FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

September 2023

Contents

I. MINISTERIAL PRACTICE

CIRCULARS

- ✓ **Communication of options for credit assignment or invoice discounts - Updates of Decree Law 11/2023 ("Disposals Decree") (Circular no. 27/E of 7th September 2023)**

With Circular no. 27 of 7th September 2023, the Italian Revenue Agency provided clarification and interpretative instructions regarding the provisions contained in Decree-Law No. 11/2023 of 16th February 2023 (so-called "Disposals Decree"), which introduced significant changes to the regulations regarding the assignment of tax credit or invoice discounts pursuant to art. 121 of Decree-Law no. 34/2020 for certain tax benefits related to building interventions, such as “Superbonus” and other building bonuses.
In particular, the so-called " Disposals Decree " has substantially reduced, starting from 17th February 2023, the circumstances allowing for the assignment of the credit and has outlined a new scope of responsibility of the assignee of the tax credit.
The Circular discusses the following topics:

(i) scope of application of the new provisions and specific situations in which the use of invoice discount or the assignment of tax credits is allowed, as an exception to the general prohibition;
(ii) circumstances when the new scope of joint and liability of suppliers and assignees applies. This includes an analysis of scenarios in which the supplier or the tax credit assignee does not concur in the violation for gross negligence and in which, therefore, joint liability with the tax credit beneficiary does not arise, in cases where the constitutive prerequisites of the deduction are lacking;
(iii) allocation of the tax credit and the conditions under which it is possible to opt for allocation of the unused annual portion of the credit into 10 annual instalments;
(iv) special use cases, such as the ban on the purchase of tax credits by the Public Administration and the so-called “*remissione in bonis*” regularization according to article 2, paragraph 1 of Decree-Law no. 16/2012 for the late submission of option communications. In this regard, the Tax Agency specifies that an amount equal to EUR 250 is required for each option communication filed beyond the ordinary deadline (31st March 2023). Alternatively, regarding expenses incurred in 2022 for which the communication was supposed to be filed by 31st March 2023, additional penalties can be paid by 30th November 2023.

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

- ✓ **VAT deduction - fair value of the provision of services (Response to the request for an advance tax ruling no. 426 of 11th September 2023).**

The Italian Tax Agency with its reply to tax ruling no. 426 of 11th September 2023, recalled the principle stated in the decision of the EU Court of Justice case C-414/2010 of 29th March 2012, according to which "*the right to deduct VAT cannot, in principle, be made conditional on the actual prior payment of the VAT itself*."
According to the Italian Tax Agency, however, this principle applies in cases where there is a correspondence between the value of the goods/services received and the consideration due, which corresponds to the deductible VAT. The circumstance that an invoice has been issued for a higher consideration is not considered decisive in its view.
The issue of the relationship between the "principle of documentary evidence " and the "principle of VAT neutrality" has been addressed by the case law of the Supreme Court of Cassation and the EU Court of Justice. The Italian Tax Agency clarifies that "*the mere possession of the invoice does not entitle the right to deduct the VAT indicated therein, which must be consistent with the underlying transaction, with the consequence that the principal is not entitled to deduct the VAT incorrectly invoiced where there is no correspondence between documentary representation and the actual economic transaction, or where such correspondence is not restored by the amendment procedure; This, also*

applies when such restoration is no longer possible, as in the present case, more than one year having elapsed since the date of issuance of the invoice, or the limit provided by article 26, paragraph 3, of Presidential Decree No. 633/1972 for the issuance of the variation note in the event of supra-agreement between the parties."

- ✓ **VAT variation note - authorized issuer in case of substitution in credit rights (Response to the request for advance tax ruling no. 427 of 11th September 2023).**

The Italian Tax Agency with its reply to tax ruling no. 427 of 11th September 2023, provided clarification regarding the person entitled to issue the VAT variation note pursuant to art. 26, c.2 of Presidential Decree No. 633/1972 in case of substitution of credit rights.
The Italian Tax Agency, referring to Response No. 120/E/2009 recalled that the recoverability of VAT through the VAT variation note ex. art. 26, c.2 of Presidential Decree No. 633/1972, two conditions are required: i) identity between the object of the invoice and the object of ordinary registration; in other words, there must be a correspondence between the content of the invoice and what is recorded in the accounts; ii) identity among the original subjects of the taxable transaction: there must be consistency between the subjects reported in the original invoice and those reported in the credit note.
In the case of the insurer's substitution in the rights of credit, from a tax perspective, the Tax Agency believes that only the party entitled to issue the VAT variation note remains the insured party (original supplier/service provider).
It is also clarified that if the client (original seller/service provider) is subject to insolvency proceedings, the issuance of the VAT credit note may take place at the time of the opening of such proceedings, in accordance with the provisions of art. 26, c.3 of Presidential Decree No. 633/1972.

- ✓ **Energy and gas tax credits for C2022 - Late adjustment invoice - Notification without penalty (Response to the request for advance tax ruling no. 429 of 18th September 2023).**

The Italian Tax Agency in its response to the request to ruling no. 429 of 18th September 2023, provided clarification regarding the offsetting of energy and gas tax credits accrued in the third and fourth quarters of 2022.
The Italian Tax Agency draws the attention to the fact that the beneficiaries of these credits were required to file by 16th March 2023, a communication of the amount of the credit accrued in 2022. They were also allowed to apply for the "*remissione in bonis*" regularization mechanism until the end of September.
Regarding the scenario where an adjustment invoice with additional energy costs after 16th March 2023, it is allowed to offset the tax credit by filing such a communication again, without resorting to the "*remissione in bonis*" and therefore without incurring the €250 penalty. In the case at stake, the taxpayer did not have the necessary adjustment invoice to document the additional costs incurred by the deadline of 16th March 2023.
The Italian Tax Agency deemed the failure to communicate not to be considered as a violation, even of a formal one.
The Italian Tax Agency also reminded that tax credits accrued in the third and fourth quarters of 2022 can only be offset by 30h September 2023. Therefore, given the obligation to use them for offsetting, the new communication containing the amounts related to the late adjustment invoice must be submitted by that date.

- ✓ **Carried interest - Qualification as income of a financial nature - Relevance of leavership clauses (Response to the request for advance tax ruling no. 432 of 19th September 2023).**

The Italian Tax Agency in its response to ruling no. 432 of 19th September 2023, provided clarifications regarding the treatment of “carried interest”. In this regard, the Italian Tax Agency recalled that pursuant to art. 60, c. 1, of Decree Law no. 50/2017, proceeds derived from participation (direct or indirect) in companies, entities, or collective investment schemes, received by employees and directors of such entities, or by parties

related to them through a direct or indirect relationship of control or management – if related to shares, quotas, or other financial instruments with enhanced property rights – can be considered capital income or miscellaneous income, subject to certain requirements. In the absence of these requirements, a case-by-case analysis is necessary.
The Italian Tax Agency deemed that these requirements were not met in the case at issue, in which there are "parallel funds", i.e., special quotas of a limited partnership different from the entity issuing the ordinary quotas.
In such a case, the Italian Tax Agency pointed out that the presence of leavership clauses, which condition the distribution of income to the existence of the employment relationship, could constitute an element susceptible to attracting them to the relevant category of employment income.
However, the Italian Tax Agency recognizes the importance of structuring an adequate vesting mechanism aimed at ensuring a gradual and permanent ownership of subscribed units proportionate to the holding period, which may constitute a favorable condition for qualifying the proceeds connected to special units as financial income.

- ✓ **Late receipt of electronic invoice - effective date of the right to VAT deduction (Response to the request for advance tax ruling no. 435 of 26th September 2023).**

The Italian Tax Agency in its response to ruling no. 435 of 26th September 2023, clarified that the late picking up of the purchase invoice in the "*Consultation and VAT-relevant Data*" reserved area of the Tax Agency portal would result in the loss of the right to deduct tax, and would also prevent the same right by submitting a supplementary favorable declaration for VAT recovery.
The Italian Tax Agency clarified that in cases where there are issues with the SdI telematic channel and the delivery of the invoice was not possible, the "*dies a quo*" for exercising the right to deduct VAT starts from the moment when the invoice is viewed in the reserved area of the Tax Agency portal.
In this case, the taxpayer was aware that the substantive condition for the deduction of VAT had been met, having paid the consideration for the services received. Moreover, the taxpayer was aware of the issuance of the invoices, having received courtesy copies of them. All the same, the taxpayer, remained inactive, procrastinating the date of "taking receipt" and, therefore, also the "*dies a quo*" for exercising the right to deduct. Even less, he had taken action to issue the self-invoice 'complaint' under art. 6, c. 8 of Legislative Decree No. 471/1997, in case of failure to receive the purchase invoice within 4 months from the date of the transaction.
In light of the taxpayer's behaviour, which was deemed inactive, the Italian Tax Agency decided to deny the taxpayer the right to deduct the VAT related to these invoices as well as the possibility for the taxpayer to file an integrative return.

- ✓ **Credit accrued as a result of distribution of so-called "tax-suspension" reserves - limits on tax credits offset in the tax consolidation regime (Response to the request for advance tax ruling no. 436 of 26th September 2023)**

The Italian Tax Agency with its response to tax ruling no. 436 of 26th September 2023 provided clarification regarding the distribution of tax-suspension reserves. In particular, the Italian Tax Agency referred to the obligation by law to tax the amounts allocated to shareholders or participants, increased by the relevant substitute tax. At the same time, the Italian Tax Agency referred to that the law also allows the recovery of the tax itself by means of the attribution of a tax credit, which can either be used directly for offsetting or transferred to the consolidating company (in the case of companies applying for the tax consolidation regime).
With reference to the latter scenario, the Italian Tax Agency recalled that companies participating in the consolidation may transfer tax credits to the consolidating company, up to the amount of IRES resulting, by way of balance and advance payment, from the consolidated tax return, as well as in the case of use in horizontal offsetting, for an annual amount not exceeding EUR 2 million.

- ✓ **Transfer of business unit between two permanent establishments in Italy of foreign groups - indirect tax treatment (Response to the request for advance tax ruling no. 438 of 28th September 2023)**

The Italian Tax Agency with its response to ruling no. 438 of 28th September 2023 provided clarifications regarding the transfer of a business branch between two permanent establishments located in Italy, belonging to two different corporate groups. In particular, the Italian Tax Agency stated that the place of supply for this transaction is deemed to be relevant in Italy and falls into the category of supplies out of VAT scope. In accordance with this statement, the applicable registration tax is calculated at a proportional rate of 3% as provided for in art. 40 of Presidential Decree no. 131/1986.
The Italian Tax Agency also reiterated the relevance of the civil law notion of a business (or business branch) under art. 2555 of the Italian Civil Code, which is also applicable for tax purposes, according to which the company is qualified as "*the set of assets organized by the entrepreneur for the exercise of the business"* to be understood as a *universitas* of tangible and intangible assets and legal-economic relations that enable the exercise of the business activity. In this context, the Tax Agency deemed the transaction at stake to be qualified as a supply of goods, which is not relevant for VAT purposes, rather than as a provision of services (as argued by the taxpayer since the business unit mainly consisted of intangible assets).

- ✓ **Facilitated settlement of tax disputes - Disputes pending in the Supreme Court concerning tax-related penalties (Response to the request for advance tax ruling no. 441 of 29th September 2023)**

The Italian Tax Agency with its response to the ruling no. 441 of 29th September 2023 provided clarifications with reference to disputes relating exclusively to tax penalties, in case of facilitated definition under art. 1, paragraphs 186 to 205 of Law no. 197/2022 ("Budget Law 2022"). Specifically, the Italian Tax Agency stated that if a dispute is intended to be defined according to the “facilitated settlement of tax disputes” that exclusively concerns penalties, no payment relating to the penalties themselves is required. This possibility applies only if the amount related to the taxes has already been previously settled through other facilitated settlement methods or if it has already been duly paid. In this case, the dispute can be settled without any financial burden through the submission of the application for settlement within the deadline established by law.
The Italian Tax Agency also focuses on the distinction between "penalties related" and "penalties not related" to the tax by clarifying that, as a rule, penalties not related to the tax refer to violations that do not affect the determination or payment of the tax.

- ✓ **Facilitated definition of tax disputes - filing of the IPEA form (Response to the request for an advance tax ruling no. 442 of 29th September 2023)**

The Italian Tax Agency in its response to the ruling no. 442 of 29th September 2023 provided indications in case of access to the facilitated definition procedure under Article 1, paragraphs 186 to 205 of Law No. 197/2022 ("Budget Law 2022") in case of filing of the IPEA form.
Regarding losses deducted in excess of what is required for the facilitated definition of the dispute, the Italian Tax Agency refers to art. 6, c. 9 of Decree-Law No. 119/2018, which states that "*the definition does not, however, give rise to the repayment of amounts already paid even if they are in excess of what is required for the definition."* In summary, according to the Italian Tax Agency, the object of the definition procedure remains the higher tax assessed before the deduction of losses. Consequently, the value of the dispute corresponds to the additional taxes claimed in the original assessment.

The Agency stated that it is not permissible to considerate losses as credits or "free" them.
However, the Agency confirmed that it is possible to reduce the taxable income on which the tax is calculated by using the offset losses.

RESOLUTIONS

- ✓ **Establishment of the tax codes for the payment, by means of the "F24 Payments with identifying elements" (F24 ELIDE) form, of the amounts recovered as a result of the substantive check on the facilities under art. 24 of Decree-Law No. 34/2020 ("Relaunch Decree") (Resolution no. 52/E of 18th September 2023)**

With Resolution No. 52, the Italian Tax Agency has established the tax codes for the payment, via the "F24 Payments with identifying elements" (F24 ELIDE) form, of the amounts recovered as a result of the substantive control on the facilities under art. 24, Decree Law No. 34 of 19th May 2020 ("Relaunch Decree"). The "Relaunch Decree" had provided for the exemption from the payment of the IRAP balance relating to the tax period in progress as of 31st December 2019 (without prejudice to the payment of the advance payment due for the same tax period) and that of the first IRAP advance payment relating to the tax period following the one in progress as of 31st December 2019.
In case of recovery by the Tax Administration, of the amounts unduly enjoyed, the taxpayer must make the payment, together with the related interest and penalty according to art. 13 of Legislative Decree No. 471/1997, using the following tax codes:

(i) "5063" denominated *"Art. 24 Decree-Law No. 34 of 2020 - Recovery of state aid exemption IRAP balance payment and related interest - Substantial control";*
(ii) "5064" referred to as *"Art. 24 Decree-Law No. 34 of 2020 - Recovery of state aid exemption IRAP balance payment - Penalty - Substantial control";*
(iii) "5065" referred to as *"Art. 24 Decree-Law No. 34 of 2020 - Recovery of state aid exemption payment of first IRAP advance and related interest - Substantial control*";
(iv) "5066" referred to as *"Art. 24 Decree-Law No. 34 of 2020 - Recovery of state aid exemption payment first IRAP advance - Penalty - Substantive control".*

ORDERS

- ✓ **Communications for the promotion of voluntary compliance in respect of persons who have applied the forfait regime under paragraphs 54 *et seq*. of art. 1, Law No. 190/2014 and failed to provide the mandatory information in the RS section of the "Redditi PF" Return (Italian Tax Agency Order n. 325550 of 19th September 2023)**

With Order No. 325550 of 19th September 2023, in compliance with art. 1, paragraphs 634-636 of Law No. 190/2014, the Italian Tax Agency has identified the procedures for providing information to taxpayers who applied for 2021 the *forfait* regime, pursuant to art. 1, paragraphs 54 *et seq.* of Law No. 190/2014, the information concerning the failure to indicate the mandatory information as required by the regulation. Furthermore, with the Order, the Italian Tax Agency has established new communications intended for taxpayers who applied the *forfait* regime in 2021 and have not filled out the RS section for the indication of certain informative data. These communications will enable taxpayers who adopted the forfait regime to assess the accuracy of the data held by the Italian Tax Agency, and, if necessary, provide elements and information that can justify the alleged anomaly.
Specifically, the measure defines:

- the methods by which the Italian Tax Agency makes elements and information available to the taxpayer;
- the procedures for the taxpayer to request information or report elements, facts, and circumstances unknown to the Italian Tax Agency;

- the mechanism for sharing the elements and information made available to taxpayers with the Tax Police;
- the procedures that the taxpayer can regularize errors or omissions and benefit from the reduction of penalties provided for the violations incurred.

The notice is sent via PEC to those listed in the National Index of Digital Domiciles of Businesses and Professionals governed by art. 6-bis of Legislative Decree No. 82/2005; in the absence of a PEC address, or in case of non-delivery, the notice is sent by ordinary mail. The communication can also be consulted within the restricted area of the online portal of the Italian Tax Agency ("Tax Box", section "Agency write").

✓ **Cancellation of the notice of distribution in ten annual instalments of residual credits resulting from the assignment or invoice discount relating to deductions due for certain building interventions pursuant to art. 9, c. 4, of Decree-Law No. 176/2022 - Cancellation of the option to use traceable credits for offsetting via F24 form (Italian Tax Agency Order no. 332687 del 22th September 2023)**

With Order No. 332687 of 22nd September 2023, the Italian Tax Agency provided:

1) the procedure for the cancellation of the communication of distribution of the residual credits in ten annual instalments, resulting from the assignment or discount on the invoice for the deductions due concerning certain building interventions as per art. 9, c.4 of Decree-Law No. 176/2022 (Superbonus, Sismabonus and bonus for the elimination of architectural fences);
2) the procedure for the cancellation of the option to use the so-called "traceable credits" in compensation through the F24 model.

This measure became necessary because of the requests received from suppliers and assignees, holders of the credits, who expressed that they had mistakenly made the communications, to allow the latter to remove their effects.

Concerning the communication mentioned in point 1), the cancellation request must be made directly by the supplier or transferee, or by an intermediary referred to in art. 3, c. 3 of Presidential Decree No. 322/1998, through the "Credit transfer platform" in the reserved area of the website of the Italian Tax Agency. The Italian Tax Agency will make known the date of activation of this new functionality through a special notice published on its website. It should be noted that until the activation of the platform functionality, the request must be made through the form entitled "Request for cancellation of the division of residual credits into ten annual tranches," attached to the measure. The acceptance of the cancellation request determines the reduction of the amount of usable credits resulting from the division into ten tranches and the restoration of the amount of the instalment of the original credit, which will be given the tax code, the reference year, and the deadline it had before the division into ten tranches.

With reference to the communication mentioned in point 2), the request must be made through the "Credit transfer platform" directly by the supplier or assignee holder of the credits, using the special functionality that will be available as of 5th October 2023. Acceptance of the cancellation request determines the reduction of the number of usable credits for which the option for use through the F24 form had been communicated, with the consequent reactivation of the option to assign the relevant tranches.

✓ **Contents, methods and terms of submission of the application for recognition of the non-refundable contribution provided for the interventions facilitated with the 90% Superbonus ex art. 9, c. 3 of Decree-Law No. 176/2022 (Italian Tax Agency Order no. 332648 del 22th September 2023)**

With Order No. 332648 of 22nd September 2023, the Italian Tax Agency approved the form "Application for Recognition of the non-refundable contribution on building interventions 2023 deductible at 90%" with the related instructions.
The application should be prepared and submitted from 2nd to 31st October 2023, using the web procedure available on the website of the Italian Tax Agency. The submission can be made directly by the applicant or by an authorized intermediary referred to in art. 3, c. 3 of Presidential Decree No. 322/1998 with delegation to the consultation of the so-called “Tax Box”.
After the deadline for the submission of applications, the funds will be redistributed for the disbursement of the grant, with the percentage of distribution announced in a subsequent measure to be issued by 30th November 2023.

LEGAL CONSULTANCIES

- ✓ **Additional remuneration paid to pharmacies for medication reimbursement: VAT exclusion regime (Italian Tax Agency Legal Consultancy no. 2 of 15th September 2023)**

With the Legal Consultancy No. 2 of 15th September 2023, the Italian Tax Agency clarified that the VAT exclusion regime applies to the additional remuneration for the reimbursement of medicaments dispensed under the so-called “Sistema Sanitario Nazionale”. This benefit was introduced as a business support measure for 2021 and 2022 and is therefore excluded from the application. The same regime applies for the additional remuneration related to medicament reimbursement disbursed to pharmacies, and for the support established in 2023.

II. UPDATE ON REGULATION

- ✓ **Extension of the Suspension of the Write-down of Securities on the Balance Sheet (Ministerial Decree of 14th September 2023, Official Gazette of 23rd September 2023)**

The Ministerial Decree of 14th September 2023 was published in the Official Gazette No. 223 of 23rd September 2023. With this Decree, the Ministry of the Economy and Finance acknowledges the continuation of a situation of price volatility and therefore turbulence in the financial markets by extending, for entities that adopt national accounting standards, the valuation of securities recorded in current assets at the same values resulting from the previous financial statements. This extension therefore makes it possible to avoid write-downs based on the realizable value deduced from market trends and therefore deviating from the valuation criterion set forth in art. 2426, paragraph 1, no. 9) of the Italian Civil Code, which requires securities not constituting fixed assets to be valued 'at the realizable value deduced from market trends'. The exemption is applicable on an optional basis.
If this exemption is used, an amount of profit corresponding to the difference between the values recorded in the application of the provisions in question and the market values recorded at the end of the reporting period, net of the relevant tax charge, must be allocated to a reserve. If the profit for the year is less than this difference, the reserve must be supplemented by utilizing revenue reserves or other available equity reserves or, failing this, by profits from subsequent years.

- ✓ **“Southern Decree”: 'Single SEZ' to boost the economy in the Mezzogiorno from 1 January 2024 (Decree-Law No. 124 of 19th September 2023)**

Decree-Law No. 124/2023 (''Souther Decree") was published in the Official Gazette No. 219 of 19th September 2023 and came into force on 20th September 2023. The main objective is the revitalization of the economy in Southern Italy through the establishment, as of 1st January 2024, of the Special Economic Zone for Southern Italy "Single SEZ", which includes the territories of Abruzzo, Basilicata, Calabria, Campania, Molise, Puglia, Sicily, and Sardinia. The decree sets out the organizational structure of the single SEZ, regulates its strategic plan, and defines its development policy, indicating, in a differentiated manner for the regions that are part of it, the sectors to be promoted and strengthened, the priority investments and interventions, and the implementation methods.
It should be noted that the decree introduced a contribution in the form of a tax credit, for 2024, for companies acquiring capital goods for production facilities located in the so-called "single SEZ".
Eligible investments are those relating to the purchase, including leasing, of new machinery, plant, and equipment for production facilities already in existence or to be established in the area, as well as the purchase of land and the acquisition, construction, or extension of buildings instrumental to the investments.
The relief does not apply:

- to entities operating in certain sectors (steel, coal, and lignite industry, transport and related infrastructure, production, storage, transmission and distribution of energy and energy infrastructure, broadband, as well as credit, finance, and insurance)
- for companies in a state of liquidation or dissolution and companies in difficulty according to EU regulations.

The tax credit is commensurate with the share of the total cost of the assets purchased (or, if applicable, of real estate investments made) from 1st January 2024 to 15th November 2024 up to a maximum, for each investment project, of EUR 100 million. In any case, investment projects of less than EUR 200,000 are not eligible.
The tax credit is granted to the maximum extent allowed by the 2022-2027 Regional Aid Map and up to the defined maximum expenditure limit.

- ✓ **"Energy Decree": urgent measures on energy, investments to support purchasing power and to protect savings (Decree-Law No. 131 of 29th September 2023)**

Decree-Law No. 131/2023 ('Energy Decree') was published in the Official Gazette No. 228 on 29th September 2023 and came into force on 30th September 2023. The main changes concern:

(i) the possibility of availing of a "special amnesty" in respect of violations concerning the omission/infidelity in the transmission/recording of tax payments, even if already ascertained by 31st October 2023 (please note that the ascertainment of violations by means of a report, as a rule, does not allow to avail of the "special amnesty"). This includes breaches committed between 1st January 2022 and 30th June 2023. The amends must be completed by 15th December 2023;

(ii) the extension of the 5% VAT rate for supplies of methane gas (for civil and industrial uses) accounted for in invoices issued for estimated or actual consumption for October, November, and December 2023. If the supplies are accounted for based on estimated consumption, the 5% VAT rate also applies to the difference resulting from the amounts recalculated based on the actual consumption referable, also in percentage terms, to October, November, and December 2023. For the purposes of applying the 5% VAT rate, the time of invoicing of consumption is irrelevant. This extension also applies to (i) supplies of thermal energy produced with methane gas pursuant to an energy service contract (referred to in Article 16.4 of Legislative Decree no. 115/2008) billed for estimated or actual

consumption for the period from 1st October to 31st December 2023 and (ii) supplies of district heating services;

(iii) the qualification of transfer of business assets to insurance assets, with the consequent exclusion from VAT of the same and the application of registration tax at a fixed rate.

✓ **"Decree on Postponements": urgent provisions on the extension of regulatory deadlines and tax payments (Decree-Law No. 132 of 29th September 2023)**

Decree-Law No. 132/2023 ("Decree on Postponements") was published in the Official Gazette No. 228 on 29th September 2023 and came into force on 30th September 2023. The main postponements of regulatory deadlines and tax payments are reported below:

(i) extension to 31st December 2023 of the deadlines in respect of home purchase relief;

(ii) extension from 30th September 2023 to 15th November 2023 of the deadline for the payment of the 14% substitute tax required for the optional redetermination of the value of crypto assets held as of 1st January 2023 pursuant to Article 1, paragraph 133 of Law No. 197/2022 ("Budget Law 2023");

(iii) remittance of tax and social security contributions due on time for persons who, due to the meteorological events that occurred in July 2023 in the Lombardia region, did not make their tax and social security payments on time in the period from 4th to 31st July 2023. Such payments shall be considered timely if made by 31st October 2023;

(iv) postponement to 30th November 2023 of the payment - which must necessarily be made in a single instalment - for the completion of the operations of assignment and facilitated transfer of non-instrumental assets (real estate and registered movables) to shareholders and of the facilitated transformation of commercial companies into simple companies.

Among the main changes, there is also the bringing forward from 31st December 2023 to 16th November 2023 of the deadline for the use of the energy and gas tax credits relating to the first and second quarters of 2023 (pursuant to Art. 1, paragraph 7 of Law No. 197/2022 and art. 4 of Decree-Law No. 34/2023), thus reducing the period for their utilization.

III. CASE-LAW UPDATE

✓ **Permanent Establishment - Exclusion of reimbursement pursuant to Article 30-*ter* of Presidential Decree No. 633/1972 even for transactions carried out directly by the parent company (Supreme Court no. 25685 of 4th September 2023)**

The Supreme Court stated that a non-resident subject with a permanent establishment in Italy is not eligible for a VAT refund pursuant to art. 30-*ter* of Presidential Decree No. 633/1972. The refund is also denied for transactions carried out directly by the parent company, i.e., without the involvement of the permanent establishment. This consideration is made in the light of the European Court of Justice (Case C-244/08) according to which the VAT position of the non-resident entity flows *in toto* into that of the permanent establishment, with the consequent exercise of the right to the refund of VAT through the deduction mechanism. The Supreme Court points out that how VAT is refunded - by way of deduction or refund - is determined according to the place where the taxable person is established:

- if the taxable person does not have a fixed establishment in Italy, it may exercise the right to a refund of the VAT by way of a refund under art. 30-*ter* of Presidential Decree No 633/1972;

- if the taxable person has a permanent establishment in Italy - precisely because it is established - it may exercise its right to a refund of the VAT only by way of deduction.

In the latter case, the taxable person is considered to all intents and purposes to be a resident taxable person and is therefore not required to apply the reverse charge mechanism on services supplied to resident taxable persons. On the contrary, he is required to pay VAT on such supplies as any other resident taxable person, and consequently, he will have the normal right to deduct VAT (pursuant to art. 19 *et seq*. of Presidential Decree No. 633/1972) as a VAT refund mechanism. Therefore, the right to an immediate refund of any excess credit pursuant to art. 30-*ter* of Presidential Decree No. 633/1972 is not provided for - regardless of whether the transactions were carried out by the permanent establishment or directly by the parent company. In such cases, the right to refund will only be available if the other cases provided for by art. 30 of Presidential Decree No. 633/1972 granted to resident persons are met.

✓ **Import VAT - advance invoicing - right to deduct only when goods are cleared (Supreme Court no. 25891 of 5th September 2023)**

The Supreme Court has confirmed that, with reference to the imports of goods, the obligation to apply VAT and the corresponding right to deduct it arises only at the time of customs clearance. It is irrelevant whether the invoice has already been issued and the goods are already physically in Italy. Therefore, for imports, the time in which VAT becomes chargeable is the time at which customs formalities are completed, also in the case of an advance purchase (with advance invoicing and/or payment). Otherwise, the possibility of deducting tax that does not yet exist would be granted.

✓ **Payment of VAT in the country of consumption (Supreme Court no. 26056 of 7th September 2023)**

The Supreme Court has stated that, in accordance with the principle of taxation in the country of destination and the prohibition of double taxation, VAT must be paid in the country where the actual consumption of the goods takes place and not in the countries through which the goods have transited. In such cases, it is essential to distinguish between release for free circulation and final importation, i.e., release for consumption. In this regard, the Supreme Court recalls that release for free circulation attributes the customs status of Community goods to non-Community goods and implies not only the application of commercial policy measures but also the completion of the other formalities provided for the importation of goods, as well as the application of the duties legally due. Final importation, on the other hand, is linked to the release for consumption through the payment, in addition to duties, of duties relating to internal taxation (VAT and other consumption taxes).

✓ **Supply of goods existing in the national territory to a non-EU person without a VAT identification number - qualification of the transaction (Supreme Court no. 26121 of 8th September 2023)**

The Supreme Court has clarified that the supply of goods existing in the national territory carried out by a transferor resident in the territory of the State to a non-EU transferee without a VAT identification code - and therefore not subject to VAT - constitutes neither an export supply (as the goods have not left the Community territory) nor a non-taxable intra-community supply (as the transferee is not a resident of any Member State). Rather, this transaction constitutes a common supply of goods within the national territory: the Italian transferor will be obliged to issue an invoice to the non-EU transferee, indicating the Italian VAT rate on the sale price of the goods paid by the purchaser.

- ✓ **Withholding exemption scheme of interest income paid to a Swiss company - Conditions (Supreme Court no. 26183 of 9th September 2023)**

The Supreme Court upheld a refund petition submitted by a company based in Switzerland seeking the refund of undue withholding taxes on interest income paid by Italian subsidiaries.
The judges affirmed that, for the purposes of exemption from withholding tax on interest paid by an Italian company to its Swiss subsidiary, it is necessary and sufficient that the same is subject to taxation according to domestic law. On the other hand, neither the European Council Directive 2003/49/EC - the "Interest and Royalties Directive" - nor the Agreement signed on 26th October 2004 between the European Community and Switzerland provides that the interest paid must necessarily be subject to tax in the State of the recipient company, nor do they require the recipient company to provide evidence that the interest has been subject to tax in its State of residence.

- ✓ **Capital gains from the transfer for valuable consideration of participations in resident companies - Participation exemption (Supreme Court no. 27267 of 25th September 2023)**

The Supreme Court has confirmed that capital gains realized by a non-resident company following the sale of a participation in an Italian company, if taxable in Italy, must be subject to the same tax burden as that provided for resident companies.
In compliance with the principle of freedom of establishment under art. 49 of the TFEU, the judges affirmed that capital gains realized by non-resident companies must be able to apply the participation exemption regime under art. 87 of the TUIR, i.e., the same regime provided for capital gains realized by Italian companies.

- ✓ **Repayment of payments on account of future capital increase before the agreed deadline: hypothesis of corporate bankruptcy by diversion - Intragroup transfers of financial resources: conditions of legitimacy of the cash pooling agreement (Supreme Court no. 23239 of 26th September 2023)**

The Supreme Court affirmed the principle that *"in the case of a contribution on account of a future capital increase, the need to protect the creditors requires the identification of a final deadline to which, in the event of failure to approve the increase, the right to repayment of the contribution is linked*".
Restitution before the time limit agreed upon or fixed by the court integrates, according to the judges, in the event of the subsequent bankruptcy of the company, a corporate bankruptcy by diversion. If no time limit has been agreed upon to guarantee the creditors, nor is such a time limit fixed by the judge, the sums cannot be repaid since they are intended to cover the increase in capital (so-called headed reserve).
Otherwise, the repayment would be devoid of cause, the obligation being related to the failure to adopt the resolution within a certain time limit.
Judges also commented on the cash pooling contract, a practice of transferring intragroup financial remittances, emphasizing that its legitimacy is conditioned by the presence of two elements:

(i) the presence of a precise contractual regulation of intra-group relations, indicating the manner and terms in which the balances of the subsidiaries' peripheral current accounts must be transferred to the centralized current account, as well as the manner and terms within which such cash must be returned;
(ii) the agreement must be placed within the logic of countervailing benefits, according to which it is possible to find a justification for such cash pooling operations in the benefits that the same company receives from management choices made for its benefit by other entities of the same group or by the holding company that heads the group of companies.

IV. EUROPEAN UNION

CASE LAW

- ✓ **Transactions with excess VAT - Refund of the excess - Direct action against the administration (EU Court of Justice, 7th September 2023, Case C-453/22)**

The Court of Justice of the European Union has stated that, where a higher VAT rate has been applied to a certain transaction, the supplier may - under certain conditions - reclaim the higher VAT directly from the Tax Agency. The situations justifying direct action against the Tax Agency must be assessed on a case-by-case basis but require in any case that a refund by the supplier is impossible or excessively difficult. Among the various hypotheses, the Court accepts the case where the purchaser - who had applied to his suppliers for the correction of invoices received with incorrect VAT information and for reimbursement of the amount of VAT wrongly charged - is refused that application on the ground that it is time-barred under national law.
Judges also point out that the refund of VAT wrongly invoiced and paid is not permitted where it is established that the right to it is fraudulently or abusively enforced. For example, where there is a possibility that, after the refund issued by the Tax Agency directly to the customer, suppliers will rectify the invoices initially issued and claim from the authorities a refund of the higher tax paid.
The Court also added that, if the reimbursement does not take place within a reasonable period, the damage suffered as a result of the unavailability of the amount equivalent to the VAT unduly levied will have to be compensated by the payment of default interest.

- ✓ **Proposal for a Council Directive "Business in Europe: Framework for Income Taxation" ("BEFIT" proposal) (Proposal Directive (EU) no. 532 of 12th September 2023) and Proposal for a Council Directive "Directive on Transfer Pricing" (Proposal Directive (EU) no. 529 of 12th September 2023)**

The European Commission has adopted a package of initiatives to reduce tax compliance costs for cross-border companies within the European Union. In particular, the following Directive proposals were published on 12th September 2023:

(i) Proposal for a Directive 'Business in Europe: Framework for Income Taxation' ("BEFIT" proposal);
(ii) Proposal for a "Directive on Transfer Pricing" (proposal on transfer pricing).

The BEFIT Directive proposal aims to introduce common rules for determining the tax base of EU-based companies that are part of groups with global consolidated revenues of more than EUR 750 million. The proposal envisages the aggregation of the tax bases of individual companies - after applying specific tax variations aimed at homogenizing the rules for determining taxable income as much as possible - in the hands of the parent company, allowing the cross-border offsetting of tax profits and losses.
The proposed Directive on Transfer Pricing aims to introduce a common framework for the application of transfer pricing rules within the European Union, with specific reference to the application of the arm's length principle. In particular, the directive incorporates the key elements of the analysis provided for in the OECD Transfer Pricing Guidelines (functional analysis, comparability analysis, and transfer pricing methods recognised by the OECD) and clarifies their application to prevent double taxation.

- ✓ **Proposal for a Council Directive "Proposal for a Council Directive establishing a Head Office Tax system for micro, small and medium-sized enterprises" (Proposal Directive (EU) no. 528 of 12th September 2023)**

On 12th September 2023, the European Commission published a new proposal for a Directive establishing a tax system for European SMEs based on the “Head Office Tax System' principle”.
The proposal contains rules that introduce the possibility for SMEs operating cross-border within the EU to continue to apply the tax rules of their Member State of residence when determining the taxable income of their permanent establishments in other Member States. The Directive will also amend Directive 2011/16/EU ("DAC Directive") to allow for the exchange of information between the Member States involved. In particular, the rules included in the proposal are aimed at the creation of a 'one-stop-shop' regime under which the declaration of income, tax assessment, and collection of taxes related to the permanent establishment will be handled directly by the tax administration of the Member State where the head office is located, with the consequent transfer of tax revenues from the Member State of the head office to the Member State of the permanent establishment.
The proposed Directive is currently being negotiated between the Member States with the aim of reaching a unanimous agreement. The European Commission proposes the transposition of the Directive into the respective national legislations by 31st December 2025, so that the rules enter into force on 1st January 2026.

V. TELEFISCO 2023 – the Italian Tax Agency clarifications

At a meeting organized by the specialized press on 20th September 2023, the Italian Tax Agency issued a series of clarifications in different areas (VAT, business income, building bonuses, settlement of tax disputes, tax litigation, third sector, taxation of business crises, and flat tax).

Below are some of the main clarifications.

✓ **VAT**

- “Letters of Intent”: The Italian Tax Agency specified that the penalties provided for in the case of misappropriation are also applicable if the “habitual exporter’s” supplier has issued a non-taxable invoice within the limit of his available ceiling, but for an amount exceeding the letter of intent issued to the supplier.
- Credit notes: The Italian Tax Agency recalls that the variation note (debit or accredit) has the same requirements as the invoice and must be issued, concerning the original invoice, for the difference of the amount found to be incorrect or granted as a discount. With reference to the time limit for the annotation of the invoice, the Italian Tax Agency specified that the time limit runs from the date of receipt of the invoice.
- Penalties and reverse charge: the Italian Tax Agency specified that, if non-existent transactions have been carried out which are abstractly taxable with fraudulent intent and with the application of VAT through the reverse charge mechanism, the only applicable penalty is the one provided for by art. 6, c. 9-bis.3 of Legislative Decree no. 471/1197, equal to 90% of the amount of the deduction unduly made, and not also the one provided for the offence of false declaration.

✓ **CORPORATE INCOME TAX**

- Facilitated transformation from a corporation into a simple partnership and taxation of profit reserves: the Italian Tax Agency, referring to the rules on the transformation of a corporation into a simple partnership, has clarified the treatment reserved to the taxation of past profit reserves, confirming that they are subject to a 26% withholding tax pursuant to art. 27, paragraph 1 of Presidential Decree No. 600/1973. According to the Italian Tax Agency, in fact, even though the simple partnership resulting from the transformation does not fall (according to the provision) among the subjects required to apply the withholding tax, *“there are no*

logical-systematic reasons to deny the application of the aforesaid withholding tax if the simple partnerships resulting from the transformation of a joint-stock company impute to their shareholders the income earned by the joint-stock company undergoing transformation". The Italian Tax Agency refers to Article 170, paragraph 5 of the Consolidated Income Tax Law ("TUIR"), concerning homogeneous regressive transformations, which states that: *"the reserves (established before the transformation) are subject to tax according to the regime applicable to the distribution of the reserves of the companies referred to in article 73"*. Therefore, in the application of this provision, for such reserves formed "in constancy" of the corporation, the simple company - as the same legal entity - would have to take over the fulfilment of the relative obligations, among which, those of the withholding agents.

✓ **BUILDING BONUSES**

- Invoice with "full" discount: for the "Superbonus", in case of an invoice with a full discount (i.e. in the absence of payment), the moment when the expenditure is considered to have been incurred coincides with the moment when the invoice is transmitted through the SDI, since for the principal/assignee that is the date on which the invoice is considered to have been issued for VAT purposes.
- Invoice discount: the Italian Tax Agency has clarified that if works are carried out with the so-called "Superbonus" in two consecutive years, to exercise the option for the discount on the invoice, the fact that the works were carried out in different tax periods is not relevant. The option can be exercised in the second year, provided that in that year a SAL of at least 30% of the intervention is achieved. If this threshold is not reached, it will only be possible to deduct the corresponding invoiced amounts in the tax return.

✓ **SETTLEMENT OF TAX DISPUTES**

- Interests from instalment payments: the Italian Tax Agency clarified that the interest paid for the deferral of amounts paid pending judgment can be deducted from the total amount due. The doubt arises with respect to the hypothesis in which the taxpayer, for the payment pending judgment, requests a payment by tranches to the Collection Agency, paying interest on each tranche. The provision on the facilitated settlement of disputes (Law 197/2022 para. 196) provides that the amounts due are deducted from the amounts paid for any reason pending judgment due to the Agency, thus excluding any amounts paid in favour of the Collection Agency (Circ. no. 6/2019).
- Blameless error and minor breach: the Italian Tax Agency stated that, in the case of access to the facilitated definition procedure, any calculation errors in the determination of the amounts due will not automatically compromise the completion of the definition. In case of a blameless error, the discipline of slight default is deemed applicable, and the taxpayer will be invited to integrate the amounts due.

✓ **THIRD SECTOR**

- VAT regime of former non-profit organizations: social cooperatives, even if they qualify as social enterprises as of right, can apply the reduced VAT rate of 5% to sociomedical, welfare, and educational services in favour of disadvantaged persons, according to the provisions in force.
- Donation of obsolete goods: companies may donate obsolete goods to Third Sector entities and benefit from the tax discipline of Law 166/2016, avoiding the application of VAT on free transfers of goods and computers, provided that these goods are still fit for use but no longer marketable.

✓ **TAXATION OF BUSINESS CRISIS**

- Tax Settlement: In the composition agreement, there is a prohibition on the impaired treatment of tax claims with respect to lower claims. This restriction does not apply to the debt restructuring agreement, that has mainly of a negotiated nature and does not provide for the principle of *par condicio creditorum*.

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For information: info@5lex.it