FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

February 2023

Table of contents

I. MINISTERIAL PRACTICE

PRINCIPLES OF LAW

✓ **Qualifying payments for the use or licensing of software for the purposes of double taxation treaties (Legal principle no. 5 of 20 February 2023)**

The Italian Tax Authorities have expressed their views on certain aspects concerning the qualification of payments made to acquire the right to use, reproduce and distribute software programs where, without such licence, a copyright infringement would occur.

Pursuant to article 23(2)(c) of the Presidential Decree no. 917 of 22 December 1986 ("**TUIR**"), payments received to use intellectual property rights are deemed to have taken place in the territory of the State when they are made by parties residing there or by permanent establishments in that territory of non-residents. Furthermore, pursuant to article 25 of Presidential decree no. 600 of 29 September 1973, these payments are subject to a 30% withholding tax.

Paragraph 12.2 of the Commentary on article 12 of the OECD Model clarifies that the character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. It also clarifies that the rights in computer programs are a form of intellectual property.

Paragraph 13.1 of the Commentary clarifies that payments made for the acquisition of partial rights in the copyright will represent a royalty where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright.

Based on the above and considering the Italian legal system and the clarifications included in the Commentary on the OECD Model, the payments for the right to use, reproduce and distribute the program that would, without such license, constitute an infringement of copyright, must be settled in accordance with the relevant Treaty provision for the purposes of distributing taxing rights.

CIRCULARS

✓ **Clarifications on the "new" Patent Box regime (Circular no. 5/E and Order no. 52642 of 24 February 2023)**

In the Circular, the Italian Tax Authorities clarify the "new" Patent Box regime following the public consultation that ended on 3 February. The order amends document no. 48243 dated 15 February 2022 in order to bring it into line with the current regulatory framework.

The current regime provides for a 110% extra deduction on research and development costs related to specific types of intangible assets. The document provides some guidelines on the transitional regime.

Taxpayers willing to switch to the new regime must notify their waiver of the prior agreement procedure by certified email (PEC) or registered mail. The waiver must be sent even if the taxpayer has filed for renewal of a prior agreement already signed.

The transition to the new regime is possible when no agreement has been signed with the Italian Tax Authorities to complete the pending procedure. Taxpayers may also remain in the previous Patent Box regime, provided that an option relating to tax periods prior to 2021 has been validly exercised.

Furthermore, the following was clarified: (i) an asset for which an industrial property right has been obtained which, however, is not used in business processes, is not

deemed "used" and (ii) the basis for calculating the research and development tax credits must be reduced by the IRES (corporate income tax) and IRAP (regional production tax) attributable to the 110% extra deduction of the cost eligible for the new Patent Box regime.

RESPONSES TO REQUESTS FOR A PRELIMINARY OPINION

- ✓ **Management of investment funds – Services provided to the asset manager (SGR) by other group companies – VAT exemption (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 179 of 31 January 2023)**

The Italian Tax Authorities clarified that, for the purposes of the exemption provided for in article 10(1)(1) of Presidential Decree no. 633 of 26 October 1972 ("**Decree No. 633/72**") on mutual fund management services provided to an SGR, these services must be intrinsically connected with the management of the funds and must be provided solely for the purpose of the management of the same funds.

However, for exemption purposes, the services must, comprehensively evaluated, form a distinct whole, and be specific to, and essential for the management of mutual investment funds. The subjective qualification of the service provider is irrelevant.

The Italian Tax Authorities make reference to the interpretation principles formulated, in particular, in the responses to the requests for a preliminary opinion nos. 628 of 29 December 2020 and 489 of 5 October 2022, which are deemed to apply both to the services rendered by other group companies and when such services are outsourced to a third party.

The Italian Tax Authorities specify that, in any event, their power to control the correct functioning of the above principles is not affected.

- ✓ **Social security fund – Investing in foreign investment funds which are not yet PIR compliant (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 205 of 7 February 2023)**

The Italian Tax Authorities have excluded the exemption regime for social security and pension funds in relation to income deriving from certain investments ("qualified investments") to the extent of investments in collective undertakings (OICRs) that are not yet PIR compliant. Pursuant to Law no. 232 of 11 December 2016, under the PIR regulation:

(i) qualified investment may be made directly, by subscribing shares or quotas of companies resident in Italy or in EU or EEA Member States (with permanent establishment in Italy), or indirectly, by subscribing or acquiring units or shares of OICRs resident in the territory of the State pursuant to article 73 of the TUIR;

(ii) the "predominance" of the investment in qualified investments must be evidenced in the regulation of the Italian OICRs or, for foreign investment funds, in the offering memorandum. If the offering memorandum does not include these provisions, the investment policy actually implemented by the OICR is not relevant. Therefore, the existence of the "predominance" requirement must always be carried out ex ante.

- ✓ **Sale and lease back transactions – VAT treatment (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 206 of 7 February 2023 and Italian Tax Authorities' resolution no. 3 of 3 February 2023)**

In order to identify the correct VAT treatment in a sale and lease back transaction, the case must be assessed individually, considering the specific contractual provisions established by the parties.

As clarified in Italian Tax Authorities' Resolution no. 3 of 3 February 2023, under the principles set out in the EU and national case law (see Court of Cassation decision no. 11023 of 27 April 2021), the characteristics of sale and lease back transactions cannot be applied in a generalised manner to all sale and lease back agreements for which it is necessary to evaluate the individual case, which requires an examination of the specific transactions carried out by the parties when exercising contractual autonomy.

- ✓ **Group VAT settlement regime – Scope – Non-resident companies identified directly in Italy (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 209 of 8 February 2023)**

The Italian Tax Authorities have clarified the VAT group settlement procedure which, pursuant to article 73(3), allows for the periodic VAT settlement to be carried out in a single way, by offsetting the payables against the receivables arising from the settlement of participating companies, by companies resident in other EU Member States which meet the requirements of the Ministerial Decree dated 13 December 1979 and those for the VAT identification in Italy.

In their response, the Italian Tax Authorities clarified that companies residing in another Member State and identified in Italy may adopt, similarly to resident companies, the group VAT settlement procedure, where no company established in Italy participates. In their Response to the request for a preliminary opinion no. 544 of 3 November 2022, the Italian Tax Authorities note that, "*(...) in Italy, the identification of the participants in the VAT group settlement procedure for VAT purposes is a requirement that must be met from 1 January of the year of its application. Indeed, the option has an effect on all transactions carried out as from that date*". Conversely, the identification for VAT purposes is not required as of 1 July of the year preceding the entry into the group VAT settlement procedure. This is necessary for the control requirement governed by article 1(1)(d) of the Ministerial Decree dated 13 February 2017.

According to the Italian Tax Authorities, French companies may opt for the group VAT settlement procedure from 1 January 2023, assuming that the foreign companies have a legal form equivalent to those incorporated under Italian legislation, and that a controlling relationship pursuant to article 2 of the Ministerial Decree dated 13 December 1979 (shares or quotas owned for more than 50% of their capital) has been in place since a date prior to 1 July of the previous calendar year.

- ✓ **VAT refund – Non-resident entities (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 211 of 13 February 2023)**

The Italian Tax Authorities clarified the arrangements for certifying the conditions necessary to claim a VAT refund (for an amount exceeding Euro 30,000) submitted by the tax representative of a foreign entity.

The foreign entity may certify compliance with the relevant requirements as follows:

(i) self-certification submitted by the tax representative, in accordance with normal rules, when the party entitled to the VAT refund is resident in the EU or, if resident in a non-EU country, when the self-certification is produced pursuant to international treaties between Italy and the country of origin;

(ii) in all other cases, the certification must comply with the procedure set out in article (3)(4) of Presidential Decree no. 445 of 28 December 2000 (statement by the foreign authority).

Therefore, the certifications or statements made by other parties, including the independent auditors, cannot be used.

- ✓ **Domestic tax consolidation scheme - Terms and restrictions to the use of transferred receivables (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 220 of 22 February 2023)**

The Italian Tax Authorities' response to the request for a preliminary opinion no. 220 of 22 February 2023 covered a consolidated company that transferred a VAT receivable that the group decided not to offset, to the domestic tax consolidation scheme (fiscal unit).

The companies participating in such scheme may transfer tax receivables to the consolidating entity provided that their balance does not exceed the IRES tax resulting, by way of advance balance and payment of balance, from the tax consolidation return and up to the threshold set out in article 25 of Law Decree no. 241 of 9 July 1997.
In this respect, it is confirmed that the consolidating entity may use the amounts transferred pursuant to article7(1)(b) of the 2018 Ministerial Decree exclusively to pay the IRES tax (by way of advance balance and payment of balance). Consequently, the consolidating entity cannot hold residual credit balances.

Under any other conduct, the possibility of correcting the effects of the non-offsetting of the transferred VAT receivables is confirmed by means of the supplementary statement pursuant to articles 2(8) and (8-*bis)* and 8(6-*bis)* et seq. of Presidential Decree no. 322 of 22 July 1998, in order to restore the unused VAT receivable with the consolidating entity.

- ✓ **Incorrect application of reverse charge – Refund of non-deducted VAT (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 203 of 7 February 2023)**

The Italian Tax Authorities provided additional information about the possibility of claiming a refund of VAT paid and not due, resulting from the incorrect application of VAT via the reverse charge mechanism, with respect to non-resident service providers.

Specifically:

(i) the taxable purchaser/customer may correct the mistake (application of VAT to exempt, non-taxable or non-subject transactions) by recording accounting entries with a sign opposite to those incorrectly recorded, thereby offsetting the relevant amounts, except where they have been unable to exercise their right to deduct VAT;

(ii) the non-deducted VAT may be recovered by means of an amendment note, where the conditions set forth in article 26(3) of Decree No. 633/72 are met, or, alternatively, by claiming a refund pursuant to article 21(2) of Legislative Decree no. 546 of 31 December 1992.

In order to comply with the neutrality of VAT, the refund shall not qualify as "unjust enrichment". During the investigation phase that follows the claim for reimbursement, the claimant must provide the relevant evidence to the competent office.

- ✓ **Tax treatment of mergers between closed-end real estate alternative investment funds reserved for professional investors (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 208 of 8 February 2023)**

The Italian Tax Authorities clarified the tax treatment of mergers between closed-end real estate funds reserved for professional investors. In the case examined, a

Luxembourg company invested indirectly in three Alternative Investment Funds (AIFs) set up in Italy and managed by an SGR.

The SGR merged the AIFs in order to streamline the administrative processes and cut costs. After the merger, the units of the merged funds will be cancelled and new units will be issued on an exchange basis which considers the interim financial statements.

In the case examined, the following tax treatment must be applied:

(i) for direct tax purposes, as real estate funds are not subject to IRES and IRAP taxes (article 6(1) of Law Decree no. 351 of 25 September 2001), the related mergers do not generate taxable income for the funds;

(ii) if the units are not liquidated or reimbursed, no investment income is generated pursuant to article 44(1)(g) of the TUIR or there is no income from the trading of the units under article 67(1)(c-*ter)* of the TUIR for the recipients. Conversely, the amounts received by the unit holders as a result of cash adjustments as part of the unit exchange qualify as investment income pursuant to the above-mentioned article 44(1)(g) of the TUIR and will be subject to taxation;

(iii) transfers of real estate property are VAT relevant only when they meet the conditions set out in paragraph 5 of the above-mentioned article 36, i.e. when the receiving fund's deduction percentage is below that of the merged fund;

(iv) a fixed registration tax of Euro 200 is applied pursuant to article 4(b) of the Tariff Part I of Presidential Decree no. 131 of 26 April 1986;

(v) mortgage and cadastral taxes are applied at a fixed amount of Euro 200 pursuant to article 10(2) of Law Decree no. 347 of 31 October 1990.

✓ **Option for the SIIQ/SIINQ regime - checking certain requirements which were not met when opting for the special regime (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 197 of 7 February 2023)**

In its response, the Italian Tax Authorities clarify that, in order to exercise the option for the "listed real estate investment companies - SIIQ" and "unlisted real estate investment companies - SIINQ" regime, the relevant communication must be submitted by the end of the tax period preceding that from which the company plans to avail of said regime. The requirements provided by the applicable provision for exercising the option must be met "*at the beginning of the first tax period from which the party exercising the option plans to avail of said regime*". If one or more of the requirements are not met when the option is exercised, the communication does not become effective.

Formal errors in filling in the form for the special regime option maybe corrected by paying a penalty of Euro 250.

In the event of a joint option, the special regime for SIIQ-SIINQs may also be extended to unlisted companies limited by shares resident in the territory of the State, whose main business activity consists in the performance of real estate lease activities and which are held by other SIIQs - SIINQs, which meet the consolidation requirements pursuant to articles 117(1) and 120 of the TUIR, whose voting and profit-sharing rights are held by the same parent for at least 95%.

✓ **Mergers – Using tax credits for building renovations (Response to the request for a preliminary opinion of the Italian Tax Authorities no. 218 of 16 February 2023)**

The Italian Tax Authorities clarified that, after the merger, the newco or the acquiring company may offset the tax credits for building renovations and energy savings included in the acquired company's "tax box" ("*cassetto fiscale*").

The transfer of these amounts from the acquired company to the acquiring company does not configure a new assignment of claims since the acquiring company takes over all the rights of the acquired company.

In order to check that the amounts used for offsetting purposes by each party do not exceed the portion available each year, under penalty of rejection of the F24 form, the tax code of the acquiring company that uses the credit for offsetting purposes must be indicated in the "taxpayer" section and the tax code of the acquired company that transferred the tax credit must be indicated in the "*tax code of the co-obligor, heir, parent, guardian or receiver*", together with the ID code "62 - *party other than the credit beneficiary"*.

ORDERS

✓ **Disclosing the tax credits accrued in 2022 in respect of the charges incurred to purchase energy products (Italian Tax Authorities' order no. 44905 of 16 February 2023)**

The Italian Tax Authorities described the content and procedures for submitting the communication to be sent by 16 March, under penalty of forfeiture of the right to use the residual credit, concerning the tax credits accrued in 2022.

(i) Parties required to send the communication

The communication must be sent by the beneficiaries of tax credits for the electricity and natural gas purchased in:

- the third quarter of 2022 (article 6 of Law Decree no. 115 of 9 August 2022);
- October and November (article 1 of Law Decree no. 144 of 23 September 2022);
- December 2022 (article 1 of Law Decree no. 176 of 18 November 2022).

The same provision applies to the tax credit for fuel purchased in the fourth quarter of 2022.

(ii) Parties not required to send the communication

The following parties are not required to send the communication:

- beneficiaries who have already fully used the credit accrued by offsetting via the F24 form;
- beneficiaries who have already informed the Italian Tax Authorities of the assignment of the credit (unless the assignment notice has been cancelled, or the assignee has rejected the amount).

(iii) Sending the communication

After sending the form, a receipt is issued confirming its acceptance or rejection.

For each tax credit, the beneficiary may send only one valid communication, covering the entire amount accrued in the reference period, gross of any amount already offset in the F24 form pursuant to Legislative Decree no. 241 of 9 July 1997 up to the date of the communication.

Sending this communication does not exclude the possibility of sending the notice of assignment of the credit at a later date.

II. UPDATE ON REGULATIONS

✓ **Law converting the *Milleproroghe* Law Decree in the Official Journal of the Italian Republic (Law no. 14 of 24 February 2023)**

On 27 February 2023, Law no. 14 of 24 February 2023 converting the Law Decree no. 198 of 29 December 2022 (the "*Milleproroghe* Decree") was published in the Official Journal of the Italian Republic no. 49. This law came into force on 28 February 2023.

The main changes introduced are as follows:

(i) *2021 IMU (property tax) return*
The deadline for submitting the 2022 IMU return pertaining to 2021 was extended from 31 December 2023 to 30 June 2023.

(ii) *Issuing electronic invoices*
The prohibition to issue electronic invoices for healthcare services provided to natural persons was extended from 1 January 2023 to 1 January 2024.

(iii) *Tax breaks on first home*
Confirmation of the deletion of tax breaks on the first home from 1 April 2022 to 30 October 2023.

(iv) *Communications of tax breaks for building renovation works*
The deadline for submitting the communications of tax breaks for construction works was extended from 16 March 2023 to 31 March 2023.

(v) *Write-off of municipalities' and other local bodies' tax demands*
Local bodies have been granted the possibility of deciding, by 31 March 2023, to apply the rules governing: (a) the simplified settlement of tax disputes; (b) the simplified waiver of pending judgments before the Court of Cassation; and (c) the payment of the instalments due in connection with measures to avoid tax litigation. These decisions are only effective if published on the institutional site of the relevant body by 30 April 2023.
Furthermore, the local bodies that, at 31 January 2023, had not yet resolved not to cancel the positions relating to the amounts entrusted to the collection agent in the period from 2000 to2005, with a residual amount of Euro 1,000 at 1 January 2023, may opt, by 31 March 2023: (a) not to have the positions cancelled; (b) to have them cancelled in full in accordance with the rules governing the elimination of the positions of state administrations, tax agencies and social security institutions. The cancellation will be finalised on 30 April 2023. Until that date, collection of the above amounts is suspended.

✓ **Law Decree "Enacting urgent measures on the assignment of tax credits relating to incentives" (Law Decree no. 11of 16 February 2023)**

The Law Decree was published on 16 February 2023 in the Italian Official Journal and must be converted into law by 17 April 2023. The main measures approved by the government are as follows:

(i) public administrations cannot act as assignees of tax credits arising from the so-called "tax breaks for building renovation works" (superbonus 110%, building heritage recovery, ecobonus, seismic improvements, façade bonus, installation of photovoltaic systems, charging points and removal of architectural barriers);

(ii) introduction of a provision that excludes the assignee's joint and several liability for the claim from the State in the event of the assignees' involvement in breaches affecting tax breaks for building renovation works. This exclusion of liability applies when the assignee has a number of documents pertaining to the construction works. However, the case of fraud remains relevant;

(iii) as of 17 February 2023, the following is no longer permitted: (a) applying the invoice discount on the consideration for construction works that originate tax breaks for building renovation works and (b) assigning credits arising from tax breaks for building renovation works. This restrictive measure does not apply to eligible expenses that meet certain requirements before 17 February 2023, distinguishing between tax breaks for building renovation works arising from the superbonus 110% scheme and those generated otherwise.

III. CASE-LAW UPDATE

✓ **The repayment of the amount paid by the promisor/purchaser as a down payment on the price which was mistakenly not subject to VAT, is not a taxable supply (Court of Cassation, ruling no. 1609 of 19 January 2023)**

With respect to VAT, advance payments relating to a preliminary contract for a property sale qualify as taxable transactions. Therefore, the promisor/seller must issue the corresponding invoice showing the tax to be paid thereon. Furthermore, should the transaction not take place, they must make the necessary adjustment and issue an invoice for a refund of the amount already paid, i.e., a taxable transaction with a sign opposite to the first one.

Should the original down payment mistakenly not be taxed or should the relevant authority fail to report the breach, the return of the amount by the promisor/seller is purely financial in nature and cannot be taxed. Indeed, it does not qualify as a taxable supply as per the definition set out in article 2(3)(a)) of Decree no. 633/72.

The Court's ruling is understandable. Otherwise, the principle of neutrality which underlies the relevant tax mechanism would be unduly distorted.

✓ **Fixed amount of VAT and registration tax on the without-recourse assignment of receivables already assigned with recourse under a factoring contract (Court of Cassation, ruling no. 2592 of 27 January 2023)**

The assignment by a bank to a company of receivables not collected by the latter and already assigned to it with recourse under a factoring contract is subject to VAT and registration tax due in fixed amount.

The Court makes reference to rulings of European and national case law, which have already acknowledged that, for VAT purposes, although each service must be considered separate and independent, in certain cases, the transaction characterised by several events must be considered as a whole. Therefore, in this case, the unitary nature of the assignments of receivables, with recourse first and then without recourse, must be acknowledged. Indeed, the return of the receivables must be considered as functionally related to the original one, inherent in the with-recourse factoring contract.

According to well-established case law, factoring transactions must be considered VAT exempt when the legal cause of the transaction can be attributed to the financing of the transferor. On the other hand, they are taxable when the reason therefor can be identified in the recovery and collection of receivables. In the case examined, the factoring contract is of a financial nature. Indeed, its aim is to obtain an advance, similar to a bank discount, rather than to recover and collect the amount claimed by the assignor from third parties.

As it is subject to VAT, the transaction is also subject to a fixed, rather than proportional, registration tax, in accordance with the principle of alternating VAT and registration pursuant to article 40 of Presidential Decree no. 131 of 26 April 1986.

✓ **Interruption of the 90-day suspension period to appeal following a tax settlement proposal (Court of Cassation, ruling no. 36919 of 16 December 2022)**

The 90-day suspension period to file an appeal following a tax settlement proposal pursuant to article 6(3) of Legislative Decree no. 218 of 19 June 1997 is interrupted. This is due to the lack of an agreed settlement, usually upon the taxpayer's formal and irrevocable waiver of the appeal (to which the taxpayer's failure to appear, whether justified or not, on the date set for the settlement of the dispute cannot be compared; see Court of Cassation, measure no. 27274 of 24 October 2019).

Considering the taxpayer's tax settlement proposal as merely dilatory is not a valid reason for assuming that the suspension period has been interrupted. The suspension of the period for filing an appeal ensures a "*spatium deliberandi"* in view of the settlement, which cannot be denied by an *ex-post* assessment based on the function of the request.

According to previous rulings of the same Court, even the filing of the request with an office lacking territorial jurisdiction can cause the suspension of the period for appealing against the notice of assessment (see Court of Cassation, ruling no. 8178 of 22 March 2019).

- ✓ **VAT credit: this credit may be offset even if no return has been filed (Court of Cassation, ruling no. 29415 of 10 October 2022)**

The Court of Cassation held that, under certain circumstances, failure to file an annual VAT return in the year in which the VAT credit accrued does not prevent the taxpayers from availing of the VAT credit accrued following offsetting in the annual VAT return filed for the subsequent tax period. Therefore, it is acknowledged that failure to file an annual VAT return does not prevent the taxpayers from deducting the VAT credit in the subsequent tax period.

For the purposes of allowing the appeal, the Court found it relevant the fact that the Italian Tax Authorities, instead of challenging the existence of the VAT credit, had only challenged the failure to file the annual VAT return in the tax period in which the VAT credit had accrued.

- ✓ **Parent-Subsidiary Directive and international treaties: no incompatibility (Court of Cassation, ruling no. 2355 of 10 January 2023)**

The Court of Cassation confirms that there is no incompatibility between the exemption from EU withholding taxes and the refund of the tax credit provided for by the international treaties against double taxation. Indeed, theoretically - albeit with subsequent practical checks - these are two compatible systems that are proposed as alternative solutions to be applied also with subsequent options.

Once again, the Court faced the long-standing question of the compatibility between the Parent-Subsidiary Directive and the international treaties in a case involving an Italian company (a subsidiary) and its English parent for dividends paid in 2002 and 2003.

IV. EUROPEAN UNION

CASE-LAW

- ✓ **Freedom of establishment and tax treatment of intra-group transfers of (i) intellectual property rights relating to trade-marks and (ii) capital held in subsidiaries (ECJ, 16 February 2023, Case-707/20)**

Article 49 of the Treaty on the Functioning of the European Union ("**TFEU**") must be interpreted as follows: national legislation which subjects to immediate taxation a transfer of assets by a company which is tax resident in a Member State to a subsidiary which is tax resident in a third country and which does not carry on a business activity in that Member State through a permanent establishment, where those two companies

are wholly-owned subsidiaries of a common parent which is resident for tax purposes in another Member State, does not constitute a restriction on the freedom of establishment of that parent where such transfer would take place under tax neutrality if the subsidiary were also resident for tax purposes in the first Member State or carried on business there through a permanent establishment.

Article 49 of the TFEU must be interpreted as follows: a restriction on the right of freedom of establishment resulting from a difference in treatment between domestic and cross-border transfers of assets carried out for consideration within a group of companies, by virtue of national legislation which makes a transfer of assets carried out by a company resident for tax purposes in a Member State subject to an immediate tax obligation may, in principle, be justified by the need to preserve a balanced allocation of the powers of taxation between the Member States, without any possibility of deferment of payment of the tax in order to ensure the proportionality of that restriction, where the taxpayer concerned has received, in return for the disposal of the assets, consideration corresponding to the full market value of those assets.

- ✓ **Short-term property rentals – Property rentals operators – Requirement to provide information relating to rental agreements (EJC, 22 December 2022, Case C-83/21)**

The European Court of Justice, ruling on the Council of State's reference for a preliminary ruling, stated that article 4 of Law Decree no. 50 of 24 April 2017 on short-term property rentals is not in contrast with article 56 of the TFEU (which prohibits restrictions on the free movement of services within the EU), insofar as it requires intermediaries (i.e., "property rentals operators, specifically, persons managing online portals, putting in contact people looking for a property with those willing to rent real estate units") to:

(i) provide information on short-term property rentals agreed through them;

(ii) apply a 21% withholding tax on the rent received through them, by way of a flat tax rate or income tax advance payment.

Conversely, the Court states that the provision requiring, again with respect to short-term property rentals, that intermediaries residing or established in the territory of a Member State other than the Member State of taxation must designate a tax representative resident or established in the territory of the Member State of taxation, is in contrast with article 56 of the TFEU (as a disproportionate measure in relation to the objective of limiting tax evasion).

***

This document is solely for informative purposes and does not constitute a professional opinion.

For information: info@5lex.it