purposes:

- 40% on profits produced up to the fiscal year as of 12/31/2007;
- 49.72% on profits produced from the fiscal year following the fiscal year as of 12/31/2007 until the fiscal year as of 12/31/2016;
- 58.14% on profits produced in the fiscal year as of 12/31/2017.

Following the literal tenor of the transitional rule, it has always seemed that the only requirement for the application of the former regime was the presence of a distribution resolution adopted by the company by December 31, 2022.

In the response to Interpello No. 454 of September 16, 2022, a different orientation of the Agency emerged, according to which, as clarified in Resolution No. 56/E of 2019, the transitional regime provided by Paragraph 1006 of Article 1 of the Law 205/2017 derives from the legislator's desire to safeguard, for a limited period of time (January 1, 2018 to December 31, 2022), the tax regime of profits formed in previous tax periods with respect to the introduction of the new tax regime. This consideration leads to the conclusion that "*the normative identification of the time frame of the transitional regime and the application of the aforementioned cash principle, leads to the conclusion that for dividends received as of January 1, 2023 relating to qualified shareholdings, withholding tax or substitute tax at the rate of 26 percent is applicable. Therefore, in the present case, profit reserves distributed after December 31, 2022, should be subject to withholding tax at the rate of 26 percent by the petitioning company pursuant to Article 27, paragraph 1, of Presidential Decree No. 600 of September 29, 1973*."

It should be noted, however, that the identification of the transitional period by law provision does not seem to justify the reference to the cash principle. Moreover, this opinion seems to clash with the literal tenor of the legal provision itself. Further reflection by the agency on this point would be appropriate; in any case, the tight timeframe invites urgent consideration of the appropriateness of distributions considering this stance as well.

No abuse in the purchase of shares to achieve the majority to be conferred in neutrality | Response Agenzia Entrate n. 374/2022

The response considers a corporate reorganization and generational handover operation articulated in the following steps:

- a person, already in possession of a 50 percent share in the company, acquires from an inherited community 1 percent of the shareholding in the Company, in order to acquire 51 percent and, therefore, control, pursuant to Article 2359, first paragraph, No. 1 of the Civil Code;
- subsequently establishes a new company (holding company), wholly owned by the same, in which 51 percent of the Company's shares will be vested, benefiting from the controlled realization regime provided for in Article 177 of the Tuir;
- control of the holding company is transferred to the daughter, by means of a family pact, pursuant to Article 768-bis of the Civil Code, in order to be able to carry out the generational transfer.

According to the Agency, the concatenation of transactions envisaged does not represent abusive conduct, as it appears to be aimed at pursuing a more efficient governance of the family business, albeit indirectly, through a single-member holding company, specially established, through the transfer of the majority stake held, which constitutes valid economic reason justifying the tax advantage resulting from the application of Article 177, paragraph 2, instead of Article 9 of the TUIR. In addition, the divestment of the shareholding by the hereditary community, which intends to exit the corporate structure, appears to be an integral part of the same reorganization project and is, together with the contribution that follows it, consistent with the reorganization purposes illustrated.

Contribution of minority interests: Holdings in cooperative and consortium companies must also be considered for holding companies |Response Agenzia Entrate n. 451/2022

The response n. 451 of Sept. 9, 2022 examines the issue of the contribution of minority interests held by transferees in holding companies.

According to the Inland Revenue, since the literal tenor of the second sentence of paragraph 2-bis of Article 177 of the Tuir requires that the qualified percentages must be exceeded for all "indirectly participated companies," for the purposes of applying the provision, holdings in entities other than those that have a legal form of a company do not assume relevance.

Therefore, stakes held (indirectly) in consortia are not relevant for the purpose of applying the controlled realization regime. On the contrary, "sub-threshold" stakes indirectly held in consortium companies (joint-stock or limited liability companies or cooperative societies) are relevant insofar as their legal "status" as companies is relevant.

Preliminary transactions that allow neutral contribution are not abusive| Response Agenzia Entrate n. 450/2022

The specific question put to the Revenue Agency concerns the contribution of a holding company that holds percentage interests below the 20 percent threshold. This is a necessary requirement because each of the transferees (holding 50 percent of the holding company) intends to realize a minority contribution in favor of their own wholly owned newco (family holding company).

In order to qualify for the controlled realization regime, the holding company would sell the "below-threshold" shareholdings to the two newco' at market prices: the preliminary sale transactions, therefore, would take place not with third parties, but with the holding companies controlled (each) by the shareholders.

The Revenue's response deems the proposed behavior not abusive, in light of the conditions under which the transactions take place. Given the general significance that the response may take, we quote the relevant part: *"the carrying out of preliminary sale and purchase transactions that, whether evaluated individually or as a whole, are an integral part of a broader project of group reorganization and are, together with the subsequent contribution, consistent with the reorganization purposes envisaged, makes it possible to meet the requirements to apply the provision of paragraph 2-bis of Article 177 of the TUIR (and of the possible induced neutrality) instead of the application of the ordinary taxation regime set forth in Article 9 of the TUIR.*

In other words, the tax advantage, represented by the application of Article 177, paragraph 2-bis, of the TUIR instead of Article 9 of the TUIR, is not undue, if the transaction as a whole is consistent with the rationale of the aforementioned paragraph 2-bis of Article 177 of the TUIR.

In this regard, it is noted that, even in the case at hand, an undue tax advantage does not arise where the hostile shareholdings are disposed of at market values pursuant to Article 9 of the TUIR and settled with own means, since in such a case it is not relevant whether such transfers take place in favor of third parties or of the two branch holding companies participated by the same shareholders of the transferring company."

Budget resolution can make directors' fees deductible | Supreme Court, Judgment 9.8.2022 No. 24562

Even in Srl, a specific resolution of the shareholders' meeting concerning the remuneration due to directors is required for the purposes of their tax deductibility. In the Supreme Court's ruling No. 24562, Aug. 9, 2022, the issue of whether the absence of a prior resolution can be remedied through the shareholders' meeting approving the annual financial statements is also examined.

The judges set out a general principle that "the lack of a specific resolution of the shareholders' meeting regarding the determination of directors' remuneration can indeed be remedied at the resolution approving the financial statements, but only if said resolution has expressly approved the relevant item, the mere approval of the financial statements containing said item not being sufficient."

In the present case, however, "the shareholders' resolution approving the budget did not specifically discuss the director's compensation, but merely approved a budget that also contained the relevant item. The resolution approving the budget is, therefore, not sufficient to remedy the lack of specific resolution on the director's compensation."

It is to be considered interesting, however, the opening of the ruling about the possibility of ex post facto remediation of the lack of a meeting resolution.

Keeping and conservation of accounting records

Following the amendment made to Article 7, paragraph 4-quarter, of Legislative Decree no. 357 of 10 June 1994, by Article 1, paragraph 2-bis, of L. n. 122 of 4 August 2022 at the time of conversion of Legislative Decree no. 73/2022, the keeping and conservation of accounting records with electronic systems are considered regular, even in the absence of printing or electronic storage, provided that during access, inspection, or verification, the same are updated and that they are printed following the request of the Financial Administration.

Reply to the Ruling of the Revenue Agency of July 29th, 2022, no. 395

According to the Reply to the Ruling of the Revenue Agency of July 29th, 2022, no. 395, the acquisition of infra-group shareholdings through the stipulation of interest-bearing infra-group loans is an elusive operation, for IRES and IRAP purposes. In particular, the deductibility of interest expense deriving from the loan agreement is not recognized.

The case shown is quite complex and concerns the acquisition by Alfa of the shareholding in a target company (Beta1), already belonging to Alfa group, through a loan granted by the same transferring companies, also belonging to the same Alfa group. The loans granted were subsequently transferred to meet other needs of the Group.

The Revenue Agency states that the proposed operation of infra-group acquisition is carried out with the constitution of an infra-group debt intended exclusively to pay off an original loan; and the actual change of control at the group level required by Circular no. 6 of 2016 for the purpose of deductibility of interest expense in LBO transactions is not achieved.

The push down of the debt will have a negative impact on the operating result of Alfa, which suffers the weight of the financial charges of the debt, against the circulation of the corresponding credit positions to the benefit of another party of the same group, without this shift being functionally connected to the planned acquisition.

Carry-forward of tax positions in demerger transactions – Circular Letter n. 31 dated August 1st 2022

The Italian Revenue Agency has clarified that the so-called "Vitality test" provided for by art. 173, paragraph 10 of the TUIR, should only concern the transferred object of the demerger, and not the demerging company in its whole.

With the Circular Letter No. 31/2022, the Italian Revenue Agency issued clarifications on the so called "vitality test" provided for by art. 173, paragraph 10 of Italian Tax Code ("ITC"), with particular reference to the tax positions which can be potentially carry forward upon the beneficiaries of the demerger.

To understand the relevance of the clarification, it is worth noting that in principle, the tax attributes (i.e. tax losses, non-deductible interest expense and NID) accrued before the demerger can be carried forward to the beneficiaries of the demerger within the limit of the net equity value of the shareholders' equity of the company that produced such tax position ("equity test").

Furthermore, the profit and loss accounts of the demerging entity, for the fiscal year prior to the demerger resolution, and for the fiscal year in which the demerger is resolved as it results until the moment of the resolution, should show ordinary gross proceeds and labor costs higher than 40% of the related average of the two prior fiscal years (c.d. "vitality test").

Up to now, in accordance with the indications provided for by the Italian Revenue Agency with Circular Letter no. 9 /2010, the so-called vitality test was to be applied on the demerging company, with reference to the revenues and costs accrued in the income statement of that company (regardless of the subject of the demerger, be it a going concern or a single asset or several assets that do not constitute a company). In other words, according to this approach, the so-called economic vitality of the demerger is to be inherited by the beneficiary company.

With the Circular letter n. 31/2022, the Italian Revenue Agency has clarified that the so called "vitality test" should now be verified with reference to the accounting data of the demerger compendium only and no longer of the demerging company in its whole.

Furthermore, in development of what was clarified in the ruling dated 28 December 2021 no. 864, the Italian Revenue Agency specified that in case, as a result of the demerger, assets not included in a going concern are transferred to the non-newco beneficiary, "considering the non-existence of the accounting data indicated in paragraph 7 of article 172 relating to transferred assets, it is necessary to identify alternative criteria (such as, for example, the presence of latent values in the transferred assets) ".

These criteria should be "representative, at the same time, of both the vitality of the demerger compendium and its ability to reabsorb the subjective tax positions transferred to the beneficiary company as a result of the application of the criterion referred to in Article 173, paragraph 4, of the ITC.

IRAP return simplifications (Art. 10 of Decree-Law 21 June 2022, n. 73 - Resolution N. 40, 15 July 2022)

As hoped for in the previous Tax Alert, with Resolution N. 40 of July 15th, 2022, the Italian Tax Authority provided operating instructions on the procedures for filling out the IRAP 2022 form - to be submitted by Nov. 30th, 2022 - following the simplifications introduced by Art. 10 of Decree-Law n. 73 of June 21st, 2022, which restated some parts of Art. 11 of Legislative Decree n. 446/1997.

The guidance provided with the Resolution No. 40 is briefly explained below:

- in lines IS1, column 2, IS4, column 3, and IS5, column 2, the deductions applicable in relation to individuals **other than** permanent employees should be indicated;
- IS2, IS3 and IS6 should not be filled in;
- in line IS7, column 3, the deduction of the cost of personnel hired on a permanent basis should be indicated, including the deduction allowed for seasonal workers;
- in line IS9, any excess between the allowed deductions and the maximum amount represented by the employer's wages and charges should be indicated.

Given that the newly introduced changes apply from the tax period prior to the one in progress as of June 22nd, 2022 (i.e., 2021 for "calendar-year" taxpayers), the Italian Tax Authority considers that for the first year it is still possible to fill out Section I of the IS form according to the rules currently provided in the instructions for filling out the IRAP 2022 form.

During the conversion into Law of Decree-Law n. 73 of June 21st, 2022, the aforementioned art. 10 was amended in order to include in the law the clarification provided by the Resolution n. 40, establishing that - for the first year of application of the new provisions - it remains possible, where considered easier, to fill out the IRAP 2022 form without considering the changes introduced.

Supreme Court July 6th 2022, n. 24154 – Withholding tax on dividends paid by Italian companies to foreign mutual funds

An US mutual fund (hereinafter “the Fund”), owning shareholdings in Italian listed companies, received from the latest ones dividends net of the domestic withholding tax, applied, to the reduced amount of 15%, in compliance with the Italy/United States DTT.

The Fund claimed the refund, to the Italian tax authorities, of an amount equal to the difference between the said withholding of 15% and the substitutive tax of 12,5% applicable to the accrued net profit of the mutual funds according to the art. 9, par. 2, of the L. n. 77/1983 then in force. The taxpayer argued such a request essentially affirming a discrimination of the Fund compared to Italian mutual funds, as well as the infringement of the freedom of movement of capital sets forth by art. 63 of the Treaty of the functioning of the European Union (TFEU).

Following to the tacit refusal of the Italian tax authorities, the Fund filed an appeal to the Pescara Lower Court and, consequently, contested the adverse sentence issued by the Lower Court in front of the Regional Tax Court.

Following the negative sentence of the latest Court, the Fund filed a recourse to the Supreme Court which was approved on the basis of the motivations below described.

The supreme judges firstly argued that the tax residence of the Fund in a country outside of EU does not prevent the application, to the case at issue, of the art. 63, par. 1, of the TFEU explaining that the discrimination between the mutual funds tax resident in Italy and the mutual funds tax resident in a non EU country is fit to discourage the latest ones in buying shareholdings in EU companies (see ECJ April 2014, C-190/2012, “Emerging Markets”).

The judges secondly affirmed the infringment of the art. 63, par. 1, of the TFEU, despite such an infringment arises from the application of the art. 10 of Italy/United States DTT.

To this purpose, has been affirmed that the rules provided by the international Treaties against double taxation, entered into between EU countries and non EU ones, after the entering into force of the Rome EU Treaty, must be interpreted, by the tax authorities and by the judges, pursuant to the European law (and, in particular, to the non-discrimination principle and to the fundamental freedoms), therefore, in case of contrast between the European rules and the conventional ones, the latest rules must be disapplied.

However, the judges asserted that, since the conventional rules applied by the taxpayer regard the content of the corresponding domestic ones (in the case at issue, the art. 10 of the of Italy/United States DTT actually reduces, under certain conditions, the tax rate sets forth by the art. 27, par. 3, of Presidential Decree n. 600/1973 in order to soften double taxation), the said disapplication must not concern the conventional rule but, on the contrary, the domestic one.

That stated, the Supreme judges consequently disapproved the thesis of the regional ones according to which the conventional tax rate would not be further reduced, because of an irrefutable presumption, without juridical base, of consistency of the conventional rules.

Therefore, the Supreme Court affirmed that the difference between the said 15% withholding tax, applied by the Italian participated companies at the moment of the payment of the dividends to the Fund, and the lower substitutive 12,5% tax applicable to the accrued net profit of the Italian mutual funds, gives rise to a discrimination suffered by the same Fund since both the tax regimes concerned, under comparison, regard the same investment income.

The judges finally noted that the named limitation to the freedom of movement of capital is not justified neither by specific reasons related to the consistency of the national tax system nor by the need to assure the effectiveness of the tax assessments on the mutual funds e this for the reason why the art. 26 of Italy/United States DTT, which provides the exchange information discipline between the relevant authorities of the contracting States also to the purpose to avoid tax evasion.

Italian Tax Authority Circular n. 29 dated July 28, 2022 | Further clarification about the exit from the Controlled Foreign Companies (CFC) regime

The Italian Tax Authority (hereinafter "ITA"), through the Circular n. 29/2022, provided further clarification on how an Italian resident subject may disapply the "*Controlled Foreign Companies*" (also "CFC") regime.

The ITA's clarifications superseded the approach described in Circular no. 18/2021. In the latter Circular, the ITA pointed out that if, in a given tax period, a foreign controlled entity met the requirements for the application of the CFC rules, this regime would be applicable in the same and subsequent tax years, unless it was possible to benefit from the so-called *"effective economic activity* exemption" (i.e. demonstrating that the foreign controlled entity carried out an "*effective economic activity, through the use of personnel, equipment, assets and premises*" - Art. 167, paragraph 5 of the IITC).

The ITA overcomes this approach in light of the fact that *"the level of taxation and the percentage of passive income can vary significantly from year to year*", asserting that the exit from the CFC regime is possible not only upon demonstration of the *"effective economic activity* exemption", but also by meeting the *ETR test* and/or the *passive income test*. The ITA, moreover, confirmed that during the fiscal year(s) in which the transparency taxation does not apply (i.e. CFC regime is not applicable), the "monitoring" of the CFC's *tax assets* must still continue if any residual (virtual) tax losses, as well as any excess of interest expense (and/or EBITDA) and updated CFC's assets tax values want to be used in future fiscal years when the CFC regime will (possibly) be applicable again.

Tax ruling n. 408/2022 | Interaction between the CFC and "entry tax" regimes

The Italian Tax Authority (hereinafter "ITA"), through the answer to the tax ruling n. 408 dated August 4, 2022 has provided further clarifications about "interaction" between the *CFC* and "*entry tax*" regimes.

The operation under discussion, concerned the incorporation by an Italian resident company (Alfa) of an EU subsidiary that has never met the conditions for the application of the CFC regime under Italian tax law. Alfa seeks confirmation about the tax value to be attributed to the assets that will be incorporated by the surviving company.

The ITA (mentioning ITA's Circular no. 18/2021 e no. 29/2022) confirmed that If the foreign company did not meet the conditions to be considered a CFC in the period preceding the merger, the entry tax value of the (foreign) assets should be determined in accordance with the provisions of Article 166-bis (3), of the IITC (i.e. on the basis of their market value). In particular, the Italian Tax Authorities points out that this valuation method applies both in cases where the foreign company meets the "exemption" under Article 167(5) of the IITC (i.e., proving that it carries out "*an effective economic activity, through the use of personnel, equipment, assets and premises*") and, alternatively, the so-called ETR test and passive income test.

Lastly, ITA confirmed what was reported in its Circulars no. 18/2021 and no. 29/2022, pointing out that in case the merger is finalized in the second half of the tax period of the foreign company, the "CFC test" should be conducted in the same tax period and not in the previous one.

Tax step up| Italian tax authority (ITA): recent relevant interpretations and revocation

With the Resolution n. 43 dated 2 August (see also ruling n. 447/2022) ITA has clarified – changing its previous interpretation disclosed in ruling n. 108/2022 – the perimeter of the provision included in art. 110, p. 8-ter, of DL n. 104/2020 (included in the Budget Law 2022), which provides for the deduction over 50 years of the higher tax values (due to accounting step up or previous differences recognition for tax purposes) of "*intangibles which amortization quotas, according to art. 103 of the Italian CIT Code…are deductible for an amount not exceeding 1/18 of the cost or value*".

More in detail, ITA has clarified that the reference to art. 103 of Italian CIT Code is aimed to limit the perimeter of the new provisions set forth by art. 110 to assets which tax amortization plan of 1/18 is expressly provided by the mentioned CIT code. Thus, it refers to the deduction of the quotas of trademarks, goodwill and other intangible with an undetermined useful life (*ex* art. 10 of DM 8 June 2011 which recalls art. 103 of Italian CIT Code).

With regard to the step plan of tax values (due to accounting step up or previous differences recognition for tax purposes) ITA has also confirmed that the option is effective with the disclosure in the relevant tax return, even if it is filed within 90 days from the ordinary filing deadline, while the omitted, lower and/or late payment of the substitute tax does not affect such option (please refer to rulings n. 411 and n. 448 of 2022).

Finally, on 29 September 2022 ITA has published the provisions and instructions regarding the revocation of the tax step plan at hand, as provided by the Budget Law 2022 (art. 1, pp. 624 and 624-*bis*, Law n. 234/2021).

Indirect Tax |VAT

VAT registration through the appointment of a VAT representative - art. 1, par. 4, of Presidential Decree no. 441 of 1997– Italian Tax Authorities Tax ruling no. 442 of September 2, 2022

Italian Tax Authorities provide clarifications on the VAT registration in Italy through the appointment of a VAT representative according to Article 1, par. 4 of Presidential Decree No. 441/1997.

In detail it has been clarified the meaning to be attributed to one of the methods of appointment of the VAT representative, i.e. the "*letter recorded in a specific register kept at the competent VAT office*".

The appointment can be made through:

- public deed;
- a registered written private deed;
- a letter recorded, prior to the date on which the transfer of the goods took place, in the specific register kept at the competent VAT office in relation to the fiscal domicile of the representative or of the represented person.

In addition to these documents, a deed notarized by a foreign public notary adhering to the Hague Convention of 5th October 1961 with the "Apostille" stamp or legalized by the general consul of Italy in the foreign state (Resolution no. 550570 of 26th January 1990) providing such relationship of representation are admitted.

In any case, the VAT representative results in a mandate with representation according to civil law requirements and for this reason it must be formally appointed (after such moment, the vat representative will be jointly liable with the customer for the fulfilment of Italian VAT obligations).

With reference to the letter, it can be drafted on plain paper, it must be submitted to the Competent tax office together with the request of attribution of the VAT number, and it must contain the data identifying the represented foreign company and the Italian VAT representative. The person who has the power to sign on behalf of the foreign company and the one able to sign on behalf of the Italian VAT representative must sign such letter in front of the tax officer. Then the Office records the letter of appointment and releases the documentation certifying the recording on the so-called "Modello VI" register.

In conclusion, the Italian Tax Authorities highlight that, in the lack of one of the above-mentioned official acts, occurs an **omitted appointment** of the VAT representative (and not a late communication). Moreover, the Italian Tax Authorities provide more clarifications on the following:

- a taxable person (resident in Italy) can assume the role of VAT representative with reference to multiple foreign taxable persons, by using a different VAT number for each represented person. The VAT representative must keep each VAT position separately, by means of separate VAT bookkeeping;
- code "1" i.e. "declaration of starting of activity with attribution of fiscal code" must be indicated in the communication of starting of activity; a specific fiscal code will be attributed to the subject, and it is different from the one belonging to the VAT representative.

VAT deduction related to pharmaceutical payback - art. 11 of Law Decree no. 158/2012 – art. 26 of Presidential Decree no. 633/1972 - Italian Tax Authorities Tax ruling no. 440 of August 29, 2022

Even in case of pharmaceutical payback the taxpayer can recover the VAT paid to the Regions subject to the fact that the deadline for issuing credit notes are respected. After that deadline, the VAT recovery could be granted through the procedure set out by art. 30-ter of Presidential Decree no. 633/1972.

The payback subject to the ruling is not among those expressly regulated by Budget Law for the year 2018 (Law no. 205/2017), but it is referred to the price reduction that pharmaceutical companies shall grant to the Regions in particular circumstances. Given the lack of clarity on the VAT for this type of payback, the taxpayer prudently avoided deducting VAT on the amounts given back to the Regions and therefore did not issue any credit notes, nor did he include the relative amount of deductible VAT in any VAT return, waiting for clarification by the Italian tax authorities.
In this regard, the tax authorities have stated that it is not possible to extend, in a generalized manner, the provisions regulated by the Budget Law for 2018. Therefore, in order to define for the taxpayer any right to deduct, it is necessary to refer to the ordinary provisions related to the variation and deduction for VAT purposes, since the payback constitutes a kind of price revision provided for by the law and implemented through special determinations by AIFA (i.e., the Italian medicines agency).
In light of the above, the credit note shall be issued within the deadline for the submission the VAT return for the year in which the relevant conditions are met (art. 26 of Presidential Decree no. 633/1972) and the right to deduct the VAT may be exercised at the latest in the VAT return related to the year in which the credit note was issued.
Therefore, with reference to the case submitted by the taxpayer, the tax authorities exclude that "the taxpayer may issue, as of now, the credit notes related to the payments that refer to AIFA determinations, with the relevant publication on the Official Gazette of the Italian Republic, prior to 1st January 2022".
However, it is clarified that in the event of a judgement declaring unlawful the content of the determination issued by AIFA (with the consequent redetermination of the taxable amount with respect to the original transactions), the deadline for issuing the credit note would start from that moment.
Lastly, the tax authorities point out that, in the case of payments referring to determination prior to 1st January 2022, it is not precluded from applying for the refund of VAT according to the article 30-ter of the VAT Decree. In such a case, the application shall be submitted within two years from the day on which the requirement for the refund occurred.

Custom bills – VAT registration – art. 25 of Presidential Decree no. 633/1972 - Italian Tax Authorities Tax ruling no. 417 of August 5, 2022

In order to deduct the VAT paid upon importation the taxpayer should record in the VAT ledgers the custom bill or, in relation to the new law dispositions, through the exchange of e-messages, he should download and record the accounting prospectus, so called "prospetto di riepilogo ai fini contabili".

For the deduction of import VAT related to the operations of amount lower than 300 euro, it can be issued a recapitulative document to be registered in the VAT ledgers on a monthly basis.

More in details, the recapitulative document must report the data indicated in the relevant customs declarations allowing the identification of the relevant customs operation and not hindering the control activities by the Authorities. The import operations that can benefit of such simplifications are the ones whose amount is lower than 300 euro.

Italian Tax Authorities seized the opportunity to clarify the following:

- Import declarations are submitted to Customs Authorities with digital signatures, that certifies the presence of requirements such as readability and authenticity;
- Customs Authorities' AIDA system provides the accounting prospectus to the importer (not available right now);
- It is not possible to confirm the information reported in the courtesy document released by the carrier, since its content is not ruled by law dispositions.

The above clarifications are in line with what already stated with Circular no. 22/2022, according to which the data included in the accounting prospectus are compliant for VAT registration purposes, and necessary to deduct the related VAT.

VAT credit notes – principle regulating the credit notes issuance in specific cases – art. 26 of Presidential Decree no. 633/1972 - Tax Ruling no. 386 of July 20, 2022

Italian Tax Authorities clarified that the issuance of a credit note is foreseen in any type of contractual termination. In fact, a formal (contractual or judicial) assessment of the cause of resolution is not necessary and, therefore, a credit note can be also issued further to the activation of an express termination contractual clause.

The taxpayer involved in the ruling sells goods to its clients issuing regular invoices. Such sales derive from:

i) Written agreements including an express termination contractual clause;

ii) Purchase orders.

When the taxpayer needs to proceed with the credit recovery from its clients, he sends a letter warning the clients to fulfil their obligations. The further step is the activation of the express termination contractual clause.

With the Ruling answer in object, the Italian Tax Authorities have provided clarification regarding the principle regulating the credit notes issuance in relation to certain cases of customer's payment default.

1. ***Unilateral termination of the agreement providing continuous and periodic supplies***: according to art. 26, par. 9, of Presidential Decree no 633/1972, the right to issue the credit note exists only with reference to those transactions, already carried out and invoiced, for which the counterparty is insolvent. Consequently, the omitted payment or the elapse of the deadline provided for the payment imply the resolution of the agreement with *ex tunc* effects, and it constitutes the condition for the issuance of the credit note starting from the first invoice remained unpaid. After the occurrence of the condition for the issuance of the credit note, the VAT deduction must be exercised within the law terms stated by art. 19. of Presidential Decree no. 633/1972.

   In any case, the taxpayer can opt for the starting of a judicial proceeding against its debtor, and for the issuance of the credit note starting from the opening of the judicial proceeding (further to the new rules with effect from 26 May 2021).
2. ***Judicial recovery attempts of sums in case of partnerships or joint-stock companies, bankruptcy proceedings and partial payment***: if the taxpayer doesn't issue the credit note according to art. 26, par. 2 and 9 above-mentioned, he could issue it:
   - starting from the moment in which the debtor goes under a bankruptcy proceeding;
   - at the moment of formal acknowledgement that the procedure is unsuccessful.
     Further to the start of enforcement actions against the debtors, the VAT credit is fully or partially recovered, such amounts will be invoiced to the original debtor at the moment of the collection (to be split between tax base and VAT).
3. ***Termination and recognition of the withdrawal following a settlement agreement:*** this scenario is included under par. 3 of art. 26, allowing the issuance of a credit note within one year from the tax point of the taxable transaction if the resolution occurs further to an occurred settlement agreement between the parties . In such a case, the amount of the credit note will be equal to the amount subject to waiver of collection as a result of the settlement agreement, split between taxable base and VAT.

Indirect Tax | Customs

AIDA Reengineering: export and transit operations

In the context of the **AIDA re-engineering**, with reference to **export** and **transit** operations, with **Note Prot 370606/RU of 9 August 2022**, ADM provided operational instructions for experimentation in the **training environment** and a **roadmap** for the participation to the new systems.

The **deadline** for operators to join these systems is **1 March 2023**. The systems for creating and transmitting declarations must therefore be adapted by that date.

In AIDA 2.0, through a digitized dialogue protocol between the customs office and the declarant, it will be possible to **submit**, **amend** or **invalidate** a customs declaration, with an exchange of messages in **XML** format.

The customs declaration can be sent **in several steps** or in "**complete**" mode and with a maximum of **9999 items** per declaration (compared to the current 40).

The new export service will enable **centralized clearance** but will no longer allow "**groupage**" or "**combined with transit**" exports.

"**Desktop Dogane**" will no longer be operative and **authorized consignees** will have to adapt their software to implement the new communication process.

Ukraine signs Convention on Common Transit Procedure

Ukraine has formally joined the *Convention on a Common Transit Procedure* and the *Convention on the Simplification of Formalities in Trade in Goods*. Therefore, starting from **1 October 2022** the **Common Transit Procedure** can be used also in Ukraine. The Common Transit procedure allows goods to circulate more easily between the EU 27 Member States, the EFTA countries (Norway, Iceland, Switzerland), North Macedonia, Serbia, Turkey and, since 1 January 2021, UK. Ukraine's

participation in these conventions will consequently facilitate trade between the EU, Ukraine, and Common Transit Countries: **simplified rules and customs formalities** will help to cut down on costs and facilitate flows of goods with benefits both for economic operators and Customs authorities also in terms of reduced transit-time.

CBAM – overview and possible impacts on companies

On 22 June 2022 the EU Parliament adopted the text on the CBAM "***Carbon Border Adjustment Mechanism***", which – compared to the proposal published by the EU Commission – has brought forward its full implementation by 2032, following a transitional period set to start next year. With this mechanism, importing companies will be required to purchase **CO_2 certificates** equal to the price of carbon they would have emitted if the goods had been produced in Europe. The primary objective of the CBAM is to **reduce carbon emissions, by discouraging importations of products manufactured in less climate-oriented countries**, accelerating the purposes of the EU "*Fit for 55 in 2030"* package. The approved text affects companies operating in sectors in which the production of the goods requires the use of large quantities of carbon, such as **aluminum**, **cement**, **fertilizers**, **iron** and – in addition to the EU Commission text – also **organic chemicals** and **polymers**.

Products made with forced labour (EU Commission proposal); the role of customs authorities

On September 14, the European Commission presented a proposal for a Regulation that aims to **ban the placing and making available on the EU market, as well as the export from the EU, of products made with forced labor, including forced child labor**.

The proposal focuses on establishing a corporate governance system aimed at reporting human rights violations in the activities of companies. **A significant role is given to customs authorities, which will have to detect and stop such products at the borders**.

To this end, operators shall provide customs authorities with information identifying the product, manufacturer or producer, and suppliers.

To ensure that controls are effective, **cooperation and information exchange between competent authorities and customs authorities will be promoted**; and the Commission will provide a database of areas and products at risk of forced labor.

Toward the eighth sanctions package of EU against Russia

On 28 September 2022, **EU High Representative of the Union for Foreign Affairs and Security Policy Josep Borrell**, on behalf of the Union strongly condemned, in a statement, the sham *referanda* organised in certain parts of the Ukrainian regions of Donetsk, Kherson, Luhansk and Zaporizhzhia and reaffirmed the Union's support for Ukraine. On the same day**, EU Commission President Ursula von der Leyen** announced the **eighth package of sanctions against the Russian Federation** in response to the above-mentioned *referenda* in the occupied territories in Ukraine. The new measures will include the drafting of **a list of individuals and entities circumventing the sanctions measures adopted, new import bans on certain Russian goods and raw materials** (including the discussion of a price cap on oil), the **extension of subjective restrictive measures and the list of items that cannot be exported to Russia** (in order to deprive the Russian military complex of key technologies such as aviation items electronic components and specific chemicals), **a ban on EU citizens sitting on the management bodies of Russian state-owned enterprises, and further bans on the provision of European services to Russia**. The extension of the geographical scope of the **applicable restrictions** (currently: Crimea, Donetsk and Luhansk), **to all areas not controlled by the government of Ukraine**, (including the oblasts of Zaporizhzhia and Kherson) is also reported.

Reminder Plastic Tax: the single-use plastic tax will entry into force from 1 January 2023

Provided there is no further postponement, starting **from 1 January 2023, the tax on single-use products containing virgin plastic, also known as "Plastic Tax" will entry into force in Italy.**

This tax will apply to the consumption of **products with single use**, called "**MACSI**", made with the use, even partial, of plastic not coming from recycling processes.

The tax amounts to **€0,45xKg of virgin plastic contained in each single-use product**.

The MACSIs are those goods that are intended for **containing, protecting or delivering goods or food products, as well as preforms and semi-finished products** made by plastic materials and intended for the production of single-use products.

This new form of taxation will affect the following types of subjects:

- for MACSIs manufactured in Italy, **the manufacturer or the customer** (the person requesting the manufacture of MACSI by a tool agreement);
- for MACSIs from other countries of the European Union. **Intra-community buyers** of MACSIs in the case of B2B sales or the **transferor** in the case of B2C sales to private consumers in Italy;
- for MACSIs from third countries, **the importer**.

Trust

Trust interposed, irrelevance for the purposes of inheritance tax | Tax Authority Ruling answer no.359/2022

The **Ruling Answer no. 359 of July 4th, 2022**, provided some clarifications on the corporate equity participation that fell in succession and have been previously transfeered by the settlor in a trust whose beneficiaries are his children and grandchildren.

If the corporate equity participation falling in succession is part of the assets transferred in the trust (established for a generational changeover purpose by the settlor), it does not contribute, at the opening of the inheritance of the settlor for the purpose of the hereditary assets, although previously the trust had been declared interposed for tax purposes pursuant to art. 37, paragraph 3 of the Italian Tax Code (TUIR): indeed, **the interposition only concerns the imputation of the income of the trust** but, assuming the full validity of the trust from a Civil Law point of view, the participation transferred no longer belongs to the settlor having entered the full ownership of the trustee.

In this case, indeed, according to what was stated in the request, the Settlor has passed away and the inheritance was opened in favor of the children. The Tax Authority points out in this regards that, at the time of the settlor's death, the equity participation in the Company was no longer part of his assets as it was already transferred into the Trust at the time. Therefore, on the assumption that, from a Civil Law point of view, the equity participation in question has not fallen in succession, but is part of the transferred assets in the Trust and that the Trustee is the owner of the aforementioned equity participation in the Company as its limited partner, in compliance with the destination constraint imposed by the Trust Act, the Tax Authority considers that for the purposes of submitting the inheritance tax return and determining the related tax, the aforementioned equity participation should not be included in the inheritance assets of the deceased.

The Tax Authority had already analyzed this Trust in the Ruling Answer no. 796/2021, addressing the attention however on the aspects relating to direct taxation, concluding that the Trust should be considered tax interposed or rather non-existent and its income should be attributed directly to the settlor.

Indeed, acknowledging the recent Supreme tax court judgment on the subject of trusts (*Corte di Cassazione no. 8082/2020*), the tax Authority overturns the "old" orientation and highlights that the application of the inheritance tax takes place only at the time of the final attribution to the beneficiaries, realization moment of the actual transfer of wealth through a final asset allocation; establishing the restriction of destination does not, on the contrary, integrate an autonomous requirement for the purposes of inheritance tax.

In the present case, therefore, with reference to the equity participation in question, the inheritance tax will be applied to the act of final transfer of the participation to the final beneficiaries by the Trustee.

Revaluation of shares and transfer into the Trust | Tax Authority Ruling Answer no. 401/2022

The Tax Authority with the Ruling Answer **no. 401 of August 2nd, 2022** provides clarifications regarding the capital gain deriving by the sale of equity shares held by a trust and the cost of which was previously redetermined by the settlor/beneficiary, pursuant to *Article 5 of Law 448/2001*. According to the answer by the Tax Authority, the emerging capital gain constitutes a "miscellaneous" income pursuant to Article 67, paragraph 1, letter c) of the Italian Tax Code (TUIR) and is subject to substitute taxation in the amount of 26%. However, although the arguments put forward are not entirely exhaustive on this point, the Authority confirms that the value of the equity participations as redetermined by the settlor/beneficiary before the establishment of the trust (pursuant to Article 5 of Law 448/2001), cannot be used for the purposes of determining the capital gain.

In the present case, the instant shareholder of 50% of Alfa srl and 33% of Beta srl, transferred in a **trust all** its **shareholdings**, after having carried out the revaluation of Alfa's shares.

The beneficiary of the Trust is the same Settlor, and the Constitutive Act provides that:

- during the lifetime of the trust, all **the incomes from the assets** tied to it are "unavoidably attributed" to the final beneficiaries;

- any **dividend** distributed by the Alfa and Beta companies must be attributed by the trust directly to the final beneficiary at the time of termination of the trust;
- the beneficiary is entitled to **an annuity** equal to 50% of the dividends that Alfa and Beta intend to distribute;
- in the event of **a transfer of the shares** that does not exhaust the purpose of the trust, instead of paying the aforementioned annuity, the trustee must pay the beneficiary an annuity, "in constant installments and having regard to the duration of the trust", equal to 10% of the sale consideration acquired by the trustee, net of taxes.

In the light of the proposed scenario, the applicant asks, in the first place, whether the trust can be considered **look - through from a tax side**. The Tax Authority Ruling Answer is positive, given that the trust deed specifies that the income produced will be "mandatorily" attributed to the identified beneficiary / settlor, thus recognizing the beneficiaries the "right to demand from the trustee the sums allocation". Therefore, the income produced by the trust will be taxed **directly by the settlor**.

The most delicate step emerging from the Ruling Answer that deserves particular attention is that which concerns the **sale of the shareholdings** of Alfa srl by the trust and the determination of the participation cost.

In this regard, the Authority correctly notes that the capital gain from the sale constitutes **"miscellaneous" income** within the meaning of art. 67 paragraph 1 of the Italian Tax Code (TUIR), subject to a substitute tax of **26%** *pursuant* to Article 5 of Legislative Decree 461/97, without contributing to the formation of the total income. In addition, the Ruling Answer also notes that "*for the purpose of determining the aforementioned capital gain, it cannot be used the redetermined value pursuant to art. 5 of Law no. 448 of 28 December 2001 of the shareholding in Alfa by the settlor/beneficiary prior to the establishment of the trust*".

This conclusion, in relation to the determination of the **cost of participation**, is not exhaustive and not set out in the reasons for it.

Global Employer Services

Special Tax Regime for Inbound workers and mandatory deadline for the payment of the one-off tax | Tax Authority Ruling Answers no. 371 and 372 of 2022

The beneficiary subject of the special tax inbound regime workers as referred to in Article 16 of Legislative Decree 147/2015, who has omitted the payment, within the terms of the law, of the one-off charge provided for in Article 5, paragraph 2-bis of Legislative Decree 34/2019, for the purpose of applying the option to extend the duration of the regime, cannot benefit from the extension for a further five years.

In fact, the Tax Authority highlighted in two Ruling Answers of last July, 12th (**Ruling Answers no. 371 and no. 372**) the **mandatory nature** of the deadline for the payment of the one-off charge for the purpose of perfecting the option to extend the duration of the regime. An approach of complete closure and penalizing for the taxpayer emerges in this case, not even admitting recourse to the institution of "tax amendment" (voluntary correction of mistakes with the tax authority by paying a surcharge).

Special Tax Regime for Inbound workers and foreclosure of extension in case of an incorrect payment of the one-off tax | Tax Authority Ruling Answer no. 383/2022

The Italian Tax Authority with the Ruling Answer **no. 383 of 2022** considers precluded the extension for a further five years of the regime for the Inbound workers provided for in Article 5, paragraph 2-bis of the Law Decree 34/2019, in case of lower payment of the one-off charge according to the procedures established in the Provision of March 3rd 2021, protocol no. 60353. The taxpayer who has paid a lower charge than the due, for to an incorrect determination of the tax basis, will be precluded from applying the benefit, since the recourse to the institution of 'tax amendment' (voluntary correction of errors) is not allowed in this case. It is just allowed the possibility of requesting the reimbursement of the amount already paid, pursuant to Article 21 of Legislative Decree 546/92.

In its Ruling Answer, the Tax Authority equalizes the hypothesis of lower payment to that of the omitted payment by formalizing a penalizing approach regarding the extension for a further five years of the special tax regime for the inbound workers. This interpretation is similar to the other equally rigorous interpretation of the previous Ruling Answers no**. 371 and 372 of 2022**.

Tax Litigation

The new regime on the burden of proof

An unexpected statutory change implemented by Law no. 130/2022 is represented by the new regime of the burden of proof provided for in Article

7, Paragraph 5-bis, of the Legislative Decree no. 546/1992, which states as follows: "*The Tax Authority must prove the claims alleged in the tax assessment. The judge bases its decision on the proof placed before the Court and declares null and avoid the tax assessment if there is no evidence of the - nature of the claim or if the evidence is contradictory or insufficient to establish the exact reasons on which the claim and the related penalties are based, according to the requisite tax legal standard and in a well-argued fashion.*

However, it is up to the taxpayer to provide reasons motivating a tax refund request, when this is not a result of the payment of sums assessed".

The role of this clause is unclear. Specifically, it is not clear whether this clause is merely an act of acknowledgment or if its scope is innovative.

In truth, until now, both the trend of judgements in the Italian Supreme Court and the theory of the majority scholars have deemed Article 2697 of the Civil Code to be applicable to the tax trial, supplemented by the principle of so-called closeness of the proof (the latter principle is used, for example, in lawsuits regarding transfer price adjustments).

It follows from the above that when the appeal is brought against a tax assessment, it is on the Tax Authority, the plaintiff in a substantial meaning, to prove the facts on which the tax claim is based, whereas the taxpayer must provide the rigorous proof of relevant facts which modify or extinguish the tax claim. Contrarily, in the refund claims and in those regarding tax incentives, the taxpayer must demonstrate the facts constituting the reimbursement right.

This is a settled opinion as well as the one according to which it is up to the taxpayer to proof the existence and pertinence of the cost (for VAT the acquisition of goods and services).

Having said the above, the new paragraph 5-bis of Article 7 of the Legislative Decree no. 546/1992 states, as a general rule, that the Tax Authority must prove the claims alleged in the tax assessment, while the taxpayer must "provide the reasons supporting the tax refund request" where it is not a refund resulting from the annulment of the tax assessment (it is curious to note that for reimbursement proceedings, the term proof is not used, but rather the expression "provide reasons").

So far, it would appear that "nihil sub sole novi", or that the new rule be a mere confirmation of the case law that allocates the burden of proof differently in lawsuits regarding a tax assessment and in those regarding refunds.

However, there are (S. MULEO and F. PISTOLESI) those who believe that the rationale of the new law is that of reacting to the case law of the Supreme Court which, in certain cases, deems that the burden of proof shall rest on the taxpayer even in the case of lawsuits regarding a tax assessment as well. For example, this is the case of the proof of the existence and pertinence of the cost (or the acquisition of goods and services) and also the proof of the right to a tax incentive when such right is denied by the Tax Authority.

This also considering the fact that the Tax Authority can hardly claim the deductibility of a cost or the eligibility to a tax incentive without supporting the claim with some arguments.

However, the newly introduced paragraph 5-bis should not neutralise either the principle of closeness of proof, as already provided for in Article 2697 of the Civil Code, or the allocation of the burden of proof in lawsuits concerning claims of abuse/evasion set out in Article 10-bis of Law no. 212/2000 (given that it is a special and earlier established rule).

Lastly, Law no. 132/2000 makes no provisions regarding the effective date of the rule in hand. In this regard, it has been suggested that it be applicable only to lawsuits beginning after the entry into force of the aforementioned law, and also to those pending or still ongoing on the basis of assessments notified from September 16th onwards.

Provisions on tax justice and trial | Law n. 130 of 31 August 2022, in force since 16 September 2022 (Official Journal n. 204 of 1 September 2022)

The intervention in question, initiated with a draft law by the Ministries of Economy and Justice, is part of the reforms envisaged by the National Recovery and Resilience Plan (PNRR), prepared by the Italian Government in 2021, inserted in the Next Generation EU (NGEU) Program and relating to measures agreed by the European Union in response to the pandemic crisis: considering tax litigation as a crucial sector for the confidence of economic operators, also in the perspective of foreign investments, the intervention was proposed, among others, to deflate the proceedings, speed up their timing, reduce the backlog at the Supreme Court, introduce an autonomous and professional role of the tax judiciary (now constituted by the first and second degree Tax Courts, in place of previous provincial and regional Tax Commissions).

Some of the new provisions are recalled below.

Facilitated definition of tax judgments pending before the Supreme Court | Art. 5 of Law no. 130/2022 and Revenue Agency, Director's Provision n. 356446/2022

The possibility for the taxpayer to access the definition, with facilitated methods, of the tax controversies pending at the Supreme Court has been introduced.

Pending tax controversies are intended as controversies with an appeal to the Supreme Court notified by September 16, 2022, provided that, at the date of the application, a definitive sentence has not been passed. The effects of the definition prevail over those of any judgments not finalized before the entry into force of the law. Disputes concerning, even if only in part, traditional own resources and value added tax levied on imports, sums due by way of recovery of State aid are excluded from the definition.

Excluding disputes with total loss of the taxpayer in both previous levels of judgment (for which the possibility of definition is precluded), it is possible to define: (i) with the payment of an amount equal to 5% of the value of the dispute, the disputes in which the Revenue Agency is entirely unsuccessful in all previous degrees of judgment and the value of the dispute does not exceed € 100,000; (ii) with the payment of an amount equal to 20% of the value of the dispute, disputes in which the Revenue Agency is unsuccessful, in whole or in part, in one of the previous degrees of judgment and the value of the dispute is not over € 50,000. The value of the dispute means the amount of the tax that was the subject of dispute in the first instance, net of interest, late payment and any penalties related to the tax, even if imposed with a separate provision; for disputes relating exclusively to sanctions not related to the tax, the value of the dispute is determined by the amount thereof.

Any amounts already paid, pending the judgement, for any reason, provided that they have not already been reimbursed, must be deducted from the amount due for the definition. In any case, the refund of the sums already paid is precluded, even if they are in excess of the amount due for the definition.

The payment must be made in a single installment; installment plans or offsetting with taxpayer credits are not allowed.

For the purposes of the conclusion of the definition, it is necessary that, within 120 days from the entry into force of the Law (therefore by January 16, 2023, falling on Saturday 14 the 120th day of January), the taxpayer submits, by means of PEC, the request for definition with attached the receipt of payment of the amount due made through Form F24, or the only request for definition in the event that no amounts are due.

Any denial of the definition must be notified by the Revenue Agency within thirty days of submitting the application and constitutes an act that can be challenged before the Supreme Court within sixty days.

Testimonial evidence | Art. 4 of Law n. 130/2022 and art. 7 of Legislative Decree n. 546/1992

In order to broaden the investigative powers of the judicial body, the possibility of admitting the testimonial evidence, where it is deemed necessary and even without the agreement of the parties has been introduced (the oath continuing to remain precluded): this is not a means of ordinary but tendentially exceptional evidence, left to the judge's decision.

The taking of testimonial evidence is provided in the forms prescribed by art. 257-bis Criminal Proceeding Code and, therefore, through replies to queries made within the pre-established term in writing and authenticated signature. In cases the tax claim is based on reports or other authentic deeds up to a complaint of forgery, the proof is admitted only on factual circumstances other than those attested by the public official.

It will therefore be possible to identify the areas in which the institute can find more consistent application.

Judicial conciliation agreement proposed by the Tax Court | Art. 4 of Law n. 130/2022, Art. 48-bis.1 and 15 of Legislative Decree n. 546/1992

With a further and autonomous provision, in the context of the deflation of the dispute, it is envisaged that, for disputes subject to the institute of complaint-mediation (Art. 17-bis of Legislative Decree n. 546/1992) and, therefore, with value no higher than € 50,000, the Tax Court, where possible, can formulate a conciliatory proposal to the parties (at or outside the hearing), having regard to the subject matter of the judgment and the existence of issues of easy and prompt solution: the case can be postponed to the next hearing for the finalization of the agreement and, if not finalized, the discussion of the case is carried out at the same hearing.

With reference to the sanctioning bonus effects and the payment methods, the same provisions governing the Judicial conciliation agreement proposed by the parties apply also in this case (Art. 48-ter of Legislative Decree n. 546/1992).

With reference to court fees, also as a result of a further amendment made by the Reform in question to another provision (see Art. 15 p. 2-octies Legislative Decree n 546/1992), it is provided that in case one of the parties or the judge has formulated a conciliatory proposal, not accepted by the other party without justifiable reason, the latter shall bear the

costs of the judgment increased by 50 per cent, if the recognition of his claims following the sentence is lower than content of the proposal formulated to it: provision with evident purpose to drive the acceptance of the proposal and, therefore, deflation of the dispute.

The suspension of the challenged deed: acceleration in the handling of the requests | Art. 4 of Law n. 130/2022 and art. 47 Legislative Decree n. 546/1992

With reference to the applications for suspension of collection, it is envisaged that the President of the section is required to set the hearing for the first useful council chamber and in any case no later than thirty days from the presentation of the application itself (instead of 180 days), with communication to the parties at least five days before (instead of ten days). Furthermore, as a further guarantee of the acceleration of the precautionary phase and its separation from the merit of the dispute, it is specified that (i) the reasoned, non-challengeable order that decides on the application must be taken at the same hearing for the discussion of the application for suspension; (ii) the hearing for the discussion of the suspension application cannot in any case coincide with the hearing for the discussion of the merit of the dispute.

Finally, with reference to the possibility that the Court decides to make the suspension subject to the provision of a guarantee by taxpayers, it is envisaged that the guarantee is excluded for applicants with a "tax stamp of reliability" (or subject to the rules set out in Art. 9-bis of Legislative Decree n. 50/2017) and with the attribution of a trust score of at least 9 in the last three tax periods prior to the one in which the appeal was filed and for which such scores are available.

Rejection of the complaint and non-acceptance of the mediation proposal, effects on court fees | Art. 4 of Law n. 130/2020 and Art. 17-bis of Legislative Decree n. 546/1992

Again in the context of the dispute deflation and to give greater push to the institution of the complaint / mediation, it is envisaged that, in the event of the complaint being rejected or the mediation proposal not being accepted, the loss of one of the parties, in acceptance of the reasons already expressed in the event of a complaint or mediation, it entails, for the losing party, the order to pay the related legal costs; this sentence can then be relevant for the purposes of any administrative liability of the official who has unreasonably rejected the complaint or did not accept the mediation proposal.

Effective date

Given the entry into force of Law n. 130/2022 on 16 September 2022, it is specified that the provisions relating to testimonial evidence and the formulation of the conciliatory proposal by the judge apply to appeals notified starting from 16 September 2022.

Crime of failure to pay withholdings due solely on the basis of the substitute's declaration - Constitutional illegitimacy | Constitutional Court, sentence 14.07.2022 n. 175

With the sentence in question (in Official Journal n. 29 of 20/7/2022), the Constitutional Court ruled on the criminal case of withholdings payment failure by the substitute agent who, following the modification as of Legislative Decree no. 158/2015 (Reform of the sanctioning system), had also been extended to the withholdings resulting only from the declaration of the substitute, and no longer only to the withholdings resulting from the certification issued to the substitutes (see Art. 10-bis of Legislative Decree n. 74/2000, "*Anyone who fails to pay within the deadline set for the submission of the annual withholding tax return due on the basis of the same return or resulting from the certification issued to the substitutes, for an amount exceeding one hundred and fifty thousand euros for each tax period, is punished with imprisonment from six months to two years*".

According to the Constitutional Court, as a result of regulatory and jurisprudential recognition, this extension of the case by means of a legislative decree violates the principles and directive criteria of the delegated law and the principle of legal reserve in criminal matters (in contrast to articles 25, second paragraph, 76 and 77, first paragraph of the Constitution), with partial constitutional illegitimacy (limited to this legislative extension) and consequent responsibility for the legislator to review the overall sanctioning regime.

Credit claimed by the taxpayer and forfeiture of the power of assessment | Supreme Court sentence n. 18710 of 10/06/2022

With the ruling in question, the Court of Cassation confirms the principles already affirmed in previous judgments (see Supreme Court, Section unified 29/07/2021 n. 21766 and Section unified 15/03/2016 n. 5069), with reference to the possibility of the financial administration to challenge the credit resulting from the taxpayer's return (in this case VAT) even though the deadline for exercising the power of assessment has expired.

In particular, according to the judges of legitimacy, the inactivity of the Administration cannot be equivalent to the implicit recognition of the credit, considering in this regard relevant the procedural provision according to which, again in the matter of reimbursement, inactivity takes on the meaning of tacit refusal, that can be challenged (Art. 21 of Legislative Decree n. 546/1992): consequently, the omitted exercise of the power of control does not determine any effect on the credit claimed, which can only derive from the positive verification of compliance with the reality of what declared.

Transfer Pricing

Transfer pricing: burden of proof and transfer pricing method selection

By means of their Decision n. 26695, published September 12, 2022, Italian Supreme Court, confirming previous decisions recently made by lower Tax Courts, reiterated two important principles, when dealing with transfer pricing matters, with reference to the "burden of proof" and the "selection of an appropriate method" for determining intercompany prices at arm's length.

In the subject controversy case,, the Tax Agency, which had lost both previous judgments in front, respectively, of the Provincial Milan and the Regional Tax Court of Lombardy, , had filed an appeal against the latter's decision claiming that: 1) Art. 110, § 7, Presidential Decree n.917/1986 should not be intended as an anti-abuse rule aimed at preventing base erosion and/or profit shifting to lower tax rate jurisdictions, contrary to what was stated in the appealed decision, and 2) the *Transactional Net Margin Method* (TNMM) was a more suitable method than the Comparable Uncontrolled Price (CUP) method, used by the taxpayer, , to justify intercompany sales of cars at a price deemed lower than the market one by the Tax Agency .

The Supreme Court's judges, while analyzing the case and referring to previous Court's decisions, have pointed out the following:

- with reference to the "burden of proof", "*Art. 110, § 7, Presidential Decree n. 917/1986 aims at countering the* [harmfull] *economic impact of intercompany "transfer pricing", [….] and does not attributes to the Tax Administration the burden of proofing any "elusive" effects therefrom, but rather the simple occurrence of intercompany "transactions at a price apparently lower than what should be determined under the arm's length standard ;on the contrary, the burden of proofing that such "transactions" occurred at "market prices" is put on the taxpayer, for it being "the closest party" to such proof, pursuant to the principle stated in Art. 2697 of the Italian Civil Code.and applied also with reference to tax deductions in general.*";
- with reference to the most appropriate "method selection", the TNMM may be more appropriate than the CUP method, "*provided that the period analyzed is* [correctly] *set,* [sufficiently] *comparable entities are identified, approriate adjustments are made to the tested party's accounting books' entries , the differences between the tested party and the selected comparables, in terms of risks borne and functions performed, are taken in due account and, finally, a reliable profit level indicator is selected".*

In summary, the Supreme Court, confirming the claims raised by the Tax Agency, reiterated that (i) transfer pricing regulations do not have any anti-abuse function, hence, in case of a tax audit, the Tax Administration's only burden should be that of identifying the existence of intercompany transactions occurred at prices apparently below market prices and (ii) the selection of the most appropriate transfer pricing method shall be made on a case by case basis and that the TNMM may be preferred over the CUP method, should certain specific conditions be met.

Government Incentives

Procedure for volunteer repayment of the research and development tax credit – Extension

(Art. 38 of Decree-Law No. 144 of September 23th, 2022)

Article 38 of Decree-Law No. 144/2022 extended to October 31th, 2022 the deadline originally set for September 30th, 2022 for filing the request in order to access to the procedure provided by Article 5, paragraphs 7 to 12, of Decree-Law No. 146/2021 for volunteer repayment of the tax credit for research and development activities provided for by art. 3 of Decree-Law No. 145/2013. It should be noted that under this procedure, undue use of the research and development tax credit can be regularized without application of penalties and interest.

It should be noted that the procedure is intended for company who would like to repay the credit accrued in the 2015-2019 fiscal year and used for offsetting other liabilities until October 22th, 2021, if:

- they have actually carried out, by incurring the relevant expenses, activities that in whole or in part could not be qualified as eligible research or development activities in the meaning relevant to the tax credit;
- they have applied par. 1-*bis* of art. 3 of the decree, in a manner that does not comply with the authentic interpretation provision contained in art. 1, par. 72 of Law No. 145 of December 30th, 2018;
- they have made errors in quantifying or identifying eligible expenses in violation of the principles of relevance and appropriateness;
- they have made errors in the determination of the historical 2012-2014 average amount.

The provision, on the other hand, did not provide any extension to the deadline for payment of the unduly used credit, which must be paid back in a lump sum by December 16th, 2022, or in 3 equal annual installments (December 16th, 2022 - 2023 and 2024) provided that it has not already been assessed by a definitive deed of the Tax Authority notified before October 22th, 2021.

Certification of Tax Credit for Research, Development and Innovation Activities

(Art. 23, of Decree Law No. 73 of June 21th, 2022, converted into Law No. 122 of August 4th, 2022)

Art. 23 of Decree Law No. 73/2022, introduced the possibility of requesting a certification attesting to the qualification of investments made or to be made for the purposes of their classification among eligible research & development, technological innovation, design and aesthetic ideation activities as well as for the achievement of the objectives of digital innovation 4.0 and ecological transition in relation to the tax credit for research & development, technological innovation and design activities provided by Art. 1 paragraphs 200 - 203 *sexies* of the Budget Law 2020.

With respect to what was already anticipated in the previous Tax Alert, to which we refer for more details, during conversion into Law, it was specified that among the entities qualified to issue the certification are include, in any case, state universities, legally recognized non-state universities and public research institutions.

Tax credit for research & development activities - Activities pertaining to design and aesthetic ideation - Article 3 of Decree Law No. 145 of December 23, 2013

(Revenue Agency Ruling No. 41/E of July 26th, 2022)

In the ruling 41/E of July, the Italian Revenue Agency, having heard the technical opinion of the Ministry of Economic Development (MiSE), provided some clarifications in relation to the correct identification of the criteria that are relevant to eligibility for the "incremental" tax credit for investments in research and development activities under Article 3 of Decree Law No. 145 of December 23th, 2013, converted with amendments by Law No. 9 of February 21, 2014, carried out in the fashion, leather goods, jewelry and eyewear sectors.

More in detail, the ruling analyzes the case of a company engaged in the activity of ideation and prototyping of goods falling within the fashion, leather goods, jewelry and eyewear sector carried out for certain brands, held by companies belonging to the same group. Specifically, the taxpayer is involved in making the aesthetic and technical prototype models aimed at a different study of the characteristics of the future product required, and it ask for a confirmation of the eligibility of these activities for the tax credit research & development.

In such document, the Italian Revenue Agency cites the opinion obtained from the MiSE, which, first of all explain the definitions of fundamental research, basic research and experimental development contained in paragraph 1.3, point 15, of the European Commission Communication (2014/C 198/01) of June 27, 2014, entitled "*Framework for State Aid for Research, Development and Innovation*" according to the classifications defined within the OECD and, more specifically, in the so-called "*Frascati Manual*". After that, the document specifies that the eligible activities must be characterized by the presence of elements of novelty and creativity and therefore also by the degree of uncertainty and risk of scientific or technological failure that cannot be overcome with the knowledge and skills already available. On the other hand, eligible research and development activities are not considered to be those that are the result of a simple use of the state of the art in the specific field and that, while resulting in an improvement for the enterprise, do not imply an advancement of the available general knowledge or capabilities

With particular reference to design activities and aesthetic ideation, aimed at the conception and realization of new collections or samples that have elements of novelty with respect to the previous collections or samples with regard to the materials used, their combination, patterns, shapes, colors and other relevant elements, but whose only 'technical effect' concerns the external form or aesthetic appearance of the product, MiSE clarifies that these are not eligible activities as they do not involve the carrying out of work necessary to overcome scientific or technological obstacles. More generally, it

considers that activities aimed at modifying the appearance of products in a broad sense and launching new fashion trends, but not aimed at resolving an uncertainty of a technical or scientific nature, should be excluded.

Finally, it is worth noting that, with reference to the case under analysis, it is also pointed out that there is no documentation providing evidence of work with research and development content according to the above-mentioned criteria to support the request of the company.

Therefore, in conclusion, the Italian Revenue Agency considers that the company cannot benefit from the research and development tax credit pursuant to Article 3 of Law Decree No. 145/2013.

Tax credits related to the purchase of electricity and natural gas

(Art. 1, of Decree-Law No. 144 of September 23th, 2022)

Article 1 of Decree-Law No. 144/2022 (so-called "Aiuti-*ter*"), recently published in the Official Gazette, extended, with some amendments, for the months of October and November 2022 the extraordinary contributions for the purchase of electricity and natural gas.

More in detail, for companies with high electricity consumption (so-called "*energy-intensive companies*") whose costs per kWh of the electricity component, calculated on the basis of the average of the third quarter of 2022 and net of taxes and any subsidies, have undergone an increase in the cost per kWh of more than 30 per cent compared to the same period of the year 2019, an extraordinary contribution is recognised to partially offset the higher charges incurred, in the form of a tax credit, equal to 40 per cent of the expenses incurred for the energy component purchased or self-produced and actually used in the months of October and November 2022.

Also, with regard to companies, other than energy-intensive companies equipped with electricity meters with an available power of 4.5 kW or more that recorded such an increase in the third quarter of 2022 compared to the same quarter of 2019, a tax credit equal to 30% of the expenses incurred for the purchase of electricity is recognized.

Moreover, a tax credit equal to 40 per cent of the expenses incurred for the purchase of natural gas consumed for uses other than thermoelectric uses is recognised to companies with a high consumption of natural gas (so-called "*gas-intesive companies"*), if the price of natural gas, calculated as the average, referred to the third quarter of 2022, of the reference prices of the Infraday Market (MI-GAS) published by the Energy Market Manager (GME), has undergone an increase of more than 30 per cent of the corresponding average price referred to the same quarter of the year 2019.

The tax credit to the extent of 40% of the expenses incurred for the purchase of natural gas consumed for uses other than thermoelectric uses, is also recognised to companies, other than gas-intensive companies, that have recorded the same increase in the third quarter of 2019 compared to the same quarter of 2022.

The rule also provides for companies other than energy-intensive and gas-intensive companies, following a request submitted to the energy supplier within 60 days of the end of the period, provided that it is the same as the one from which they were supplied in the third quarter of 2019, to obtain from the latter a communication in which the calculation of the increase in the cost of the energy component and the amount of the tax credit due for the months of October and November 2022, are reported.

As for the previous quarters, the tax credit can be used as an offset in F24 pursuant to Article 17 of Legislative Decree No. 241/1997, but no later than 31 March 2023 and is transferable, only for the full amount, to other entities, including financial institutions and other financial intermediaries, with the possibility of two further transfers exclusively in favour of qualified entities with the obligation to obtain a compliance certification. The tax credit is not relevant for IRES and IRAP purposes and may be cumulated with other incentive concerning the same costs, up to the limit of the cost incurred.

Lastly, it should be noted that paragraph 11 of Article 1 of Decree-Law No. 144/2022 also extended to 31 March 2023 the deadline for the use of credits for the purchase of energy and natural gas for qualifying entities as set forth in Article 6 of Decree-Law No. 115 of 9 August 2022, relating to the third quarter of 2022, also by the assignee in the event of the transfer of the credit.

It is also provided that the beneficiaries of the above-mentioned tax credits, shall submit to the Italian Revenue Agency a specific communication on the amount of tax credit accrued in the year 2022 within February 16th, 2023.

FSI

Virtual currencies – Taxable income from cryptocurrencies staking activity | Ruling n. 437/2022

With Ruling no. 437/2022, Italian Tax Authorities clarify the tax treatment applicable to the income stemming from staking activity, confirming that a taxpayer holding a crypto wallet through an Italian company is not subject to tax monitoring provisions and to Italian tax on financial assets held abroad (s.c. "IVAFE").

In a nutshell, "staking" is a specific process – *i.e.* an algorithmic mechanism – aimed at validating those information registered within the blockchain. For this purpose, cryptocurrencies held by investors supporting staking activity are temporarily made as unavailable by the platform, since used for such a validation process. The platform remunerates investors participating to staking with additional virtual currencies, net of a certain amount withheld by the platform.

This noted, the claimant holding an online crypto wallet through an Italian company, is of the opinion that the income deriving from staking should be considered as a capital gain under article 67, para. 1, let. *c-ter)* and para*. 1-ter* of the Italian Tax Code. Moreover, as the wallet is held through a platform managed by an Italian company, the Claimant deems that the disclosure obligations under the mentioned monitoring tax provisions should not apply in the present case.

Referring to income deriving from staking, Revenue Agency does not agree with the Claimant's position, qualifying such an income as a capital income, pursuant to article 44, para. 1, let. h), Income Tax Code. Namely, the Italian Tax Authorities clarifies that the mentioned provision should apply to those income stemming from capital investments, falling therefore within the qualification of "capital income" for tax purposes.

Consequently, income deriving from staking activity is subject to 26% withholding tax *ex* article 26(5) of Presidential Decree no. 600/1973. On this basis, the taxpayer shall declare this income in the proper section "RL" of the annual income tax return.

Finally, with reference to tax monitoring rules provided for by article 4, Legislative Decree no. 167/1990, Revenue Agency confirmed that the taxpayer is required neither to fill the RW section of his annual income tax return, nor to pay the IVAFE given that the crypto wallet is held through an Italian company.

Virtual currencies – Qualification of income realized on the transfer of cryptocurrencies | Revenue Agency Ruling No. 397/2022

With Ruling no. 397/2022, Italian Revenue Agency confirmed the tax treatment applicable in case of a transfer of virtual currencies deposited with a foreign platform. In particular, during 2021 the claimant transferred its portfolio of virtual currencies – partially deposited with a U.S. exchange platform and with a so-called "cold storage wallet" located in the UK. Before proceeding with that transfer, the cryptocurrencies deposited with the cold storage wallet have been transferred to the U.S. exchange platform.

It should be also noted that the claimant has moved from the UK to Italy, asking to benefit from the "substitute taxation regime" applicable to so called "new residents" under article 24-*bis* of the Italian Tax Code.

Revenue Agency addresses the following aspects: (i) the nature of the income stemming from the transfer of virtual currencies, (ii) the territoriality principle applicable to such an income, and (iii) the envisaged tax treatment in case of transfer between two different wallets.

With reference to the first point, Italian Tax Authorities recall their previous guidance where the cryptocurrencies have been qualified as "foreign currencies". On this basis, the related income falls within the scope of article 67(1) let. c-*ter* of the Italian Tax Code and it is subject to the 26% substitute tax under to article 5, Legislative Decree no. 461/1997.

In relation to the territorially requirement, Revenue Agency points out that, as clarified in the Ruling no. 12/2021, cryptocurrencies are considered as foreign currencies to the extent that they are not deposited with an account held through an Italian intermediary. In such a case, Italian Tax Authorities confirm that cryptocurrencies shall be subject to tax monitoring provisions under article 4, Decree Law no. 167/1990.

Based on the general principle under which any "withdrawal from wallet" should be regarded as a "transfer for consideration" – provided that the average balance exceeds the threshold of € 51,645.69 for at least seven consecutive days – Italian Revenue Agency clarifies that the transfer from a wallet to another, both owned by the same person, does not represent a taxable event.

Finally, with reference to the case at hand, Italian Revenue Agency confirms that the income realized by the Claimant by virtue of the sale of the virtual currencies falls within the regime introduced by article 24-*bis* of the Italian Tax Code, provided that all the other relevant conditions are met.

Dividends – IRAP provisions applicable to financial intermediary – article 6, para. 1, let. a) of Legislative Decree no. 446/1997 | Provincial Tax Court of Reggio Emilia, Case Law no. 53/2022.

The Case Law under analysis deals with the application of IRAP provisions in relation to dividends received by an Italian financial intermediary from its Italian controlled company. More specifically, such dividends have been included for 50% of their amount in the IRAP taxable base of said Italian financial intermediary, under article 6, para. 1, let. a) of Legislative Decree no. 446/1997 (IRAP Decree).

The financial intermediary has submitted a request of reimbursement to Italian Tax Authorities, arguing that the mentioned article 6 of IRAP Decree is not consistent with Directive 2011/96/EU ("Parent-Subsidiary Directive"), stating that "where a parent company (…) by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company (…) shall (…) refrain from taxing such profits" (see article 4, para. 1, let. a).

Following the Revenue Agency rejection on the above request, the financial intermediary appealed said decision before the relevant Provincial Tax Court, deeming that article 6, para. 1, let. a) of IRAP Decree is not consistent with article 4, para. 1, let. a of Parent-Subsidiary Directive:

a) either, in light of the interpretation provided by the ECJ in their Case Law – see C-365/16 and C-68/15 – which should be considered as directly applicable within the domestic tax framework; or

b) because in contrast with principles outlined by Treaty on the Functioning of the European Union ("TFEU") – namely article 49-55, "freedom of establishment" and article 63, "freedom of movement of capital between Member States" – as well as contrary to articles 3 and 53 of Italian Constitution.

This noted, the Provincial Tax Court of Reggio Emilia (Judgment no. 53/2022) agrees with the grounds and reasons outlined in the appeal submitted by the Italian taxpayer, confirming the reimbursement of the IRAP paid in relation to the dividends included in IRAP taxable base, since:

- Parent-Subsidiary Directive is aimed at preventing double taxation of EU sourced-dividends, provided that the relevant conditions are met;
- the abovementioned Directive is applicable also to IRAP (*i.e.* not only to IRES);
- in the present case "reverse discrimination" is envisaged, since the IRAP Decree provides for a worse tax treatment to Italian-sourced dividends, compared to that granted by the Parent-Subsidiary Directive to EU sourced dividends;
- consequently, article 6, para. 1, let. a) of IRAP Decree is not applicable since in contrast with Parent-Subsidiary Directive.

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