FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

July 2023

Summary

I. MINISTERIAL PRACTICE

CIRCULARS

✓ **Inheritance and donation tax – Art. 8, par. 3 of Legislative Decree no. 346 of 31 October 1990 - Tax treatment of gender legacies (Circular no. 19/E of 6 July 2023)**

The Italian Tax Authorities has provided clarifications on the treatment of gender legacies for inheritance and donation tax purposes. When calculating inheritance tax, the value of the gender legacy, like that of the species legacy, must be deducted from the value of the inheritance or inheritance shares, without prejudice to the civil law distinction between a gender legacy and a species legacy.
The Italian Tax Authorities' orientation conformed to what the Supreme Court had affirmed in its ruling no. 24421 of 3 November 2020, changing the orientation followed in the past (most recently the response to the request for advance tax ruling no. 577 of 3 September 2021).

✓ **Art. 18 of Decree Law no. 73 of 21 June 2022 (Decree "Simplifications"), converted, with amendments, by Law no. 122 of 4 August 2022 - Amendments to the VAT rules on services rendered to in-patients and accompanying persons of in-patients (Circular no. 20/E of 7 July 2023)**

Art. 18 of Law Decree no. 73/2022 (Decree "Simplifications") has made a significant change to the VAT rules with reference to the services rendered to in-patients and accompanying persons of in-patients, by amending art. 10, par. 1, no. 18) of Presidential Decree no. 633/1972 and the provision set forth in Table A, Part III, no. 120), annexed to Presidential Decree no. 633/1972.
Regarding the first point, the Circular clarifies that the VAT exemption provided for applies in the case of non-contracted healthcare facilities that provide in-patient healthcare services as part of a more complex in-patient and treatment service, using a professional.
With reference to the second point, the Circular clarifies that hospital and care services for which there is no exemption pursuant to art. 10, par. 1, no. 18) and 19) of Presidential Decree no. 633/1972, are subject to the 10% rate pursuant to no. 120), Table A, Part III, annexed to the aforesaid Presidential Decree.
In addition, the application of the 10% VAT rate has been extended to accommodation services for accompanying persons of hospitalized patients rendered by hospital institutions, clinics, affiliated and non-contracted nursing homes, mutual aid societies with legal personality and non-profit organizations.

✓ **Facilitated waiver of tax disputes pending before the Supreme Court - Art. 1, par. 213 to 218 of Law no. 197 of 29 December 2022 - Budget Law 2023 (Circular no. 21/E of 26 July 2023)**

The Italian Tax Authorities have provided clarifications on the facilitated waiver of the appeal to the Supreme Court, introduced with the Budget Law 2023 as an alternative tool to the facilitated definition of pending litigations, allowing to benefit from the reduction of penalties to 1/18th of the minimum. The waiver allows the definition of tax disputes concerning tax acts and not only penalties, pending as of 1 January 2023 in the Supreme Court, in which the Italian Tax Authorities are involved.
Tax acts, such as payment slips, can be conciliated if they constitute the first tax act notified to the taxpayer.
With the waiver of the main/cross appeal following the reaching of an agreement with the other party, the taxpayer must pay the agreed amounts (taxes, interest and penalties reduced to 1/18th) within 20 days from the signing of the agreement, however respecting the deadline of 30 September 2023.
It does not appear indispensable that the waiver of the appeal must take place by 30 September 2023.

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

✓ **Art. 10-bis of Law Decree no. 137 of 28 October 2020. De-taxation of contributions and allowances of any kind exceptionally paid as a result of the epidemiological emergency by COVID-19. Access to a bank loan with a State guarantee, pursuant to art. 1 of Law Decree no. 23 of 8 April 2020, and redundancy fund in derogation, provided for by art. 22 of Law Decree no. 18 of 2020 (Response to the request for advance tax ruling no. 366 of 4 July 2023).**

The Italian Tax Authorities exclude, with respect to the bank loans backed by State guarantee pursuant to art. 1 of Law Decree no. 23/2020 and to the in derogation - wage compensation fund pursuant to art. 22 of Law Decree no. 18/2020, the application of the tax exemption pursuant to art. 10-bis of Law Decree no. 137/2020 of the "COVID-19 contributions".
According to the opinion of the Italian Tax Authorities, the tax relief scheme is applicable if:

- for the beneficiary, the grant or allowance represents a real and quantifiable economic advantage (i.e. a revenue supplement or a total or partial participation in the incurring of certain costs);
- costs, for which full or partial participation is envisaged through the grant or allowance, are borne by the beneficiary.

The exclusion from the application of the tax exemption is linked to the absence of the objective prerequisite of the measures under examination, which do not represent operating subsidies paid against an actual incurring of costs by the beneficiary.

✓ **Partial demerger – Allocation of IRAP credit – Art. 173, par. 4 of TUIR (Response to the request for advance tax ruling no. 368 of 4 July 2023)**

The Italian Tax Authorities provided clarification on the allocation of the IRAP credit accrued by a company participating in a partial demerger in favor of two beneficiary companies, qualifying the allocation of the IRAP credit as a "subjective position".
Tax credits are considered to be subjective positions not related to elements of the demerged assets, transferable from the demerged company to the beneficiary companies in proportion to their respective shares in the transferred book net equity (art. 173, par. 4 of TUIR).
Tax-relevant subjective positions must have the following characteristics:

- be pre-existing in the demerged company at the date when the actual effects of the demerger occur;
- be not included in the accounts before the demerger (otherwise, they would be assets);
- be related (and tied) to elements of the demerged assets;
- be substantially divisible among the parties participating in the corporate demerger.

It should also be noted that from the date when the demerger takes effect, the subjective positions of the demerged company and the related instrumental obligations are attributed to the beneficiary companies and, in the case of a partial demerger, to the demerged company itself, in proportion to the respective shares of the book net equity transferred or remaining (unless the subjective positions are specifically related to the elements of the demerged assets, in which case they follow those elements to their respective owners).

✓ **Taxation of income from employment under the Double Taxation Convention in force between Italy and Switzerland in case of transfer of residence during the year (Response to the request for advance tax ruling no. 370 of 4 July 2023)**

The Italian Tax Authorities recalled that if an individual transfers his tax residence from Italy to Switzerland during the course of the year, the split year clause (art. 4, par. 4 of

the Italy-Switzerland Double Taxation Convention) applies for income taxation purposes.
The application of the aforementioned clause implies that the individual is considered to be resident for tax purposes in Switzerland from the day following the day of his registration with AIRE and resident for tax purposes in Italy until that day.

✓ **Rottamazione-quater - "Horizontal" offsetting - Art. 1, par. 242 of Law no. 197 of 29 December 2022 (Response to the request for advance tax ruling no. 372 of 7 July 2023)**

The Italian Tax Authorities stated that the amounts due as a result of the role scrapping can only be paid in the manner indicated in art 1, par. 242 of Law no. 197/2022, namely:

- by means of direct debiting to any current account indicated by the debtor in the manner determined by the Tax Collection Authority in the communication referred to in art. 1, par. 241 of Law no. 197/2022.
- by means of pre-filled payment forms, which the Tax Collection Authority is required to attach to the communication referred to in art. 1, par. 241 of Law no. 197/2022.
- at the counters of the Tax Collection Authority.

It is therefore not possible to make payments by offsetting with other tax credits (horizontal offsetting) nor with the same credit (vertical offsetting) nor with other trade receivables from the public administration.

✓ **Art. 6, par. 3 of Law Decree no. 115 of 2022 - Non-energy consuming tax credit - Provision of business services and rebilling of electricity costs (Response to request for advance tax ruling no. 373 of 10 July 2023)**

The Italian Tax Authorities have clarified that, with respect to the portion of the cost of the raw material subject to analytical chargeback in the supply of business services by the non-energy consuming company to third parties, the tax credit is not due. Therefore, the orientation already adopted by the Italian Tax Authorities with the previous response to request for advance tax ruling no. 597/2022 is confirmed.
For the recharging of the cost of the energy component to be considered analytical, the above-mentioned rebilling must take place:

- expressly identifying the portion of the charge deriving from the cost of electricity or natural gas borne by the service provider;
- by directly correlating the increase in the cost of energy borne by the customer and the share of the fee due by the customer, so that the increase in the price of raw materials is borne (in whole or in part) by the customer.

✓ **VAT - Intervention of a permanent establishment in the supply of goods and services with territorial relevance in Italy – Art. 17, par. 4 of Presidential Decree no. 633/1972 (Response to the request for advanced tax ruling no. 374 of 10 July 2023)**

The Italian Tax Authorities have confirmed that for VAT purposes a permanent establishment of a non-resident company exists when the activity carried out on Italian territory is not a mere administrative support activity.
The permanent establishment is involved and must be regarded as the person liable to tax if it:

- actively intervenes in the operations carried out by the head office (art. 192-bis of Directive 2006/112/EC);
- is characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources (art. 53, par. 1 of EU Regulation no. 282/2011).

In the case examined by the Italian Tax Authorities, the permanent establishment is considered to be involved because, although it does not directly negotiate purchase and sales contracts, it is involved in a number of operations such as managing customer relations, stock management and warehouse supervision, relations with

production plants, organizing deliveries, relations with transporters from third-party warehouses to customers, assistance with invoicing and accounting, technical assistance, feedback with customers and quality control.

- ✓ **Taxation, under the Treaty against double taxation between Italy and China, of income from consultancy services provided in Italy by a person resident in China for a company resident in another EU Member State and VAT registration in Italy (Response to the request for advanced tax regulation no. 387 of 13 July 2023)**

The Italian Tax Authorities confirm that the mere attribution of an Italian VAT number to a non-resident is not relevant for the purpose of establishing its residence for direct tax purposes.
In particular, the case analyzed relates to an Italian citizen resident in China who performs consultancy activities in Italy.
Based on the provisions of art. 23, par. 1 (d) of TUIR, self-employment income deriving from activities carried out in the territory of the State is deemed to have been generated there.
Furthermore, art. 14 of the Italy-China Double Taxation Treaty states that income from self-employment carried out in Italy by a person resident in China is taxable only in the latter country if:

- the taxpayer does not stay in Italy for a period or periods exceeding a total of 183 days during the calendar year;
- the taxpayer does not habitually have a fixed base in Italy.

Regarding the income from employment performed by the taxpayer, art. 15 of the Treaty provides for its exclusive taxation in the State of residence (China), unless such employment is performed in the other contracting State; in the latter case, such income must be subject to concurrent taxation in both countries.

- ✓ **Tax redemption of OICR shares pursuant to art. 1, par. 112 and 113 of Law no. 197 of 29 December 2022 - Budget Law 2023 (Response to the request for advanced tax ruling no. 391 of 19 July 2023)**

The Italian Tax Authorities have clarified that a person resident in Italy from 2023 onwards may opt, with respect to income taxable in Italy, for the tax redemption of OICR, even if the ownership of the securities was acquired prior to the transfer of residence in Italy.
Even if on 31 December 2022 the taxpayer is not tax resident in Italy, with the transfer of tax residence in 2023, the individual will be resident in Italy at the time the income is actually received, thus being this latter taxable in Italy.
The option of the tax redemption of OICR is exercised by:

- applying a 14% substitute tax to the difference between the purchase or subscription cost or value and the value of the units or shares on 31 December 2022 and paying the same by 30 June 2023;
- completing Form RM, section XIX in the Income Tax Return Form 2023.

- ✓ **VAT - VAT treatment of a transaction consisting of a supply of goods, a supply of patents and a commitment to continue production – Art. 2 and 3 of Presidential Decree no. 633/1972 (Response to the request for advance tax ruling no. 399/2023 of 27 July 2023)**

The Italian Tax Authorities have confirmed that the transfer of a totality, in whole or in part, of assets may entail the transfer of a business or a part of a business. The revealing factors of the existence of the business or business branch can be identified in the organization imparted to the assets and in their functional destination, as a unitary whole, for the exercise of the business, such as to allow, in the event of the transfer of the aforesaid whole, the commencement or continuation of the activity in the hands of the transferee.
According to the guidance of the Court of Justice, the transfer of a totality or part of an asset must be interpreted as covering the transfer of an undertaking or an autonomous

part of an undertaking, including tangible and, possibly, intangible elements which, taken together, constitute an undertaking or an autonomous part of an undertaking capable of carrying out an autonomous economic activity, but does not include the mere transfer of goods such as the sale of a stock of products (EU Court of Justice, "Zita Models", Case C-497/01 of 27 November 2003).
Regarding the distinction between the transfer of a business and the transfer of a bundle of assets, it is therefore necessary to carry out an overall assessment of the factual circumstances characterizing the transaction in question, attaching particular importance to the nature of the economic activity that is intended to be continued (EU Court of Justice, "Christel Schriever", Case C-444/10 of 10 November 2011).
The Italian Tax Authorities conclude that the transfer in question relates to isolated assets, which are not in themselves capable of continuing/performing, on an autonomous basis, a productive activity, as confirmed, on the one hand, by the allocation of the finished and semi-finished products to scrap, and, on the other hand, by the allocation of the intangible assets to two separate entities. Moreover, there is no transfer of personnel from the transferor to the transferees, nor are the financial, commercial and personal relationships transferred, nor is there any right for the transferee to take over the transferor's purchase or sale contracts, which remain with the transferor.
Therefore, the one at stake is not a supply of a business, but rather three separate transactions, independently relevant for VAT purposes according to the regime applicable to each.

- ✓ **Art. 11, par. 1 (a) of Law no. 212 of 27 July 2000. Merger between companies resident in the same EU country with permanent establishment in Italy. Applicability of art. 11, par. 3 of the Ministerial Decree of 1 March 2018. (Response to the request for advanced tax regulation no. 400 of 27 July 2023)**

The Italian Tax Authorities affirmed that the tax consolidation pursuant to art. 11, par. 3 of the Ministerial Decree of 1 March 2018 is not interrupted in the case of a merger between two companies based in the European Union, both of which have a permanent establishment in Italy.
In order to confirm the applicability of the tax consolidation in the case of a foreign domestic merger carried out between two companies resident in the same foreign State, it is necessary to verify that the transaction is assimilated to a domestic merger. This requirement is met if:

- the transaction qualifies as a merger under Italian civil law;
- the entities involved have a legal form homologous to that provided for companies under Italian law;
- the transaction has effects in Italy on the tax position of at least one person involved.

- ✓ **Participating financial instruments subscribed by managers/employees - Applicability of art. 60 of Law Decree no. 50/2017 (Response to the request for advanced tax regulation no. 403/2023 of 28 July 2023)**

The Italian Tax Authorities have confirmed that income deriving from financial instruments subscribed by managers, using in part a loan provided by the company, may fall within the financial income pursuant to art. 60, par. 1 of Law Decree no. 50/2017 if the following conditions are met:

- the total investment commitment of all employees and directors involves an actual disbursement of at least 1% of the total investment made;
- the income from the shares, units or financial instruments giving the enhanced asset rights accrues only after all members or participants in the collective investment undertaking have received an amount equal to the capital invested and a minimum return provided for in the statutes or regulations or, in the case of a change of control, on condition that the other members or participants in the investment have realized a sale price at least equal to the capital invested and the aforementioned minimum return;

- the shares, units or financial instruments having the above-mentioned enhanced property rights are held by the employees and directors, and, in the event of their death, by their heirs, for a period of not less than five years or, if prior to the expiry of such five-year period, until the date of change of control or replacement of the entity in charge of management.

The fulfilment of the aforementioned requirements is a guarantee of an alignment of the interests and risks of the managers with those of the other investors for the purpose of a common assumption and sharing of corporate risk. This alignment constitutes the rationale for assimilating income to income of a financial nature, regardless of any link with the activity carried out by the managers or employees of the company.
The loan granted by the applicant company, to partially cover the subscription of financial instruments by certain managers, is remunerated by an annual interest rate well below the market rate and therefore the low-interest loan constitutes a fringe benefit for the employee, so that the interest differential of which must be taxed as employment income.
There are no clauses allowing for the recovery of the invested capital in any case, to completely neutralize the risk position of the manager. In particular: while holding the participating financial instruments, the holder is exposed to the risk of loss of capital in the same way as ordinary shareholders; in the case of good leaver and bad leaver, there is no guarantee of return of paid-up capital.
Regarding the appropriateness of the measure of remuneration, it is stated that the remuneration received by managers in relation to the work performed is fully in line with industry standards and consists of a fixed and a variable part.
The Italian Tax Authorities are of the opinion to exclude that the income from the subscription of the participating financial instruments have a supplementary function to the remuneration of the management and, therefore, conclude that the income from the investment of the managers may fall within income of a financial nature.

ORDERS

✓ **Procedures for the implementation of art 1, par. 186 to 202 of Law no. 197 of 29 December 2022, concerning the facilitated settlement of tax disputes to which the Italian Tax Authorities are a party (Italian Tax Authorities Order no. 250755 of 5 July 2023)**

The Italian Tax Authorities have updated the model for the application for the definition of pending litigations as of 1 January 2023 provided for by art. 1, par. 186 et seq. of Law no. 197/2022. The update incorporates the new features introduced by art. 20 of Law Decree no. 34/2023 (Decree “Bills"), which postponed to 30 September 2023, instead of 30 June, the deadline for submitting the application for the definition of pending litigations and the payment of the relevant amounts due in full or for the first instalment.
The taxpayer may choose to install the amounts due in no. 20 instalments, quarterly, or no. 54 instalments, where the first three instalments are quarterly and thereafter become monthly. The instalments must include interest. In both options, the first three instalments are due on 30 September, 31 October and 20 December.
A different form must be sent for each autonomous tax dispute (relating to the individual contested act), in exemption from stamp duty.

II. UPDATE ON REGULATION

✓ **Law no. 83 of 13 June 2023 Ratification and execution of the following Agreements: a) Agreement between the Italian Republic and the Swiss Confederation on the taxation of frontier workers, with additional Protocol and exchange of letters, done at Rome on 23 December 2020, b) Protocol amending the Treaty between the Italian Republic and the Swiss Confederation for the avoidance of double taxation and the settlement of certain other questions concerning taxes on income and on capital, with additional Protocol, concluded at Rome on 9 March 1976, as amended by**

the Protocol of 28 April 1978 and the Protocol of 23 February 2015, done at Rome on 23 December 2020

Law no. 83 of 13 June 2023 ratifies the Italy-Switzerland agreements on frontier workers and double taxation. It entered into force on 1 July 2023 and is scheduled to be applicable from 1 January 2024.
The law provides that wages, salaries, and other similar remuneration received by frontier workers resident in Italy, who on the date of entry into force carry out, or who between 31 December 2018 and the date of entry into force have carried out, salaried work in the frontier area in Switzerland for an employer resident there, with a Swiss permanent establishment or fixed base, remain taxable only in Switzerland.
In addition, the deductible applicable for Italian workers working in Switzerland is raised to EUR 10,000, making the portion of frontier workers' income exceeding the amount taxable in Italy.

✓ **Law no. 85 of 3 July 2023 Conversion into law, with amendments, of Law Decree no. 48 of 4 May 2023 (Decree "Labour")**

The Law converting the Decree "Labour" contains the following main innovations:

- tax wedge and fringe benefits, for which the contribution reduction is confirmed, and the exemption threshold is raised to EUR 3,000. For fringe benefits, the exemption threshold only applies in the case of employees with dependent children. In addition, the application of the threshold is also foreseen for sums paid to reimburse the payment of household utilities for the integrated water service, electricity and natural gas;
- cancellation of contribution debts, which allows self-employed workers enrolled in the relevant social security management schemes of the INPS (National Social Security Institution), as well as persons enrolled in the INPS scheme "separate management", also in their capacity as holders of coordinated and continuous collaboration relationships, to submit a request to the INPS for the payment of pension contributions affected by the automatic cancellation of debts of up to EUR 1,000, limited to contributions for which the five-year limitation period has not expired. The payment must be made, in one lump sum or in equal monthly instalments, by 31 December 2023;
- fixed-term contracts, for the renewal of which the need for reasons has been ruled out, if the total duration of the relationship does not exceed 12 months, as already provided for extensions. In calculating the 12 months, for both extensions and renewals, the time period of the relationship under contracts concluded before 5 May 2023 is not to be taken into account;
- employment administration for which, in the absence of different provisions in the collective agreements, the quantitative limit is modified to 20% of the number of permanent workers employed by the user, from which workers whose employment relationship with the administrator is an apprenticeship contract are excluded;
- inclusion allowance that will replace, as of 1 January 2024, the "citizenship income", for households with disabled members, minors, over 60s and, a novelty introduced during the conversion, members in a disadvantaged condition and included in care and assistance programs of the territorial social and health services certified by the public administration.

✓ **Law no. 87 of 3 July 2023, Conversion into law, with amendments, of Law Decree no. 51 of 10 May 2023 (Decree "Omnibus")**

Law no. 87 of 3 July 2023 converts with amendments Law Decree no. 51 of 10 May 2023 (Decree "Omnibus"). The main changes are represented by:

- confirmation of the extension of the definitions introduced by the Budget Law 2023;

- confirmation of the postponement of direct tax and VAT payments by Isa subjects (also in the presence of exclusion causes), subjects participating in companies affected by the Isa and who impute their income by transparency, and minimum and flat-rate subjects from 30 June to 20 July 2023 (without any surcharge) and from 21 July to 31 July 2023 with a 0.40% surcharge;
- further postponement, with reference to associations, of the deadline for the application of the new VAT rules set forth in art. 5, par. 15-quarter of Law Decree no. 146/2021 to 1 July 2024. The amendments made to art. 4 and 10 of Presidential Decree no. 633/1972 entail the relevance for VAT purposes of transactions carried out by certain types of associations;
- postponement from 30 June to 30 September 2023 of the deadline for payment in a lump sum, or of the first instalment, of the 14% substitute tax on the value of the crypto assets held as at 1 January 2023 pursuant to art. 1, par. 133 et seq. of the Budget Law 2023;
- postponement by one year for tax substitutes providing tax assistance, of the deadline for the dematerialization and telematic transmission of the forms relating to the allocation of the eight, five and two per thousand of the IRPEF.

✓ **Decree of 20 July 2023 of the Ministry of Economy and Finance: Amendment of the Decree of 4 May 1999 (Identification of States and territories with a privileged tax regime)**

The Ministry of Economy and Finance, by means of a Decree published on 28 July 2023, provides for the elimination of the reference to Switzerland, effective as of the tax year 2024, from the list referred to in art. 1 of the Decree of the Minister of Finance of 4 May 1999, published on 10 May 1999 ("Identification of States and territories with a privileged tax regime").
The Decree was issued in implementation of art. 12, par. 3 of Law no. 83 of 13 June 2023.

III. CASE-LAW UPDATE

✓ **Procedures for providing a guarantee to access the refund of VAT credits for companies forming part of a group of companies, with a group VAT settlement regime (Supreme Court, 17 April 2023, no. 10108)**

Art. 38-bis, par. 7 of Presidential Decree no. 633/1972, provides for the possibility for the taxpayer to be exempted from the provision of the guarantees, when certain conditions are met, including the submission of a self-declaration, pursuant to art. 47 of Presidential Decree no. 445/2000, certifying the existence of particular conditions of patrimonial solidity or reliability of the taxpayer, relating to the net assets, the amount of real estate, the characteristic management, the company structure, and the fulfilment of social security and insurance obligations.
Since the function of the self-declaration is to replace the provision of the guarantee, the Supreme Court states that its submission must logically also take place, at the latest, at the time of the submission of the annual VAT return.
The omission or non-payment is a merely formal breach and legitimizes the imposition of administrative penalties for failure to pay VAT, even if the VAT debt is offset against the taxpayer's credit.

✓ **Accrual principle for the recognition in the tax period of credits acquired from third parties and VAT credits (Supreme Court, 31 May 2023, no. 15430)**

The jurisprudence of legitimacy holds that the temporal allocation of positive or negative income components cannot be left to the taxpayer's discretionary decision

unless the adoption of a different decision would entail the substantial circumvention of the accrual principle.
The recognition of the value of receivables acquired from third parties must take place in the period in which the certainty that the claim may or may not be satisfied is acquired. The existence of the aforementioned elements does not require proof that the creditor has taken steps to collect its claim.
With reference to the VAT credit not yet refunded, which the taxpayer claims from the Tax Authorities, since compliance with the requirements of certainty and determinability is verified directly by the taxpayer, collection is essentially risk-free, and it is of no consequence that such credits are paid in a subsequent tax period.

- ✓ **Deductibility of temporary employment costs for direct tax purposes (Supreme Court, 17 April 2023, no. 10104)**

The Supreme Court has ruled on the deductibility of costs related to temporary employment. This negative income component is a non-deductible item for IRAP purposes, as it is included in item B9 of the income statement.
Art. 2 of Law Decree 201/2011 provides an analytical deduction from income taxes of IRAP related to employee or assimilated personnel expenses, in addition to the flat-rate deduction provided by art. 6 of Law Decree 185/2008. Moreover, based on Interpretation Document no. 1 of accounting principle 12 of the OIC, it is clarified that all costs incurred during the year for employees, including temporary work, must be recognized under item B9, since, with reference to the principle of substance over form, it is the user that borne the cost of the employee.
Accordingly, under the rules in force *ratione temporis*, the taxable portion of the costs of temporary staff administered by third parties cannot be deemed to be excluded from the IRAP relating to the taxable portion of the costs of employed or assimilated personnel, and the IRAP paid in respect of the taxable portion of the costs of temporary staff excluded from the taxable base becomes deductible for income tax purposes pursuant to art. 2, par. 1 of Law Decree no. 201/2011.

- ✓ **Exemption from VAT in the case of premiums and discounts (Supreme Court, 23 March 2023, no. 8364)**

The Supreme Court clarified that for VAT purposes the bonus represents a gratuitous supply of money excluded from taxation pursuant to art. 2, par. 3 (a) of Presidential Decree no. 633/1972 as an autonomous supply having as its object money, since it is an autonomous contribution recognized indiscriminately at the end of the financial year to the customer upon achievement of a certain turnover or in any event to incentivize him to make future purchases.
The discount, on the other hand, represents a value that directly decreases the price of the goods bought or services exchanged, reducing the amount due for the individual transactions performed, and therefore does not constitute a gratuitous supply of money.
The Supreme Court's ruling is in line with the practice of the Italian Tax Authorities, which in their response to request of advanced tax rulings no. 172/E of 30 May 2019 clarified that the variation note decreasing the taxable amount and the tax is not allowed if the price reduction is not due to a discount, understood as a component that directly affects the consideration of the goods or services, reducing the amount due for the individual transactions performed, but to an end-of-year bonus, seen as an autonomous contribution recognized indiscriminately at the end of the financial year to the customer upon reaching a certain turnover or, in any case, to incentivize it to make future purchases.

- ✓ **Use of tax losses, indication in tax return (Supreme Court, 23 June 2023, no. 18043)**

The Supreme Court stated that the taxpayer is free to decide whether and when to use past tax losses to offset future income, since the provisions of art. 84 TUIR grant him the right to utilize the losses by exercising an option to be manifested in the tax return. Such a return, which generally represents a declaration of knowledge, constitutes for the part in which the taxpayer decides to utilize the tax losses a negotiated act and, therefore, cannot be subject to retraction.
The provision of art. 84 TUIR, in force *ratione temporis*, cannot be interpreted as giving rise to an obligation on the part of the Tax Authorities to consider past losses that have not been utilized by the taxpayer. Consequently, the failure to indicate in the declaration the carry-forward of losses cannot be corrected *ex officio* by the Tax Authorities.

- ✓ **Application of ICI/IMU rules to the area surrounding the dilapidated building or the building under construction (Court of Cassation, 11 July 2023, no. 19646)**

The Supreme Court clarified that the ICI/IMU rules do not exclude that the area surrounding the dilapidated building or the building under construction (net of the relevant area of the site or footprint) is also relevant for ICI/IMU purposes, being subject to different treatment depending on whether it is agricultural land or building land.
For the purposes of ICI, in order to be subject to tax, the building must be completed and usable, without it being necessary to register it in the land register. The condition for its registration being relevant for taxation purposes pursuant to art. 2, par.1 (a) of Legislative Decree no. 504/1992, is the moment from which it can be considered a building by reason of the completion of the works relating to its construction.
For the purposes of IMU, art. 13, par. 2, 3, 4 and 5 of Law Decree no. 201/2011 establishes that the municipal tax is based on the possession of property as per art. 2 of Legislative Decree no. 504/1992, including the main house and its appurtenances.

- ✓ **Applicability of fixed-rate penalties in case of misapplications of the reverse charge mechanism (Supreme Court, 5 April 2023, no. 9442)**

The Supreme Court affirms that in the event of issuance of an invoice pursuant to art. 17, par. 6 (a-bis) of Presidential Decree no. 633/1972 with erroneous payment of VAT by the customer of the supply of goods or servcies, through the reverse charge mechanism, the customer does not have to remit the VAT, but is punished with the fixed penalty, with joint and several liability on the part of the customer, provided for by art. 6, par. 9-bis. 2 of Presidential Decree no. 471/1997, introduced by Legislative Decree no. 158/2015.
The case under analysis is characterized by the fact that the taxpayer could not have availed itself of the reverse charge regime, in the absence of the requirements provided for by art. 17 of Presidential Decree no. 633/1972.
The Court held that the more favorable penalties provided for in art. 6, par. 9-bis. 2 of Legislative Decree no. 471/1997 were applicable. Legislative Decree no. 471/1997, which concerns the application of the fixed-rate penalty, in accordance with the principle of *favor rei* laid down by art. 3, par. 3 of Legislative Decree no. 472/1997, according to which, as regards administrative penalties for breaches of tax rules, the more favorable rule is to be applied also to breaches committed before its entry into

force, provided that there are still ongoing proceedings and that the contested measure is not final.

✓ **Deductibility of costs for audit services (Supreme Court, 5 April 2023, no. 9446)**

The Supreme Court stated that according to the provisions of art. 109, par. 2 (d) of TUIR, audit services must be deducted in the year when the consultancy is completed. On the subject of business income, the rules on the temporal allocation of income components, laid down generally by art. 75 of Presidential Decree no. 917/1986, are exhaustive and mandatory, since the taxpayer is not allowed to allocate, at will, a positive or negative income component to a financial year other than the one identified by law as the accrual year, nor is it permitted to allocate it in an amount greater than that provided for in each year.

✓ **Distinction of financial instruments between shares and similar securities and bonds and similar securities in tax matters (Supreme Court, 27 April 2023, no. 11191)**

For income tax purposes, pursuant to art. 44, par. 2 (a) of TUIR and pursuant to the PEX regime set forth in art. 87, par. 3 and 5 of TUIR, the distinction of financial instruments between shares and similar securities and bonds and similar securities, adopted by the tax legislature, is based:

- first, on the circumstance that the relevant remuneration is constituted wholly by the participation in the economic results of the issuing company or of another company of the group or of the business in connection with which the securities and financial instruments were issued. This requirement, independently of other variables, is sufficient in itself to classify the financial instrument as a share or similar security, subject, in the case of financial instruments issued by non-resident persons, to the further condition that the remuneration is wholly non-deductible in the determination of income in the foreign State of residence of the issuing person;
- on a secondary basis, where the remuneration of the security is not wholly represented by the aforesaid economic results, it is necessary to verify the existence of the conditions for classifying it among those similar to bonds, taking into account the existence of an unconditional obligation to pay at maturity an amount not less than that indicated therein and the absence of rights to participate in the management of the company.

In qualifying a given security for tax purposes, it is therefore firstly necessary to ascertain that it does not have the characteristics to be considered similar to shares, due to the fact that its remuneration is not wholly represented by the economic results of the issuing company, and then to verify whether the conditions for classifying it as a security similar to bonds are met.

IV. EUROPEAN UNION

CASE LAW

✓ **National legislation providing for the possibility of suspending, without limitation in time, the limitation period of the tax administration's action in the event of legal proceedings - Principles of legal certainty and effectiveness of Union law (EU Court of Justice of the EU, 13 July 2023, C 615/21 "Napfèny-Toll")**

The EU Court of Justice has ruled on the issue of the principles of legal certainty and effectiveness in the case concerning the possible suspension of the limitation period

of the right to issue assessment for VAT purposes by the Tax Authorities for the duration of judicial reviews.
The Court recalls that the principle of legal certainty forms part of the legal order of the European Union and, as such, must be respected by the Member States in the exercise of their powers. That is because that principle is intended to ensure the foreseeability of legal situations and relationships and requires, in particular, that the situation of a taxable person, with regard to his rights and obligations towards the tax or customs authorities, cannot be called into question indefinitely.
The principles of legal certainty and effectiveness of European Union law must be interpreted as not precluding legislation of a Member State and administrative practice relating thereto under which, in the field of value added tax, the period within which the Tax Authority's right to assess that tax is time-barred and is suspended for the entire duration of judicial review, irrespective of the number of times the administrative tax procedure has had to be repeated following such reviews, and without limitation as to the cumulative duration of the suspensions of that time-limit, including where the court ruling on a decision of the Tax Authority in question, adopted in the course of a repeat procedure, following an earlier judicial decision, finds that that Tax Authority has not complied with the guidelines set out in that judicial decision.

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