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STUDIO LEGALE E TRIBUTARIO

Tax | Update

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Summary

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UPDATE ABOUT REGULATION

- ✓ **Rationalization and simplification of tax compliance regulations (Legislative Decree no. 1/2024)**

Legislative Decree no. 1 of 8 January 2024 (Legislative Decree "Adempimenti") was published in the Official Journal no. 9 of 12 January 2024. It was issued as implementation of the appointment granted to the Government for tax reform, about rationalization and simplification of the rules on tax compliance.

- ✓ **Implementing decrees concerning the tax reform no. 111/2023**

The Legislative Decree "Accertamento", finally approved by the Council of Ministers on 25 January 2024, is pending for publication.

- ✓ **Ministerial Decree 27 November 2023 (Official Journal no. 8 of 11 January 2024)**

The Decree of the Ministry of the Economy and Finance of 27 November 2023 was published in the Official Journal no. 8 of 11 January 2024, which provides the list of entities that, for the fiscal year 2023, benefit from the provisions of Law no. 296/2006, art. 1, par. 185, i.e. non-profit associations that are treated as entities exempt from IRES pursuant to art. 74, par. 1, TUIR.

- ✓ **Budget Law 2024: news concerning capital gain related to transfer of real estate subject to superbonus**

The Budget Law 2024 introduced the relevance within the "other incomes" category of the realization of a taxable capital gain, which has been realized through the transfer of real estate, on which "superbonus" works have been put in place, pursuant to art. 119 of Law Decree no. 34/2020, concluded no more than 10 years after the transfer deed.
The provision explicitly excluded *"property acquired by inheritance and property used as the principal residence of the transferor or his family members".*
For the purposes of calculating the costs relating to the real estate unit, the Budget Law has established that: (i) if the aforesaid works have been completed for less than 5 years at the time of transfer, the expenses relating to such interventions are not taken into account, if the discount on the invoice or credit assignment has been exercised; (ii) if the interventions, on the other hand, have been completed for more than 5 years but less than 10 at the time of transfer, the expenses may be considered as increasing the cost only to the extent of 50%.

MINISTERIAL PRACTICE

REPLIES TO REQUESTS FOR ADVANCE TAX RULING

- ✓ **Taxation, for gift tax purposes, of a donation deed of money deposited in a foreign account by a foreign donor to an Italian beneficiary (Reply to request for advance tax ruling no. 7 of 12 January 2024)**

In their reply to request for advance tax ruling no. 7 of 12 January 2024, the Italian Tax Authorities confirmed that a donation of money made by means of a bank transfer from a foreign bank account of a non-resident donor, in this case a Swiss one, to an Italian one is not subject to gift tax, as it does not fall within the territorial principle.
According to the Italian Tax Authorities' specifications, in fact, money from a foreign current account is not considered "existing" in the territory of the State.

- ✓ **Offsetting of VAT credits of non-operating companies – Art. 30 of Law no. 724 of 23 December 1994 (Reply to request for advance tax ruling no. 10 of 17 January 2024)**

With their reply to request for advance tax ruling no. 10 of 17 January 2024, the Italian Tax Authorities clarified that the VAT credit requested for refund and subsequently challenged due to the failure of the so-called "operativeness test", can be regenerated under the condition that it is paid back.
The disappearance of a cause for exclusion implied that one of the conditions for the definitive loss of the accrued VAT credit no longer existed, since the company subject to the ruling was no longer considered "non-operational" under the meaning of art. 30 of Law no. 724/1994.

- ✓ **Partial proportional demerger followed by the facilitated transformation of the beneficiary into a simple company pursuant to Law no. 197/2022 - Transfer to a commercial company of the real estate received as a result of the demerger (Reply to request for advance tax ruling no. 12 of 22 January 2024)**

In their reply to request for advance tax ruling no. 12 of 22 January 2024, the Italian Tax Authorities, following a reorganization by the individuals business partners, carried out through a partial proportional demerger of real estate in favor of a newco transformed into a simple company, transfer of a business concern to a newco, transfer of the shareholding in favor of a group company, purchase of the real estate by the newco and merger of the transferee company into the spin-off company, concluded that the operation at stake constitutes abuse of law.
In fact, in the case at stake, considering that through the demerger and subsequent transformation of the beneficiary into a simple company, the real estate is transferred back to the transferee newco, the Italian Tax Authorities concluded that the overall operation is aimed to obtain an undue tax advantage, corresponding to the lower taxes due as a result of the transfer of the real estate and the cash in of the sale price in the hands of the shareholders, thereby taking advantage of the substitute tax, instead of the ordinary taxation of the capital gain and the distribution of dividends to individuals.

- ✓ **Deduction of interest expenses arising from a mortgage loan for a rented property to be used as a main residence and activation of the procedure**

provided according to rt. 447-bis of the Code of Civil Procedure (Reply to request for advance tax ruling no. 13 of 23 January 2024)

With their reply to request for advance tax ruling no. 13 of 23 January 2024, the Italian Tax Authorities confirmed that, in case of a mortgage loan for the purchase of a property unit used as a main residence and available for rent, which was followed by refusal to renew at the first due date, pursuant to art. 3 of Law no. 431/1998, the right to deduct interest expenses is not hindered if the corresponding legal action is exercised within three months from the purchase. In the case questioned, the petitioner, to benefit from the right to deduct, activated legal action within the following three months.

- ✓ **Reverse charge wrongly applied - Recovery of VAT paid in case of a non-deductible pro-rata - Art. 60, last par. of Presidential Decree no. 633/1972 (Reply to request for advance tax ruling no. 20 of 26 January 2024)**

The Italian Tax Authorities, with their reply to request for advance tax ruling no. 20 of 26 January 2024, examined the hypothesis of the VAT applied subject to assessment, pursuant to art. 60, par.7 of Presidential Decree no. 633/1972.
In the case at stake, the Italian Tax Authorities clarified that the petitioner will be able to exercise the right to deduct by applying to the VAT charged the pro rata applicable to each fiscal year under assessment. For this purpose, it is not allowed the VAT deduction percentage applicable when the VAT was charged.
The applicant, therefore, as a result of the reverse charge wrongly applied, will not be able to deduct with the annual VAT return the amount already paid, but may, in order to ensure the neutrality of the VAT, request a refund of that amount, pursuant to art. 30-ter, par. 1, of Presidential Decree no. 633/1972.

- ✓ **Stock option plans - First time adoption of international accounting standards - Relevance for direct tax purposes (IRES and IRAP) (Reply to request for advance tax ruling no. 25 of 29 January 2024)**

With their reply to request for advance tax ruling no. 25 of 29 January 2024, the Italian Tax Authorities clarified that for costs charged to the income statement relating to stock option plans realized in the first IAS/IFRS financial statements, the principle of “enhanced derivation” applies, pursuant to art. 83 of Presidential Decree no. 917 of 22 December 1986 (TUIR). Based on this principle, the qualification, time allocation and classification criteria adopted by the company in its financial statements prepared in accordance with international accounting standards are relevant for tax purposes.
The applicant, therefore, as clarified by the Italian Tax Authorities, will be able to deduct these costs for IRES purposes, without prejudice to the portion of them representing directors' remuneration, pursuant to art. 95, par.5, TUIR.
Finally, accumulated differences relating to stock-option plans, the so-called “stock-option plan reserve” at the IAS/IFRS transition date cannot be deducted through off-balance sheet tax adjustments.
Regarding IRAP purposes, the costs recognized in the income statement for the stock option plans in the year 2021 in question are relevant in determining the net production value limited to the portion of these costs attributable to the cost of employees hired under open-ended employment contracts.

About the costs for the aforesaid stock option plans recognized in the FTA, it is deemed that these are not relevant and, therefore, are not deductible in the determination of the net production value for IRAP purposes for the same reasons as their non-deductibility for IRES purposes and on the basis of the principle of the so-called direct deduction from the income statement that characterizes the IRAP taxable base (art. 5 of Legislative Decree no. 446/1997).

- ✓ **IRAP – Composition with creditors - Trade mark - Disposal - Capital gain - Relevance (Reply to request for advance tax ruling no. 27 of 31 January 2024)**

In their reply to request for advance tax ruling no. 27 of 31 January 2024, the Italian Tax Authorities illustrated the treatment for IRES and IRAP purposes of a capital gain realized through the sale of a trademark within the framework of a liquidation arrangement procedure. To this end, the Italian Tax Authorities pointed out that for IRES purposes, the transfer of assets to creditors in a composition with creditors does not entail the realization of any capital gains or losses (art. 86, par.5, TUIR).
For IRAP purposes, reference is made to art. 3, par.1, letter a) of Legislative Decree no. 446/1997, according to which, for corporations, the taxable base is determined by the difference between the value and the costs of production, excluding certain items, including positive and negative components of an extraordinary nature arising from transfers of companies or business units.
As further clarified by Italian Tax Authorities' Circular no. 27/2009, it is not relevant that in the current regulatory framework are no longer expressly relevant the capital gains/losses related to capital equipment not deriving from transfer of going concern.
Art. 5, par. 3 of the mentioned above Legislative Decree recognizes trademarks as relevant for IRAP purposes.
Finally, there are no provisions in the current IRAP rules concerning the determination of the value of production in relation to transactions carried out in implementation of an arrangement with creditors. Therefore, the Italian Tax Authorities held that in the case at hand, the capital gain realized from the sale of a trademark as part of an arrangement procedure is relevant for IRAP purposes in the ordinary way.

RESOLUTIONS

- ✓ **New tax codes**

The Italian Tax Authorities have set up the following contribution causes for the payment (or offsetting), via F24 form, of the following taxes:

(i) extraordinary tax calculated on the increase in the interest margin pursuant to art. 26 of Law Decree no. 104/2023 (so-called banks' extra-profits) (Italian Tax Authorities Resolution no. 7/E of 24 January 2024);
(ii) non-repayable contribution not due under art. 9, par. 3 of Law Decree no. 176/2022 (Italian Tax Authorities Resolution no. 9/E of 29 January 2024).

PROVISIONS

- ✓ **Approval of the Annual VAT/2024 return forms for the year 2023, with instructions, to be submitted in the year 2024 for value added tax purposes (Italian Tax Authorities Provision no. 8230/2024 of 15 January 2024).**

By Provision no. 8230/2024 of 15 January 2024, the Italian Tax Authorities approved the Annual VAT and Annual VAT Base 2024 (fiscal year 2023) forms with instructions, to be submitted between 1st February 2024 and 30th April 2024.
Specifically, the Basic VAT Form is reserved for taxpayers who, during the fiscal year, determined the tax according to the general rules.
Among the significant changes in the Annual VAT Form 2024 is included the elimination of Schedule VB.

- ✓ **Approval of the Single Tax Certificate "CU 2024", relating to the year 2023, along with the instructions for its filling-infilling-in, as well as the front page for telematic transmission and the CT panel with the relevant instructions (Italian Tax Authorities Provision no. 8253/2024 of 15 January 2024)**

With Provision no. 8253/2024 of 15 January 2024, the Italian Tax Authorities approved the model of the “Certificazione Unica” (withholding agents certification) for the fiscal year 2023 with instructions for its filling-in.
“CU 2024” must be submitted by withholding agents by 16th March of the year following the reference year.

- ✓ **Preparation by the Italian Tax Authorities of draft VAT registers, periodic VAT settlements and the annual VAT return (Italian Tax Authorities Provision no. 11806/2024 of 19 January 2024)**

With Provision no. 11806/2024 of 19 January 2024, the Italian Tax Authorities published the drafts of the pre-filled-in VAT documents, following the extension of the trial period initially planned.
In addition, as from 1st January 2024, the possibility of downloading monthly VAT registers, VAT recap on a monthly and quarterly basis, periodic VAT liquidation and the annual VAT return is made available to the recipients of the pre-filled-in drafts and their intermediaries.

- ✓ **Amendments to the FTT form for the declaration of the Financial Transaction Tax, approved by order of the Director of the Italian tax Authorities of 15 December 2017 (Italian Tax Authorities Provision no. 13275/2024 of 22 January 2024)**

Provision no. 13275/2024 of 22 January 2024 introduced changes to the FTT form for declaring the financial transaction tax.
This tax applies to transfers of ownership of shares and other participatory financial instruments, transactions in derivative financial instruments and high-frequency trading.
The new model can be used from 25 January 2024 and can be transmitted electronically using special software.

- ✓ **Approval of the technical specifications for the telematic transmission of data contained in the 2024 annual VAT return for the year 2023 (Italian Tax Authorities Provision no. 19397/2024 of 26 January 2024)**

By Provision no. 19397/2024 of 26 January 2024, the technical specifications for the telematic transmission of the Annual VAT 2024 and Annual VAT Base 2024 forms approved by Provision of 15 January 2024 were approved.

- ✓ **Identification of relevant data to the application of the synthetic tax reliability indices for the fiscal year 2024 and schedule of revisions of the synthetic tax reliability indices applicable from the fiscal year 2024 (Italian Tax Authorities Provision no. 21545/2024 of 29 January 2024)**

With Provision no. 21545/2024 of 29 January 2024, the Italian Tax Authorities identified: (i) the relevant data for the application of the synthetic tax reliability indices for the fiscal year 2024; (ii) the revision schedule of the synthetic tax reliability indices applicable for the fiscal year 2024.

CASE LAW UPDATE

- ✓ **Italian legislation transposing the Interest and Royalties Directive - Difference between abuse of law and beneficial owner clause (Supreme Court, Decisions nos. 510 and 573 of 8 January 2024)**

The Italian Supreme Court, in two Decisions, again analyzed the basic principles of withholding taxes on interest and royalties.
In this case, the Italian Supreme Court confirmed the refusal of Italian Tax Authorities to a claim of withholding tax on interest proposed by the EU holding company in relation to payments received by the Italian subsidiary.
In this regard, the Court specified that, in application of the ordinary distribution of the burden of proof between the tax authorities and the taxpayer, it is up to the taxpayer company to prove that it is the so-called “beneficial owner”.
This requires it to pass three tests: (i) the substantive business activity test, which verifies whether the recipient company carries out a genuine economic activity; (ii) the dominion test, which verifies whether the recipient company can freely dispose of the interest received or whether it must remit it to a third party; (iii) the business purpose test, which verifies the reasons for the interposition of a company in the cross-border income flow, i.e. whether "*the recipient company has a function in the financing transaction, or whether it is a mere conduit company (or société relais), whose interposition is aimed exclusively at a tax saving*".
For this reason, the status of beneficial owner must be the result of a substantive verification and not the result of a mere formal attribution of that title.

- ✓ **Defense of the shareholder - Censorship on the merits of the claim - Cancellation of the company act due to extinction of the company (Supreme Court, Decision no. 736 of 9 January 2024)**

The Italian Supreme Court, with its Decision no. 736 of 9 January 2024, clarified that the possible cancellation of the assessment in respect of the company on which the same

notice was served, without excluding the existence of the higher income in respect of the same, does not imply as a direct effect the automatic cancellation of the assessment served on the shareholder. In fact, according to the latter subject, in the proceedings instituted, income may be subject to an incidental assessment.

- ✓ **Participation exemption - Definition - Acquisition of shareholdings (Supreme Court, Decision no. 898 of 9 January 2024)**

The Italian Supreme Court, with the Decision no. 898 of 9 January 2024, clarified that the definition of a holding company, set forth in art. 162-bis, TUIR, does not apply for the purposes of the participation exemption rules (so-called PEX), set forth in art. 87, par.5, TUIR.
In fact, the Court further clarified, recalling the above-mentioned article of law, that for participations in companies whose activity consists exclusively or prevalently in the acquisition of shareholdings, "*the requirements set forth in subparagraphs c) and d) of paragraph 1 refer to indirectly participated companies and are verified when such requirements exist with respect to the investees that represent the majority of the value of the shareholder's assets*", considering the current value of the participations and not the value recorded in the balance sheet.

- ✓ **Art. 12 of Law Decree no. 78/2009 - Applicability in case of transfer of resources to *non-blacklisted* States (Supreme Court, Decision no. 967 of 10 January 2024)**

The Italian Supreme Court clarified that for the purposes of the application of art. 12 of Law Decree no. 78/2009 (a rule against tax havens whereby financial assets held therein are presumed to be constituted, unless proven otherwise, by means of income deducted from taxation), it is not relevant if the transfer of wealth is made to a country not included in the so-called black-list if such transfer was transitory and intended to reach its final destination in countries that make up that list.
Indeed, the principle of worldwide taxation provides that, to find out whether or not there is a privileged tax regime, final destination and the actual beneficiary of the money have to be investigated.

- ✓ **Conditions for setting up a permanent establishment in the territory of the State (Supreme Court, Decision no. 992 of 10 January 2024)**

The Italian Supreme Court has further clarified that, pursuant to art. 162, par.7, TUIR, there is no permanent establishment in the case of a person operating in the territory of the State on behalf of a non-resident enterprise, acting as an independent agent in the ordinary course of business.
In this regard, the Court has clarified that for the purposes of the configuration of a permanent establishment, the following is required: (i) a presence that is based in the territory of the State and has a certain stability; (ii) a place of business capable, even if only potentially, of generating incomes; (iii) an activity that is autonomous from that carried out by the holding company.

- ✓ **Application of Conventions for the avoidance of double taxation (Supreme Court, Decision no. 994 of 10 January 2024)**

The Supreme Court confirmed its recent orientation (Supreme Court no. 30779/2023) about refunds of taxes paid in another non-EU State and not due in the territory of the State. In fact, according to the Court's clarification, the correct interpretation of domestic or treaty rules does not require "*actual taxation in the other country*" in order to obtain a refund in Italy.

- ✓ **Property held by non-resident individual - Configurability of permanent establishment (Supreme Court, Decision no 2116 of 22 January 2024)**

The Italian Supreme Court has clarified that a permanent establishment in Italy occurs in the case of possession of a property held by an EU individual, through which it carries out its activity.

- ✓ **Capitalized registration tax - Deductibility on an accrual basis (Supreme Court, Decision no. 2519 of 26 January 2024)**

The Italian Supreme Court, in line with recent principles, further clarified that taxes, other than income taxes and those for which the tax has to be recharged, are deductible on an accrual basis if they are closely related to positive income items, since specifically included in the consideration; same principle for accessory charges connected to negative items, having the same nature and following the same rules of the costs they are relating to.

EUROPEAN UNION

- ✓ **Right to deduct VAT - Fraudulent recipient - Carousel Fraud (EU Court of Justice, Section I, 11 January 2024, Case C-537/22)**

The EU Court of Justice interpreted art. 167, 168 letter a) and 178, letter a) of Council Directive no. 2006/112/CE of 28 November 2006 in the case of a national practice whereby the tax authorities deny a taxable person the right to deduct VAT on the purchase of goods that were supplied to him on the ground that the invoices relating to those purchases are unreliable because of circumstances indicating a lack of diligence attributable to that taxable person.
The Court stated that the Directive must be interpreted as meaning that:

- where a tax authority intends to refuse a taxable person the right to deduct VAT paid on the ground that it has participated in a VAT carousel fraud, it precludes the tax authority from merely establishing that the transaction forms part of a circular invoicing chain;
- it is for that tax authority, — without necessarily identifying all the operators involved in the fraud and their respective conduct — first, to provide an accurate description of the constituent elements of the fraud and to prove fraudulent conduct; and, secondly, to establish that the taxable person actively participated in that fraud or knew, or ought to have known, that the acquisition of goods or services relied on as a basis for that right was connected with that fraud.

- ✓ **Renovation and repair services on residential property - Applicable VAT rate (EU Court of Justice, Section VIII, 11 January 2024, Case C- 433/22)**

The EU Court of Justice, in Case C-433/22, interpreted restrictively the EU regulation, point 2, Annex IV (now point 10, Annex III) of Directive no. 2006/112/EC, ruling it must be interpreted as not precluding national legislation which provides for the application of a reduced rate of VAT to services relating to the renovation and repair of private dwellings on condition that the dwellings concerned are actually used for residential purposes at the time when those works are carried out.
The Court has in fact clarified that: (i) the term “residence” generally refers to property intended to be inhabited and thus serving as a residence for one or more persons; (ii) the term “private” refers to the purpose of dwelling itself, thus excluding property for commercial purposes.
Therefore, the Court considers that, to establish those characteristics, reference must be made to the actual use of the property for residential purposes on the date on which the works were carried out.
Finally, the Court states that this interpretation should not be read to mean that the property must be permanently occupied during the renovations.

OTHER

- ✓ **Contradictory procedure in customs declaration control procedures. Clarifications following the amendments to the Statute of Taxpayers' Rights introduced by Legislative Decree no. 219/2023 (Circular of the Italian Customs and Monopolies Authorities no. 2 of 17 January 2024)**

In Circular no. 2 of 17 January 2024, the Italian Customs and Monopolies Authorities, following the changes introduced to the “Statute of Taxpayers' Rights”, provided clarification on the deadline for discussions to take place within a procedure.
In fact, as clarified by the Statute itself, the time limit is 60 days to exercise the right to a discussion. In the case of customs inspections, however, the right to a discussion within 30 days remains unaffected.

- ✓ **Abrogation of the institution of complaint-mediation (MEF Press Release no. 13 of 22 January 2024)**

In press release no. 13, the Ministry of Economy and Finance specified that the complaint-mediation phase has been abolished with effect from appeals notified as from 4 January 2024, regardless of the value of the dispute.

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