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Tax Alert

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Automatic non-repayable grant

In order to support the economic operators affected by the epidemiological emergency "Covid-19", the legislator has provided for a further non-repayable grant for VAT subjects, with active VAT number at the date of entry into force of Law Decree 73/2021 (i.e. 26t May 2021), that have already benefited from the non-repayable grant provided for by art. 1 of Law Decree 41/2021. In order to benefit of such incentive, the previous grant shall not have been unduly received or returned.

The amount of the new grant is equal to the amount already received and it is not necessary to file a further request to the Italian Tax Authority, which will pay the grant by crediting the bank account or in the form of tax credit based on the choice made by the taxpayer for the previous grant.

Alternative non-repayable grant

Alternatively, a non-repayable grant is recognized for VAT subjects, resident or established in Italy, who carry out business activities, art activities or self-employed or that generate agricultural income:

a) with revenues not higher than Euro 10 million in the second fiscal year before the current one;
b) for which the average monthly amount of turnover in the period between 1 April 2020 and 31 March 2021 is at least 30 % lower than the average monthly amount of turnover in the period between 1 April 2019 and 31 March 2020. For this purpose, reference is made to the date on which the goods or services were supplied.

Subjects that have already received the previous non-repayable grant may obtain any higher value of the new grant, but the received amount will be deducted from the latter.

The subjects whose activity is terminated on the date of entry into force of the Decree, public bodies and subjects indicated in art. 162-bis of the Italian Tax Code (financial intermediaries, holding companies, etc.) are excluded from the grant.

For subjects that have already benefited from the non-refundable grant provided for by art. 1 of Law Decree 41/2021, the grant is calculated by applying a percentage to the difference between the average monthly amount of turnover for the period between 1 April 2020 and 31 March 2021 and the average monthly amount of turnover for the period between 1 April 2019 and 31 March 2020. The percentage is calculated, as follow:

a) 60% for entities with revenues not higher than Euro 100,000;
b) 50% for entities with revenues between Euro 100,000 and 400,000;
c) 40% for entities with revenues between Euro 400,000 and 1,000,000;
d) 30% for entities with revenues between Euro 1,000,000 and 5,000,000;
e) 20% for entities with revenues between Euro 5,000,000 and 10,000,000.

For subjects that did not benefit from the previous non-repayable grant, the incentive is determined by applying a percentage to the difference between the average monthly amount of turnover for the period between 1 April 2020 and 31 March 2021 and the average monthly amount of turnover for the period between 1 April 2019 and 31 March 31 2020:

a) 90% for entities with revenues not higher then Euro 100,000;
b) 70% for entities with revenues between €100,000 and €400,000;
c) 50% for entities with revenues between €400,000 and €1,00,000;

d) 40% for entities with revenues between €1,000,000 and €5,000,000;

e) 30% for entities with revenues between €5,000,000 and €10,000,000.

The contribution cannot exceed Euro 150,000.

It should also be noted that the grant is not taxable for IRES and IRAP purposes.

The taxpayer may irrevocably choose to receive the grant as tax credit, to offset any tax liabilities with the F24 Form.

The request should be filed to the Italian Tax Authority. For those who are obliged to the fulfil, it will be necessary to file the communication of the VAT settlements for the first quarter 2021 before submitting the request for non-repayable grant.

The terms, procedures and elements to be indicate will be defined by a Provision of the Italian Tax Authority.

Equalized non-repayable grant

A different grant is recognized for VAT subjects, resident or established in Italy, who carry out business activities, art activities or self-employed or that generate agricultural income:

a) with revenues not higher than Euro 10 million in the second fiscal year before the current one;

b) that have suffered a worsening of the net results in the fiscal year running as of 31 December 2020 compared to that running as of 31 December 2019 for an amount equal to or higher than the percentage defined by Decree of the Ministry of Economy and Finance.

A Decree will also define the percentage to apply at the difference between net results of the financial year running as of 31 December 2020 compared one running as of 31 December 2019, in order to determine the grant.

As already mentioned above, the grant is not taxable for IRES and IRAP purposes and the contribution cannot exceed €150.000.

The taxpayer may irrevocably choose to receive the grant as tax credit, to offset any tax liabilities with the F24 Form.

In order to obtain the non-repayable grant, a request must be filed to the Italian Tax Authority. The request for the grant may be submitted only if the tax return for the fiscal year 2020 is filed within 10 September 2021.

Non-repayable grant in case of residual available resources

An additional non-repayable grant is provided in the event of any unused resources will be available, with respect to the abovementioned grants. The grant is available for entities with revenues or turnover between Euro 5 and 10 million in the second fiscal year prior to the one running at the date of entry into force of the Decree that have the requirements of the non-repayable grant (art. 1 Law Decree 41/2021) or the alternative non-repayable grant.

Furthermore, it should be noted that the conditions and limits provided for by the *Temporary Framework* with reference to sections 3.1 and 3.12, are applicable to the aforementioned grants. In addition, please note that even for aids obtained pursuant to section 3.1, companies will be required to submit a specific self-declaration in order to certify the existence of the conditions provided for in the section 3.1.

Extension of the Rent tax credit - Art. 4

The deadline for the tax credit provided for by art. 28, par. 5 of Law Decree 34/2020 is extended until 31 July 2021 for rents of real estate for non-residential use and lease of the going concern in favor of tourist accommodation businesses, travel agencies and tour operators, granted to the extent of 60% of monthly amount of rent, or 50% for monthly rents of lease of the going concern.

In addition, it is recognized a tax credit to subject, excluded the one mentioned above, and to professionals, with revenues not exceeding Euro 15 million, including non- commercial entities and Third Sector entities, for rents of real estate for non-residential use and for rents of lease of the going concern paid for the months from January 2021 to May 2021.

The credit is available subject to the condition that the average monthly amount of turnover or fees recorded in the period between 1 April 2020 and 31 March 2021 is at least 30% lower than that recorded in the period between 1 April 2019 and 31 March 2020. For entities who started their business after 1 January 2019, the tax credit is available regardless of the decrease in average turnover.

Urgent measures for the fashion textile sector - Art. 8

Article 8 of Law Decree 73/2021 introduces some amendments to the tax credit in order to contain the negative effects resulting from the prevention and containment measures adopted for the epidemic emergency on the final inventories in the textile, fashion and accessories sector, pursuant to article 48-*bis* of Law Decree 34/2020.

Entities operating in the textile, fashion, footwear production and leather goods industry (i.e., the textile, fashion and accessories sector) are entitled to benefit of a tax credit equal to 30% of the value of the final inventories referred to Art. 92 of the Italian tax code relating to the fiscal year running as of the date of entry into force of the Ministerial Decree of 9th March 2020 (i.e., FY 2020) and to the fiscal year running as of 31 December 2021, in excess of the average of the previous three years. By express provision of the law, this grant falls within the scope of the Temporary Framework for State Aid.

In case of entities with audited financial statements, the check procedure are carried out on the basis of the financial statements, while companies that are not subject to audit by an audit company and do not have a statutory auditor, must use a certification of the consistency of the inventories, issued by a statutory auditor or by an auditing company registered in section A of the register referred to in art. 8 of Legislative Decree 27 January 2010 no. 39.

The tax credit can be used to offset any tax liabilities according to to Art.17 of Legislative Decree 241/1997 in the following fiscal year. Therefore, the subjects intending to make use of the tax credit must submit a specific communication to the Italian Tax Authority. The modalities, the terms of filing and the content of the communication - as well as the modalities for monitoring the use of the tax credit and the compliance with the budget increased to Euro 95 million for the year 2021 and Euro 150 million for the year 2022 - are established by a Provision of the Director of the Italian Tax Authority to be adopted within 30 days from the entry into force of the Decree.

Moreover, within 20 days from the entry into force of the Decree, a specific decree of the Ministry of Economic Development will be issued concerning the criteria for the correct identification of the economic sectors in which the beneficiaries operate.

Extension of the period of suspension of the activities of the collection agent - Art. 9, paragraph 1

As part of the measures aimed at encouraging the resumption of economic and social activities following the Covid-19 pandemic, it is provided the extension to 30 June 2021 of the suspension of the terms of payments deriving from notices of payment issued by collection agents as well as notices provided by articles 29 and 30 of the Decree 31 May 2010, n. 78, converted, with amendments, by the Law n. 122 of 30 July 2010.

Plastic Tax - Art. 9, paragraph 3

The applicability of the consumption tax on single use manufactured goods, i.e. *MAnufatti Con Singolo Impiego* (so-called "Plastic Tax"), previously established starting from July 1st 2021by the 2021 Italian Budget law, has been extended to January 1st 2022 by the art. 9, paragraph 3, L. D. n. 73/2021, so-called "*Sostegni bis*" (Official Gazette May 25, 2021), in line with the date set for the applicability of the consumption tax on sweetened beverages (so-called "Sugar Tax")

Urgent measures in support of internationalization - Art. 11

The rule provides for the refinancing of the 394/81 fund for Euro 1.2 billion, intended to provide subsidized loan through SIMEST in order to support internationalization of the companies.

The "Made in Italy Fund" is also increased by Euro 400 million for the non-refundable grant loans, in addition to the above-mentioned subsidized loans.

Requests for support for capitalization operations submitted after 26 May 2021 will be excluded from the non-refundable grant and will only be able to benefit from soft loans under Fund 394/81.

In addition, the rule introduce an amendment to the art. 72 of Decree-Law No. 18/2020 aimed at decrease to 10% the maximum share of non-refundable co-financing for initiatives to support internationalization characterized by specific purposes or in sectors or geographical areas considered priorities according to selective criteria.

Moreover, on a transitional basis, for applications submitted until 31 December 2021, the maximum non-refundable co-financing percentage will be 25%.

Measures to support corporate liquidity - Art. 13

Article 13 of Law Decree No. 73/2021 extends, with some amendments, the schemes of the SMEs Fund and the "Italian Guarantee" for loans issued as of July 1st, 2021.

More in detail, the Temporary Framework regime is extended to 31 December 2021 for guarantees issued by SACE, pursuant to art. 1 of Law Decree No. 23/2020, and for guarantees issued by the SMEs Fund. In addition, it has been reduced to 90% the amount of the guarantee that may be issued by the SMEs Fund, provided for by art. 13, par. 1, lett. m) of Law Decree No. 23/2020.

Furthermore, companies with a number of employees of no less than 250 and no more than 499 that have access to SACE's "Italian Guarantee" might distribute dividend, due to the elimination of the specific provision form the relevant law.

Taxation of capital gains of innovative start-up - Art. 14

Article 14 of Law Decree May 73/2021 introduces a temporary measure allowing the exemption from income tax of capital gains resulting from the sale of qualified and non-qualified participation (pursuant to art. 67, par. 1, letters c) and c-*bis*) of the Italian Tax Code) held in innovative Start-up and innovative SMEs, made by individuals, outside the exercise of a business. The measure concern capital gains relating to the sale of shares acquired

- during the period between 1 June 2021 and 31 December 2025;
- held for at least 3 years;
- through the contribution of capital stock in cash or following the conversion of convertible bonds into newly issued shares or through the offsetting of credits during contribution of capital increases.

In addition, capital gains resulting from the sale of share realized by individuals outside the exercise of a business are exempt from income tax provided that

- the shares were acquired through capital contribution;
- the capital gains are reinvested in innovative start-up or SMEs by means of capital contribution in cash;

the reinvestment must take place within one year from the realization of the capital gain.

VAT dispositions Credit Notes - Art. 18

- Article 26 of Presidential Decree no. 633 of 1972 has been amended to anticipate the time limit for issuing credit notes in case of bankruptcy proceedings. Particularly, the supplier of a taxpayer involved in a bankruptcy proceeding can issue a credit note staring from the moment in which such proceeding is opened and until the deadline to exercise the right of deduction. However, there are certain open points that should be clarified by Italian Tax Authorities, such as:
  - ✓ the provision is currently only applicable to bankruptcy proceedings started after the enactment of the Decree at stake (i.e. after May 26, 2021) and not for the proceedings already started;
  - ✓ when the credit note should be issued. Indeed, a bankruptcy proceedings could also have a positive outcome, therefore, the supplier should have the right to decide when issuing such credit note, starting from the opening of the proceeding, until its end.

ACE enhancement - Art. 19, para. 2-7

Article 19, para. 2-7 of the so-called "Sostegni-bis" decree (D.L. 73/2021) establishes the ACE enhancement for assets increase earned in 2021 tax period through partners' contribution (even in case of previous credit give up) or income provision set aside. For this increase, the notional yield coefficient is equal to 15%, within 5 million. The maximum an IRES subject can save is therefore 180,000 EUR (36,000 EUR per million of euro).

Assets increase applies from the beginning of the period, even if different from income provisions. They waive the ordinary rule, based on the *pro rata temporis* importance of the increase deriving from partners' contribution.

This benefit comes alongside the existing one. It means that for assets increase gathered during the fiscal period 2011-2020, deduction will still apply the 1.3% coefficient.

For 2021 tax period, deduction deriving from this benefit can be claimed through a tax credit, as an alternative to the downward variations in the 2022 Income Form and prior to Tax authorities' communication. The tax credit has to be calculated applying the 2020 IRES (or IRPEF) rate to the notional yield and it can be used in relation to all the F24 deposits, the day after the recapitalization. As well as compensated in F24, tax credit can be transferred to other subjects or asked for a refund without producing interests.

For those who want to benefit from the tax credit during the year, they can expect a refund of the excess quota they taken advantage of, whereas the assets increase is lower at the end of 2021.

Amendments to the tax credit for investments in new assets - Art. 20

The rule extends the possibility to use the tax credit for investments in new assets in a single annual instalment also for entities with revenues higher than Euro 5 million. This rule is applicable to the tax credit relating to investments in tangible assets other than those in Annex A of the 2017 Budget Law (formerly "super-depreciation") made from 16 November 2020 until 31 December 2021.

Set-off of claims 2021 - Art. 22

The Article 22 of Law Decree May 25th 2021 no. 73 (the "Sostegni bis Decree") raised to €2 million, for 2021 only, the limit pursuant to Article 34, par. 1, first sentence, of Law December 23th 2000 n. 388. Therefore, the limit for the use of tax and social security contribution credits for offsetting in the F24 form, which had already been raised for 2020 from €700.000 to €1 million (Article 147 of Law Decree May 19th 2020 n. 34), is now equal to €2 million for 2021.

Provisions on research and development of vaccines and drugs - Art. 31, par. 1-5

In order to incentivize and support companies that carry out research and development projects on innovative drugs, including vaccines, the provision introduces for them a tax credit equal to 20% of the costs incurred from 1 June 2021 to 31 December 2030, up to a maximum amount of Euro 20 million per year for the following activities: fundamental research, industrial research, experimental development activities and feasibility studies necessary for the research project.

Costs incurred in connection with research and development activities indicated in art. 25 of GBER Regulation No. 651/2014 dated 17 June 2014, are eligible (such as personnel costs, depreciation related to instruments and equipment to the extent and for the period they are used for the project, costs for contractual research, knowledge and patents acquired or licensed from external sources under normal market conditions, as well as costs for consultancy and equivalent services, additional overheads and other operating costs, including costs of materials, supplies and similar products).

The credit is also available to resident companies or to permanent establishments of non-residents companies that carrying out research and development activities in Italy on the basis of contracts concluded with companies resident or located in EU member states, members of the European Economic Area, or included in the list referred to in the Decree of the Ministry of Finance 4 September 1996.

The tax credit cannot be combined, in relation to the same eligible costs, with other incentives in the form of tax credits for research and development activities. Moreover, the grant is not relevant for IRES and IRAP purposes.
The tax credit can be used to offset tax liabilities pursuant to art. 17 Legislative Decree No. 241/1997, in three annual installments of the same amount, starting from the following year.

Tax credit for sanitization and the purchase of protective equipment – Art. 32

In order to encourage the adoption of measures aimed at containing and fighting the epidemiologic emergency from Covid-19 and encourage the reopening of activities, a tax credit is granted in the amount of 30% for the months of June, July and August 2021 up to a maximum of Euro 60.000 for each beneficiary to companies, professionals, including non-commercial and the Third Sector entities, for the costs relating to:

- sanitization of work environments and tools;
- test to those who lend their services in the context of work and institutional activities;
- purchase of personal protective devices (masks, gloves, face shields, overalls, etc.)
- purchase of cleaning and disinfecting products;
- purchase of safety devices (thermoscanners, thermometers, etc.);
- purchase of devices to ensure interpersonal safety distance (protective barriers, etc.).

The tax credit can be used in the tax return for the fiscal year in which the expenditure was incurred or in order to offset other tax liabilities. The grant is not relevant for IRES and IRAP purposes.
A Provision of the Italian Tax Authority establishes the criteria and modalities for the application and use of the tax credit within the expenditure limit of Euro 200 million for 2021.

Extension to the tax credit for advertising investments - Art. 67, par. 10

In order to align the rules of the tax credit for advertising investments on radio and television for 2021 - 2022 with those in force for advertising investments on newspapers, par. 10, art. 67 of Law Decree No. 73/2021 amended art. 57-*bis* of Law Decree No. 50/2017.
In fact, following the introduction of the “special regime” by Article 186 of Decree-Law 34/2020 for the 2020, this regime had been extended by art. 1, par. 608 of Law no. 178 30 December 2020, for 2021 and 2022 only for advertising investments in newspapers.
Following the further amendment, the credit for advertising investments is due to the extent of 50% of the value of investments made in 2021 and 2022 in daily newspapers and periodicals, including online, and national analogue and digital television and radio not owned by the State. It should be noted that the overall resource limit is Euro 90 million for each of the two years, divided in Euro 65 million for the press and Euro 25 million for television and radio broadcasters.
The possibility of filing electronic communications for the reservation of the grant for the year 2021 is also extended to 30 September. Communications already filed in March remain valid.

Direct Tax

Italian Revenue Agency – Principle of law n. 10/2021 – Inapplicability of the participation exemption regime in case of migration of an Italian holding company

The document concerned has been inspired from the previous Circular Letter of the Italian Revenue Agency n. 6/2006 according to which, in case of transfer of business including a shareholding qualifying for pex, the built-in gain related to this shareholding concurs to determine the capital gain referred to the business on the whole. Such an argument arises both from the concept of business sets forth by art. 2555 of the Italian Civil Code and the art. 86 of the Italian tax Code, pursuant to which, in the event of sale of business, the related capital gain is uniformly determined keeping into account all the items belonging to the business sold.

Moreover, the named Principle of law has clarified that the said argument works not only with regard to transfer of business for consideration, but with reference to all the realization cases – including the migration of Italian companies and the other similar cases provided by art. 166 of the Italian tax Code – concerning a business or a line of business too.

Therefore, according to the Italian Revenue Agency, should the object transferred is a business, the pex regime possibly applicable to a shareholding included in the said business is not applicable and, consequently, the capital gain is determined, pursuant to art. 166 of the Italian tax Code, by the difference between the market value of the business transferred and the fiscal value of the items related to the same business which have not been included among the assets and liabilities of the permanent establishment possibly set up in Italy.

On the contrary, in the event of the transfer regards, not a business, but single shareholdings, or the office of a passive holding, since in such cases is not conceivable the existence of a business pursuant to art. 2555 of the Italian Civil Code, the participation exemption regime set forth by art. 87 of the Italian tax Code might be applicable and this in accordance with art. 166 of the Italian tax Code, which, with regard to the determination of the capital gain, refers to the market value of the single asset transferred (see Assonime Circular letter May 25th , 2021, n. 16, pag. 6).

Questioning no. 238 dated April, 23rd 2021

According to the Revenue Agency, art. 177 paragraph 2-bis of TUIR (Italian Tax Consolidated Text) doesn't exclude the contribution of share capital bare ownership from the "realizzo controllato" (controlled profits) tax regime *a priori,* unlike what is set out in paragraph 2 of the same article. In its response to **Questioning no. 238 dated April, 23rd 2021,** the Revenue Agency claims that par. 2-bis recalls the participation attributing voting rights, as well as those having more than 25% share capital [5% in case of a listed company) of the company involved in the contribution. It remains understood that the receiving company should be entirely participated by the contributing company.

Paragraph 2-bis of Art. 177 (likewise paragraph 2 of the same regulation) is not applicable in case of contribution of the mere usufruct rights instead, since it does not allow the receiving company to be a partner in the company subject to contribution or to participate to the shares of the exchanged entity (as already explained in the Response no. 381/2020).

Communication on Business Taxation for the 21st Century

On 18 May 2021, the Commission published the Communication on Business Taxation for the 21st Century. The Communication sets out both a long-term vision to provide a fair and sustainable business environment and EU tax system, and a tax agenda for the next two

years, with targeted measures that promote productive investment and entrepreneurship and ensure effective taxation. More specifically, the Commission sets out a series of targeted initiatives, as follows:

- **Better support business, and particularly SMEs**, in their recovery, with a Recommendation on the domestic treatment of losses. The Recommendation prompts Member States to allow loss carry back for businesses to at least the previous fiscal year. Loss carry back has the advantage of benefitting only the businesses that were profitable in the years before the pandemic. Companies that were making a profit and paying taxes in the years prior to 2020 would be able to offset their 2020 and 2021 losses against these taxes.
- **Promote innovation by addressing the debt-equity bias** in corporate taxation through an allowance system. The Commission proposal will try to redress the debt-equity bias and contribute to the re-equitation of companies financially vulnerable because of the COVID-19 crisis.
- **Ensure greater public transparency** on the taxes paid by businesses, by proposing that certain large companies operating in the EU should have to publish their effective tax rates.
- **Tackle the abusive use of shell companies**, through new anti tax-avoidance measures. The Commission will propose new monitoring and reporting requirements for shell companies, so that tax authorities have better oversight and can better respond to aggressive tax planning through these entities.

Deductibility of intragroup costs - Ordinance no. 12268 filed of May 10

With the ordinance no. 12268 filed of May 10, the Supreme Court returns to rule on the deductibility of intragroup costs. According to the judges, an intragroup service is deductible if the company that benefited from the service can demonstrate the actual benefit achieved or potentially achievable.

The taxpayer appealed to the Supreme Court complaining of a failure to evaluate the evidences produced in support of the inherence of intercompany charges. The judges of legitimacy reiterated that the burden of proof, including the inherence of such costs and their direct link to revenue-producing activities, lies with the taxpayer, who he is also required to demonstrate the economic consistency of the costs incurred in the business activity, where the adequacy of the data relating to costs and revenues shown in the financial statements and in the tax returns is also contested by the tax authority. In the lack of such proof, the denial of the deductibility of part of a cost that is disproportionate to the revenues or to the business purpose could be legitimate.

In this context, the presentation of the contract regarding the services provided may be not sufficient, much less the invoice, since it is necessary to give elements to determine the actual or potential utility achieved by the taxpayer who received the service.

The appeal board ruled out the inherence without, however, a concrete and effective scrutiny of the evidences produced by the company, all aimed at demonstrating the effectiveness and relevance of the services received.

The Supreme Court therefore accepted the taxpayer's appeal.

Ruling no. 342 dated May 13th 2021

In the ruling no. 342 dated May 13th 2021, the Revenue Agency states that in the tax period in which the requirements are met for the tax deduction of losses on small credits from business income (i.e. *The credit is considered modest when it amounts € 5,000 for larger companies and not exceeding € 2,500 for other companies*), pursuant to Article 101, par. 5 of the Italian Tax code, the taxpayer has the right to deduct the entire amount of such credits, up to the limit of the non-deducted write-downs, even if the cost is reclassified to the income statement as a write-down/accounting provision.

Therefore, referring to previous practice documents (Circular no. 26/E dated August 1st 2013 and no. 14/E dated June 4th 2014), the Tax Authorities has recognised the taxpayer's right to deduct the accounting write-down of the i.e. "mini-credits" already in the tax period in which the conditions required by the tax legislation are met; in this case, the aforementioned mini-credits will no longer have to be considered for the calculation of the flat-rate accounting provision pursuant to Article 106, par. 1, of the Italian Tax code (0.50% of the value of the credits) and the subsequent derecognition from the financial statements of the receivables previously written down and deducted will not produce any tax effect.

The Revenue Agency also emphasised that the non-deduction of the accounting write-downs of credit in the year in which the requirements of the tax legislation were already met however does not represent a breach of the accrual principle, provided that such deduction does not take place beyond the tax period in which the company proceeds with the derecognition of the credit from the financial statements in accordance with the accounting standards.

Tax treatment of the so-called tax suspended reserves

The Milan AICD rule of conduct no. 211 regards the tax treatment of the so-called tax suspended reserves. In particular, it focuses on the tax regime of the reserves secured in case of the option exercise related to the re-evaluation of the enterprises assets made on the basis of specific law provisions, including, most recent, that of art. 110, D.L. no. 104/2020.

The rule of conduct states that, according to the traditional approach, the re-evaluation reserves established on the basis of law no. 342 of 2000, also referenced to by the recent regulation of cited art. 110, D.L. no. 104/2020, originate taxable basis in the hands of the company (and the shareholders) only in case of distribution to same of the re-evaluation active balance. Events other than the distribution to shareholders do not constitute a taxable event.

Such interpretation is historically shared by the tax authorities and, more recently, by the OIC interpretation document no. 7 of 2021. Hence, certain more recent interpretations of the Revenue Agency, pursuant to which not only the distribution to shareholders, but also any use other than the cover of income losses represent taxable events, cannot be shared.

The rule of conduct reiterates that art. 13, co. 3, of law no. 342/2000 provides, clearly, as the only taxable event of the re-evaluation reserve, the distribution to shareholders. Different interpretations, based on the provision of art. 2 of same art. 13 which regards the civil law restrictions resting on the reserve, are to be rejected since the two plans, that of the civil law restrictions and that of the tax ones, are separate and autonomous. According to the Association, while comma 2 of art. 13 of quoted law no. 342/2000 applies in any case of reduction of the re-evaluation active balance, comma 3 applies only in case the reduction of the re-evaluation active balance originates from the attribution of same to shareholders.

The opinion formulated by the rule of conduct are also supported by the recent Assonime Circular no. 18 of 2021.

Indirect Tax | VAT

E-commerce package – domestic implementation - Legislative Decree May 25, 2021, no. 83, implementing EU Directive 2017/2455 and EU Directive 2019/1995 (E-Commerce Decree) (published on the Italian Official Gazette no. 141 of June 15, 2021)

Starting from July 1, 2021, the EU e-commerce package will enter into force. Italy implemented internally the EU dispositions with Legislative Decree dated May 25, 2021, no. 83, published in the Official Gazette no. 141, dated June 15, 2021.

More in depth, the Decree intervenes on Presidential Decree no. 633 of 1972 and on Law Decree no. 331 of 1993, in order to enact the EU dispositions on e-commerce transactions.

Please find below the hot topics:

- Unique threshold of 10.000 for B2C distance sales. Above the threshold distance sales are subject to VAT in the country of the purchaser;
- OSS regime: VAT in the EU countries could be accounted for directly in the country of establishment of the EU supplier (if Extra-EU, one EU country must be choosen), by applying the OSS regime, without having the obligation of VAT identification in all the EU countries in which distance sales are performed above the 10k threshold. OSS regime, currently applicable to Telecommunication, Broadcasting and Electronic – TBE - services, will also apply to all B2C supplies of services, to EU distance sales and to distance sales carried out through the intervention of a marketplace;
- IOSS regime: special regime for distance sales of imported goods which value is not higher than euro 150;
- For distance sales facilitated through the use of a marketplace, the liability for the payment of VAT is in charge of the marketplace.

Incorrect application of the reverse charge - Fixed administrative penalties in case of wrong application of the reverse charge mechanism - Tax ruling no. 301 of April 28, 2021

In the event of wrong application of the reverse charge mechanism on a transaction incurred in Italy between two foreign entities, the wrong behavior of the supplier (i.e. invoicing through the Luxembourg VAT number without application of Italian VAT), and of the purchaser (i.e. application of Italian VAT through reverse charge mechanism), only implies an administrative penalty of between €250 and €10,000, as stated by art. 6, par. 9-bis2 of Legislative Decree no. 471 of 1997.

According to art. 17, par. 3 of Presidential Decree no. 633 of 1972, in case of transactions relevant in Italy carried out between foreign entities (not established in Italy) the foreign supplier should use its Italian VAT registration and VAT number in order to invoice the domestic sale with Italian VAT, to be paid by the foreign purchaser. However, due to the fact that no fraud occurred and that the mistake in the application of VAT (paid according to the reverse charge by the purchaser) was due to a misunderstanding between the two foreign entities, Italian Tax Authorities clarified that only formal penalties apply, for the wrong application of reverse charge, instead of ordinary VAT. The purchaser could also deduct the VAT wrongly paid through reverse charge.

VAT Refund for non–residents - Electronic portal VAT refund also applicable to EU entities registered for VAT purposes in Italy - Tax Ruling no. 359 of May 20, 2021

A non-resident taxpayer with a tax representative in Italy can ask for a VAT refund according to art. 38-bis2 of Presidential Decree no. 633 of 1972, through the electronic portal for domestic purchases and imports, if the input invoices/customs bills are addressed to the foreign VAT number, while the transactions referring to the Italian VAT number managed through the tax representative must be included in the Italian annual VAT return.
This means that the appointment of a tax representative does not preclude the non-resident from applying for the VAT refund through the 8th EU Directive - electronic portal procedure, provided that the invoices are addressed to the foreign VAT number (it is not allowed therefore to use said refund procedure for invoices addressed to the Italian VAT number) and that they are not included in the Italian monthly computations and Annual VAT Return.

VAT refund also applicable in case of late identification in Italy - Tax ruling no. 393 of June 8, 2021

This case pertains to a transaction with movement of goods in Italy composed by (i) a sale from IT company towards a Spanish one; (ii) a further sale carried out by the latter Spanish company to an EU purchaser, VAT identified in Italy (to which it was wrongly applied the zero-rated regime through the Spanish VAT number). However, also the second sale should have been subjected to IT VAT due to the fact that the last purchaser is not established in Italy. Further to the error, the Spanish company requested an Italian VAT identification, still applying the wrong VAT treatment for a limited period due to a default in its IT system.
ITA confirmed that, even if VAT was wrongly applied, only the fixed administrative penalty from euro 250 to euro 10.000 should apply (art. 6, par. 9-bis2, Legislative Decree no. 471 of 1997) and the purchaser could still deduct the VAT applied through reverse charge.
Furthermore, the Spanish company requested the refund of IT VAT through the electronic portal (8th EU Directive) that was firstly denied by tax authorities due to the fact that the company carried out transactions in Italy for which is a taxpayer.
ITA pronounced stating the principle of neutrality of VAT, confirming that the Spanish company has the right to ask the refund of the VAT paid in Italy through the 8th VAT directive. Thus, due to the fact that even if VAT was wrongly applied, the application of penalties under 6, par. 9bis2 lead to the fact that the supplier could be treated as subject that did not carried out transactions VAT relevant in Italy.
In conclusion, as regards the transactions carried out after the VAT identification, where the seller continued not applying VAT, Italian Tax Authorities clarify that the purchaser should have regularized the transactions at stake by issuing a self-invoice according to art. 6, par. 8 of Legislative Decree 471 of 1997.
Such conclusion seems to be not in line with the principles above mentioned and with tax ruling no. 301 related to a similar case.

Undue Deduction - Article 6 par. 6 of Legislative Decree no. 471 of 1997

<u>Illegitimacy of proportional penalties for a taxpayer who deducts VAT charged on a transaction that should have been exempt – CJEU Case C-935/19 dated April 15, 2021</u>

By implicitly confirming the deductibility of the tax, the Court of Justice has ruled that proportional penalties are unlawful where, in the absence of fraud, VAT has been charged on a transaction which should instead have been classified as exempt. Member States are competent to choose the penalties in the event of failure to comply with the conditions laid down by EU law for exercising the right to deduct VAT, but they must not go beyond what is necessary to ensure the correct collection of the tax and to prevent fraud. In particular, in order to assess whether a penalty complies with the principle of proportionality, account must be taken of the nature and gravity of the infringement which that penalty is intended to punish and of the manner in which the amount of the penalty is determined.
The decision at stake therefore concludes that in case of erroneous qualification of the transaction as subject to VAT (instead of exempt) the proportional penalty cannot be applied on the amount unduly deducted, without any intent of fraud or tax evasion.

<u>In the event of application of VAT rate, the client can benefit from the lower penalty, but he may not deduct the tax paid in excess – Supreme Court of Cassation, decision no. 10439 dated April 21, 2021</u>

The Court of Cassation provided a restrictive interpretation of Article 6, par. 6 of Legislative Decree no. 471 of 1997, which seems not fully in line with the EU principles of neutrality and proportionality.

More in depth, according to the Court, the interpretation of such article leads to the fact that the legislative amendment of art. 6 was provided in order to decrease the penalties applicable for undue deduction in cases in which VAT has been applied with higher rate in respect of the one due (from proportional ones 90% to fixed ones from euro 250 to euro 10k). Conversely, as per the right to deduct VAT in case of wrong application of VAT, it has to be taken into account only within the limits of the amount due.

According to the wording of the article, the right of deduction in case of wrong application of VAT should lead to the interpretation that it is possible to deduct only the VAT effectively due.

According to the Court, the VAT neutrality system does not allow a taxable person to deduct a tax that is not due, on the basis of the principle that only those taxes that are actually due are to be paid or deducted, regardless of that taxes erroneously paid and indicated in the invoice.

The decision at stake seems to be penalizing and not taking into account the neutrality principle of VAT for which art. 6 was introduced.

VAT treatment of fronting bank services - Ruling no. 358 of 2021

With the Ruling no. 358/E of 19 May 2021 the Italian Revenue Agency provided some clarifications in relation to the VAT treatment applicable to the fronting bank services rendered by a bank within the management of receivables classified as “unlikely to pay” (hereinafter "UTP").

In the case addressed by the Revenue Agency, following a partial and non proportional demerger, the claimant, as beneficiary company (hereinafter “claimant” or “acquiring company”), receives *inter alia* from the demerged company (hereinafter also “bank”) a portfolio of UTP receivables. However, although the acquiring company is a financial intermediary registered under article 106 of Italian Banking Act, the claimant is not authorised to carry out banking activities. For this reason, the acquiring company is not allowed to operate on current accounts and therefore it may not autonomously manage the operations related to UTP receivables acquired.

This considered, in order to manage and execute the UTP receivables transferred within the demerger, the parties agreed on an operational protocol related to so called fronting bank services, under a specific framework agreement. According to the mentioned agreement, the bank is appointed by the claimant – through a specific mandate – to intervene in the following:

- financing activity, *i.e.* new finance granted to the borrowers and regulated trough current accounts – in this case, the legal and economic parties are the claimant and the borrowers being financed;
- operations pertaining to the existing or new current accounts – *e.g.* settlement of in-and-out payments relating to the new finance provided.

As consideration for the fronting bank activities, the acquiring company shall pay to the bank both a lump-sum fee and a yearly commission fee.

With the aim to determine the proper tax treatment, the Revenue Agency firstly recalls the principles outlined by the European Court of Justice case law, clarifying that financial services are regarded as VAT exempt transactions depending on their nature, namely regardless of the features of persons supplying or receiving such services, or the way in which they are provided.

Secondly, the Italian Tax Authorities point out that the VAT exemption may not apply where the liability of supplier is limited to technical matters only, whereas the supplier should be responsible for the proper execution of financial services provided. In the present case, although the demerged company has a mere operational role – both in the management of the transferred UTP and in the financing activity – the bank supplies the services under analysis according to the instructions provided by the transferred borrowers 'in the name and on behalf of' the claimant. In this respect, the Italian Revenue Agency also notes that the bank will be liable for third parties claims arising from the non-fulfillment of contractual obligations.

On these bases, the Italian Revenue Agency confirmed that the fronting bank services carried out by the bank may be regarded as VAT exempt services according to article 10, paragraph 1, no. 1) and no. 9) of the Italian VAT Law.

Other Indirect Tax

Disposal of NPLs on a secondary market: registration, mortgage and cadastral taxes due on a fixed basis only if carried out by banks and authorised financial intermediaries - Ruling no. 304/2021

Ruling no. 304/E of 28 April 2021 pertains to the subjective requirements to be met in order to benefit from the more favourable regime set forth by article 7.1, paragraph 4-*bis*, of the Italian Securitisation Law (Law no. 130 of 30 April 1999).

In a nutshell, the mentioned article 7.1, paragraph 4-*bis* of the Italian Securitisation Law (introduced by the Law Decree no. 34 of 30 April 2019) establishes that, under certain conditions, registration, mortgage and cadastral taxes are equal to €200 each. In particular, this provision reduces the indirect tax burden where the assets subject to the aforementioned indirect taxes are acquired by certain vehicles ("ReoCo" and "LeasCo") within and in the exclusive interest of the securitization transaction.

The case analysed by the Italian Tax Authorities concerns a special purpose vehicle incorporated under Law no. 130/1999 ("SPV") which, in the context of a securitisation, acquires mortgage-backed non performing loans (hereinafter "NPLs") originated by Italian resident banks. Such loans were purchased by the SPV both on the primary market – *i.e.* directly from the Italian bank originators – and on the secondary market from entities not qualified as financial institutions – in the present case from other SPVs or from companies allowed to purchase NPLs under article 115 of TULPS and article 2 of Ministerial Decree no. 53/2015.

The Italian Revenue Agency clarifies that said article 7.1, paragraph 4-*bis* must be interpreted restrictively, as this pertains to a favourable tax treatment granted only to the specific cases provided for by the Law. More in detail, the Italian Tax Authorities note that, based on the literal meaning of the provisions at hand, only the acquisition of NPLs from banks and financial intermediaries registered under article 106 of Italian Banking Act may benefit from the registration, mortgage and cadastral taxes due on a fixed basis.

It follows that the more favourable indirect tax regime granted by article 7.1, paragraph 4-*bis* of the Italian Securitisation Law is not applicable where, within a securitisation, the NPLs are acquired on the secondary market – *i.e.* when the NPLs, previously acquired from the originating bank (or financial intermediary) by non-financial entities, are transferred through a securitisation transaction.

Customs

Sugar Tax Decree May 12th 2021

The Ministry of Finance issued on May 12th 2021 a Decree, containing the application instructions on the consumption tax on sweetened beverages (so-called "Sugar Tax")

Global Employer Services

Ministerial tax practice: Employment income in the COVID -19 era

The reimbursement of the employee expenses under the smart working regime[1] - Rulings n. 314, n. 328 and n. 371 of 2021

The current pandemic crisis has radically changed the way the employment relationship is performed because of the inability of working in the workplace (at the ordinary company headquarters) due to bans imposed during the lock down and the ever-increasing use of new IT technologies focused on managing work remotely.

The current situation has generated tax issues that the domestic tax legislation does not specifically address, leaving interpretative gaps and a complete absence of exact indications.

Ministerial practice has recently intervened on this point by setting some principles although a priority intervention by the tax legislator, which can clearly delimit the fiscal boundaries of smart working and the consequent exemptions in the tax field, would be preferable.

The principle that seems to arise from the recent practice published by the Italian Revenue Agency through the Ruling answers no. 314, no. 328 and no. 371 of 2021 on smart working is the possibility of granting tax exemption on the reimbursement to smart working employees only in case the employer does not pay a flat-rate reimbursement. On the contrary, this reimbursement is required to be analytically documented and linked to cost savings for the company.

Specifically, with the Ruling answer no. 314 of April 30th 2021, the applicant company represents that, in the context of a trade union agreement or company regulation and in order to indemnify employees from working related expenses they incur while operating from their homes, intends to grant each employee the reimbursement of expenses arising from his/her smart working activity outside from the company offices. The expected amount is equal to 0.5 Euro for each day on smart working determined on the basis of daily savings for the company (costs of electricity, water and other utilities). In this context, the financial administration agrees with the solution represented by the applicant (exemption of the daily reimbursement) as the criterion for determining the share of costs to be reimbursed to employees in smart working mode is based on parameters aimed at identifying costs saved by the company that, on the other hand, were incurred by the employee. Based on these considerations, the financial administration agrees for the exemption and therefore the IRPEF (personal Income Tax) non-taxability of the reimbursement to the employee as it refers to expenses incurred in the exclusive interest of the employer.

The Italian Revenue Agency reaches opposite conclusions in the Ruling no. 328 of May 11th 2021 on a similar case in which the employer intends to agree specific individual agreements with the employees who work exclusively remotely. The reimbursement is equal to 30% of the actual expense charged to the employee for documented expenses related to internet connection, use of electricity, air conditioning or heating and which must be reported in the periodic invoices issued in his name or in the name of his cohabiting spouse. It is also provided that said sums have a compensatory nature and that are computable for the purposes of other contractual and legal institutions including any severance payment. The Authority notes that when determining the employment income, the expenses incurred by the worker and reimbursed on a flat-rate basis, can be excluded from the taxable basis only in the event the legislator has provided for a criterion aimed at determining the quota that can be excluded from taxation, being considered referable to the exclusive interest of the employer. It is therefore concluded that the sums reimbursed by the applicant company to its employees who carry out their work in smart working on the basis of a flat-rate criterion and are not supported by objective elements and parameters, cannot be excluded from the determination of employment income in case of an absence of a punctual legal provision.

Lastly, the Tax Authority pronounces again on the correct tax treatment of employee reimbursements for IRES purposes with the Ruling answer no. 371 of last 24 May. On that occasion it was clarified that the reimbursement paid by the employer to an employee for the

expenses incurred for the activation and for the subscription fees to the data connection service concurs to the employment income also in this case on the circumstance that the cost of data traffic is not supported by objectives and documented elements and parameters; this reimbursement is instead deductible for IRES purposes pursuant to art. 95 of the Italian Tax Code as this sum is borne by the company for an employee need related to the way of performing his working activity. (*smart-working*).

The conclusions reached by the financial administration in recent Ruling answers show a very penalizing approach in the case of **flat-rate reimbursement** of expenses but on this point it seems clear that the current tax legislation does not leave the chance for different interpretations. In fact, based on art. 51 of the Italian Tax Code, the reimbursement of expenses can be exempted only where expressly provided for and furthermore the legislator has established lump sum determination criteria in specific cases, leaving no margins for analogous applications.

Note: [1] Ruling answers no. 314 of April 30th 2021, no. 328 of May 11th 2021 and no. 371 of May 24th 2021

Reimbursement of PC and Tablet expenses for distance learning[1] ("DAD") for children - Resolution no. 37 / E of 2021

The reimbursement, as part of a corporate Welfare Plan, paid by the company to its employees for the expenses incurred for the purchase of *PC, Tablet or Laptop* in order to allow the "*attendance of distance learning* " (DAD) of their children, it is not subject to personal income tax IRPEF and does not generate taxable income if the employee produces suitable documentation issued by the school or university certifying that the lessons have been carried out through the distance learning (DAD).

The arguments exposed by the Tax Authority in Resolution 37 / E of 28 May 2021 are based on the regulatory framework referred to article 51, paragraph 2, letter f) - f-bis) of the Italian Tax Code, which provides that from the employment taxable income have to be excluded works and services made available by the employer to employees and their families and the sums provided for the purpose of education, training, recreation, social and health assistance, and worship, scholarships etc.

The Revenue Agency highlights how *PCs, Laptops and Tablets* are necessary tools to participate in lessons held in the "virtual classroom" and to establish the necessary relationship between teachers and students.

Similarly, excluded from taxation are also *vouchers*, legitimated documents available through the *Welfare* platform, issued for the purchase of the same devices from affiliated resellers, if used for the distance learning.

Note: [1] Resolution no. 37/E of May 28th 2021

Notional remuneration and work carried out in *smart working*[1] – Ruling answer n. 345 of 2021

Despite the sudden pandemic crisis has disrupted the ordinary ways of carrying out the work performance for many expatriates, the Revenue Agency with its answer no. 345 of last May 17 denied the possibility of applying the *notional remunerations* (based on art. 51, paragraph 8 bis of the Italian Tax Code) for outbound assigned employees performing their activity in Italy in *smart working* as a consequence of the health emergency. In these cases it will still be applied the normal method of determining the employment income according to the paragraphs 1 to 8 of the same article.

In the case examined in the ruling, an employee tax resident in Italy and employed with a permanent contract, was assigned from May 1st, 2019, to a French foreign subsidiary and the employer applied the discipline of *notional remunerations* according to the article. 51, paragraph 8 bis of the Italian Tax Law. Due to the health emergency in the year 2020, the employee returned to Italy where he continued to perform his working activity for the foreign company without interruption in *smart working* mode. Taking as reference the OCSE guidelines of April 3rd, 2020 and the Italy - France Agreement signed on July 23rd, 2020, the employer considered continuing to correctly apply the notional remunerations.

The Tax Authority through its Ruling answer specified that the OCSE guidelines as well as the friendly provisions contained in the Italy - France Agreement exclusively concern the interpretation of international law **but have no relevance** for the purposes of the internal legislation and cannot be used to interpret the provisions contained in art. 51, paragraph 8 bis of the Italian Tax Law. Considering the return of the employee to Italy starting from 23 February 2020, since one of the conditions required by the law is not met, it is not possible to apply **the notional remuneration**.

In particular, considering that starting from 23 February 2020 the employee stays in Italy, the employer is required to **re** - **proportion** the notional remuneration for the month of February 2020 and to **recalculate the employment income produced from that date** according to the ordinary provisions of art. 51 of the Italian Tax Law instead of the special remuneration regime.

Note: [1] Ruling answer no. 345 of May 17th 2021

Tax Jurisprudence: The tax residence of individuals

Order of the Supreme Court of Appeal no. 14240 of 25.05.2021 - Presumption of tax residence for the Italian citizen who has emigrated from Argentina to Switzerland

The article 2 paragraph 2-bis of the TUIR provides a **relative presumption** (surmountable with contrary evidence) of residence for tax purposes in Italy, for persons deleted from the registers of the resident population and transferred to countries with privileged taxation and is also applicable to the subject, an Italian citizen who moved in Argentina decades ago and then emigrated to Switzerland. This is affirmed by the Supreme Court of Appeal, with order no. 14240 of May 25, 2021.

In the case in question, the parties considered that the presumption of residence in Italy, dictated by art. 2 paragraph 2-bis of the TUIR for persons transferred to countries with **privileged tax regime**, could not be applied, as the subject had not even transited in Italy, but had recently moved from Argentina to Switzerland.

The Supreme Court of Appeal, however, **rejects** this approach and notes that the scope of application of the norm is not defined in objective terms, i.e. considering the type of transfer made, but in **subjective** terms, identifying the interested party, represented by the Italian citizen, who having been registered in the Register of Resident Population, was then deleted and moved to a country with privileged taxation, without making further distinctions. Therefore, in the case in point, the presumption could be applied even if the person in question had materially moved from Argentina to Switzerland, but had at the time been registered as resident in Italy.

Although the Supreme Court of Appeal considered this ground of appeal unfounded, it upheld the taxpayer's appeal against the judgment of the Regional Tax Commission which had found him to be resident in Italy, noting, inter alia, that the adjudicating body of the case should in any event have taken into consideration the Convention against double taxation between Italy and Switzerland, since this is a provision which is of a higher-level to those of the national system and prevails over them (even in the case of transfer to countries with privileged tax regime).

Order of the Supreme Court of Appeal no. 11620 of 4.5.2021 - Proof of transfer abroad does not rule out tax residence in Italy

For the purposes of ascertaining the tax residence in Italy of an individual who has moved to Spain and is registered to AIRE, it must be ascertained whether the person has established or maintained his/her domicile in Italy, as regulated by art. 43 of the Civil Code, **recognizable by third parties**, intended as stable establishment in the territory of the State for most of the tax period, of the location where he/she manages his/her business and interests. It is not sufficient to exclude tax residence in Italy merely by determining that the taxpayer had actually established his habitual resistance in Spain.

The Supreme Court of Appeal notes in fact that the registration to AIRE and the establishment of one's residence in a foreign property are not sufficient to exclude the tax residence in Italy; the legislator in fact, explains the Supreme Court, has chosen to anchor the taxation of income to the existence of a **physical link** between the taxpayer and the territory of the State, which is not limited to the location in Italy of the only registered residence, but also involves the proof of domicile, intended *as the center of business and interests of the natural person*, given the regulatory provision contained in art. 2 of the TUIR.

According to the most recent jurisprudential evolution, the identification of the domicile must be recognizable to third parties in order to be relevant and this recognition must be identified in relation to the management of economic and asset interests and affairs**, primarily with respect to the location of emotional and family relationships**. It follows that the domicile must, not only, be the location of management of its interests recognizable to third parties, but this recognition must be linked to indices in order to identify primarily in Italy the economic and capital interest of the taxpayer (Supreme Court of Appeal No. 32992/2018 - Supreme Court of Appeal No. 6501/2015).

In the light of these principles, the Supreme Court concludes that in the case in point the adjudicating body did not operate correctly, having failed to verify whether the taxpayer, regardless of the establishment of the foreign residence, had maintained in Italy its business and interests such as, for example, social duties held Italian entities, opening of current accounts and acts of purchase and sale.

Supreme Court of Appel ruling no. 7621 of 18.3.2021 - The acquisition of foreign citizenship as evidence in support of tax residence abroad

The acquisition of foreign citizenship by an Italian citizen registered to AIRE must be correctly assessed by the judge called upon to evaluate the fictitious nature of the taxpayer's foreign residence, as it may correctly constitute a **indicator** to the fact that this person has had, in the years prior to the acquisition of foreign citizenship, emotional ties with the foreign country as well as his or her permanence there.

In the case in point, the tax authorities had held that, although the taxpayer's presence in Italy was not sufficient to integrate the legal presumption of residence (in excess of 183 days of physical presence), such residence could be affirmed on the basis of other circumstantial elements, capable of deeming residence in London as fictitious.

Similarly, the adjudicating body had not valued the circumstance alleged by the taxpayer of the acquisition of British citizenship; this element, according to the opinion of the Supreme Court of Appeal, can have indicative relevance of the effective permanence in the United Kingdom in previous years as well as the ties of the taxpayer with the United Kingdom itself.

The Supreme Court of Appeal seems in fact to confirm that for the purposes of ascertaining tax residence, all elements of connection with the foreign country provided by the taxpayer himself as evidence in support of the demonstration of residence, must be carefully considered. The judge must therefore conduct a thorough logical and legal examination of the relevant scenario without neglecting the elements of connection with the foreign country provided by the taxpayer.

Tax Litigation

Instructions and operational guidelines on the prevention and contrast of tax evasion, as well as on activities relating to tax litigation, consultancy and services to taxpayers (Circular n. 4/E of 7 May 2021)

With Circular 4/E of 7 May 2021, the Revenue Agency, following the consolidation of the regulatory framework relating to the full resumption of activities to prevent and combat tax evasion (with the approval of Legislative Decree n. 41 of 22 March 2021) provided the instructions and guidelines necessary to regulate the activities of the Office.

In particular, among the various points of interest provided, it is possible to highlight (i) the attention to be paid to the sustainability of the claim, (ii) the strengthening of the tools to support the prevention and fight against VAT fraud, as well as (iii) indications regarding risk analysis activities within the groups.

On the first point, also considering the current scenario of economic crisis, it is expressed the need to limit the controversy by assessing the sustainability of the claim, intercepting the deeds that are difficult to defend in court and accessing the controversy reduction procedures.

With regard to the second point, the objective of the strengthening is pursued with prior checks on big-data, as well as through the use of the anti-fraud controls set up by the legislator through art. 1, paragraphs 1079 and following of the 2021 budget law which allows the automatic block, following the crossing of the data, in the issuance of ideologically false letters of intent and invoices to fake habitual exporters.

Finally, with reference to risk analysis, the indication is to pay particular attention to the examination of information regarding the group to which the verified subject belongs.

Transfer of the Corporate Income Tax (so called “IRES”) credit accrued before the consolidation in the supplementary declaration

With the response to questioning n. 201 of 23 March 2021, the Revenue Agency has admitted the possibility for companies that have exercised the option for the regime referred to in art. 117 and following of the Presidential Decree n. 917 of 1986 (Italian Tax Code, so called “TUIR”), to transfer the credit accrued before the consolidation so that it is used by the consolidating company in "vertical" offsetting with the group's IRES debt. It is specified that this faculty is conditional (i) on the continuing availability of the credit accrued before the exercise of the option; (ii) the fact that said credit, at the time of the original return, could not be used due to the absence of taxes to be paid on a consolidated basis. In the case object of the questioning, in particular, the transfer of the credit was aimed at offsetting the higher tax due from the consolidation resulting from a conciliation agreement and two acceptance agreements reached with the tax authorities following the notification of an assessment notice and two invitations to appear in relation to the years 2015, 2015 and 2016 respectively. From an operational point of view, it is finally specified that, for the purpose of the correct and complete completion of the transaction, it is provided the only liability of the formal penalty referred to in art. 8, paragraph 1 of Legislative Decree n. 471 of 1997, reduced pursuant to art. 13 of Legislative decree n. 472 of 1997 for the modification of the declarations of the single company of the group (supplementary Income Tax Return), as well as of the declarations of the consolidation (supplementary

Consolidated Tax Return), with the exception of the supplementary declaration of the Consolidated Tax Return 2019 as it is entirely in favor of the taxpayer.

Clarifications on the methods and timing for carrying out the assessment activity in relation to research and development tax credits

With Circular n. 31/E of 23 December 2020, the Revenue Agency intervened on the issue of the terms for carrying out the checks relating to the tax credit for research and development pursuant to art. 3 of Legislative Decree n. 145/2013, specifying that taxpayers who commit errors in identifying the objective scope of the benefit and who use the related tax credit in compensation, incur in this case the use of non-existent credits in compensation and, consequently, for the recovery of said tax credit, the tax authorities benefit from the broader term referred to in art. 27, paragraph 16, of the Legislative Decree n. 185/2008 (31 December of the eighth year following the one when its use in compensation occurred) with the possibility to apply the penalty falling in a range between 100% and 200% pursuant to art. 13, paragraph 5, Legislative Decree n. 471/1997 (penalty for which the facilitated definition in case of verification with acceptance does not apply), without prejudice for the taxpayer of the possibility to avail himself of the voluntary correction before the issue of an assessment notice. The Circular also specifies that the requests for ruling regarding the inclusion of a certain activity to the scope of the tax credit discipline must be preliminarily proposed by the taxpayer before the Ministry of Economic Development (MISE) if they involve assessments on whether or not the credit is due; indeed, such requests for a ruling, representing actually a request for a technical opinion, are excluded from the area of application of the ruling, as the investigation would require specific technical skills not of a fiscal nature that fall within the operational scope of other administrations. In conclusion, the Revenue Agency will answer only the questions concerning fiscal issues.

The orientation of the Supreme Court on the relationship between the rules for the temporal allocation of negative income components and the principle of derivation (Civil Supreme Court, Section V, Ord., 20-04-2021, n. 10285)

With the aforementioned sentence, the Supreme Court, analyzing the issue of the possible prevalence of accounting principles on the general rule of temporal allocation referred to in the Presidential Decree n. 917 of 1986 -TUIR-, art. 109, paragraph 2, lett. a), expressed the legal principle according to which in the matter of income taxes of joint-stock companies, the determination of the tax basis is, as a rule, inspired by the principle of "dependence", that is the derivation from the result of the income statement, drawn up in compliance with the rules of the civil code and national accounting principles, by virtue of which the temporal allocation criteria provided for by the accounting principles may derogate from the general rules established by the Presidential Decree n. 917 of 1986, art. 109. This possibility, however, according to the Supreme Court is conditional on the fact that the accounting of the components of the business income has taken place in compliance, in addition to the aforementioned accounting principles, with the mandatory variations, increasing or decreasing, consequent to the application of the criteria established by the provisions of Section I of Chapter II of Title II of the Presidential Decree n. 917 of 1986.

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