FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

October 2023

Summary

MINISTERIAL PRACTICE

CIRCULARS

- ✓ **"Wind farms" - Determination of the cadastral income - Whether the value of the wind turbine support tower may be taken into account in the estimate - Further clarifications (Circular no. 28/E of 16 October 2023)**

With Circular No. 28 of 16 October 2023, the Italian Tax Authorities, in light of the orientation expressed by the most recent jurisprudence of legitimacy and Circular no. 27/E of 13 June 2016, provided further clarifications on disputes concerning the appeal against notices of cadastral assessment that rectifies the cadastral income of wind farms ("*centrali eoliche*").

Wind farms are defined as "*structures intended for the production of electricity through the exploitation of wind energy, consisting, in general, of a series of wind generators with the associated foundation works, transformer and control cabins, electrical installations and cables for connection to the grid, and ground works*".

Law No. 208 of 28 December 2015 ("**Stability Law 2016**") had provided that, as of 1 January 2016, the determination of the cadastral income of real estate for special and particular use, registrable in the cadastral categories "D" and "E", have to be carried out by means of direct appraisal. In order to determine the direct valuation, both the land and the buildings, as well as the elements structurally connected to them, had to be considered within the limits of ordinary appreciation, while machinery, devices, equipment and other facilities, functional to the specific production process, were excluded.

Circular no. 27/E of 13 June 2016, par 1.3, had also clarified that, due to their specific typological-constructive characteristics, the support structures of wind farms' wind turbines were to be counted among "*constructions*". In short, the Italian Tax Authorities had stated that, for the purposes of determining the cadastral income of wind farms, the so-called wind tower ("*torre eolica*") should not be considered as a functional component of the production process.

The Supreme Court, in recent pronunciations, has, on the contrary, affirmed that, with specific reference to the peculiar case of the wind tower and the determination of the cadastral income of the wind farm, in deference to the aforementioned legislation, the instrumental relationship of the towers themselves with respect to the production process must also be taken into account.

Therefore, in light of the Court of Cassation's pronunciations, the Italian Tax Authorities, has clarified that the indications contained in Circular no. 27/E of 13 June 2016 are considered superseded and has invited the territorial structures to re-examine any pending disputes concerning the matter under examination and to abandon the claim, in the presence of activities of the office carried out according to non-compliant criteria.

- ✓ **Inheritance and gift tax "inheritance" and "gift" cores (Circular no. 29/E of 19 October 2023).**

In Circular no. 29/E of 19 October 2023, the Italian Tax Authorities clarified that, for the purposes of the application of inheritance tax, the tax treatment of the "*coacervo successorio*" set forth in Article 8, par. 4, of the Consolidated Act of Provisions Concerning Inheritance and Donation Tax ("**TUS**"), must be deemed "*implicitly abrogated*", with the consequence that the same cannot be applied either to determine the rates or for the purposes of calculating the deductibles.

In the past, with Circular no. 3/E of 22 January 2008, the Italian Tax Authorities had illustrated how inheritance tax was to be determined, stating that the heir had to add to the assets forming part of the estate all the donations received from the *de cuius*, discounted at the date of the opening of the succession. In particular, the Italian Tax Authorities argued that, although the rule provided for the cumulation of the donatum with the relictum for the sole purpose of determining the progressive rate to be applied the cumulation should also apply to the system of deductibles.

On the contrary, with Circular no. 29/E of 19 October 2023 the Italian Tax Authorities aligned itself with a series of decisions of the Supreme Court adverse to the position expressed by the Italian Tax Authorities in the practice documents published to date (see Supreme Court Order no. 22738/2020; Judgment no. 24940/2016; Judgment no. 26050/2016; Judgment no. 12779/2018; Judgments no. 32818/2018, 32819/2018 and 32830/2018; Judgment no. 758/2019; Judgment no. 10255/2020; Judgment no. 25909/2020; Judgment no. 27827/2020; Judgment no. 3989/2021; Judgment no.10171/2022; Judgment No. 11422/2022 and Ruling No. 17623/2022).

Specifically, it has been clarified that, while the "*coacervo*" no longer applies for inheritance tax purposes, it remains valid for gift tax.

- ✓ **Tax treatment of crypto-assets (Circular no. 30/E of 27 October 2023).**

With Circular no. 30/E of 27 October 2023, the Italian Tax Authorities intervened on the tax regime of crypto-assets as introduced by Law no. 197 of 29 December 2022 ("**Budget Law 2023**"). The Circular reviews the regulatory, national and EU framework and the clarifications provided on the matter until 2022 and provides explanations in relation to their taxation as of 1 January 2023.

Please note that the Budget Law 2023 introduced into Article 67 of Presidential Decree No. 917 of 22 December 1986 ('**TUIR**') par. 1 letter *c-sexies*, which defines crypto-assets as *"a digital representation of value or rights that can be transferred and stored electronically, using distributed ledger technology or similar technology*". The scope of application of the rule includes any income phenomenon attributable to the "*holding*", redemption and "*transfer"* of "*values"* and "*rights*" using distributed *ledger technology* (Dlt).

Capital gains and other income realised as a result of transactions involving crypto-assets are therefore subject to the same taxation (rate of 26%) applicable to financial assets. Taxable persons are individuals (provided that the income is not earned in the exercise of a business, trade or profession or as an employee), non-commercial entities (if the transaction from which the income derives is not carried out in the exercise of a commercial enterprise), simple companies and equivalents, and non-residents without a permanent establishment in the territory of the State (when the income is deemed to have been generated in the same territory).

On the subject of territoriality, the Circular recalls that various incomes ("*redditi diversi*") deriving from "activities carried out" in the territory of the State and from "assets" located in the same territory are considered to be produced in Italy. Therefore, income realised by non-residents is also covered by the new rules if it relates to crypto-assets held in Italy with service providers or intermediaries resident in Italy or at their permanent establishment if non-resident.

For those who already held crypto-assets on 1 January 2023, the possibility has been granted to revalue the cost or purchase value of these assets, provided that the aforementioned value is subject to a 14% substitute tax. To benefit from this preferential regime, the taxpayer must pay the substitute tax in full, or the first of three equal annual instalments, by 15 November 2023.

The circular recalls the rules for regularisation by taxpayers who have breached tax monitoring obligations for cryptocurrencies held by 31 December 2021 and/or have not indicated in their returns the income from crypto-assets realised by the same deadline. These may regularise their position by submitting a special instance and paying a substitute tax equal to 3,5% of the value of the same cryptocurrencies held at the end of each year or at the time of realisation, as well as the additional sum equal to 0,5% for each year of the aforementioned value by way of penalties and interest.

Lastly, it is recalled that stamp duty will be applied to relations involving crypto-assets, at the rate of 2 per thousand per annum of the relative value, with payment methods and deadlines being the same as those ordinarily envisaged for stamp duty. In addition, as from 2023, a tax is to be levied on the value of crypto-assets held by all persons resident in the territory of the State.

REPLYREPLIES TO REQUESTS FOR ADVANCE TAX RULINGS

- ✓ **Qualification of income from carried interest (Reply to the request for advance tax ruling no. 444 of 2 October 2023).**

The Italian Tax Authorities, in their reply to request no. 444 of 2 October 2023, dealt with the qualification as capital income ("*reddito di capitale*"), pursuant to Article 44, par.1-g of the TUIR, of income deriving from investments made by managers that are capable of ensuring the alignment of interests between them and investors.

The Italian Tax Authorities have specified that the amount of the investment suitable to ensure the alignment of interests between investors and *managers* must in any case refer to the so-called "Quote Carried" and not also to financial instruments without enhanced asset rights.

The "Quote Carried*"* have the following peculiarities:

(i) although the overall investment commitment involves an actual disbursement of less than 1% of the total investment made by the investment undertaking, the managers*'* exposure to risk is considered suitable because there is no possibility for the manager to obtain "*redemption*", even in part, of their investment;
(ii) in all cases of termination of employment, the purchase of a portion of the "Quote Carried*"* would be for a consideration equal to the lower of market value and subscription cost;
(iii) despite the presence of good and bad leavership clauses, managers are allowed to retain ownership of financial instruments even in the event of termination of employment.

Therefore, despite the fact that Article 60 of Law Decree 50/2017 is not applicable *tout court* due to the lack of the "*minimum invested capital*" and the existence of the *good and bad leavership clauses (which in principle represent a useful indicator to link the income to the commitment made* by the *managers in their* work and therefore to produce employment income), the income deriving from the so-called "Quote Carried " subscribed by the *manager* falls within capital income in consideration of the requirements mentioned above.

- ✓ **Merger by incorporation - Group VAT settlement (Reply to the request for advance tax ruling no. 445 of 9 October 2023).**

With its reply to request no. 225 of 9 October 2023, the Italian Tax Authorities provided further clarification on the VAT group settlement procedure (Article 73, par. 3 of Presidential Decree 633/1972), which allows companies, linked by controlling relationships, to proceed with the periodic VAT settlement in a unified manner by offsetting debits and credits.

In particular, the Italian Tax Authorities have clarified that, the VAT group liquidation procedure is not interrupted even if the controlled company, participating in the liquidation, as a result of an extraordinary transaction, has incorporated by merger one or more companies outside the procedure, of which it has held control - direct or indirect - for less than one year.

Therefore, the aforementioned company may only transfer to the VAT group liquidation procedure the VAT debt or credit arising from the transactions carried out by the merged companies in the month or quarter current on the date on which the merger takes effect for VAT purposes.
On the other hand, any VAT credits accrued up to the month or quarter preceding the date of the merger of the companies are excluded from the procedure.

- ✓ **Stamp duty registration of tender contracts (Reply to the request for advance tax ruling no. 446 of 9 October 2023).**

The Italian Tax Authorities, with their reply to request no. 446 of 9 October 2023, clarified that stamp duty on public contracts under the Public Contracts Code (Legislative Decree 36/2023) entered into as of 1 July 2023 is always due, whether registered at the offices of the Tax Authorities or by telematic means, according to the brackets in the table in Annex I.4 of the new Public Contracts Code.

Therefore, if the contract falls within the scope of those governed by Article 18 of Legislative Decree 36/2023, the stamp duty hitherto required for the completion of the relevant formality does not have to be applied at the time of any registration.

The contractor is obliged to pay the stamp duty as a lump sum, by means of the F24Elide form (cf. Order no. 240013/2023 and Resolution no. 37/E/2023), at the time of the conclusion of the contract, according to the table per bracket of the maximum consideration net of VAT of the contract. Stamp duty is not due for contracts with a consideration of less than EUR 40,000.

- ✓ **Non-resident person - refund of VAT receivables relating to purchases made in Italy (Reply to the request for advance tax ruling no. 449 of 20 October 2023).**

The Italian Tax Authorities, with their reply to request no. 449 of 20 October 2023, reaffirmed the conditions for the refund, through the so-called "*electronic portal*", of VAT paid in Italy by a non-resident company that has not direct identification in Italy or a tax representative.

For the case under assessment, the instant, a company incorporated under Swedish law with no permanent establishment in Italy nor direct identification under Article *35-ter* of Presidential Decree 633/1972, purchased goods from Finnish suppliers, who also had no permanent establishment in Italy but were identified there for VAT purposes. The instant received the purchase invoice from the Finnish suppliers supplemented with VAT applied in the measure of 22% because the goods were already in Italy following a Community transit. Subsequently, the goods were sold to the final transferee, a resident person, applying the *reverse charge* mechanism.

In light of the above, the petitioner requested clarification on (i) the need for identification in Italy in order to regularise its position with respect to the transactions carried out and (ii) the identification of the most appropriate procedure to obtain a refund of the tax paid in Italy.

The Italian Tax Authorities have clarified that, for the purposes of the refund of VAT paid in Italy by a person established in another Member State, it is possible to apply the rules set forth in Article *38-bis* of Presidential Decree no. 633/1972, in accordance with the conditions set forth in Directive 2008/9/CE.

Specifically, the rules provide that "*persons established in other Member States of the Community who are subject to tax in the State in which they have their domicile or residence shall request the refund of the tax paid on the importation of goods and on the purchase of goods and services, provided that it is deductible pursuant to Articles 19, 19-bis1 and 19-bis2, in accordance with the provisions of this Article*". In addition, Article *38-bis* provides that the refund cannot be claimed by persons who, during the reference period, have a permanent establishment in the territory of the State or by persons who have carried out transactions there other than those for which the person liable for payment of the tax is the principal or the transferee, non-taxable transport or ancillary transport operations, and those carried out pursuant to Article *74-septies*.

- ✓ **VAT - Failure to issue invoices and submit a return - Applicable penalties and the relevant self-assessment payment (Reply to the request for advance tax ruling no. 450 of 20 October 2023).**

The Italian Tax Authorities, in their reply to request no. 450 of 20 October 2023, clarified the modalities for regularising violations in the case of omitted invoicing and failure to file the VAT return.

In particular, analysing the case of a non-Italian resident company belatedly identified for VAT purposes, the Italian Tax Authorities confirmed that, in case of failure to submit the VAT return within the deadline, the proportional penalties pursuant to Article 5 of Legislative Decree 471/1997 applies. The penalty, ranging from 120% to 240% of the tax due with a minimum of 250 euro, must be imposed even if the taxes have been paid. Only in the case that the taxes are paid within 90 days from the deadline for submitting the VAT return the fixed penalty is applicable, pursuant to Article 5, par.1, of Legislative Decree 471/1997.

It is up to the Italian Tax Authorities to assess whether to apply a reduced penalty of up to half the minimum, as provided for in Article 7, par.4, of Legislative Decree 472/1997.

- ✓ **Transfer in favour of the municipality - Option contained in the programme agreement - Land transformation acts - Exclusion (Reply to the request for advance tax ruling no. 451 of 27 October 2023).**

The Italian Tax Authorities, in their reply to request no. 451 of 27 October 2023, clarified the conditions for the application of the facilitations provided by the combined provisions of Article 20, par. 2, of Law no. 10/1977 and Article 32, par. 2, of Presidential Decree no. 601/1973: application of the fixed registration tax and exemption from mortgage and cadastral taxes to a series of transfer deeds concerning public housing.

In particular, in the case examined by the Italian Tax Authorities, the Municipality entered into a "programme agreement" with a S.r.l. for the implementation of an urban redevelopment project, whereby the company undertook to build a multifunctional complex intended for residential, commercial and service use and to grant the Municipality the right to purchase an area within the complex.
According to the interpretation of the Italian Tax Authorities, the transfer of the buildings from the S.r.l. to the Municipality is not capable of directly and immediately accomplishing the function of transforming the territory in the sense outlined above, as it constitutes a "*mere*" property sale which, although involving a public entity, follows a private contractual scheme, in line with the principle of contractual autonomy. Moreover, at the time of the acquisition of the building by the municipality, the urban transformation of the territory would already be complete.

Therefore, the relief under Article 20, par.2, of Law 10/1977 does not apply.

RESOLUTIONS

- ✓ **"*Certificazione Unica 2024*" - Reporting of the data in the Section "Data relating to spouse and dependants" - Clarifications in the light of the changes introduced by Legislative Decree no. 230 of 29 December 2021 (Italian Tax Authorities Resolution no. 55/E of 3 October 2023).**

The Italian Tax Authorities Order no. 55 of 3 October 2023 confirmed the need for tax withholding agents to indicate in the 2024 Single Tax Certificate, section "*Data relating to spouses and dependent family members*", the data relating to all family members who, in the 2023 tax year, are tax dependants, even if they do not meet the conditions to benefit from deductions for dependent family members and regardless of whether deductible/deductible expenses have been recognised by the withholding agent in the CU.

The above clarification is relevant in relation to:

(i) the substitution, for dependent children under the age of 21, of deductions for family loads with the payment of the single universal allowance, subject to the provisions of Article 12 of the Consolidated Income Tax Act as amended by Legislative Decree 230/2021;
(ii) the determination of the regional IRPEF surcharges with reference to the regions that provide for special benefit related to the tax burden;
(iii) the corporate *welfare* measures introduced by Article 40 of Law Decree 48/2023, under which, limited to 2023, the value of goods sold and services provided to employees with children who are tax dependent children, including sums paid or reimbursed to the same employees by their employers for the payment of household utilities, will not be included in the formation of income (up to the limit of €3,000).

- ✓ **"*Realizzo Controllato"* regime - Contribution of the total shares held, partly in full ownership and partly in bare ownership - Contribution *"minusvalente"* (Italian Tax Authorities Resolution no. 56 of 16 October 2023)**

With Resolution no. 56 of 16 October 2023, the Italian Tax Authorities intervened on the so-called "*Realizzo Controllato*" regime, pursuant to Article 177, par. *2-bis,* of the Consolidated Income Tax Act, in the case of the contribution of participations held partly in full ownership and partly in bare ownership.

In particular, in the present case, the petitioner intended to make a contribution of an amount lower than the tax cost of the participation contributed, as it did not consider it necessary to overcapitalize the holding company, thus giving rise to a so-called "*minusvalente*" contribution.

It is recalled that, for the purpose of calculating the income of the contributor (including non-entrepreneurs), the "*Realizzo controllato*" regime allows for the valuation of the shares or units received as a result of contributions to companies, on the basis of the corresponding share of the net assets formed by the transferee company as a result of the contribution. Thus, the recognition of the shares received by the transferee in the accounts is used to identify the gain of the contributor.
Thus, in the presence of contributions of equity interests, through which the transferee company acquires control of a company, the general criterion of '*normal value*', pursuant to Article 9 of the TUIR, is replaced by that of" *Realizzo controllato*" regime.

The Italian Tax Authorities also stated that:

(i) In the event that the shares held in bare ownership are contributed together with those held in full ownership, and the transaction as a whole meets the qualifying thresholds set forth in subparagraph a of Article 177, *2-bis*, of the TUIR, the contribution may benefit from the" *Realizzo Controllato*" regime;
(ii) the (negative) difference between the lower value of the participation received by the contributor, subsequent to the contribution transaction, with respect to the tax value of the participation transferred, entails the application of paragraphs 2 and *2-bis of* Article 177 of the TUIR, but does not allow the transferor to deduct the capital loss.

- ✓ **Institution of the tax code for the use in offsetting , through the F24 form, of the FTT - tax on financial transactions (Italian Tax Authorities Resolution no. 57 of 26 October 2023).**

With Resolution r no. 57 of 26 October 2023, the Italian Tax Authorities established the tax code for the use in compensation, through the F24 form, of the FTT - tax on financial transactions (the so-called Tobin tax) pursuant to Article 1, paragraphs 491, 492 and 495 of Law no. 228/2012.

Please note that the tax codes for the payment through the F24 form, of the FTT - *Tobin tax* were established by Order no. 62 of 4 October 2013. Article 28, par. *3-bis* of Law

Decree no. 4/2022 included the *Tobin tax* in the list of taxes for which compensation is allowed.

In order to allow the use in compensation of any credit resulting from the declaration of the tax on financial transactions with the F24 form, to be submitted only through the telematic services made available by the Italian Tax Authorities, the tax code "4067" named " *Credito relativo all'imposta sulle transazioni di azioni e di altri strumenti partecipativi, sulle transazioni relative a derivati su equity e sulle negoziazioni ad alta frequenza relative ad azioni e strumenti partecipativi - art. 1, commi 491, 492 e 495, l. n. 228/2012*" has been established.

As regards the completion of the F24 form, the tax code must be indicated in the "Treasury" section, in correspondence with the sums indicated in the column "credit amounts offset" or, in cases where the taxpayer must proceed with the repayment of the sums in question, in the column "debit amounts paid", with indication in the "reference year" field of the tax year to which the credit refers, in the format "YYYY".

UPDATE ON REGULATION

- ✓ **"*Anticipi*" Decree: Urgent measures on economic and fiscal matters, in favour of territorial entities, for the protection of employment and for unavoidable needs (Law Decree no. 145 of 18 October 2023)**

On 18 October 2023, Law Decree no. 145 ("**Anticipi Decree"**) was published in the Official Gazette, linked to the 2024 Budget Manoeuvre, containing urgent measures on economic and fiscal matters, in favour of territorial entities, to protect employment and for non-deferrable needs.

Some of the main tax innovations include:

(i) the postponement to 16 January of the payment of the second instalment of direct taxes 2023 for individuals with VAT registration with revenues or remuneration in the 2022 tax period not exceeding 170.000 euro;
(ii) the extension to 30 June 2024 of the deadline for companies to adhere to the procedure for spontaneous repayment of unduly compensated tax credits for research and development activities;
(iii) the reduction of excise duties on energy products used as fuel or heating fuel for civil purposes;
(iv) the bringing forward to 1 December 2023 of the equalisation adjustment for pensions;
(v) the establishment of a new temporary solidarity contribution against the so-called "*high utility bills*" for the year 2023;
(vi) financing of 50 million euro for 2023 to support productive investments by micro, small and medium-sized enterprises (the so-called "New Sabatini").

- ✓ **Conversion into law of the D.L. Omnibus bis L on urgent economic and fiscal measures, in favour of territorial entities, for the protection of employment and for urgent needs (Law no. 136 of 9 October 2023)**

Published in the Official Gazette, on 9 October 2023, Law no. 136 converting Law Decree no. 104 of 10 August 2023 ("**Omnibus bis Decree**") containing urgent provisions to protect users, on economic and financial activities and strategic investments.

The main changes made by the Act, effective from 10 October 2023, are as follows:

(i) the provision of a tax credit for research and development in the microelectronics sector;
(ii) the extension, to 31 December 2023, of the deadline for incurring expenses for work on single-family buildings (so-called "*villette*") to be able to benefit from the Superbonus at a rate of 110%, provided that, as at 30 September 2022, at least 30% of the work had been carried out;
(iii) the introduction of the obligation, in the presence of unused credits deriving from sales or invoice discounts, to notify the Italian Tax Authorities, within 30 days of the event that determined the non-usability of the credit, of this circumstance;
(iv) the extension of the surveillance period *("period di sorveglianza")* for recovering the tax benefit in the case of relocation to ten years;
(v) In order to counter the increase in mortgage repayments, an extraordinary tax on interest margins (so-called "*extra-profits*") was established for the year 2023 for banks, even if they operate in the territory of the State through a permanent establishment;
(vi) the introduction of a subsidy for consortia and aquaculture enterprises, whose activities have been affected by the crisis caused by the proliferation of blue crab.

CASE LAW UPDATE

- ✓ **For the purposes of ascertaining the specific intent of the offence of concealment or destruction of accounting documents, it is sufficient to carry on a business activity (Criminal Supreme Court, Ruling no. 40503 of 5 October 2023)**

With Judgment no. 40503, filed on 5 October 2023, the Supreme Court ruled on the prerequisites for the crime under Article 10 of Legislative Decree no. 74 of 10 March 2000.

In the present case, at the time of the inspection by the Financial Police, the taxpayer's tax documentation was missing. The Court held that even the temporary unavailability of the documentation is in itself sufficient for the purposes of the consummation of the offence, recalling, in this regard, a previous ruling of 2018 (Criminal Supreme Court, ruling no. 46049 of 28 March 2018), according to which "*the offence of concealment or destruction of accounting documents referred to in Article 10 of Legislative Decree no. 74 of 2000 constitutes a crime of concrete danger, which is integrated, in the case of destruction, by the elimination of the documents or by their alteration with erasures or abrasions, and, in the case of concealment, by the temporary or definitive unavailability of the documents, achieved through their material concealment, constituting, in the latter case, a permanent crime*".

With regard to the ascertainment of the specific intent (i.e. the purpose of evading income tax or VAT) required for the existence of the offence in question, the Supreme Court, aligning itself with the well-established jurisprudential orientation, refers to the production of income. The Supreme Court, in fact, states that the ascertainment of the specific intent presupposes proof of the production of income and turnover and that such proof, based on rules of common experience, may be inferred from the fact that the agent is the owner of a business activity.

- ✓ **Right to refund of tax credit on dividends (Supreme Court, Ruling no. 29580 of 25 October 2023)**

The Supreme Court, in its Judgment no. 29850 published on 25 October 2023, ruled on the refund of a tax credit on dividends distributed by an Italian subsidiary in accordance with EEC Directive no. 90/435/EEC of 23 July 1990 (the so-called "*Parent-Subsidiary Directive*"). The case at hand concerned a tax credit refund on dividends distributed to a French company by its Italian subsidiary.

The Supreme Court reiterated what was affirmed in Judgment Nos. 20618/2023, 16920/2023, 25196/2022 and 13845/2021, i.e., that the recognition of the benefit of exemption from withholding taxes, of EU source, does not exclude the right to reimbursement of the tax credit on dividends of conventional source, since the risk of economic double taxation or violation of the principle of tax neutrality is not necessarily eliminated. In other words, for the Supreme Court, there is no incompatibility between the exemption from EU withholding taxes and the refund of the tax credit under the Italy-France Convention.

Furthermore, with regard to the refund claim, it was stated that it is sufficient to verify that the dividends have been included in the taxable income, thus it is irrelevant whether the foreign State's rate is higher, equal to or lower than the Italian rate.

- ✓ **Legitimate service of a tax settlement notice on a taxpayer's accountant (Supreme Court, Judgment No. 7638 of 28 March 2018)**

With Judgment No. 7638, filed on 28 March 2018, the Supreme Court ruled on the legitimacy of the service made on the taxpayer's accountant. In particular, the Court held that the circumstance that the notified document, in the case in point a notice of liquidation, was collected by an employee of the professional firm, who declared herself qualified to collect it and signed for receipt, founded the certainty of the completion of all the fulfilments of the notification procedure required by law.

After recalling the two conditions for service pursuant to Article 139 of the Code of Civil Procedure, i.e. the exact determination of the place where service is to be effected and the presence therein of a person bound to the addressee by a specific relationship from which it may be inferred that the document will be brought to the addressee's attention, referring to a previous ruling in 2003 (Supreme Court, ruling no. 16164 of 28 October 2003) ruled that "it is *relevant that there is a substantial relationship, even of a provisional or temporary nature, between the addressee and the addressee of the document, which*

reasonably leads to the presumption that the latter will be made aware by the former of the service being effected, and this is sufficient".

- ✓ **Recognition of the deductibility, for IRES and IRAP purposes, of VAT deemed non-deductible (Tax Court of First Instance of Milan, ruling no. 3061 of 11 September 2023 and Tax Court of First Instance of Rome, ruling no. 11270 of 22 September 2023)**

The Tax Court of First Instance of Milan in Ruling no. 3061, filed on 11 September 2023, and the Tax Court of First Instance of Rome in Ruling no. 11270, filed on 22 September 2023, ruled in favour of the deductibility, for IRES and IRAP purposes, of VAT deemed non-deductible.

In Ruling no. 3061/2023, the appellant had challenged the Italian Tax Authorities' silence-rejection of an IRES refund application for the amount of VAT deemed non-deductible. According to the appellant, VAT was to be regarded as an incidental, and therefore deductible, expense and not a cost for the company.

Also in Ruling no. 11270/2023, the appellant had challenged the Italian Tax Authorities' silence-rejection of a request for IRAP refund. Specifically, the request for reimbursement had been submitted following a tax assessment conducted by the Financial Police, which had led to the issuance of two tax assessment reports. According to the company, VAT had to be deductible on the basis of objective limits to deductibility, while the Italian Tax Authorities considered that VAT was non-deductible due to the lack of valid documents necessary to recognise "*input*" VAT.

In both first instance rulings, the judges ruled that if, as a result of the Italian Tax Authorities' assessment activity, the taxpayer is denied the deductibility of the VAT paid for the purchase of goods or services, but the cost incurred for the purchase of such goods or services is recognised as deductible for direct tax purposes, then the right to deduct the amounts paid for VAT must be deemed to exist.

ASSONIME

- ✓ **"Outbound" Withholding taxes on payments to non-residents for software distribution: Principle of Law no. 5 of 2023**

The Assonime Circular no. 27 of 12 October 2023 examines the issues related to the conventional qualification as royalties (pursuant to Article 12 of the OECD Model) of the fees paid to non-resident individuals, without a permanent establishment in Italy, for the granting of the right to use, reproduce and distribute a software program.

On the level of national legislation:

(i) if the purchase of the right of use on the software is aimed at purely personal and commercial use by the purchaser, without there being any commercial exploitation towards third parties, it is framed as a business profit and does not fall within the scope of Article 12 of the OECD model, but within that of Article 7 of

the OECD model, which would entail the exemption in Italy of the income received by the foreign entity. In that case, the taxable condition would be linked to the presence of a permanent establishment;

(ii) if the purchase of the right of use is instead aimed at the economic exploitation of the software towards third parties, understood as the right to reproduce, distribute or modify the *software* itself, then it falls within the scope of Article 12 of the OECD Model. This classification entails the obligation, for resident operators, to make an "outbound" withholding tax pursuant to the combined provisions of Article 23, par. 2-c, of the TUIR and Article 25, par. 4, of Presidential Decree 600/73 with the application of a rate equal to 30% (reduced in certain cases in application of the Conventions).

The mere distribution of software, on the other hand, is in the so-called "*zona grigia*", raising doubts as to whether or not a withholding tax must be paid. An intervention is therefore called for to provide the parameters for the application of Article 12 of the OECD Model.

OTHER

✓ **individuals subject to split payment: availability of the 2024 lists**

The Department of Finance has made available, in the special section of its website, the lists for the year 2024 of the entities (companies, entities and foundations) required to apply the split payment, as provided for by Article *17-ter*, par. *1-bis,* of Presidential Decree no. 633/1972.

Interested parties may report any missing or erroneous inclusions in the lists by providing appropriate supporting documentation and exclusively through the request form. This refers specifically to:

(i) de facto subsidiaries controlled by the Presidency of the Council of Ministers and Ministries;
(ii) entities or companies controlled by the central government;
(iii) bodies or companies controlled by local governments;
(iv) bodies or companies controlled by the National Social Security and Welfare Institutions;
(v) bodies, foundations or companies in which the public authorities hold an interest of at least 70% of the capital;
(vi) listed companies included in the FTSE MIB index of the Italian stock exchange.

✓ **Approval of the Draft Budget Law 2024 - updates**

On 30 October 2023, the draft text of the 2024 budget law has been transmitted to Parliament. The process of approval by both the Chamber of Deputies and the Senate of the Republic started and will end by the end of the year.

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This document is solely for informative purposes and does not constitute a professional opinion.

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