FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

April 2023

Summary

I. MINISTERIAL PRACTICE

CIRCULARS

✓ **Facilitated Conciliation of Tax Disputes (Circular no. 9/E of 19 April 2023)**

In the Circular no. 9/E of 19 April 2023, the Italian Tax Authorities clarify the scope and the procedural profiles of the simplified tax dispute settlement, an institution introduced by paragraphs 206 to 212 of article 1 of Law no. 197 of 2022 ("**Budget Law 2023**") and subsequently amended by Law Decree no. 34 of 30 March 2023.

The Circular clarifies that the simplified conciliation, so called *"out of court",* novated by the reform of the tax process pursuant to Legislative Decree no. 156 of 24 September 2015, occurs when pursuant to article 48, paragraph 1, of Legislative Decree 546/1992 *"during the pendency of the proceedings, the parties reach a conciliatory agreement by submitting a jointly signed application for the total or partial settlement of the dispute".*

The above-mentioned conciliation, with novative effect, entails the reduction of the administrative sanctions to forty or fifty per cent of the statutory minimum - depending on whether the agreement is reached during the first or second instance - and the possibility of making payments in instalments.

By Law Decree no. 34/2023, this discipline was extended to disputes pending not on 1 January 2023, as envisaged on the date the Budget Law came into force, but on 15 February 2023, deeming sufficient for the purposes of the pendency of the dispute *"the notification of the appeal to the opposing party".*

The Circular clarifies the admissibility of entering into a facilitated settlement on the basis of proposals submitted before the entry into force of the 2023 Budget Law. Otherwise, it is considered that the institution is not applicable to disputes concerning *"penalties only"* as the benefit of the reduction of penalties *"would represent an automatic reduction of the penalty, contrary to the ratio legis".*

Finally, the Italian Tax Authorities also clarified the terms of payment of the amounts due for the facilitated conciliation, which can be deferred in a maximum of twenty quarterly instalments to be paid "*by the last day of each quarter following the payment of the first instalment".*

Failure to pay the above-mentioned sums result in the forfeiture of the institute and the related benefit of the reduction of penalties. In addition, the competent office shall register the remaining sums and the penalty, which shall be increased by half.

✓ **Qualification of companies for access to the benefits under articles 119 and 121 of Law Decree no. 34 of 19 May 2020 - SOA Certification (Circular no. 10/E of 20 April 2023)**

In the Circular no. 10/E of 20 April 2023, the Italian Tax Authorities clarify the use of tax benefits, as per articles 119 and 121 of Law Decree no. 34 of 19 May 2020 (the so-called "**Relaunch Decree**"), for the execution of public works exceeding Euro 516,000, the amount of the works to be *"intended net of VAT".*

According to the indications of the Italian Tax Authorities, it can be considered that:

a) for works in progress as at 21 May 2022 and for contracts or subcontracts entered into prior to that date, it is possible to benefit from the tax incentives for eligible expenses incurred, regardless of the possession of the SOA certification, up to 31 December 2022 and in the years following 2022, including those incurred as from 1 July 2023;

b) for contracts or subcontracts concluded from 21 May 2022 until 31 December 2022, it is possible to benefit from tax incentives for expenses incurred: (i) until 31 December 2022 regardless of the "*SOA conditions*", (ii) between 1° January 2023 and 30 June 2023 only if the companies have acquired the SOA certification or have signed a contract for its issuance and (iii) from 1 July 2023 only for companies in possession of the SOA certification;
c) for contracts signed between 1° January 2023 and 30 June 2023, it is possible to benefit from the tax incentives for expenses incurred; (i) between 1 January and 30 June 2023 for companies that, at the time of signing the contract, hold the SOA certification or have signed a contract for its issue and (ii) from 1 July 2023 only for companies holding the SOA certification;
d) for contracts signed after 1° July 2023, tax relief is only available for expenses incurred by companies that have SOA certification at the time the contract is signed.

Lastly, the Italian Tax Authorities specified that the deduction relating to expenses incurred up to 30 June 2023 is allowed even if the company does not obtain the SOA certification as a result of its application.

With reference to the scope of application, the Italian Tax Authorities specifies that the "*SOA conditions*" apply exclusively with reference to the interventions provided for in articles 119 and 121 of the Relaunch Decree.

PRESS RELEASES

✓ **Building bonus credits subject to assignment and invoice discount: rules for using them over 10 years with long instalments ready (Press release of 18 April 2023)**

The Italian Tax Authorities has announced that as of 2 May it is possible for holders of *Superbonus*, *Sismabonus* and Architectural Barrier Bonus credits to access the reserved area of the Italian Tax Authorities website and request the division into ten equal annual instalments of the residual portion of each annual instalment of the credits not yet used *"for which the first option was communicated by 31 March"*.

Accruals may be made on the remaining portion of the instalments of the reported claims:

a) to the years 2022 and onwards, for credits arising from notifications of options for first assignment or invoice discount sent to the Italian Tax Authorities until 31 October 2022, relating to the *Superbonus*;
b) the years 2023 and following, for credits deriving from communications sent to the Italian Tax Authorities from 1° November 2022 to 31 March 2023, relating to the *Superbonus*, as well as communications sent up to 31 March 2023, relating to the *Sismabonus* and Architectural Barrier Bonus.

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

✓ **Application of the *call-off stock* regime and triangular transactions (Response to the request for advance tax ruling no. 271 of 3 April 2023)**

The Italian Tax Authorities has negatively expressed on the possibility of extending the suspensive effect of the *call-off stock regime*, regulated for VAT purposes by article *41-bis of* Law Decree no. 331 of 30 August 1993, to triangular transactions, since the operational scope of the regime must be "*circumscribed to the intra-Community transactions between the transferor/supplier and the designated purchaser",* involving only these parties.

Even in the presence of a supply contract concluded between the supplier and the first transferee, which provides the application of the call-off stock, the simultaneous transfer made by latter to the final transferee, according to the Italian Tax Authorities, must be considered as a *"separate, stand-alone and distinct transaction, from the one immediately preceding".*

- ✓ **Relief - Payment deadline for exercising the relevant option and application of IFRS 3 (Response to the request for advance tax ruling no. 273 of 3 April 2023)**

The Italian Tax Authorities clarified that, the omitted payment of the substitute tax precludes taxpayers the possibility to access and the exercise of the optional regime of relief of the higher values, pursuant to article 15, para. 10 et seq. of Law Decree no. 185 of 29 November 2008, that cannot be object of special correction due to the fact that, pursuant to article 13 of Legislative Decree no. 472 of 18 December 1997 *"it would turn into a form of "remissione in bonis" beyond the limits specified in the Law Decree no. 16 of 2 March 2012".*

The Italian Tax Authorities, citing its Circular no. 6/E of 1 March 2022, recalls that *"the payment by the taxpayer of a so-called voluntary tax [...] is the result of a free choice of the taxpayer and implies an unequivocal and irretractable manifestation of will on his part",* thus considering the payment a constitutive element of the option.

Furthermore, according to the Italian Tax Authorities, the aforesaid conclusions do not change with the application of IFRS 3, which indicates a maximum time limit for the determination of values and *"does not prohibit, nor limit, the timely exercise of the option and therefore the payment of the substitute tax"* within the following tax period in which the transaction has been carried out.

- ✓ **Transaction costs - Tax treatment of transaction costs capitalised by the parent/incorporated company OIC adopter and charged to equity reserves following the merger into the subsidiary/incorporating company IAS/IFRS adopter (Response to the request for advance tax ruling no. 277 of 4 April 2023)**

The Italian Tax Authorities examined the tax treatment, for IRES and IRAP purposes, of the transaction costs incurred as part of an acquisition transaction, capitalised, carried out by a Special Purpose Acquisition Company (OIC adopter) and subsequently reverse merged by incorporation into the target company IAS/IFRS adopter.

Recalling its previous response to the request for advance tax ruling no. 235 of 2 March 2023, the Italian Tax Authorities considered *"defined"* the accounting treatment of transaction costs in the presence of an acquisition transaction, considering the fact that there is "*an increase in the tax value of the equity investment which they are capitalised*" pursuant to article 110, paragraph 1, letter b) of the TUIR. The Italian Tax Authorities also reaffirmed that following a reverse merger transaction pursuant to article 172 of the TUIR, *"the same treatment must be reserved for the difference between the net equity of the parent/incorporated company and the value of the annulled equity investment in the acquiring/controlled company".*

- ✓ **Merger - Loss carry-forward, non-deductible interest expenses and ACE surpluses in the presence of consolidation tax regime (Response to the request for advance tax ruling no. 278 of 4 April 2023)**

The Italian Tax Authorities with its response to the request for advance tax ruling no. 278 of 4 April 2023, clarified the limitations of carrying forward the excess of interest expenses and ACE ex article 172, paragraph 7, of the TUIR in the event of a merger, affirmed that such limitations apply also in the case of tax consolidation.

In particular, the Italian Tax Authorities clarified the tax treatment of ACE surpluses in the case of a (reverse) merger.

The Italian Tax Authorities cited the article 11 of the Ministerial Decree of 1 March 2018, which provides that the merger between consolidated companies does not interrupt the group taxation, that can continue between the incorporating company and the other companies belonging to the national tax consolidation. In addition, in the Circular no. 9/E of 9 March 2010, has been further clarified that in the presence of merger transactions between companies participating in the same domestic tax consolidation and with tax losses carried forward during the period of consolidation, any elusive manoeuvre, aimed at achieving, with the merger transaction, the inter-subjective offsetting of tax losses between the entities involved, can be excluded. The exclusion depends on the fact that the operation itself, cannot benefit from any additional advantage in terms of offsetting taxable income, since the losses produced by the companies participating in the consolidation tax regime already "arise" as offsetable against the profits of other companies included in the group taxation.

The Italian Tax Authorities, with reference to excess interest expenses, referring to Resolution no. 42/E of 12 April 2011 clarified that in the presence of business combination transactions that do not interrupt the group taxation, the limiting provisions of article 172, paragraph 7 of the TUIR are fully operative.

Therefore, according to the Italian Tax Authorities, in line with what has been stated with regard to interest expense, the limiting provisions of the above-mentioned article 172(7) of the TUIR are also fully operative, in principle, for ACE surpluses generated by companies.

- ✓ **Exemption from withholding tax in relation to proceeds deriving from the indirect participation in a real estate fund (Response to the request for advance tax ruling no. 285 of 6 April 2023)**

The Italian Tax Authorities expressed its opinion with reference to the application of the withholding exemption regime pursuant to article 7, paragraph 3, of Law Decree no. 351 of 25 September 2001 on income deriving from the participation in Italian real estate investment funds received by a Swiss pension fund through its 100% participation in a Swiss OICR.

In the case examined, the shares of the real estate investment fund are indirectly held by a Swiss pension fund identified as qualified investor under Swiss law.

The Italian Tax Authorities recalls numerous practice documents in which it has been clarified that foreign pension funds and undertakings for collective investment are those entities that, under the legislation in force in the foreign state where they are established, have the same substantive requirements and investment purposes as Italian funds and undertakings, provided that they are subject to prudential supervision.

Therefore, according to the Italian Tax Authorities, as clarified in its Circular no. 2/E of 15 February 2012, the non-taxable regime set forth in article 7, paragraph 3, of Law Decree no. 351/2001, also applies when the foreign investor holds the full capital of corporate vehicles implementing the investment, and not just in the case of the direct participation, provided that these are also resident in so-called white list countries.

Finally, the Italian Tax Authorities, recalling its Resolution no. 54 of 18 July 2013, also stated that it is necessary to provide a self-certification of the Swiss pension fund attesting its residence in that white list country, as well as the certificate issued by the competent authority of the State of residence from which the fulfilment of the prudential supervision requirement can be verified. If the competent authority does not issue such a certificate, the submission of other appropriate documentation from which the foreign authority's supervisory requirement can be verified shall be deemed sufficient.

- ✓ **Revocation of tax rules on realignment of goodwill – "*Remissione in bonis*" (Response to the request for advance tax ruling no. 286 of 6 April 2023)**

The Italian Tax Authorities have expressed its opinion on the legitimacy of the institution of *remissione in bonis*, within the terms for submitting the first useful declaration, pursuant to article 2 of Law Decree no. 16 of 2 March 2012, for the purposes of the revocation of the so-called *"tax realignment"* regime pursuant to article 110 of Law Decree no. 104 of 14 August 2020, following the amendments made by Law no. 178 of 30 December 2020 (Budget Law 2021).

The Italian Tax Authorities considered plausible the recourse to the institution of *remissione in bonis*, which allows the enjoyment of tax benefits or access to optional tax regimes even when, as in the case at hand, the taxpayer does not fulfil within the prescribed time limits the reporting obligations or any other formal fulfilment required by law. All this on the condition that the substantive requirements and fulfilments set forth in article 2 of Law Decree no. 16 of 2 March 2012 are complied with.

In particular, article 2 of Law Decree no. 16/2012 provides for the benefits if (i) the taxpayer meets the substantive requirements provided for by the rules; (ii) the taxpayer makes the notification or performs the fulfilment within the deadline for submitting the first useful declaration; and (iii) the taxpayer pays the amount equal to the minimum penalty established by law.

- ✓ **Transfer of excess interest expense to the tax consolidation - Presence of losses prior to the option - Supplementary declaration - Exclusion (Response to the request for advance tax ruling no. 291 of 11 April 2023)**

The Italian Tax Authorities have clarified that the non-transfer of interest expenses to the consolidated regime leads to the use of them on a stand-alone basis and cannot be corrected by filing a supplementary tax return.

In adopting this approach, the Italian Tax Authorities recall the clarifications provided in its Circular no. 19 of 21 April 2009 and the subsequent clarifications stated in its Resolution no. 67 of 19 July 2019. In these documents, the Italian Tax Authorities had clarified that in the presence of non-deductible interest expense and previous tax losses (realised prior to entering the consolidated tax regime), the excess interest expense may be deducted from the consolidated group's income only if the company contributes a taxable income at least equal to the excess of non-deductible net interest expense. In the 2019 Resolution, the Italian Tax Authorities clarified that the conclusions of Circular no. 19/E apply only to cases where the company can actually use the tax losses to offset its taxable income.

The case examined concerned a consolidated company that:

a) had not transferred the excess of non-deductible interest expenses to the consolidated tax regime in application of the clarification of Italian Tax Authorities Circular no. 19/2009;
b) only from 2021 onwards the company realised that it fell within the scope of Italian Tax Authorities Resolution no. 67/2019 and was entitled to deduct interests on a group-wide basis.

The Italian Tax Authorities, starting from the assumption that this is on the taxpayer's choice, considers that the integration of the annual returns relating to the 2019 and 2020 tax periods is not admissible, while the possibility of submitting a supplementary return pursuant to article 2(8) and (*8-bis*) of Presidential Decree of 22 July 1998 with reference to the tax periods prior to 2019 is admitted.

- ✓ **Zero-balance payment proxies - Late submission - Necessary usability of credit in offset (Response to the request for advance tax ruling no. 297 of 18 April 2023)**

The Italian Tax Authorities clarified that if the taxpayer, when attempting to rectify the omitted submit of the F24 at zero balance, submits the payment proxy but this is rejected due to the expiry of the time limit for using the credit for offsetting, first of all he lose the right to offset and he is also subject to the penalties for omitted payment pursuant to article 13 of Legislative Decree 471/97, in relation to the taxes that should have been paid by means of that same offset.

According to the Italian Tax Authorities, the submission of the proxy, even at a later date, only heals the initial omission if the credit spent in compensation is still existing and usable at that date.

With reference to this case, the Italian Tax Authorities confirm the correctness of the rejection of the payment proxy, not only because it was late with respect to the original due date of the tax, but above all because it contained credits that can no longer be used for offsetting. For this reason, the failure to use the credits for offsetting within the prescribed time limits inexorably results in the loss of the credit.

- ✓ **Convertible bonds - Effects of the recapture mechanism in the event of non-exercise of conversion rights on interest expense and ACE (Response to the request for advance tax ruling no. 303 of 21 April 2023)**

The Italian Tax Authorities provided clarifications regarding the effects of the recapture mechanism in the event of non-exercise of conversion rights of a bond into shares in relation to the disciplines of interest expense and ACE.

Pursuant to article 5(4) of the Ministerial Decree of 8 June 2011 (the "**IAS Decree**"), the non-exercise of the option for the conversion entails, for tax purposes, the emergence of a positive component correlated to the non-existence of negative components (i.e., interest expense) which, for the portion referable to the comparison with the market rate, contributed to the determination of the IRES taxable base.

The application of the provisions of the IAS Decree makes possible to restore the accounting representation of a bond without subscription rights issued under the same conditions, from which the taxable base for IRES and IRAP purposes can be derived.

According to the Italian Tax Authorities, the recapture mechanism generates the aforesaid effect at the time of the non-conversion of the debt, since it is only at that moment that, also from a formal legal point of view, the bond issue is defined with the absence of any form of contribution by the subscribers of the financial instruments. The financial income, therefore, becomes relevant for IRES and IRAP purposes in the tax period in which the non-conversion takes place.

Finally, the Italian Tax Authorities analysed when the reclassification of the conversion reserve results in the reconstitution of profits that, if retained in the economy of the enterprise, allow the ACE benefit to be enjoyed.

PROVISIONS

- ✓ **Extension of the implementation modalities of the provisions concerning the assignment and traceability of tax credits recognised in relation to the costs incurred for the purchase of energy products (Italian Tax Authorities Order no. 116285 of 3 April 2023)**

The Italian Tax Authorities has extended the procedures for implementing the provisions concerning the assignment and traceability of tax credits, as set out in Order no. 253445 of 30 June 2022 published by the same, also to the tax credits

referred to in article 1, paragraphs 2 to 5, 45 and 46, of Law no. 197 of 29 December 2022.

The above treatment is extended to the following tax credits:

(i) in favour of energy-intensive enterprises of 45% of the costs incurred;
(ii) in favour of non-energy-intensive enterprises of 35 per cent of the costs incurred;
(iii) to natural gas-intensive enterprises, amounting to 45% of the costs incurred;
(iv) in favour of enterprises other than those with high natural gas consumption, equal to 45% of the costs incurred;
(v) for the purchase of fuel for agricultural and fishing activities, opened at 20%.

The above-mentioned tax credits may be either offset, pursuant to article 17 of Legislative Decree no. 241 of 9 July 1997, or transferred to third parties in accordance with the procedures set forth in the above-mentioned provision. In particular, the credit may be assigned *"only in full"*, with the compliance endorsement, and used by the assignee in the same manner in which it would have been used by the assignor.

The Agency specified that the assignment must be communicated between 5 April and 18 December 2023, with the exception of credits in favour of enterprises engaged in agricultural and fishing activities for which the assignment must be communicated by 21 June 2023.

✓ **Methods of payment of the taxes and duties due for the registration of the title and for the execution of the formalities relating to the computerised register of non-possessory pledges (Italian Tax Authorities Order no. 120760 of 5 April 2023)**

The Italian Tax Authorities has laid down the procedures for the payment of the taxes and fees due for the registration of a non-possessory security pledge and for the performance of the formalities relating to the computerised register.

With regard to the payment of taxes and fees for the registration, renewal, cancellation or annotation of a non-possessory security pledge, the sums must be debited to a current account opened with a collection intermediary, agreed with the Agency, and provided with a digitally signed power of attorney.

The same modalities are applied for the payment of the amounts due for the registration of the deed of incorporation, cancellation or amendment of the non-possessory pledge.

For the payment of the stamp duty due for the consultation of the register, the methods described above apply, while the payment of the fees is made through the platform referred to in article 5(2) of Legislative Decree no. 82 of 7 March 2005.

✓ **Benefit in ten annual instalments of the residual credits deriving from the assignment or discount on invoices relating to deductions due for certain building works (Italian Tax Authorities Order no. 132123 of 19 April 2023)**

The Italian Tax Authorities has provided that the tax credits deriving from the interventions (i) so-called *Superbonus*, (ii) aimed at overcoming and eliminating architectural barriers) and (iii) *Sismabonus*, deriving from the transfer or invoice discount notices sent by 31 March 2023 and not yet used, can be used in ten annual instalments by sending a telematic communication to the Italian Tax Authorities.

The above-mentioned communication must be sent via the web service available on the Italian Tax Authorities' website, called "*Piattaforma cessione crediti"*, by the supplier or assignee holder of the credit or, as from 3 July 2023, by an intermediary.

The measure also stipulated that the remaining portion of each annual instalment of tax credits may be divided into ten equal annual instalments, starting from the year following the reference year.

Apportionment may be made for the remaining portion of the instalments of the reported credits:

(i) to the years 2022 and onwards, for credits arising from *Superbonus* interventions for communications sent by 31 October 2022;
(ii) the years 2023 and onwards, for credits arising from *Superbonus*, *Sismabonus* and those aimed at overcoming and eliminating architectural barriers for communications sent by 31 March 2023.

The Italian Tax Authorities has ruled that each instalment may only be used as a compensation via the F24 form from 1 January to 31 December of the relevant year and may not be transferred to third parties.

II. REGULATORY UPDATE

✓ **Law converting the Decree making amendments to the urgent provisions for the implementation of the National Recovery and Resilience Plan (PNRR) and the National Plan of Complementary Investments to the PNRR (PNC) (Law converting no. 41 of 21 April 2023)**

The Conversion Law no. 41 of 21 April 2023 of the PNRR Decree 3 was published in the Official Journal.

The above-mentioned conversion law confirms several provisions of the original text of the Decree-Law, including:

(i) contribution relief in favour of enterprises that hire PhDs. In particular, the incentive consists in the exemption of the employer's social security contribution payments up to a maximum amount of Euro 3,750 on an annual basis, apportioned and applied on a monthly basis.
(ii) Changes to the institution of negotiated crisis settlement. A company in a serious and proven situation of difficulty may have the option of requesting a deferment of 120 instalments of its debt to the tax authorities. In addition, creditors will be able to issue the VAT decreasing note from the date of publication in the Companies Register of the contracts or agreements concluding the negotiated crisis settlement.

✓ **Law converting Law Decree on the "Transfer of Receivables" (Law converting Law Decree no. 38 of 11 April 2023)**

Conversion Law no. 38 of Law Decree no. 11 of 16 February 2023 introduces some correctives to the blocking of the discount and assignment mechanism for all building concessions.

On the subject of *Superbonus*, the deadline is extended from 31 March to 30 September 2023 for subsidised interventions on single-family buildings and independent units within multi-family buildings.

For the *Superbonus* tax credits relating to expenses incurred in 2022, the transferee banks, which have exhausted their tax liability, are granted the option of converting these tax credits into multi-year treasury bonds - BTPs - with a maturity of not less than 10 years.

In addition, with the changes introduced during conversion, the possibility of opting for credit assignment and invoice discount is restored in the following cases:

(i) works to overcome and eliminate architectural barriers for which the 75 per cent bonus is payable;
(ii) free building interventions;
(iii) the subsidised 50% purchase of dwellings in buildings that have been fully renovated by a construction company, the subsidised 50% purchase of newly-built garages appurtenant to dwellings, the purchase of real estate units subsidised under the *Sismabonus*, provided that by 16 February 2023 the application for a building permit for the execution of building work has been submitted. *Sismabonus on* condition that by 16 February 2023 the application for the building permit for the execution of the building works has been submitted;
(iv) *Superbonus* and minor bonus interventions carried out by IACPs, cooperatives with undivided ownership and NGOs;
(v) interventions on buildings damaged by seismic events occurring on or after 1 April 2009 and for interventions on buildings damaged by meteorological events occurring in the Marche region from 15 September 2022.

Again with reference to the *Superbonus*, the 75% Architectural Barrier Bonus and the *Sismabonus*, the option is granted to spread over 10 years the tax credits deriving from the transfer or invoice discount notices sent to the Italian Tax Authorities by 31 March 2023 and not yet used.

In addition, in the tax return for 2023, the deduction from expenses facilitated by *Superbonus* 110%, incurred in 2022, will be spread over 10 years.

III. JURISPRUDENTIAL UPDATE

✓ **Sale of buildings treated as "*Fabbricati Tupini*" - Reduced VAT rate - Conditions (Court of Cassation, ruling no. 9337 of 5 April 2023)**

The Court of Cassation has held that, in order to be considered and treated as "*Fabbricati Tupini"* that can benefit of the application of the 10% VAT rate on the sale of the same building, it is sufficient the presence of the collective interest purpose for which the building is intended.

This implies that, for the purposes of granting the relief, the residential function of such buildings, nor their stacking, is of no relevance at all. The criteria that has to be preferred is the use of the building according to its intrinsic characteristics at the time of the transaction.

This principle had already been affirmed by the same Italian Tax Authorities in its Reply to Interpretation no. 49 of 1 September 2020, in which it held that also buildings intended to house and assist, from a social-health and social-assistance point of view, persons suffering from a particular disability, were covered by the relief set forth in no. *127-quinquies*, of Table A, Part III, annexed to Presidential Decree no. 633 of 1972. Indeed, the above-mentioned legislation provides for VAT at 10% also for buildings referred to in article 1 of Law no. 659 of 19 July 1961 (i.e. dwelling houses, school buildings, barracks, hospitals, nursing homes, shelters, holiday camps, boarding schools, boarding schools, kindergartens, orphanages and the like), since they are assimilated to the buildings referred to in article 13, Law no. 408 of 2 July 1949, as amended, on account of their collective interest purposes.

Therefore, according to the Court of Cassation, the relief is granted even in the absence of a residential use, for example in the case of transfer of a property to be used as an outpatient clinic and health services or a family counselling centre.

✓ **The operability test is irrelevant if the company proves that it is not a shell company (Court of Cassation, ruling no. 9339 of 8 February 2023)**

The Court of Cassation has ruled on the subject of the relative legal presumption of non-operating companies (so-called "shell company discipline").

The Court of Cassation ruled that the taxpayer's burden of proof to the contrary can be discharged by directly proving the circumstance that, even if it should be presumed from the level of revenues to be non-existent, it demonstrates the existence of an actual entrepreneurial activity, characterised by the prospect of objective profit and business continuity, and therefore the company's real operativeness. This is irrespective of the outcome of the operativeness test and therefore of the correct identification of the values to be considered for the determination of the presumed revenues to be compared with the actual revenues, since in the case at hand the latter were affected by objective situations that prevented their greater realisation.

- ✓ **Fraud to the detriment of the State in relation to the so-called Superbonus 110% for undue offsetting of bogus tax credits (Court of Cassation, ruling no. 16728 of 12 January 2023)**

The Second Criminal Section of the Court of Cassation has ruled on the offence of undue offsetting, referred to in article 10 *quater* of Legislative Decree 74/2000, which is *"consummated at the time of submission of the last F24 form relating to the year concerned and not in that of the subsequent tax return, since, by using the indicated form, the taxpayer's deceptive conduct is perfected"*.

In the judgment under review, the appellant had used non-existent credits, due to the creation of fictitious tax credits under the *Superbonus 110%*, as compensation.
According to the Court of Cassation, all six of the appellant's grounds of appeal are unfounded.

The first plea was unfounded because, according to the Court of Cassation, the profit from the tax offence had been *"integrated regardless of and upstream of the fact that the tax debts had already been registered*", since the credits had been offset through the payment of numerous F24 forms.

Consequently, any failure of the State to compensate and the consequent non-updating of the so-called *"*tax drawer*"* are not relevant.

- ✓ **Non-deductibility of write-downs of inventories booked as specific costs (Court of Cassation, ruling no. 10773 of 21 April 2023)**

The Court of Cassation expressed a negative opinion on the tax relevance of inventory write-downs valued at specific cost. *In* fact, the Court of Cassation stated the following principle of law: "with regard to the *valuation of inventories at the end of the financial year, for the purposes of determining business income, the criterion of the lower of market value or possible realisation value and specific cost, pursuant to article 92, paragraph 5 of the Consolidated Income Tax Act, cannot be applied to assets other than those grouped into categories similar by nature and value pursuant to paragraph 1 of the same article, with particular regard to assets valued at specific cost.*

In the case at hand, the Court of Cassation found that the decision taken by the CTR on the appeal, filed by the appellant company, concerning the notice of assessment, aimed at recovering higher IRES, VAT and IRAP for the 2009 tax year, was correct, following a tax audit report notified to the taxpayer on the disallowance of the decreases in the company's income tax return and the related deductibility of the capital loss arising from the valuation of the property owned by the same company.

In fact, the company had recaptured for tax purposes the above-mentioned valuation loss related to the sale of a property owned by it located abroad, which had been accounted for as *"closing inventory"*.

The Court of Cassation upheld the resolution of the CTR on the valuation of a property accounted for as *"final inventory",* which must be *"carried out pursuant to article 92 TUIR according to the historical cost being irrelevant, for tax purposes, the depreciation that may result from the valuation at specific cost for statutory purposes".*

IV. EUROPEAN UNION

CASE LAW

- ✓ **Compatibility with articles 131 and 138 of Directive 2006/112/EC of national legislation providing for time limitations on the possibility of submitting additional evidence in the context of a VAT adjustment procedure (EJC, 2 March 2023, Case C-664/21,)**

article 131 and article 138(1) of Directive 2006/112/EC (the "**VAT Directive**"), read in conjunction with the principles of fiscal neutrality, effectiveness and proportionality, must be interpreted as not precluding national legislation which prohibits the submission and taking of new evidence demonstrating that the substantive requirements laid down in article 138 paragraph 1 of the VAT Directive, during the administrative procedure which led to the adoption of the tax assessment decision, in particular after the tax assessment operations but before the adoption of that decision, provided that the principles of equivalence and effectiveness are respected.

Compatibility with the principle of proportionality and the principle of VAT neutrality would be lacking if the national legislation did not take into account any explanation as to why the evidence was not provided earlier. A refusal can only be made on condition that it is based on special circumstances such as the absence of any justification for the delay or the fact that the delay resulted in a loss of tax revenue.

The principles set forth in the judgment under comment are relevant because they concern provisions that, although of different content, are also present in the Italian legal system, in particular, with regard to the unusability of documents and data not produced following a specific request by the Office provided for by article 32, paragraph 4, of Presidential Decree no. 600/73 and article 52 of Presidential Decree no. 633 of 1972. According to the national law of legitimacy, the conduct relevant to the application of the penalty of non-usability of evidence defined by the rules in question as refusal implies the consciousness and will of the action, mere negligence not being sufficient. The effect inferred by the National Court in its precedents is the admission of the production in court of the documents not produced during the administrative proceedings when it is shown that the failure to produce them was due to causes beyond the taxpayer's control, such as force majeure, the act of a third party or unforeseeable circumstances.

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