FIVERS

Tax update

August 2024

Summary

REGULATORY UPDATE

✓ Supplementary and corrective provisions on the cooperative compliance regime, rationalisation and simplification of tax obligations and advanced biennial agreement (Legislative Decree No. 108 of 5 August 2024)

On 5 August 2024, Legislative Decree No. 108 of 5 August 2024 was published in the Official Journal. The measures aim to simplify and rationalize some rules, encouraging tax collaboration between taxpayers and the Italian Tax Authorities.
Key changes include:

- Cooperative compliance (Article 1)

(i) **Fines for unfaithful certifications**:
   a. a penalty provision is introduced for cases in which an unfaithful certification related to the integrated system for detecting tax risks is issued.

(ii) **Clarifications on violations from tax risks**:
   a. clarifications are introduced on the rules for violations deriving from tax risks.

(iii) **Exclusion of cumulation of reductions in assessment terms**:
   a. it is established that the reductions in the deadlines for the forfeiture of the assessment action provided for by Legislative Decree No. 221 of 30 December 2023 cannot be combined with those established by Legislative Decree No. 127 of 5 August 2015.

(iv) **Changes to the subjective access requirements**:
   a. the definition of "group" for taxpayers who can access the regime is redefined.

- Tax obligations (Article 2)

(i) **Deadline for ISA programs**:
   a. the computer programs for the filling-in and transmission of the relevant data for the Synthetic Index of Tax Reliability (ISA) must be made available by the Italian Tax Authorities by 15 April of the year following the tax period.

(ii) **VAT payments**:
   a. the VAT payment of December is provided for 16 January of the following year;
   b. the deadline for the payment of VAT resulting from periodic VAT liquidationsof the first three quarters is brought forward to 16 November, if the amount due is less than 100 eur;

(iii) **Pre-filled tax return**:
   a. from 2025, access to the pre-filled tax return will be extended to more subjects, including those in charge of electronic transmission;

(iv) **New deadlines for tax returns**:
   a. the deadline for the electronic submission of tax returns for individuals has been postponed from 30 September to 31 October;
   b. for IRES subjects, the tax return must be submitted by the last day of the tenth month following the end of the tax period;

(v) **Digital services for taxpayers**:
   a. the Italian Tax Authorities will provide new digital services for the consultation and acquisition of taxpayers' tax data, including those relating to roles of the Italian Tax Authorities-Collections.

- Liquidation and control (Article 3)

(i) From 2025, taxpayers will have sixty days (instead of thirty) to pay the sums due as a result of automatic or formal checks.

- Advanced Biennial Agreement (Article 4)

(i) **Terms for computer programs**:

a. the decree modifies the date for providing to the taxpayers, by the Italian Tax Authorities, the computer programs to acquire the data necessary for the preparation of the proposal for the Advanced Biennial Agreement.

(ii) **Deadlines for accession**:

a. the acceptance to the Italian Tax Authorities's proposal must take place by 31 July or, for subjects with a tax period that is not in line with the calendar year, by the last day of the seventh following month or, for the first year in which the regime is applicable, by the deadline for submitting the annual tax return.

(iii) **Admission requirements**:

a. taxpayers who, with reference to the tax period prior to those to which the proposal refers, do not have debts for taxes administered by the Italian Tax Authorities or contribution debts, can access the Advanced Biennial Agreement.

(iv) **Substitute tax on agreed income**:

a. a substitute tax is introduced on the higher income deriving from the agreement, with variable rates (10%, 12%, 15%) based on the taxpayers' fiscal reliability index.

(v) **Optional regime for flat-rate taxpayers**:

a. an optional regime of substitute taxation of the higher income deriving from the agreement for subjects adhering to the flat-rate scheme has been introduced.

- Synthetic determination of income (Article 5):

(i) the criteria for the synthetic determination of the income of natural persons are amended. The assessment takes place only if the ascertainable income exceeds the declared income by at least 20% and by at least ten times the amount of the annual social allowance.

- Settlement-*quater* (Article 6): the deadline for paying the installment of the tax bill is postponed to 15 September 2024.

✓ Regulation 2024/2019 of 12 August 2024

Regulation No. 2024/2019 ("EU Euratom") of the European Parliament and of the Council of 11 April 2024, published in the Official Journal of the European Union on 12 August 2024 (L Series), amended the Protocol No. 3 on the Statute of the Court of Justice of the EU, with the aim of redistributing jurisdiction over prejudicial rulings under Article 267 of the Treaty on the Functioning of the EU.

The General Court of the European Union acquires jurisdiction over requests for preliminary rulings which fall exclusively within one or more specific areas, including VAT, customs law, the tariff classification of goods in the Combined Nomenclature and excise duties.

The EU Court of Justice retains jurisdiction over requests for preliminary rulings that raise independent issues of interpretation of primary law, public international law, general principles of law or the Charter of Fundamental Rights of the EU.

✓ Urgent fiscal measures, extensions of regulatory deadlines and economic interventions (Legislative Decree No. 113 of 9 August 2024)

On 9 August, the Legislative Decree No. 186 was published in the Official Journal No. 113 of 9 August 2024 ("*Omnibus* Decree"), which introduces urgent measures in the tax field, extensions of legislative deadlines and economic measures.

The measures of the *Omnibus* Decree include:

(i) **Tax credit for investments in the Special Economic Zone** – The measure provides for an additional allocation of 1.6 billion eur for 2024, in addition to the 1.8 billion eur already provided, to finance the tax credit under Article 16 of Decree-Law No. 124 of 19 September 2023 addressed to companies and economic operators making investments in the special economic zone. Economic operators who have already sent the required documentation will have to submit a supplementary

communication to the Italian Tax Authorities in the period between 18 November and 2 December 2024, confirming the implementation of the investments by 15 November 2024.

(ii) **Cross-border employees, new substitute tax on employment –** A new substitute tax of 25% on employment income received in Switzerland has been introduced. The sum to be paid, which is a substitute for personal income taxes and regional and municipal taxes, amounts to 25% of the taxes applied in the transalpine country on the same income. Workers can decide for this substitute tax:
   a. "cross-border employees" according to the Italy-Switzerland Agreement;
   b. who worked in the cantons of Graubünden, Ticino or Valais before 23 December 2020;
   c. whose incomes are taxed in Switzerland.

The *Omnibus* Decree came into force as of 10 August 2024.

MINISTERIAL PRACTICE

REPLIES TO REQUESTS FOR RULINGS

✓ Carried interest (Reply to the request for advance tax ruling No. 166 of 1 August 2024)

The Italian Tax Authorities, in the reply to the request for advance tax ruling No. 166 of 1 August 2024, clarified aspects related to the "*carried interest*" tax regime under Art. 60, paragraph 1, of Legislative Decree No. 50 of 24 April 2017, relating to income deriving from the participation in companies, entities or undertakings of collective investment (UCIs) by employees or directors.

With reference to this specific case, the taxpayer states that the *''Preference Shares'' and the "Common Shares A''* are "comparable to ordinary shares" and can be considered as an *unicum* due to their subscription method. In this regard, the Italian Tax Authorities pointed out that the two types of shares, in reality, would provide for different equity rights; in particular, the *''Common Shares A''* receive a subordinated remuneration and only potential compared to what is provided for the *''Preference Shares''* which are remunerated primarily over the other categories of shares. Therefore, according to the Italian Tax Authorities, in this specific case, the requirement requested in letter b) of paragraph 1 of Article 60 of Decree-Law No. 50 of 2017 cannot be considered fulfilled.

Taking into account that in this case the tax classification of the income deriving from enhanced financial instruments such as capital income or other income does not operate *ope legis*, it was necessary to analyse the characteristics of the equity tool with enhanced equity rights for the purpose of identifying the nature of the income, at the end of which it was concluded that they can be classified as income of a financial nature, in particular on the basis of the provisions in this specific case for the remuneration of managers, their investment and leavership clauses.

It should be noted that the income at stake, if relating to financial instruments with "enhanced equity rights", can be considered "capital income or other income" (and not employment income), under the following conditions: 1) minimum investment commitment: employees and directors must invest at least 1% of the total investment of the UCI or of the net assets in the case of companies; 2) yield of the gains: the gains must arise only after the other participants have recovered the invested capital and a minimum return provided for by the articles of association, or in the event of a change of control, after they have obtained a sale price at least equal to the capital invested and the minimum return; 3) holding period: the financial instruments must be held for at least five years, or until the change of control or replacement of the investment manager, even in the event of the death of the holders.

As clarified by the Explanatory Report to the aforementioned decree, the existence of the said requirements is a guarantee of alignment between managers and other investors in terms of interest in the return on investment and risk of loss of invested capital, which constitutes the rationale for assimilating the income in question to income of a financial nature.

Circular No. 25/E of 16 October 2017 clarified that the lack of one or more of the conditions mentioned by the rule at stake does not determine the automatic qualification of income as employment income, but

requires a case-by-case analysis to be carried out. The possible holding of financial instruments with the same characteristics by the other shareholders, as well as the presence of adequate remuneration for the work carried out by the managers, can be indicators of the financial nature of the income at stake. A further evaluation criterion is the suitability of the investment, also in terms of amount, to ensure the alignment of interests between investors and management with the latter's exposure to the risk of loss of invested capital.
The presence of “good or bad leavership” clauses can indicate a link between income and employment, qualifying the income as employment income. However, the existence of other factors, such as the risk of loss of capital, may suggest the financial nature of the income. In addition, the possibility of maintaining ownership of financial instruments after the termination of employment is a financial indicator of income.

✓ Facilitated settlement of tax disputes (Reply to the request for advance tax ruling No. 168 of 5 August 2024)

The Italian Tax Authorities, with the reply to the request for advance tax ruling No. 168 of 5 August 2024, provided clarifications on the facilitated settlement of tax disputes pursuant to Article 1, paragraphs 186-205, of Law No. 197 of 29 December 2022.
Such settlement, as illustrated in the Circular of the Italian Tax Authorities No. 2/E of 27 January 2023, made it possible to resolve tax disputes pending as of 1st January 2023, through the payment of an amount determined according to the value of the dispute and the state of the judgment.
Paragraph 194 establishes that the facilitated settlement was completed with the submission of the application and the payment of the amount due by 30 June 2023. Installment payments up to a maximum of 20 quarterly installments are allowed, with legal interest on the installments following the first.
The measure of the Italian Tax Authorities, prot. No. 250755 of 5 July 2023, which implements these provisions, specifies that Article 20 of Decree-Law No. 34 of 30 March 2023 (converted by Law No. 56 of 26 May 2023) extended the deadline for submitting the application to 30 September 2023 and introduced new deadlines for the first three installments, with the possibility of paying in fifty-one monthly installments.
Finally, with reference to Article 8 of Legislative Decree No. 218 of 19 June 1997, the legal interest rate for the installments subsequent to the first remains the one in force on the date of completion of the settlement, which takes place with the submission of the application and the payment of the first installment.
In the present case, the applicant "submitted the request for access to the settlement by exercising the option of payment in installments of the sums due and has so far paid the installments within the terms prescribed by law. The interpretative doubt arose after the publication of the MEF Decree of 29 November 2023 which, as is known, led to a lowering of the legal interest rate from 5% to 2.5% as from 1 January 2024.” Following this decree, in fact, "it is not clear whether the current Applicant will be able to apply the "new" interest rate of 2.5% on installments due from 1 January 2024, having submitted the application for access to the facilitated settlement and paid the first installment in 2023, the year in which the legal interest rate of 5% was applicable".
The Italian Tax Authorities reminded that the two dates (payment of the first installment and final completion of the facilitated settlement) coincide, considering that "in the case of payment by installments, the facilitated settlement is completed with the submission of the application pursuant to paragraph 195 and with the payment of the amounts due with the payment of the first installment by the deadline of 30 September 2023".
The Italian Tax Authorities concluded that, in light of the above, for the facilitated settlement of tax disputes, it must be reiterated that the interest due for the payment of the installments subsequent to the first one must be calculated at the legal rate applicable on the date of completion of the settlement itself.

✓ Contribution of shareholdings - Bank loan (Reply to the request for advance tax ruling No. 169 of 12 August 2024)

The reply to the request for advance tax ruling No. 169 of 12 August 2024 concerns a limited liability company owned by three quotaholders, one of whom intends to leave the company due to disagreements with the other two quotaholders. The two purchasing quotaholders, in order to liquidate the third party, want to set up a single-member holding company through the contribution of their shares and obtain a bank loan to acquire the quota revalued by the leaving quotaholder according to Article 5 of Law no. 448 of 28 December 2000.
Future dividends will allow the loan to be repaid. The purchasing quotaholders have asked for clarification on the subject of abuse of rights (Article 10-*bis,* Law No. 212 of 27 July 2000) and the Italian Tax Authorities replied favorably, confirming the absence of an undue tax advantage.
The transaction begins with a double contribution in kind under the "controlled realisation regime" pursuant to Article 177, paragraph *2-bis* of Presidential Decree No. 917 of 22 December 1986, necessary since the banks would not have granted the loan to the shareholders who are natural persons.
With reference to the sale of the quota of the leaving quotaholder, revalued and sold by replacing the ordinary regime with a reduced substitute tax (16%), the issue arose of a qualification as a transfer and not as a typical withdrawal, in which the revaluation would have no effect.
The Italian Tax Authorities has excluded the risk of requalification, as this sale appears to be a physiological operation functional to the definitive exit of the transferring quotaholder from the corporate structure.
The leaving shareholder will not hold any position in the company, a relevant circumstance as already highlighted by previous practice (reply to the request for advance tax ruling No. 20 of 31 January 2019).
Finally, it is clarified that there is no undue tax advantage in the deduction of interest expenses related to the loan, as they are taxable for creditor banks, ensuring taxation symmetry.

✓ Contributions in kind – determination of the VAT taxable base and capital gain/loss for IRES and IRAP purposes (Reply to the request for advance tax ruling No. 171 of 20 August 2024)

The Italian Tax Authorities, in the reply to the request for advance tax ruling No. 171 of 20 August 2024, clarified that the VAT taxable amount of a contribution in kind corresponds to the amount paid as a capital increase with share premium, increased by the sums paid as an adjustment for any differences in the value of the assets between the date of the appraisal and the date of effectiveness of the contribution. The above adjustment, in fact, is closely linked to the transfer transaction, as it is carried out due to the greater value of the assets transferred.
In this regard, the Italian Tax Authorities recalled that the taxable amount for VAT is governed by Article 13 of Presidential Decree 633/1972, which implements Article 73 of Directive No. 2006/112/EC, according to which "for the supply of goods and services other than those referred to in Articles 74 to 77, the taxable amount includes everything that constitutes the consideration paid or to be paid to the supplier for such transactions by the purchaser, the recipient or a third party, including subsidies directly linked to the price of such operations".
As clarified by the case law of the European Union Court of Justice, the principle applies according to which "the taxable amount for the supply of goods or services carried out for consideration is constituted by the consideration actually received for that purpose by the taxable person. This consideration represents the subjective value, i.e. the value actually received and not a value estimated according to objective criteria" (Court of Justice, decision of 7 November 2013, in joined cases C249/12 and C250/12; of 19 December 2012, in case C549/11; of 26 April 2012, in joined cases C621/10 and C129/11).
For IRES and IRAP purposes, the Italian Tax Authorities, while specifying that the determination of the arm's length value of the assets transferred falls outside the prerogatives that can be exercised at the time

of the ruling, as it is characterized by a relevance of the factual profiles that can only be found at the time of assessment, do not consider it acceptable that the arm's length value to be assumed for the determination of the capital gain of the assets contributed coincides with the amount received as the share capital of the transferee and share premium, if the appraisal report indicates a market value of the goods transferred that is higher than this amount.
In this regard, the Italian Tax Authorities noted that on the basis of the provisions of Article 9, paragraph 5, 86 and 101 of the TUIR, the taxable income deriving from the transfer of assets consists of the difference between the consideration obtained (net of directly attributable ancillary costs) and the non-depreciated cost of the asset transferred. In case of contributions or contributions to companies, the consideration obtained is considered the arm's length value of the assets and receivables transferred.

- ✓ **Deductibility for IRES and IRAP purposes of interest expenses paid on the basis of conciliation and settlement agreement (Reply to the request for advance tax ruling No. 172 of 20 August 2024)**

The Italian Tax Authorities, in their reply to the request for advance tax ruling No. 171 of 20 August 2024, expressed their opinion on the deductibility for IRES and IRAP purposes of interest expenses relating to the higher taxes defined through conciliation and settlement agreement.
In particular, the Italian Tax Authorities confirmed that such interest expenses are deductible in the tax period in which the settlements providing for their payment were signed, regardless of the business event that generated them and the deductibility of the cost to which they are linked, considering that the regulatory system of the Income Tax Code recognizes the autonomy of the function of interest expenses, applying the calculation methods of Article 93 (Reply to request for advance tax ruling No. 541 of 2022 and Resolution No. 178 of 9 November 2001).

- ✓ ***Transfer Pricing* – (Im)possibility of drafting the National Documentation in English (Reply to the request for advance tax ruling No. 174 of 21 August 2024)**

The Italian Tax Authorities, with the reply to the request for advance tax ruling No. 174 of 21 August 2024, clarified that the "National Documentation" on transfer pricing must be drafted and submitted in Italian, contrary to what was proposed by the applicant.
It should be noted that this is one of the two components to be prepared in order to access the optional regime for the non-application of the fines referred to in Article 1, paragraph 6, of Legislative Decree No. 471 of 18 December 1997. This reward mechanism provides for the preparation of a "Master file", which collects information relating to the group, and the "National Documentation" concerning intra-group transactions relating to the local entity.
According to the Italian Tax Authorities, the National Documentation refers, by its nature, to a domestic context, and must necessarily be presented in Italian, as specified in the Provision of the Director of the Italian Tax Authorities of 23 November 2020, No. 360494 and allowed by the OECD Guidelines.

RESOLUTIONS

- ✓ **Establishment of tax codes for payment of sums due following adhesion to the report of findings (Italian Tax Authorities Resolution No. 44 of 2 August 2024)**

With Resolution No. 44/E of 2 August 2024, the Italian Tax Authorities introduced new tax codes to allow the payment of the sums due by taxpayers who adhere to the report of findings, based on Article *5-quater* of Legislative Decree No. 218 of 19 June 1997, amended by Legislative Decree No. 13 of 12 February 2024.

This facilitated settlement allows taxpayers to reduce fines to one sixth compared to the normal fine provided for in the event of a settlement agreement and allows the payment in installments.
For payment through the F24 form, specific tax codes have been introduced for different types of taxes, including IRPEF, IRES, VAT, regional and municipal surcharges, and other taxes and fines.
The taxpayer must indicate in the F24 form the data relating to the settlement deed, such as the office code and the reference year.

PRINCIPLES OF LAW

✓ **Supplies subject to the reverse charge mechanism – Increasing or decreasing adjustments – Invoicing methods (Principle of law of the Italian Tax Authorities No. 2 of 12 August 2024)**

The Italian Tax Authorities stated that the reverse charge mechanism does not apply to VAT variation notes, either in decrese or in increase, referring to invoices that have not been subject to the reverse charge as this mechanism was not yet in force, in line with what was already indicated in Resolution No. 36/E of 31 March 2011.
Reference is made, in particular, to the supply of electricity to taxable retailers, for which the reverse charge mechanism (Article 17, paragraph 6, letter *d-quater* of Presidential Decree No. 633 of 26 October 1972) was introduced starting from 2015.
The Italian Tax Authorities clarified that, if, as a result of the update of the prices relating to the energy sold, there is an increase in the VAT taxable base of supplies made in the period prior to 2015, the additional fees charged by the supplier must be invoiced by debiting the VAT and not by reverse charge, as the main transaction to which the change refers was not subject to reverse charge.

LEGAL ADVICE

✓ **Export and methods of calculation of the VAT plafond in the case of invoicing and registration of advance payments (Response to the Request for Legal Advice of the Italian Tax Authorities No. 3 of 6 August 2024)**

The Italian Tax Authorities, in their Response to the Request for Legal Advice No. 3 of 6 August 2024, confirmed that the invoicing and recording of advance payments contributes to create the VAT "plafond" if the transaction as a whole is preordained to an export supply pursuant to Article 8 of Presidential Decree No. 633 of 26 October 1972 (as already clarified with Ministerial Circular No. 145/E of 10 June 1998).
However, it was recalled that the "plafond" must be adjusted if the transaction is not completed (according to the principle of law enshrined by the Supreme Court, decision No. 30800 of 19 October 2022).

CASE LAW UPDATE

✓ **Assessment – Improvement (Supreme Court, Judgment No. 21469 of 31 July 2024)**

The Supreme Court, in Judgment No. 21469 of 31 July 2024, ruled that the assessment notice that has been correctly served on the taxpayer, reaching his sphere of legal knowledge or knowability, cannot be cancelled for the sole fact that the date of completion of the notification is indicated in the serving report contained in the original notified document and not in the one included in the copy delivered to the served party, since, in this case, the Italian Tax Authorities are able to prove the exercise of the taxation activity within the terms of the law and the taxpayer, through the knowledge or knowability of the tax act, can exercise his right of defense, by filing an appeal pursuant to Article 19 of Legislative Decree No. 546 of 31 December 1992.

✓ Annual refunds – Non-payment of the consideration and VAT (Supreme Court, Decision No. 21656 of 1 August 2024)

The Supreme Court, with the Decision No. 21656 of 1 August 2024, pointed out that the taxable person, in the event of a request for a VAT refund, acting as a relevant person for the purposes of VAT, makes a claim directly against the Administration, demanding from it the refund of the excess, i.e. the *surplus*, of the deductible VAT.
Consequently, the taxpayer must prove that it has, in turn, paid the tax by paying the consideration and the tax from which the *surplus to* be recovered was generated; therefore, the request for reimbursement of the excess VAT credit necessarily requires the payment of the consideration, including the tax indicated by the supplier on the invoice: for this reason, in the absence of proof of payment of the tax, the burden of which is on the taxpayer, the refund must be denied.

✓ Assessment – Direct taxes and VAT – Doubling of terms (Supreme Court, Decision No. 21870 of 2 August 2024)

The Supreme Court, with the Decision No. 21870/2024, affirmed the principle of law according to which, on the matter of tax assessment, the doubling of the terms for the notification of notices of assessment, pursuant to Article 43, paragraph 3, Presidential Decree No. 600 of 29 September 1973, in the hypothesis of serious indications of a criminal offence from which the obligation to file a criminal complaint arises, operates in relation to the assessment and to its principal liability, without automatic extension to the jointly and severally liable co-obligor who is the addressee of an autonomous act of registration on the tax roll.
The Supreme Court affirmed a further principle of law, according to which, in relation to tax proceedings, the joint and several debtor is not entitled to challange in the appeal against the payment notice the applicability or otherwise of the doubling of the aforementioned time limits, in force *ratione temporis*, with reference to the assessment served on the principal debtor.
This assumption is based on the principle that it is a process with a different title and subsequent to the assessment against the principal debtor.

✓ VAT – Intra-EU supplies – Non-taxability (Supreme Court, Decision No. 22109 of 5 August 2024)

The Supreme Court, with the Decision No. 22109/2024, mentioning the rules on intra-EU supplies, pursuant to Article 41, paragraph 1, letter a) of Decree-Law No. 331 of 30 August 1993, reiterated that in the event that the Italian Tax Authorities challenged the non-taxable status of an intra-EU supply of goods, the supplier is required to provide evidence underlying such right claimed before the Court.
In this respect, the supplier will therefore have to prove the actual introduction of the goods supplied into the territory of the Member State of the purchaser, for example by means of the transport document showing the actual exit of the goods from the territory of the State with shipment to a taxable person identified in another Member State.
In the hypothesis of EXW sale, applying these principles, the Supreme Court has stated that the supplier must provide documentary evidence the goods are actually in the territory of the Member State of destination or of 'secondary facts' from which it is possible to identify the presence of the goods in a territory other than the State of its residence.
Finally, if such documentation is in the possession of so-called non-cooperating parties, the supplier must prove, with the contracts of the carrier, shipper and purchaser, that they have expressly agreed to delivery such documents and, in case of breach, that it has taken any legal action, not being sufficient to produce only the contractual documents in which the commitment to transfer to another Member State was set out.

✓ VAT – Waiver of refund (Supreme Court, Decision No. 22241 of 6 August 2024)

The Supreme Court, with the Decision No. 22241/2024, affirmed the principle that a taxpayer who to waives to the claim for a VAT refund does not renounce the right to the credit, which may be claimed again, if it exists, in compliance with the terms provided for by law.
Moreover, if the taxpayer decides to offset the credit, thus changing the original refund request, it may do so within the year following the one in which the credit accrues, since the principle of alternation between refund and deduction excludes the unlimited possibility of revoking the choice of refund originally made, whereas if it decides to ask again for the refund of the VAT credit, renounced in the VAT return, it may do so by submitting a specific request for refund, in the absence of specific provisions, within the term of two years from the payment or, if later, from the day on which the condition for the refund occurred pursuant to Article 21, paragraph 2, of Legislative Decree No. 546 of 31 December 1992.

✓ VAT deduction in MLBO acquisitions (Supreme Court, Decision No. 22608 of 9 August 2024)

The Supreme Court, with Decision No. 22608/2024, allowed the right to deduct VAT for transaction costs incurred by the special purpose vehicle (SPV) in a merger leveraged buy out (MLBO) transaction for the acquisition of a target company.
In the said decision, the Supreme Court states that VAT paid on transaction costs, such as advisory, legal fees, due diligence, etc., is in principle deductible. This decision is based on the principles of EU case laws, according to which preparatory acts are to be considered an integral part of economic activities and therefore the person who intends to start an economic activity and makes the first investment expenses qualifies as a taxable person for VAT purposes (Court of Justice EU judgments 12 November 2020, C-42/19, Sonaecom and 17 October 2018, C-249/17, Ryanair).
In MLBO transactions, therefore, the special purpose vehicle is created for the purpose of acquiring the target company and proceeding with the merger, thus carrying out a preparatory activity with respect to the subsequent economic one.

✓ Reverse charge – Failure to indicate on the invoice (Supreme Court, Decision No. 23262 of 28 August 2024)

The Supreme Court, with the Decision No. 23262/2024, set forth the principle of law according to which, in the matter of non-existent transactions, in the event that the VAT is paid with the reverse charge mechanism by the purchaser and is not reported by the supplier in its numerical amount on the invoice, as resulting from the arithmetical calculation made by applying the rate to the taxable base, the so-called principle of invoice evidence is applied (Article 17, paragraph 3, of Presidential Decree No. 633 of 26 October 1972), since the mere indication on the invoice of the liability for VAT and its settlement - the indication of which is necessarily made by the supplier issuing the accounting document, for the purposes of recharge as well as deduction, in accordance with the reverse charge mechanism which it is up to the purchaser to apply in his own accounting records - is an element capable of making the supplier liable for the tax; similarly, where the purchaser has settled and deducted the tax by applying the reverse charge mechanism, the non-deductibility of the VAT remains also for him.

✓ Fraudulent tax return using false invoices (Supreme Court, Decision No. 33280 of 29 August 2024)

The Supreme Court, with the Decision No. 33280/2024, recalled that the case of fraudulent tax return using false invoices, pursuant to Article 2 of Legislative Decree No. 74 of 10 March 2000, is a crime of danger and mere conduct that take place with the submission of the tax return to the financial offices and

is not dependent on the occurrence of the damaging event, nor is the actual evasion relevant, which instead connotes the intent of the offence.
Moreover, the Supreme Court affirmed the principle of law according to which, with regard to the case of omitted VAT return, pursuant to Article 5 of Legislative Decree No. 74 of 10 March 2000, involving a professional with the task of preparing and subsequently submitting the annual tax return does not exempt the obliged party from criminal liability.

MINISTRY OF ENTERPRISES AND MADE IN ITALY

- ✓ **Transition 5.0 (Operational Circular of the Ministry of Enterprises and Made in Italy of 16 August 2024)**

With the Operational Circular of 16 August 2024, the Ministry of Enterprises and Made in Italy (MIMIT) provided clarifications of a technical nature with reference to the Transition 5.0 tax credit.
In particular, the Circular deals with the following aspects: the subjective and objective scope of the facilitation; criteria for determining energy consumption and savings; requirements for plants aimed at self-production for self-consumption of energy from renewable sources; procedures for sending and managing prior communications, i.e. those regarding the reservation of the benefit, the progress of the innovation project and its completion; examples for calculating the tax credit due relating to a process affected by the investment or production structure.

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