FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

March 2023

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I. MINISTERIAL PRACTICE

CIRCULARS

- ✓ **Law no. 197 of 29 December 2022 (2023 Budget Law) "Tax peace" – Further guidance on interpretation (Circular no. 6/E of 20 March 2023)**

With Circular no. 6/E of 20 March 2023, the Italian tax authorities provided additional guidance on the interpretation and scope of application of the provisions concerning the facilitated settlement of the amounts due following the automated checks on tax returns and other measures related to the so-called "Fiscal peace", introduced by Law no. 197 of 29 December 2022 (the 2023 Budget Law).

The Circular comprises questions and answers and provides guidance on the facilitated settlement of the amounts due as a result of the automated checks on tax returns, the regularisation of formal violations, the special self-regularisation and the participation in and facilitated settlement of tax assessment procedures. It also provides answers on the settlement of pending tax litigation and the regularisation of omitted payments after acquiescence or administration or judicial settlement, and the facilitated settlement of tax bills entrusted to tax collection agents from 1 January 2000 to 30 June 2022.

It also clarifies that sending electronic invoices to the Exchange System (SdI) past the ordinary deadlines is deemed a "formal violation" which can be regularised, provided that the invoices are correctly included in the VAT settlement for the relevant period, paying the related tax. Similarly, the failure to send electronic receipts duly stored and entered in the accounts with payment of the related tax may also be regularised.

With respect to the "special self-regularisation" which allows the regularisation of tax breaches related to validly submitted tax returns for the tax period in progress on 31 December 2021 and prior tax periods, the Italian tax authorities clarify that the breaches pursuant to article 41-bis of Presidential decree no. 600/1973 (partial assessment) fall within the scope of the measure, provided that they have not already been challenged.

Finally, with respect to the possibility of facilitated settlement in the context of tax assessments related to taxes levied by the Italian tax authorities, it is clarified that the procedures resulting from formal assessments (article 36-ter of Presidential decree no. 600/1973) are out of the scope of the facilitated settlement by acquiescence or compliance. However, the same procedures may be covered by the special self-regularisation procedure for tax violations until notification of the outcome of the inspection has been received.

- ✓ **New clarifications on the request for an advance tax ruling on new investments (article 2 of Legislative decree no. 147 of 24 September 2015). (Circular no. 7/E of 28 March 2023)**

In Circular no. 7/E of 28 March 2023, the Italian Tax Authorities provided operating instructions and clarifications based on past experience, describing the guidelines for Italian and foreign companies that intend to request an advance tax ruling on new investments (pursuant to article 2 of Law decree no. 147 of 24 September 2015) in order to obtain a reply on the tax treatment to be applied to their development plan in Italy.

The Circular notes that, as of 1 January 2023, the minimum investment threshold has been decreased to €15 million and also describes the documents to be attached and the benefits associated with preliminary collaboration instruments.

Relevant investment and impact on employment: relevant investments may include any transaction, also other than asset or share deals, when investors, by using their own funds, promote an economic activity in Italy, which is accurately reflected in the financial statements of the entities participating in the investment, provided that the positive effects in terms of revenue and employment take place in the country.

According to the Circular, the applications for

- investments consisting in the acquisition of non-resident targets are eligible when Italian-based investors record the economic effects of the investment plan in their financial statements (overcoming, in this respect, the restrictive position taken in Circular no. 25/2016).
- cross-border investments are eligible when, for foreign investors, the "Italian" part of the investment has a value at least equal to the legal minimum investment threshold (for Italian investors, the total amount of the investment is relevant as it is fully reflected in their financial statements).

With respect to the impact on employment, the Circular clarifies and provides examples about possible increased employment levels (creation of new jobs) and their maintenance, even partially, to be assessed only in case of corporate crises.

Preventive nature of the advance tax ruling on new investments concerning the existence of a permanent establishment: the Italian Tax Authorities provide guidance on the preventive nature of the advance tax ruling requested in order to check the existence of a permanent establishment in the country, clarifying that reference is made to the filing of the return for the tax period in which the non-resident entity's business has started.

Simplification of the procedure for the advance tax ruling on new investments: in order to adjust the response time to investors' needs, the Circular clarifies that "partial" and "split" responses are possible, i.e., by replying to individual questions at different times, also by requesting additional documentation only in relation to one or more of them, provided that the overall preliminary procedure is concluded, for all the queries submitted, within the maximum time limit provided for by law.

Relationships with other tax compliance tools: collaborative compliance and prior agreements: in order to enhance the attractiveness of prior agreements, the Circular clarifies that queries of taxpayers who request an advance tax ruling on a new investment and, in relation to the same business plan, who also intend to enter into related prior agreements, will be treated with priority, as an exception to the chronological criterion usually applied.

Furthermore, taxpayers who comply with the replies received as part of the advance tax ruling on new investments can access the collaborative compliance scheme, also in the absence of the minimum amount of revenue or turnover.
However, it is prudently clarified that this is only possible when the reply covers all queries and not "partial" replies.

PRESS RELEASES

- ✓ **Onlus [non-profit entities] and amateur sport associations Applications for the 2023 "5 per mille" scheme start today (Press release dated 8 March 2023)**

From 8 March 2023 until 11 April 2023, non-profit entities and amateur sports associations can apply for the "5 per mille" scheme.

Non-profit organisations and amateur sports associations that did not register for the "5 per mille" contribution scheme on time by the ordinary deadline (11 April 2023) may still participate in the scheme, provided that they submit their application by 2 October and pay a penalty of €250.

The provisional lists of registered bodies will be published by the Italian tax authorities (for non-profit organisations) and CONI (for amateur sports associations) by 20 April 2023.

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

- ✓ **Financial operators - Mandatory reporting to the tax register – Articles 7.6 of Presidential decree no. 605 of 29 September 1973 and 11.2 of Law decree no. 201 of 6 December 2011 (Response to request for advance tax ruling no. 225 of 1 March 2023)**

The Italian tax authorities expressed an opinion on the scope of mandatory reporting to the tax register by a company controlled and held by unlisted foreign companies.

With respect to the provision of the Director of the Italian Tax Authorities no. 176227 dated 23 May 2022 and its annexes (last updated on 28 November 2022), in this case, the authorities clarified that the circumstance under which the settlement of the investment or divestment transaction of the securities takes place solely and exclusively through the intermediary entrusted with the execution of each investment or divestment order does not exclude the reporting obligation for the Claimant.

Consequently, based on the above, the Claimant must comply with the reporting obligations to the tax register.

- ✓ **Prior year income - income from unrecorded liabilities – article 88 TUIR (Consolidated law on income tax) (Response to request for advance tax ruling no. 240 of 6 March 2023)**

The Italian tax authorities clarified that article 88.1 of the TUIR qualifies as taxable prior year income revenues or other income earned in respect of expenses, losses or charges deducted or liabilities recorded in prior year financial statements and revenues or other income earned for an amount exceeding that which contributed to the generation of income in previous years, as well as the non-existence of expenses, losses or charges deducted or liabilities recorded in prior year financial statements.

In this case, the unrecorded liabilities that generated a positive item in the company's income statement are not related to any negative income item deducted in previous tax periods.

Under applicable regulations, the Italian tax authorities clarify that the following must be considered:
(i) the unexpected nature of the event that gives rise to the positive income item (ii) its close relationship with an economic component (or a liability) which contributed to the generation of the company's income in a tax period preceding the prior year item.

Therefore, in this case, since the liability did not contribute to the generation of income

in previous years, the Italian tax authorities deemed that the prior year item did not contribute to the generation of income, although the effects were recognised in the income statement.

- ✓ **Permanent establishment – correct identification of the activity carried out in Italy, investment services, credit institution. Inclusion in the register kept by the Bank of Italy pursuant to article 13.1 of the TUB (Consolidated banking act) – tax rules for IRES and IRAP purposes (Response to advance tax ruling no. 242 of 6 March 2023)**

The Italian tax authorities expressed an opinion on the possibility for the Italian permanent establishment of the Claimant, an authorised credit institution, to apply IRES and IRAP rules, typical of investment companies, instead of those specific to banks, since the permanent establishment, despite being authorised to operate as a credit institution as from 2021, has not changed, de facto, the activities previously carried out (in 2021, it only earned income from investment activities) and did not carry out any of the activities typical of banks.

In their ruling, the Italian tax authorities make reference to article 152.1 of the TUIR, under which for companies and commercial entities with a permanent establishment in the territory of the State, the income of the permanent establishment is determined on the basis of the profits and losses attributable to it, and in accordance with the provisions of Section I, Chapter II, of Title II, on the basis of a specific income statement and balance sheet, to be prepared in accordance with the accounting principles provided for resident entities having the same characteristics.

The Italian tax authorities concluded that, once fully operational, the permanent establishment must be qualified as a bank branch of the company in Italy and, consequently, must apply all the rules applicable to credit institutions for IRES and IRAP purposes, including the 3.5% IRES surcharge provided for financial intermediaries under article 1.65 of Law no. 208 of 28 December 2015, from which, by express provision of law, only mutual fund management companies and securities firms (SIMs) are excluded.

- ✓ **IRES tax - Interpretation of the combined provisions of paragraphs 3-bis, letter b) and 3-ter of article 89 of the TUIR - Exemption of remuneration deriving from equity investments eligible for application of the Parent-Subsidiary Directive regime (Response to advance tax ruling no. 256 of 17 March 2023)**

The Italian tax authorities replied to two queries related to the interpretation of paragraphs 3-bis, letter b) and 3-ter of article 89 of the TUIR, relating, in particular, to the "remuneration" of the investment in the "share capital", in the form of preference shares, held by a company (as a shareholder and IRES entity resident in Italy) in the subsidiary, for which the requirements of the Parent-Subsidiary Directive are met.

Specifically, the Claimant asked whether, based on the provisions of article 89.3-bis, letter b) of the TUIR, in order to obtain the 95% exemption of the "remuneration of investment", the "double equity" test is still necessary, i.e., the test - required for securities issued by non-resident issuing companies - of the total correlation to the economic results and the total non-deductibility in the calculation of the issuing company's foreign income.

Indeed, the Italian tax authorities note that, for the purposes of taxing remuneration, shares continue to be assimilated to financial instruments of any nature issued abroad only when these instruments give rise to remuneration totally linked to economic results (see Circular no. 4 of 2006).

With respect to the query concerning the tax classification of the financial instruments ("preference shares"), the Italian tax authorities note that this issue was covered by

the opinion unfavourable to the proposed solution with respect to the interpretation of article 89.3-bis, letter b). Indeed, the ongoing requirement of the "correlation to the economic results of the company" for the purposes of granting the exemption of remuneration, eliminates any interest in the tax classification of the financial instrument from which the remuneration originates.

- ✓ **Financing and demerger. Assessment of abuse of rights pursuant to article 10-bis of Law no. 212 of 27 July 2000. (Response to advance tax ruling no. 263 of 21 March 2023)**

The Italian tax authorities expressed an opinion on the abuse of rights rules concerning a series of acts during which a partial and proportional demerger, whose sole objective is liquidity, at an intermediate stage, becomes relevant.

The principle that the purposes of the demerger must relate to the interests of the companies involved and not the interests of individual shareholders, who are independent of the business context, is relevant for the assessment of the abuse of rights rules.

With reference to the first element of abuse (undue tax savings), it is noted that this arises from the tax neutrality regime of the demerger (i.e., continuity of the fiscally-recognised amounts of the assets assigned and exemption of capital gains) and from what would have been determined, for tax purposes, had the capitalisation of the company taken place through a more physiological operation, i.e., by a contribution by shareholders natural persons (who are the same for the two companies) using their own means.

Since the proposed transaction does not affect the financial position of the shareholders, it is believed that the feasibility of the capital increase, aimed at capitalising the merged company, is made possible through the prior distribution of dividends by the demerging company to the shareholders natural persons (distribution subject to a 26% withholding tax).

Therefore, in this respect, the partial proportional demerger does not meet the need for corporate reorganisation, either of the demerging company or of the demerged company. In fact, it only results in the capitalisation of the demerged company - up to the amount of the financing debt - in breach of the rules providing for the taxation of distributed dividends.

With respect to the second assumption of abuse (lack of economic substance), it is clarified that the use of the demerger only in the interest of shareholders natural persons - directed by the same shareholding structure - means that the proposed demerger cannot be considered on the same footing as other transactions that physiologically enable the shareholders to recapitalise their companies, i.e., via new contributions.

Furthermore, the Italian tax authorities point out that, in this case, there are no valid extra-tax reasons, even of an organisational or management nature, such to justify the set of transactions envisaged under article 10 bis.3 of Law no. 212/2000.

Therefore, based on the above, the transaction envisaged by the parties configures an abuse of rights.

- ✓ **Income distributed by a real estate fund – exemption from withholding tax, article 7.3 of Law decree no. 351 of 2001 (Response to advance tax ruling no. 265 of 21 March 2023)**

With respect to the exemption from withholding tax provided for by article 7.3 of Law decree no. 351 of 2001, the Italian tax authorities clarified that income distributed by

a real estate fund resident in Italy to a foreign fund is not subject to withholding tax provided that certain conditions are met.

In this respect, reference is made to Resolution no. 54/E of 18 July 2013 (which confirmed that the exemption also applies if the investors wholly own a vehicle that makes the investment) and Resolution no. 78/E of 27 June 2017 (which clarified that funds managed by advisors governed by the Investment Adviser Act of 1940 and subject to the supervision of the Securities and Exchange Commission (SEC) have the same substantive requirements and the same investment purposes as Italian funds and entities).

In this case, based on the Claimant's representations, according to the SEC guidelines, the general partners and the advisor must be considered as a single legal entity since they jointly act as fund manager and based on this, they are both subject to the SEC prudential supervision.

Therefore, assuming that, as represented by the Claimant, all the requirements set forth in the above practice documents are met, the Italian tax authorities ruled that the income deriving from the indirect investment of the funds in the real estate fund is not subject to withholding tax pursuant to article 7.3 of Law decree no. 351 of 2001.

ORDERS

- ✓ **Communication to promote voluntary compliance among VAT holders for whom late transmission of electronic invoices and electronic daily receipts is detected (Italian tax authorities order no. 61196 of 6 March 2023)**

The Italian tax authorities laid down the rules to be used to provide VAT holding taxpayers – and the Guardia di Finanza (Italian tax police) – information on electronic invoices and electronic daily receipts transmitted past the deadlines set by the respective laws, so that they can regularise the identified irregularities.

Taxpayers who have become aware of the information and elements provided by the Italian tax authorities may regularise any errors or omissions committed as set out in article 13 of Legislative decree no. 472 of 18 December 1997, benefiting from reduced penalties, based on the time elapsed since the violation was committed, as provided for in the above regulatory provision.

II. UPDATE ON REGULATIONS

- ✓ **Ministerial decree dated 1 March 2023 - Rate to be applied for discounting and revaluation transactions for the purpose of granting and disbursing subsidies to companies (M.D. 1 March 2023)**

The Ministerial decree dated 1 March 2023 for companies and made in Italy covers the change in the discount/revaluation rate for the purpose of granting and disbursing subsidies in favour of companies: as of 1 March 2023, in compliance with European Commission Communication 2008/C 14/02 (OJEU 19 January 2008, no. 14) the rate to be applied is 4.06%.

- ✓ **Implementation of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Legislative decree no. 19 of 2 March 2023 - OJ no. 56 of 7 March 2023)**

The Legislative decree transposing Directive (EU) 2019/2121 essentially harmonises the provisions concerning cross-border conversions and divisions.

It also amends the regulations on mergers, already harmonised pursuant to Directive (EC) 2005/56 transposed into Italian law by Legislative decree no. 108/2008 which is repealed by this Legislative decree from 3 July 2023.

Legislative decree no. 108/2008 will continue to apply to cross-border mergers in which, before 3 July 2023, one of the companies involved has published the draft terms of the merger.

- ✓ **Urgent provisions on the issue and circulation of certain financial instruments in digital form and the simplification of FinTech experimentation** **(Law decree no. 25 of 17 March 2023 - OJ no. 65 of 7 March 2023)**

The Decree containing the provisions on the issue and circulation of certain financial instruments in digital form became effective on 18 March 2023.

- ✓ **Banking foundations. Size of the accruals to the compulsory reserve and the optional equity accrual for 2022** **(Decree of 9 March 2023 - OJ no. 67 of 20 March 2023)**

For banking foundations, the size of the accrual to the compulsory reserve and the optional equity accrual is set for 2022.

- ✓ **Urgent measures in support of households and businesses for the purchase of electricity and natural gas and in the field of health and tax compliance** **(Law decree no. 34 of 30 March 2023 – OJ no. 76 of 30 March 2023)**

Law decree no. 34 of 30 March 2023 came into force on 31 March 2023 following its publication in Official Journal no. 76 of 30 March 2023 (the so called “Bills decree”), containing measures to support households and businesses for the purchase of electricity and natural gas, as well as in the field of health and tax compliance.

Energy and gas concessions: this decree strengthens the social bonus for electricity and gas for the second quarter of 2023, granted to economically-disadvantaged domestic customers and those in serious health conditions, by introducing a contribution for resident domestic customers, other than those entitled to the social bonus, paid as a fixed amount and differentiated according to climate zones, for October, November and December 2023, in the event of high gas prices**.**

Tax credits for companies (energy-intensive and not, gas-intensive and not) for the purchase of electricity and natural gas are also granted for the second quarter of 2023. These credits, similar to the previous ones, could be used for offsetting purposes in the F24 form by 31 December 2023 or transferred to other parties.

The decree extends the 5% VAT rate for the supply of methane gas used for combustion for civil and industrial purposes to the second quarter of 2023.

Tax obligations: significant changes to the facilitated settlements provided for by Law no. 197/2022. With respect to the “special self-regularisation”, both the deadline for

paying the amounts/first instalment and that for regularising the violation are postponed from 31 March 2023 to 30 September 2023.

Furthermore, an interpretation is provided according to which the special self-regularisation does not include violations that may result from automatic settlement (such as omitted payments), while it covers all violations that may be subject to ordinary tax self-regularisation.

With respect to the regularisation of formal violations, the deadline for paying €200 per tax period, or of the first instalment, is postponed from 31 March 2023 to 31 October 2023 (yet, the violation must be regularised by 31 March 2024). The deadline for the application for the settlement of pending litigation and for the payment of amounts is postponed from 30 June 2023 to 30 September 2023.

Similarly, the deadlines for finalising the facilitated settlement and the waiver of appeals before the supreme court are also postponed from 30 June 2023 to 30 September 2023.

Finally, special cases of non-punishment are provided for certain tax crimes (failure to pay withholding taxes due or certified exceeding €150,000 p.a., failure to pay VAT exceeding €250,000 p.a., undue offsetting of undue receivables exceeding €50,000), specifically when the relevant violations are correctly regularised and the amounts due are paid in full by the taxpayer in accordance with the applicable procedures.

- ✓ **Delegation of powers to the Government for the tax reform (Council of Ministers press release no. 25 of 16 March 2023)**

On 16 March 2023, the Council of Ministers approved the draft delegation of powers to the Government for the tax reform. The new provisions, to be implemented within 24 months of the coming into force of the delegated law, plan to simplify and reduce the tax burden, encourage investment, recruitment and establish a relationship between taxpayers and the tax authorities based on a targeted dialogue between the parties according to the needs of citizens and businesses.

- ✓ **Implementation of Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (Legislative decree no. 32 of 1 March 2023 - OJ no. 72 of 25 March 2023)**

Legislative decree no. 32 of 1 March 2023 was published in Official Journal no. 72 of 25 March 2023, containing: *«Implementation of Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation».*

Chapters I to IV (articles 1 to 15) transpose the definitions and outline the procedures relating to the regular reporting obligations to the tax authorities of other states that European rules place on operators of digital platforms.

Chapter V (articles 16 to 19) introduces further changes concerning, inter alia, data protection and data breaches, joint audits and time limits.

III. CASE-LAW UPDATE

- ✓ **Damage suffered by a taxpayer as a result of a negligent incorrect assessment by the tax authorities (Court of Cassation, judgment no. 5984 of 28 February 2023)**

The case concerns a company which allegedly made non-existent transactions and omitted the relevant VAT in its invoices.

Two criminal proceedings were also commenced against the tax payer, which ended with their dismissal because the fact did not exist.

Specifically, the Italian tax authorities qualified the purchase of two cars, which were clearly of Italian origin, as intra-Community.

The proceedings had a negative impact on the tax payer's health, working life and relationships; as a result, the director brought an action before the Court in order to obtain the payment of damages from the Italian tax authorities and the two officials involved in the assessment.

At first instance, the Court rejected the claimant's request.

The unsuccessful taxpayer appealed against the judgment and, at the outcome of the second instance judgment, the Court of Appeal, overturning the judgment by the Court of first instance, upheld the taxpayer's arguments. This approach was also confirmed by the Supreme Court in the decision covered hereby.

Specifically, the Supreme Court stated that the Italian tax authorities are also bound to comply with the principle of *neminem laedere* pursuant to article 2043 of the Italian Civil Code. Therefore, if it engages in wilful or negligent conduct, it is liable to pay damages to the taxpayer.

- ✓ **Proportionality of tax penalties (Constitutional Court, Judgement no. 46 of 17 March 2023)**

Judgment no. 46, filed on 17 March 2023, clarified that the principle of proportionality also applies to administrative tax penalties. The Constitutional Court ruled on the question of constitutionality raised by the Provincial tax commission of Bari, on article 1.1, first sentence, of Legislative decree no. 471 of 1997, whereby: in the case of failure to submit the tax return for the purposes of income tax and regional tax on productive activities, an administrative penalty ranging from one hundred and twenty to two hundred and forty per cent of the amount of the tax due, with a minimum of €250 shall apply.

In this case, a taxpayer failed to file a tax return in respect of the consolidated tax regime. However, on the one hand, the taxpayer timely filed its own stand-alone tax return, thereby unequivocally exposing themselves to the Italian tax authorities' checks, and, on the other, the taxpayer, fully paid the taxes due, albeit late, but before receiving the notice of assessment.

The Court declared the question unfounded based on an interpretation whereby the penalty may be reduced by up to half by assessing the conduct of the taxpayer and their actions to remedy or mitigate the consequences.

Indeed, the judgment states that the interpretation clarifies the criteria for determining the relevant penalties and should be applied to the tax penalty system by the Italian tax authorities or in litigation, even regardless of a formal request by a party.

IV. EUROPEAN UNION

CASE-LAW

- ✓ **Common system of value added tax (VAT) - Supply, after conversion, of a building which was the subject of a first occupation before the conversion (EU Court of Justice, 9 March 2023, Case C-239/22)**

The judges of the Court ruled on the scope of the first occupation criterion, whereby the sale of old buildings is not subject to VAT under EU law, whereas that of new buildings is taxable when a building has undergone a conversion such that it acquires the characteristics of a new building.

It is noted that the concept of conversion of buildings includes all those works which radically change the building and which are intended to change its use or substantially change the occupation conditions (EU Court, Case C-308/16).

Member States may also avail of the option provided for in article 12.2 of Directive 2006/112/EC, e.g., by introducing a quantitative criterion according to which the costs of such a conversion must be equal to a certain percentage of the initial value of the building in order to entail VAT liability.

Based on the above, the judges stated that if a national lawmaker has not availed of the above option provided for in article 12, nevertheless, it cannot be argued that the lack of a binding definition in national law of the application of the criterion of first occupation to conversions of buildings validates VAT exemption.

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