FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

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I. MINISTERIAL PRACTICE

CIRCULARS

Update methods of cadastral archives when splitting of urban land (Circular no. 11/E of 8 May 2023)

The Italian Tax Authorities, with Circular no. 11/E of 8 May 2023, provided clarifications on the methods of performing the splitting of urban land (built-up parcels removed from the land register update, for which cadastral conservation continues with reference to the built-up buildings registered on the buildings register).

The Circular groups together answers to questions on the methods of preparing *Pregeo* and *Docfa* update deeds and provides some indications on the splitting of parcels registered on the land register both with use as "*Urban Land - code 282"* and with use as "*Mixed building - code 278".*

PRESS RELEASES

Press release of the Council of Ministers no. 35 of 23 May 2023

On 23 May 2023, the Council of Ministers approved the text of the Law Decree which includes measures to deal with the emergency caused by the floods that occurred on or after 1 May 2023 (Law Decree no. 61 of 1 June 2023 published in OJ no. 127 of 1 June 2023 and in force from 2 June 2023). Press Release no. 35 anticipates and illustrates the main provisions aimed at taxpayers having their residence or domicile in the affected municipalities, including, but not limited to:

- the suspension, from 1 May 2023 to 31 August 2023, of the deadlines relating to tax and social security obligations and payments, including those arising from tax bills, falling due on or after 1 May;
- the postponement to 31 December 2023 of the deadline for completing works carried out on property units located in the affected areas, for the purposes of the 110% bonus;
- the suspension, for companies and enterprises, of payments relating to the annual fee due to the Chambers of Commerce, of accounting and corporate obligations, and of the payment of instalments on loans or financing of all kinds;
- compensation of up to Euro 3,000 for self-employed workers forced to stop working;
- possible use of the Cassa Integrazione in Deroga (Wages Guarantee Fund) for up to 90 days for employees unable to work;
- the suspension of utility payments, already resolved by the Regulatory Authority for Energy, Networks and Environment (ARERA).

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

VAT Group - Transactions between permanent establishments of the same entity, one of which is established in Italy, not forming part of a VAT Group established there, and the other is located in a non-EU country (United Kingdom) and participates in a VAT Group there (Response to the request for advance tax ruling no. 314 of 8 May 2023)

The Italian Tax Authorities clarified that the services supplied by the UK permanent establishment of an EU taxable person - which is part of a VAT group in the UK - to its Italian permanent establishment, as of 2021 (post-Brexit), must be considered subject to VAT according to the ordinary rules; therefore, if the Italian customer is a taxable person, the reverse charge mechanism applies.

The case at hand concerned the VAT relevance of transactions between two permanent establishments ("Branches") of a German legal entity: the first was located

in Italy and was not part of a VAT Group established therein; the other was located in a non-EU country (United Kingdom) which participated in a VAT Group therein.

The Italian Tax Authorities, citing the EU Court of Justice ruling (Case C-210/04, FCE Bank), noted that services between the parent company established in another EU country and an Italian branch (and vice versa) do not constitute supplies of services for VAT purposes (and are excluded from taxation), except where the parent company and/or the Branch are part of a VAT Group (Case C-7/13, Skandia). On the other hand, this does not apply to entities not established in the EU which form part of a VAT group established in the country of residence, as they cannot be treated as a single taxable person for VAT purposes within the EU. This also applies to companies established in the UK which are members of a VAT group therein, as the UK is, as of 1 January 2021, a third country with respect to the EU.

Tax credit for companies consuming high volumes of gas - Requirement of the thirty per cent increase for a fixed-price supply contract - art. 15.1 of Law Decree no. 4 of 27 January 2022, converted, with amendments, by Law no. 25 of 28 March 2022, as amended (Response to the request for advance tax ruling no. 316 of 8 May 2023)

The Italian Tax Authorities, citing the provisions regulating the benefit, emphasises that the contribution is due if the reference price of natural gas calculated as the average, referring to the last quarter of 2021, of the reference prices of the Mercato Infragiornaliero (MIGAS) published by Gestore dei Mercati Energetici (GME), has undergone an increase of more than 30% of the corresponding average price referring to the same quarter of the year 2019.

Therefore, the taxpayer, for the purpose of calculating the deviation demonstrating the existence of an increase in the aforementioned value, must refer to the comparison criterion established by the individual provisions in force at the time; the fact that its specific natural gas supply contract was stipulated at a fixed price during the period of reference of the credit is of no significance.

Partial demerger of a corporate shareholding in favour of the beneficiary sole shareholder of the demerged company. Anti-abuse assessment pursuant to art. 10-*bis* of Law no. 212 of 27 July 2000 (Response to the request for advance tax ruling no. 317 of 8 May 2023)

The Italian Tax Authorities, with reference to a partial demerger pursuant to art. 173 of the Consolidated Law on Income Taxes (TUIR) having as the beneficiary the sole shareholder of the demerged company, considered not to be applicable the abuse of the right pursuant to art. 10-bis of Law no. 212/2000.

The case at hand concerned a group reorganisation project consisting of the partial demerger of a company in favour of the sole shareholder, whereby the entire shareholding held by the demerged company in another company of the group was transferred to the beneficiary.

The Italian Tax Authorities cites the contents of the explanatory report to Legislative Decree 128/15, according to which "*no abusive conduct can be identified when the taxpayer chooses, in order to bring about the extinction of a company, to proceed with a merger rather than a liquidation*. *It is true that the first transaction is of neutral nature and the second is, on the other hand, one of realisation, but no tax provision demonstrates any "preference" for one or the other transaction; they are two transactions positioned on the same level, albeit governed by different tax rules".* Therefore, the demerger and the assignment of the shareholding to the shareholder are both considered to be physiologically suitable transactions, which are equally positioned for the purposes of a group reorganisation.

The Italian Tax Authorities also explains the operation of the principle of neutrality of the demerger under art. 173 of the TUIR and confirms that the (residual) shareholders'

equity attributed to the beneficiary must be deemed to be formed in respect of the nature (capital or profit) of the shareholders' equity items present in the demerged company and in the same proportions (without considering the untaxed reserves already reconstituted by the beneficiary).

Non-interest-bearing intra-group financing or financing at rates significantly different from market rates - effects on IRAP and for non-financial holding companies as a result of accounting under the amortised cost method of financing transactions - art. 5, par. 4-*bis* of Ministerial Decree of 8 June 2011 (Response to the request for advance tax ruling no. 318 of 8 May 2023)

The Italian Tax Authorities specified that, from a systemic point of view, art. 5, par. 4-*bis* of Ministerial Decree of 8 June 2011 is also applicable for IRAP purposes. Therefore, in the case of an industrial holding company, the figurative financial charges on the loan received from the parent company, posted under item C.17 of the income statement, are also non-deductible for IRAP purposes.

Repayment of non-interest bearing loan to non-resident parent company - art. 88 of the TUIR - art. 26 of Presidential Decree 600/1973 - abuse of the right art. 10-*bis* of Law 212/2000 (Response to the request for advance tax ruling no. 319 of 8 May 2023)

The Italian Tax Authorities clarified that for IRES purposes, the early repayment of an intercompany non-interest bearing loan at book value (deriving from the application of the amortised cost) lower than normal value is considered relevant as taxable a contingent asset pursuant to art. 88, par. 4-*bis* of the TUIR.

The case at hand concerned a loan granted to a company that adopted the IAS/IFRS standards, indirectly controlled by the lender, which was repaid in advance by way of novation by the direct parent company, which at the same time waived the receivable from the subsidiary itself, at an amount equal to the book value determined by the amortised cost. The debtor company had assumed that this transaction was not relevant for tax purposes as the repayment at book value did not entail the recording in the income statement of any differential constituting an income component.

Conversely, the Italian Tax Authorities established that the taxability of this case derives from the application of art. 5, par. 4-*bis* of Ministerial Decree of 8 June 2011 (IAS 2011 Decree), which envisages the deactivation of the principle of enhanced derivation and, therefore, means that contingent assets are significant for tax purposes, even if not recorded in the income statement. Moreover, the Italian Tax Authorities also confirms the relevance of this positive component for IRAP purposes.

VAT regulation of operations of repair and replacement of products (and/or their components) under warranty (Response to the request for advance tax ruling no. 323 of 9 May 2023)

The Italian Tax Authorities clarified the VAT treatment of operations of repair or replacement of products (and/or their components) under warranty carried out by non-EU companies using an EU logistics centre and repair centres in Italy.

The Italian Tax Authorities clarifies that the replacement of a good under warranty is considered to be outside the scope of VAT, since the good is delivered on account of warranty obligations, already part of the initial sale price already taxed. Even the dispatch of a new, replacement product by an EU Member State to the end customer in Italy is also to be considered to be outside the scope of VAT since the good is delivered only due to warranty obligations, already part of the initial taxed sale price.

On the other hand, the following constitute "for its own business" transfers of goods within the EU:

- the dispatch of spare parts from an EU Member State to a repair centre in Italy constitutes a “deemed” intra-Community acquisition within the meaning of art. 38, par. 3, letter b) of Law Decree 331/93;
- the dispatch, from Italy to the other EU country, of defective goods not repaired and not collected by the end customer (provided that the transfer of ownership of the same to Alfa takes place in Italy) constitutes a "deemed" intra-Community supply pursuant to art. 41, par. 2, letter c) of Law Decree 331/93.

The Intrastat forms do not have to be submitted in either case, as the above are transfers which take place in the context of guarantee obligations.

Liquidation of assets pursuant to art. 14-*ter* of Law no. 3 of 27 January 2012 – non-applicability of art. 26, par. 3-*bis* of Presidential Decree no. 633 of 26 October 1972 (Response to the request for advance tax ruling no. 324 of 9 May 2023)

The Italian Tax Authorities excludes the possibility of issuing credit notes for VAT purposes, as referred to in art. 26 of Presidential Decree 633/72, for the asset liquidation procedure (art. 14-*te*r of Law no. 3/2012).

This interpretative decision is justified by the wording of paragraphs 3-*bis* and 10-*bis* of art. 26 of Presidential Decree 633/72, which do not cover over-indebtedness procedures. Requirements of equal treatment with the similar bankruptcy procedure, now judicial liquidation, would legitimise an opposite solution. However, these conclusions are likely to be overturned in light of the tax delegation law, where, at art. 9, letter a), no. 3, the Government is given the task of extending the regulation of variation notes “to all institutions” of the Crisis Code. This delegation is likely to confirm, on one side, that the legislator’s intention was not to limit the regulation of variation notes (this is also confirmed by art. 18 of Law Decree 73/2021 and art. 30 of Law Decree 13/2023 conv. Into Law 41/2023) and, on the other side, that the rationale of the delegation is to update art. 26 of Presidential Decree 633/72 to the Crisis Code.

Director’s fee – obligation to remit any fee due to him/her – deductibility of the cost – withholdings to be made at the time of payment (Response to the request for advance tax ruling no. 330 of 22 May 2023)

The Italian Tax Authorities clarified that the remuneration paid by an Italian company to a director, employed by a foreign company of the group who had taken on the role of board director at the Italian company, with the obligation to repay it to the foreign company of the group:

- is not taxable for the director, by virtue of the obligation to remit to third parties;
- contributes to the income of the beneficiary company;
- is deductible for the paying company on an accrual basis and not on a cash basis.

The classification of such remuneration for conventional purposes is that of business profits, as regulated by art. 7 of the OECD Model Convention against double taxation: consequently, if the Convention that binds Italy to the other State complies with the Model, the remuneration is not taxable in Italy to the extent that there is no permanent establishment of the foreign company in Italy (taxation takes place exclusively in the other State).

ORDERS

Assessment of foreign currency exchange averages for April 2023 (Italian Tax Authorities Order no. 151340 of 12 May 2023)

The Italian Tax Authorities published the average exchange rates of foreign currencies recorded in April 2023. The rates were calculated for guidance by the Bank of Italy on the basis of market prices.

Methods for submitting to the Italian Tax Authorities the data contained in the forms concerning decisions on allocation of the eight, five and two per

thousand of IRPEF, form 730-1, by tax withholding agents providing tax assistance in the year 2023 (Italian Tax Authorities Order no. 155303 of 16 May 2023)

The Italian Tax Authorities defined the methods for submitting the forms with the decisions on allocation of the eight, five and two per thousand of IRPEF (730-1 Forms) by tax withholding agents providing tax assistance, confirming the methods fixed for the forms submitted the previous year.

Tax withholding agents deliver the data contained in the 730-1 Forms relating to the 2022 tax period to the Italian Tax Authorities via a post office or an intermediary, delivering the forms inside the specific envelope indicated in Annex 2 to Order no. 34545/2023 or in an ordinary correspondence envelope, duly sealed and marked on the flaps by the taxpayer.

With effect from returns submitted in 2024, tax withholding agents will submit 730-1 forms electronically.

Criteria, methods and deadlines for the risk analysis and control of new VAT numbers, implementing the provisions of art. 35, par. 15-*bis*.1 and 15-*bis*.2 of Presidential Decree no. 633 of 26 October 1972, introduced by Law no. 197 of 29 December 2022 (2023 Budget Law) (Italian Tax Authorities Order no. 156803 of 16 May 2023)

The Italian Tax Authorities brought into operation the rules for controls connected with the attribution of a VAT number to persons carrying out business activities, arts or professions, as envisaged by art. 35, par. 15-*bis*.1 of Presidential Decree 633/72.

In addition, the Italian Tax Authorities approved the facsimile indicating the minimum content of the surety policy or bank guarantee required for the request for allocation of a new VAT number, following any termination order by the Italian Tax Authorities. The implementing order mainly identifies the risk assessment methods of taxpayers, for the purpose of the controls in question.

RESOLUTIONS

Establishment of tax codes

With Resolution 19/E of 2 May 2023, the Italian Tax Authorities establishes the tax codes for the use in offsetting tax credits, transferred or used as a discount on invoices, relating to Super bonuses, seismic bonuses and architectural barriers bonuses (art. 121 of Law Decree 34/2020), concerning the options sent to the Italian Tax Authorities from 1 April 2023.

With Resolution 20/E of 10 May 2023, the Italian Tax Authorities established the tax codes for use, through the F24 form, of tax credits - relating to the second quarter of 2023 (art. 4, par. 2-5 of Law Decree 34/2023) - in favour of companies by way of partial offsetting of higher charges incurred for the purchase of electricity and natural gas. The credits are to be used by 31 December 2023.

With Resolution 21/E of 10 May 2023, the Italian Tax Authorities established the tax codes for payment, by means of F24 Payments with Identifying Elements Form (F24 ELIDE), of penalties for non-compliance with the obligations envisaged by par. 1 and 3 of art. 17-*bis* of Legislative Decree 241/1997 with regard to tax withholdings and offsetting in the field of contracts and subcontracts.

With Resolution 23/E of 19 May 2023, the Italian Tax Authorities established the tax code for payment, by means of the F24 form, of substitute income tax for the redetermination of purchase values of securities, shares or rights traded on regulated markets or multilateral trading systems introduced by the 2023 Budget Law (pursuant to art. 5, par. 1-*bis* of Law no. 448/2001).

II. UPDATE ON REGULATION

✓ **Law Decree no. 48 of 4 May 2023, OJ no. 103 of 4 May 2023 "Labour Decree"**

On 5 May 2023, Law Decree no. 48, published in OJ no. 103 of 4 May 2023 (known as "Labour Decree", entered into force, concerning: *measures for social inclusion and access to the labour market*), which contains a series of measures aimed at promoting social inclusion and access to the labour market, some of which will take effect immediately, while others will be applicable from 2024. The main innovations concern, in particular:

- ***tax credits for the road haulage and passenger transport sector***: tax credits have been defined in the maximum amount, respectively, of 28% for companies engaged in the transport of goods on own account and of 12% for companies engaged in the transport of persons and goods on account of third parties, calculated on the costs incurred for the purchase of diesel in the first quarter of the year 2022, used to run the aforementioned businesses;
- ***increase of the exemption threshold for fringe benefits from Euro 258.23 to Euro 3,000 only for employees with dependent children:*** limited to 2023, as an exception to art. 51 par. 3 (third sentence, first part) of the TUIR, the exemption threshold for fringe benefits is increased to Euro 3,000 only for employees with dependent children, including children born out of wedlock who are recognised, adopted or fostered, and who find themselves in the conditions envisaged by Art. 12, par. 2 of the TUIR, i.e. they are under 24 years of age and have received an income of Euro 4,000 or less during the year, or they are over 24 years of age and have received a total annual income not exceeding Euro 2,840.51;
- ***further increase by 4 per cent of the exemption on the IVS quota (social security contributions for invalidity, old age and survivors) charged to workers under art. 1, par. 281 of Law no. 197 of 29.12.2022, with no further effect on the accrual of 13th month.***
  As a result of the increase, as of July, the exemption of the IVS quota charged to workers will be: 7%, provided that the taxable salary does not exceed a monthly amount of Euro 1,923; 6%, provided that the taxable salary does not exceed a monthly amount of Euro 2,692.
  The increased exemption applies to pay periods from 1 July 2023 to 31 December 2023;
- ***administrative penalties for contribution omissions increase "from Euro 10,000 to Euro 50,000" and "from one and a half to four times the omitted amount":*** the Decree intervened on the regulation of administrative penalties for contribution omissions (art. 2, par. 1-*bis* of Law Decree 463/1983), establishing that the penalty moves to the more contained amount "*from one and a half to four times the omitted amount*". The period for disputing the penalties is also extended, by 31 December of the second year after the year of the infringement;
- ***increase of the threshold for use of vouchers for users operating in the sectors of conferences, trade shows, events, spas and amusement parks:*** Art. 37 makes an amendment to art. 54-*bis* of Law Decree 50/2017, establishing the increase to Euro 15,000 per annum of the threshold for use of vouchers (to pay remuneration to those performing occasional services) for users operating in the sectors of conferences, trade shows, events, spas and amusement parks. It is also stipulated that the prohibition on using occasional work contracts, with reference to the same sectors, applies only to employers who employ more than 25 permanent employees;
- ***Single Inclusion Allowance***: the single inclusion allowance is introduced as of 1 January 2024 to replace the Citizenship Income;
- ***work training:*** from 1 September 2023, "Support for training and work" will be established, through participation in training, qualification and professional retraining projects, guidance, job shadowing and active employment policies. It covers persons aged between 18 and 59 who are able to work and whose household income does not exceed Euro 6,000 per annum;

- ***youth employment:*** under certain conditions, employers are granted an incentive in the amount of 60% of the gross monthly salary, aimed at new recruitments of young people under 30 years of age, made from 1 July 2023 to 31 December 2023. The incentive must be paid by the employer by adjustment in the monthly contribution statements for a period of 12 months, and the request must be submitted via the INPS platform.

✓ **Law no. 49 of 21 April 2023, OJ General Series no. 104 of 5 May 2023 "Provisions on fair remuneration for professional services".**

On 20 May 2023, Law 49/2023 came into force, envisaging the payment of professional services (regulated in art. 2230 of the Civil Code) by means of remuneration defined as "fair", having the following characteristics:

- proportionate to the quantity and quality of the work performed and to the content and characteristics of the professional service;
- compliant with the remuneration envisaged, with reference to each professional activity, by specific ministerial decrees.

The rule will also apply to auditors of companies who are appointed from 20 May 2023 and may apply to audit bodies appointed at the shareholders' meetings for the approval of the financial statements for the 2022 financial year, which, when opting for approval within the 180-day period (for entities with a financial year coinciding with the calendar year) may take place until 29 June 2023.

As from 20 May 2023, clauses envisaging "unfair" remuneration and those containing obligations that are too burdensome for the professional or that give to the client disproportionate advantages with respect to the quantity and quality of the work performed, for example, obligations to waive the reimbursement of expenses, prohibition on requesting payment on account, possibility of unilateral modifications of the contract by the client and payment terms exceeding 60 days (art. 3, par. 2 of Law no. 49/2023) are considered null and void. This nullity, which may also be ascertained ex officio by the court, does not invalidate the entire contract but only cancels the clause drafted in breach of Law no. 49/2023.

✓ **Law Decree no. 51 of 10 May 2023 (O.J. no. 108 of 10 May 2023) "Urgent provisions on the administration of public bodies, legislative deadlines and social solidarity initiatives"**

Law Decree 51 of 10 May 2023, published in OJ no. 108 of 10 May 2023, confirmed the tax extensions already announced in MEF press release no. 68 published on 21 April 2023 and entering into force on 11 May 2023. In particular, art. 4 of the Decree envisaged the following extensions:

- at par. 1, "*Write-off of tax debts"* (art. 1, par. 231-252, Law no. 197 of 29 December 2022 "2023 Budget Law"): the deadline for submitting the tax write-off ("Rottamazione") request was postponed from 30 April 2023 to 30 June 2023; the deadline by which the Italian Tax Authorities-Collection Agent must communicate the liquidation of the amounts to be paid was postponed from 30 June 2023 to 30 September 2023; the payment of the lump sum amounts or of the first instalment was postponed from 30 July 2023 to 31 October 2023;
- at par. 2: the electronic transmission of the forms concerning decisions on allocation of the eight, five and two per thousand of IRPEF (730-1 Forms) is postponed to 2024, in relation to tax withholding agents providing tax assistance, which would have been due from this year concerning returns for the 2022 tax period.

✓ **Conversion Law no. 56 of 26 May 2023 (OJ General Series no. 124 of 29 May 2023) Conversion into law, with amendments, of Law Decree no. 34 of 30 March 2023, laying down urgent measures in support of households and**

businesses for the purchase of electricity and natural gas, as well as in relation to health and tax compliance (known as "Household Bills Decree").

Conversion Law 56 of 26 May 2023, published in OJ no. 124 of 29 May 2023, introduced some changes to the previous text; the main changes are listed below:

- extension of the tax write-off institutions ("rottamazione-*quater*") (indicated in par. 231 of art. 1 of the 2023 Budget Law) and the write-off, in part or in full, of debts of up to Euro 1,000 (indicated in par. 227 and 229-*bis* of art. 1 of the 2023 Budget Law) to the territorial bodies that carry out the recovery directly or entrust the recovery to entities listed on the register indicated in art. 53 of Legislative Decree 446/1997;
- introduction of the possibility, for taxpayers who have adhered to the facilitated settlement of tax disputes (indicated in art. 1, par. 186 to 202 of the 2023 Budget Law), to pay the instalments after the first 3 in a maximum of 51 equal monthly instalments, due no later than the last working day of each month, starting from January 2024;
- the following postponements are confirmed: to 30 September 2023 for the special voluntary settlement (art. 17); to 31 October 2023 for the regularisation of formal violations (Art. 17); to 30 September 2023 for facilitated conciliation and waiver in the Supreme Court and for the settlement of pending litigation (art. 20);
- art. 7-*quater* was introduced, which grants a tax credit to innovative start-ups established from 1 January 2020, operating in the environment, renewable energy and health sectors, up to an overall limit of Euro 2 million for the year 2023, consisting of a maximum amount of Euro 200,000, not exceeding 20 per cent of the costs incurred for research and development activities;
- art. 4-*bis* increases by Euro 10 million Euros, for 2023, the "Single fund to support the strengthening of the Italian sports movement", to be allocated to the payment of outright grants for amateur sports associations and clubs, which manage sports facilities and swimming pools;
- in relation to energy-saving interventions, the accumulation of tax deductions and regional contributions (or those of the autonomous provinces of Trento and Bolzano) is authorised under certain conditions;
- art. 6 envisages an exemption from the rules on determining taxable income related to energy production above the thresholds of 2,400,000 kWh per year for agro-forestry renewable sources and 260,000 kWh per year for photovoltaic sources.

✓ **Decree implementing the food income, envisaged by Law no. 197 of 29 December 2022, art. 1, par. 434 and 435 (Ministerial Decree no. 78 of 26 May 2023 of the Ministry of Employment and Social Policies)**

Implementing Decree 78 was issued, regulating the trial of this income support measure, consisting of the free distribution, also through Third Sector entities, of food parcels made from unsold food distribution items, donated by shops participating in the trial.

III. CASE-LAW UPDATE

✓ **Right to a VAT refund of a non-resident taxable person (Supreme Court, Tax Section, 3 May 2023, no. 11608)**

The Supreme Court ruled on the right to a VAT refund of a non-resident taxable person having a VAT representative in Italy, which also has a permanent establishment in the State territory.

In particular, the Supreme Court confirmed that such an organisation is considered not to participate in a sale of goods or a performance of services in accordance with art. 192-*bis,* letter b) of EC Directive 112/2006, if the means of the permanent establishment are used solely for administrative support functions, such as accounting, invoicing and credit collection. If, on the other hand, an invoice is issued

with the VAT identification number attributed to it by the Member State of the permanent establishment, it is considered, unless proven otherwise, that the permanent establishment participated in the supply of goods or of services in that Member State.

Thus, it is clear that the procedure for deduction of purchases made in Italy, by the non-resident by means of the permanent establishment, constitutes a legitimate alternative and is expressly envisaged - in an alternative as well as autonomous manner - to the refund of VAT paid on purchases made by means of the tax representative, with the obvious corollary that if the non-resident entity also operates by means of the latter, it must be ascertained whether or not the permanent establishment participates in the transactions that contributed to forming the VAT refund requested by means of the aforementioned VAT representative, in order to avoid the unlawful duplication of the credit; such a circumstance could occur if the same transactions generating VAT subject to deduction by means of the permanent establishment are also unlawfully attributed to the VAT representative which then requests the tax rebate.

- ✓ **Deductibility of payable interest does not require a judgement of inherency (Supreme Court, 4 May 2023, no. 11642)**

The Supreme Court ruled on a case in which the partial disallowance of payable interest deducted by a company for IRES purposes was disputed.

The Supreme Court stated that under art. 109, par. 5 of Presidential Decree 917/1986, payable interest is always deductible (albeit within the limits indicated in art. 96 of the same art. 109, par. 5, without it being necessary to make any judgement of inherency: this applies because payable interest is generated by the financial function, which relates to the enterprise as it stands and as it progresses, and therefore it cannot be specifically related to a particular business operation or deemed accessory to a particular cost.

- ✓ **Voluntary correction of tax return and settlement concessions (Supreme Court, Tax Section, 4 May 2023, no. 11993)**

The Supreme Court ruled on the institution of the “voluntary correction of tax return”, establishing that the choice of the “voluntary correction of tax return” in tax matters, indicated in art. 13 of Legislative Decree no. 472/1997, constituting a declaration of will in respect of which it is irrelevant that the due act constitutes, on the other hand, a mere declaration of knowledge, is of contractual nature and may be subject to annulment due to a crucial error. For the purposes of the claim for repayment of the sums thus paid, the nature - formal or substantive - of the infringement for which the “voluntary correction” is made is irrelevant.

Once the taxpayer has thus opted for the voluntary correction, the penalties thus paid result from a decision of negotiated and conscious nature, which justifies the repayment only if the same, in making it, has made a qualified error within the meaning of the general rules contained in the Civil Code.

- ✓ **Failure to make a tax withholding - Settlement by withholding agent - Claim for reimbursement by withholding agent (Supreme Court, 8 May 2023, no. 12184)**

The Supreme Court clarified that “*the extension of the effects of the tax assessment settlement relating to the other co-obligors may only be admitted in bonam partem and in the absence of any express contrary will by the taxpayer*”. The case at hand concerned withholding taxes, whereby the Italian subsidiary (withholding agent) failed to withhold tax on interest paid on a loan granted by the Swiss parent company (payer).

The Italian subsidiary had not made the withholding and, for this reason, made the tax settlement. Following this, the Swiss parent company filed a claim for reimbursement, the admissibility of which was confirmed by the Court.

- ✓ **Differences with respect to circumstance of fraudulent declaration by means of other artifices (Criminal Supreme Court, 12 May 2023, no. 20271)**

The Supreme Court clarified that the distinction between the cases indicated in art. 2 (fraudulent declaration by means of invoices or other documents for non-existing transactions) and 3 (fraudulent declaration by means of other artifices) of Legislative Decree 74/2000 does not relate to the transaction completed, but to the manner in which it is documented; the nature of the instrument used to commit the fraudulent declaration is therefore significant.

The difference lies in the consideration of the particular evidential value, in tax terms, of the documentary instrument (invoice) used to support the fraudulent declaration with fictitious payable elements, leading the legislator not to set any evasion threshold for the configurability of such unlawful conduct. Such a threshold appears, on the other hand, in the hypothesis of fraudulent declaration by means of "other artifices", indicated in art. 3 of Legislative Decree 74/2000.

- ✓ **Omitted/irregular invoice by the supplier - Lack of regularisation by the customer - Reclassification the contract (Supreme Court, 25 May 2023, no. 14650)**

The Supreme Court ruled that the customer that has not regularised the formal incorrect classification of the transaction by the supplier that issued the invoice is not liable for lack of regularisation in accordance with art. 6, par. 8 of Legislative Decree 471/1997. In particular, in the case at hand, the Italian Tax Authorities ruled that consultancy services provided by a company to two separate companies, classified as intermediation activities by the issuer of the invoices, were subject to VAT and penalised the lack of regularisation by the two client companies.

The Supreme Court held that art. 6, par. 8 of Legislative Decree 471/1997, provides that the customer is obliged to "regularise" the taxable transaction implemented by the supplier without issuing an invoice or with an irregular invoice, there being only the obligation to verify its formal regularity with reference to the chronological fact of receipt of the invoice "within legal timescales" and the existence of its essential requirements, as identified by art. 21 of Presidential Decree no. 633/1972. Therefore, there is no obligation for the customer to perform a substantive check of the correct tax classification of the transaction.

- ✓ **Taxpayer's failure to produce documents in administrative proceedings (Supreme Court, 26 May 2023, no. 14707)**

The Supreme Court ruled that the failure to produce the books and documentation required by art. 32 of Presidential Decree 600/1973 and the accounting records to the Italian Tax Authorities, in response to a questionnaire sent to the taxpayer, does not entail the removal of the possibility of using the documentation produced later during the litigation, where there is no specific invitation to produce them from the Administration accompanied by a warning as to the consequences of non-compliance.

The Supreme Court stated, based on consolidated case laws, that "*the taxpayer's failure to produce the documents during administrative proceedings determines the removal of the possibility of using them, if produced later during the litigation, if the administration proves that there had been a timely request for the same, accompanied by a warning about the consequences of non-compliance, and the taxpayer had refused to produce them, declaring not to possess them; or in any case, removing them from the audit, with specific wilful conduct aimed at evading the control".*

In order for the removal of the possibility of using the documentation to be applied, the Supreme Court states that the Tax Administration must, by sending the questionnaire, not only establish a minimum deadline for compliance with the invitations and requests, but also warn the taxpayer of the prejudicial consequences arising from any non-compliance (proof of which is incumbent upon the Tax Administration).

✓ **Triangular transactions, VAT treatment (Supreme Court, 26 May 2023, no. 14853)**

By Order No. 14853 of 26 May 2023, the Supreme Court established the following principle of law: *"In the case of triangular transactions within the territory of the European Union, where there are two successive supplies with three operators, at least one of which is situated outside the national territory and is the subject of a single transport, the first supply of goods is exempt where it is established that the goods which are the subject of that supply are transported by the first purchaser into the territory of the State of the second purchaser, without the first purchaser being able to use the goods as owner but merely acting as an intermediary for the purpose of fulfilling a delivery obligation of the goods to the third party taxpayer that markets them for consumption"*.

The Supreme Court leaves no doubt about the fact that the VAT regime of the transaction does not cover the party that deals with the transportation, but that what is important is the purchase made by the domestic purchaser based upon the second supply in the EU territory and the condition that the first purchaser does not use the goods as though it were their owner, being required to deliver them to the final consignee. In this respect, proof of the actual exit and transfer abroad of the goods is required and the transport documents must be completed in such a way as that the transporter and the vehicle used for the transportation can be identified.

IV. EUROPEAN UNION

CASE-LAW

✓ **Reference for a preliminary ruling - Common system of value added tax (VAT) - Directive 2006/112/EC - art. 185 - Adjustment of deductions of VAT already paid - Discarded goods - Subsequent sale as waste - Destruction or disposal duly proven or justified (Court of Justice of the EU, Sect. IX, 4 May 2023, C-127/22 "Balgarska")**

The EU Court of Justice held that in the case of business assets that (1) have become unusable and are subsequently sold as waste, or (2) have been voluntarily destroyed by the taxable person, there is no obligation to adjust downwards the deduction of VAT already paid.

With regard to the first case, concerning goods of the business resold as waste, the goods were nevertheless sold to third parties and VAT was charged on that sale, so they are considered to have been used in the context of taxable economic activities for deduction purposes. It is therefore irrelevant that the sale of the waste does not form part of the taxable person's usual activity, nor is it relevant that the realisation value of the goods is reduced from the initial value or that their nature has been changed.

The adjustment obligation is also absent in the second case, concerning assets voluntarily disposed of and destroyed by the enterprise or sent to landfill. Destruction, as a voluntary or involuntary action, in fact entails the loss of any possibility of using the goods in the context of taxable transactions and therefore potentially realises the conditions for adjusting the deduction.

Under art. 185, par. 2 of Directive 2006/112/EC, there is no adjustment obligation for the voluntary destruction of a business asset, provided that

- the destruction is duly proven or justified;

- the asset has objectively lost any utility in the context of the taxable person's economic activities.

The latter condition, however, seems to raise some questions about the adjustment obligation in cases where an enterprise destroys unsold goods in order to preserve the value of its trademark.

✓ **VAT exemption according to the Member State where the supplier is established (EU Court of Justice, 11 May 2023, C-620/21 "Momtrade Ruse")**

With its judgment in Case C-620/21, the Court of Justice of the EU stated that, where VAT-exempt services are supplied involving entities from several Member States, the eligibility for the exemption scheme must be assessed on the basis of the law of the State of the taxable person supplying the services, it being irrelevant that the supplier used a company established in that other Member State to contact its customers.

The case concerned the provision on exemption envisaged, at Community level, by art. 132, par. 1, letter g) of Directive 2006/112, which must be interpreted as meaning that, where a company provides social services to natural persons residing in a Member State other than that in which that company has established its business, the nature of those services and the characteristics of that company for the purposes of determining whether those services fall within the concept of "*supply of services (...) closely linked to welfare and social security work (...) supplied by (...) [a body recognised] by the Member State concerned as being devoted to social wellbeing"*, within the meaning of that provision, must be examined in accordance with the law, transposing Directive 2006/112, as amended, of the Member State in which that company has established its place of business.

This is also compatible with the VAT territoriality criterion for general B2C services, under which, pursuant to art. 45 of Directive 2006/112, the place where those services are physically performed is disregarded, as only the place where the supplier is established is relevant.

V. ACCOUNTING STANDARDS

On 23 May 2023, the International Accounting Standards Board (IASB) issued amendments to international accounting standard "IAS 12 - Income Taxes", which address the methods of accounting of deferred taxes arising from the OECD's international tax reform.

In particular, the following were introduced:
- a temporary exemption of the recording of deferred taxes by entities operating in jurisdictions that apply the *Pillar Two Model Rules*;
- specific disclosure requirements enabling investors to ascertain an entity's exposure to income taxes arising from the reform.

For financial years beginning on or after 1 January 2023, the temporary exemption is available immediately and the relevant information must be provided to investors.

VI. INPS MESSAGE

INPS, with Message no. 1931 of 24 May 2023, provided instructions for the changes recently introduced by art. 23 of Law Decree 48/2023 on the subject of the penalty regime in the event of a failure to pay social security withholding taxes on workers' salaries pursuant to art. 2 par. 1-*bis* of Law Decree 463/1983. INPS attached to the Message the forms to be used to rectify the injunction-orders subject to judicial dispute or payment by instalments pursuant to art. 26 of Law no. 689/1981.

INPS illustrated the new schedule for calculating administrative fines adjusted to the new criteria indicated in art. 23 of Law Decree 48/2023, also attaching the communication forms adjusted to the new regulatory provision.

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