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# Direct Tax

## Italian tax Authority (ITA): rulings n. 539 and 540 dated 9 August 2021 (tax recognition of the higher book values for IAS/IFRS adopter)

Two recent rulings - published on 9 August 2021 - provide for significant clarifications on the tax recognition of the higher book values regime (so-called step up) under art. 110 of Law Decree n.104/2020.

In particular, in **ruling n. 539**, regarding assets booked by IAS/IFRS adopter as **goodwill**, the ITA confirmed that the step up is allowed each time the book values exceed the tax values at the relevant yearend and, more in detail, has stated that:

- such regime **can be enacted also to “recover” the tax value** of goodwill deducted through extra-accounting tax depreciations (according to art. 103, co. 3.bis, of Italian Tax Code – ITC - and art. 5, co. 3, of IRAP Decree), also in case the previous tax value has already been subject to a different step up regime (provided for M&A transactions or under previous provisions similar to art. 110). Such interpretation is remarked also in **ruling n.540**;
- the **difference to be recognized**, quantified with reference to the financial statements as of 31 December 2019 (for entities with a calendar fiscal year) can be reduced or not changed at the end of fiscal year 2020, and in that case can be subject to the step up for the whole amount (on the contrary, the difference as of 31 December 2019 can be re-aligned only);
- the net equity item to be put **under tax suspension regime** has to be enough to cover the amount required by the law in the financial statements as of 31 December 2020, but the tax suspension can be attributed also in the financial statements as of **31 December 2021** (but not after its approval) – previous ITA interpretation just specified that the reserve had to be booked in the financial statements related to the fiscal year following the relevant one through a share/quota-holder resolution. Therefore, also the **profit of 2020** is available for the tax suspension regime (as confirmed in another ruling not published);
- the provision regarding the **taxation** – in the hands both of the entity and the share/quota-holders – in case of **distribution of the reserve under tax suspension** (due to the recall in art.110 of Law n. 342/2000) is applicable to both the profit and capital reserves. Such interpretation, supported just by the absence of a specific different provision, instead of a juridical and substantial analysis of the different nature of the values stepped up and of the reserves distributed, gives raise to doubts and uncertainty;
- in case of tax recognition of the higher book values, the additional 10% substitute tax due to cancel the tax suspension on the related reserve has to be applied on the differences between tax and book values to be realigned (meaning on the amount of the reserve booked increased by the 3% substitute tax paid for the step up); on such point the Tax Authority has provided an interpretation contrary to the sentences issued by the Supreme Tax Court (in particular, n. 11326/2020 and n. 32204/2019).

## Circular n. 24/2021 of ASSONIME

### Introduction

In Circular no. 24 of 4 August 2021 (hereinafter “the **Circular**”) ASSONIME illustrates the new regulations regarding exit and entry tax as deriving from Legislative Decree no. 142/2018, which implements ATAD 1 (2016/1164) and ATAD 2 (2017/952) EU Directives.

Revision of articles 166 and 166-*bis* of TUIR operated by the above mentioned decree, as known, consists of:

- a more articulated identification of their range of application (now expressly encompassing a wide type of “extraordinary M&A transactions”, inbound and outbound);
- the inclusion of the transfer of assets besides company businesses as going concern;

- the replacement of the valuation criterion of assets and liabilities moving from the “normal value” referred to in Article 9 of TUIR to that of “market value” referred to in Article 110, paragraph 7, of same TUIR;
- the abolition of the possibility of suspending the exit tax payment pending the realization of assets abroad, no longer an alternative to the payment in installments of the exit tax (the installments of the latter become 5 instead of six);
- the express provision of the attribution of a tax value to the inbound goodwill relating to the going concern even in the absence of incurring charges for its acquisition.

The review has also touched some aspects relating to the use of the tax losses (operating losses) (current or carried forward) by the taxpayer performing the outbound M&A transactions contemplated by Article 166.

In lingering on all these aspects, the Circular highlights some critical issues by examining severally the exit tax regulations as well as the tax valuation of the incoming assets/liabilities.

#### The payment in installments of the capital gain, the combination of regulations and the PEX system

As to the first subject, the relationship between the regulations contained in Article 166 of TUIR and the “installments allocation” of the capital gains realized on assets owned for at least three years pursuant to Article 86 of TUIR, the latter in some respects more favorable since it does not require the payment of interest and the granting of guarantees.

And indeed, one can think of the case of the contribution of a business as a going concern located abroad owned for at least three years in relation to which any capital gain realized, on the basis of the combined provisions of Articles 9 and 86 of the T.U.I.R., can be spread over five tax periods on a straight-line basis, in fact, without having to pay any interest or grant guarantees.

The overlap between the two set of regulations can also occur in the case of a transfer of assets or businesses as going concern from an Italian permanent establishment to the foreign head office or in the case of a transfer of assets from the Italian head office to a foreign permanent establishment benefitting from the *branch exemption* rules: the so-called *internal dealings*, in fact, are considered in the same way as transactions between related parties to be valued, in accordance with the provisions of Article 152 of TUIR and point 8 of Revenue Agency Provision dated August 28, 2017, no. 165138, based on the market value by applying, where appropriate, Article 86 of the TUIR.

Well, according to the Circular, and the opinion can be shared, the rules competition should be resolved in favor of the more convenient one not considering Article 166 of TUIR more specific than Article 86; otherwise plain effects of discrimination would arise up to the point, where the above transactions are different from those for which the payment in installments is allowed, of entailing the immediate taxation of the capital gain against, as we have seen, a fractional allocation without interest and guarantees.

As regards in particular the cases represented by the transfer of tax residence, the transfer of a business as a going concern from a permanent establishment to the head office and the M&A outbound transactions, ASSONIME focuses on the capital gain's “*unitary calculation*” (see paragraph 3 of Article 166 TUIR).

The question is whether this unitary calculation - which also literally concerns the exit tax to be paid in installments (see paragraph 10 of Article 166) - corresponds to that concerning the capital gain arising from the sale of a business as a going concern pursuant to Article 86 of TUIR or, as ASSONIME believes, this is a calculation that “does not imply that the capital gains relating to the single assets transferred must lose the specific tax attribute that characterizes them”.

This, however, having to consider that the calculation of the capital gain in the perspective of Article 166 of TUIR is relevant for the purposes of segregation with respect to the ordinary income of the last fiscal year in Italy and the offsetting with any losses carried forward, as well as for the purposes of the payment in installments of the tax imposed on same capital gain.

ASSONIME's opinion, according to which the unitary calculation of the capital gain in the above mentioned cases would differ from that provided for by Article 86 of TUIR and is linked to the application rationale of the exit tax, it is countered, as well known, by the one supported by the Revenue Agency, as expressed in the law principle no. 10/2021<sup>1</sup>.

In such a principle, relating to the case of a transfer of residence of an enterprise owning a business as a going concern which includes a PEX shareholding, the enjoyment of the participation exemption regime is denied as regards the mentioned shareholding, on this point confirming an interpretation that originated from circular letter no. 6/E/2006; this conclusion is argued by the fact that, in the case of the

realization of a business as a going concern, there is a single capital gain referable to the "universitas" so that it is not possible to split the said capital gain and extrapolate the portion referable to the shareholdings. Such a reading, in the Revenue Agency's opinion, would be supported by the current version of Article 166 of TUIR where it refers to the unitary calculation of the capital gain (reference similar to the content of the repealed Ministerial Decree of 2 July 2014).

Against the interpretation of the Revenue Agency, according to the Circular, indeed militates, among other arguments, the fact that Article 87 on a systematic level prevails over the preceding article, being aimed at coordinating, like the regime relating to the dividends exemption, the double taxation of company and shareholders.

Neither would be possible to extend the Agency's solution as expressed in said law principle to the case of the transfer of residence of passive holding companies to another EU member State, holding companies, as well known, characterized by the absence of a business as a going concern to which referring the PEX shareholdings. A different interpretation, in fact, according to the Circular, for the above mentioned companies would entail a more burdensome tax regime than any other form of monetization of the same surplus values and this in contrast, not only with the ATAD Directives, but also with the EU freedom of establishment.

<sup>1</sup>*Commented by ASSONIME with the circular 25 May 2021, no. 16.*

### The use of losses

As to the use of losses (current or carried forward), Article 166 of TUIR, as amended by Legislative Decree no. 142/2018, distinguishes between transactions that involve the total detachment from the Italian tax system since there is no permanent establishment left in our country and transactions that, on the contrary, involve a partial transfer of assets and/or liabilities abroad.

In particular, in the first case ("total transfer") paragraph 6 of Article 166 provides that past losses are fully offset with the ordinary income relating to the last period of residence in Italy (i.e. the income resulting from the ordinary management events) and for the difference, together with the loss of the last tax period, to be offset, again entirely, with the exit tax capital gain.

In the second case ("partial transfer" as a permanent establishment will remain in Italy), losses carried forward must be first used to offset the taxable income of the last period of residence in Italy ("ordinary income") up to the threshold of 80% of same income pursuant to Article 84 of TUIR. Any residual losses or, in the case of no taxable amount, losses carried forward together with any current loss, must be divided between what is referable to the "surviving" permanent establishment and what is instead attributable to the assets/liabilities transferred on the basis of the criterion of their respective net book value (without taking into account the tests referred to in Article 172, paragraph 7, of TUIR).

The portion of losses attributable to the assets/liabilities transferred can be fully offset with the exit tax capital gain where, on the other hand, that attributable to the permanent establishment can be carried forward by latter and used in the future with the ordinary rules (and, therefore, within the limit of 80% of the taxable amount pursuant to Article 84 of TUIR).

With specifically regards to the use of losses by the "surviving" permanent establishment, paragraph 6 of Article 166 provides that the portion of losses to be carried forward is not subject to the limitations set forth in Article 172, paragraph 7, of TUIR not suffering, consequently, further reductions in the case of transfer of tax residence abroad or of transfer to the foreign head office of a business unit that is part of a permanent establishment; interpretation that can be justifiable since in such cases there is no possibility of an intersubjective compensation of losses.

Thus the sustainability, according to ASSONIME, of the interpretation according to which limitations referred to in Article 172, paragraph 7, of the TUIR should not apply in all cases of M&A outbound transactions in which the accrued losses remain at the disposal of the "surviving" permanent establishment.

Some considerations on the case of past losses referable to taxpayers opting for the so called national tax consolidation, the use of which does not seem governed by paragraph 6 of Article 166, follow.

No issue, obviously, when the outgoing transaction causes in itself the exit from the consolidation and the reallocation of the losses to the company that generated them since, due to the retroactive effects of the interruption at the beginning of the tax period, the company leaving the consolidation is in the same situation as the stand-alone company.

Where there's no interruption as a result of the M&A outbound transaction, it is the case for example of the partial demerger of a consolidated company which has attributed past losses to the fiscal unit and which has no losses accrued before entering the consolidation, is not clear the fate of the exit tax capital gain, that is, if it is fully taxable, how it would be suggested by the letter of Article 166 TUIR or it can flow into the ordinary income of the last tax period in which the assets/liabilities transferred are taxable in Italy. Following the latter interpretation, ASSONIME believes that a waiver of the benefit of the fractional taxation of the capital gain is possible based on the argument that it is as an optional regime.

#### The incoming tax value

As regards Article 166-*bis* T.U.I.R. and the incoming attributable tax value ruled therein, the Circular is of the opinion that the article should not be applied, despite its ambiguous wording, any time the assets/liabilities of the non-resident taxpayer have already a tax value for Italian tax purposes and, therefore, not extraneous to the Italian tax system.

The issue arises, for example, for the case of the transfer of tax residence to Italy by a foreign taxpayer already having a permanent establishment in Italy before the transfer; it's clear that, in this case, the assets/liabilities of the aforementioned permanent establishment already have their own fiscal value for the Italian tax law so that the provisions of article 166-*bis* will not be applied to them. The same is to be said with regards to the merger when the incorporated foreign entity owns an Italian permanent establishment or, as regards the transfer of assets from a foreign permanent establishment (not under participation exemption regime) to the Italian head office.

In all the above mentioned cases, even when the country of origin applies an exit tax on the capital gains relating to the assets accrued and/or transferred, Article 166-*bis* is not applicable.

Particularly difficult is the solution concerning the applicability of Article 166-*bis* to the assets/liabilities of a CFC.

The non application may be supported by arguing that the transparency regime referred to in Article 167 of TUIR requires that said assets/liabilities are valued for tax purposes in order to determine the income to be attributed to the resident shareholder. In particular it could be argued that Article 166-*bis* cannot be applied in the case of repatriation of a CFC, considering that in this case assets/liabilities already entered in the circuit of corporate's assets already having an "Italian" tax value; the case of the CFC could suggest the comparison with that of the assets of an Italian permanent establishment of a non-resident entity (assets having an "Italian" tax value) or of an Italian company whose assets are transferred into a foreign permanent establishment (also with an "Italian" tax value).

This solution is shared by the Revenue Agency both in an unpublished response to a ruling concerning the incorporation of a CFC by a controlling company fiscally resident in Italy and in the draft circular on the CFC regime provided for in Article 167 of TUIR, draft called for public consultation on July 5, 2021.

In particular, the aforementioned draft circular states that, in the case of the transfer to Italy of the headquarters of a CFC taxed on a transparency basis, the repatriated assets/liabilities must take fiscal values equal to those used for the purposes of the CFC regulations at 31 December of the last fiscal year to which the transparency regime applies (in case of a fiscal year coinciding with the calendar year) and the tax losses accrued during the transparency regime, which, although accrued abroad, are to be considered business losses pertaining to the Italian law, as well as the excess of interest expense, interest income and ROL (see par. 8.1), are to be recognized.

The Revenue Agency considers said solution consistent with the provisions of point 8.7 of the Revenue Agency Provision dated August 28, 2017, no. 165138, in the event of termination of the branch exemption regime due to expiry of the term of effectiveness. In particular, in the aforementioned point 8.7 it is stated that, in the event of cessation of the option effects, the tax values of the assets and liabilities of the permanent establishment are assumed to be equal to those existing for the same at the end of the previous tax period and the residual losses of the permanent establishment remain usable solely for the purpose of reducing the income earned by the same.

This solution would be consistent with the non-taxation of the CFC's assets / liabilities in the event that the resident controlling shareholder transfers his residence abroad, thus ceasing the transparency regime.

However, the opposite solution, namely that entailing that Article 166-*bis* of TUIR also applies to the case of the repatriation of a CFC, is shared by the Circular and its first commentators<sup>2</sup>.

There are essentially two arguments in favor of the need to give a new tax value to the assets/liabilities of the repatriated CFC pursuant to Article 166-*bis* of the TUIR.

The first is that if the aforementioned provision were not applicable, there would be the risk of double taxation phenomena, considering that the country of origin could provide for an exit tax on current values whose recovery would not be possible either on the basis of the DTT rules, or on the basis of Article 165 of TUIR.<sup>3</sup>

The second argument consists of the fact that the fiscal *status* of a CFC it's not at all comparable to a non-resident person who has a permanent establishment in Italy, given that the rules contained in Article 167 of TUIR have the function of taxing the controlling shareholder and not the CFC itself.

Furthermore it can be noted that the attribution of new tax value to the assets of the CFC for Italian purposes is only aimed at calculating the income to be attributed to the Italian controlling shareholder, so that it cannot be held, in order to inhibit the application of Article 166-*bis*, that the assets/liabilities of the repatriated CFC have been introduced into the business assets circuit already before the transfer.

<sup>2</sup>See A. Garcea, "La disciplina CFC alla prova della entry/exit tax", in *Corr. Trib.*, 2021, pg. 752 ss.

<sup>3</sup>A. Garcea, *nt. 2*, pgg. 756-757, note 10.

## Tax Court of Reggio Emilia, June 14th 2021, n. 162/1/21 – Loss of the power of assessment related to long-term income items

Following to our Tax alert of April 2021, we remind that, in that occasion, we pointed to the sentence of the Supreme Court, United Divisions, of March 25<sup>th</sup>, 2021, n. 8500, which stated that the loss of the power of assessment of the tax authorities, which intend to tackle a long-term income item, takes place when the term for the assessment of the tax return where the item is splitted has expired. That stated, it must be firstly noted that the Supreme Court of June 30<sup>th</sup>, 2021, n. 18730, even though referred to a case different from the long-term income items, essentially confirmed the arguments of the United Divisions.

On this purpose, it is worth to underline the different position of the Tax Court of Reggio Emilia in contrast with the United Divisions' one. The question faced by the Lower Tax Court concerned a notice of assessment issued by the tax authorities regarding, *inter alia*, a dispute on the inherence of a cost, suffered by a company during the FY 2011, postponed to the following FYs.

The judges rejected the assessment arguing that the significant fact for income tax purposes took place in the FY 2011 whose terms for the assessment, at the moment when the assessment has been notified to the taxpayer, were expired.

Therefore, the judges considered the share-out of the yearly quota of the named cost not significant for the terms of assessment's calculation, arguing that, in compliance with the position of such Italian doctrine, the Supreme Court's position, exposing the taxpayer to the risk to be assessed for ages, is in contrast with the proportionality and reasonableness principles provided by Italian Constitution.

## Ruling no. 569/2021 | Subject: WHT exemption pursuant to art. 26, paragraph 5-bis, Presidential Decree no. 600/1973

With the answer to the ruling no. 569 dated August 30<sup>th</sup>, 2021, Italian Tax Authority denied the exemption of the withholding tax on interest related to medium-long term loans (i.e. longer than 18 months), paid from an Italian company to non-resident entity not falling within the entities listed by Article 26, paragraph 5-*bis*, Presidential Decree no. 600/1973, even if this recipient is controlled by an entity which would be entitled to benefit from the exemption instead. ITA confirmed, therefore, the approach already stated by Resolution no. 76/2019 and by Answer to ruling no. 125/2021.

For sake of completeness we remind that the entities mentioned by Article 26, paragraph 5-*bis*, Presidential Decree no. 600/2019 are (briefly) credit entities established in EU Member States, insurances incorporated and authorized under the EU's laws and foreign institutional investors, even if not subject to taxation, subject to supervision in the foreign countries where they are established.

The case at hand involved an Italian company, financed by its direct Luxembourg parent company (intermediate holding), which in turn was financed by investment funds subject to supervision in Luxembourg. The Italian company asked the withholding tax exemption on

the interest paid to the intermediate holding, considering the funds (not the intermediate holding company) as the entities entitled to such exemption (as beneficial owners of the income). These funds were (i) institutional investors without tax liability (ii) established in States belonging to the white list (such as Luxembourg) and (iii) under supervision in their country.

Based on the literal wording of the rule, ITA did not agree with the "look through" approach and denied the exemption based on the characteristics of the direct recipient (the intermediate holding) which did not meet the mentioned conditions. This approach is also applicable to back-to-back financing.

## **Ruling no. 537/2021 | Subject: dividend distribution to Switzerland's parent company – WHT exemption**

With the answer to the ruling no. 537 dated August 6<sup>th</sup>, 2021, Italian Tax Authority clarified some aspects related to the withholding tax on outbound dividends paid by Italian subsidiaries. In particular, it stated that companies under the cooperative compliance regime can overcome the holding period requirement provided by the *Parent-Subsidiary* Directive (adopted in Italy by Article 27-*bis* of Presidential Decree no. 600/1973).

In the case at hand, an Italian company wholly controlled since August 1<sup>st</sup>, 2020 by a parent company resident in Switzerland should have made a dividend distribution to the latter.

WHT exemption pursuant to *Parent-Subsidiary* Directive also applies to Swiss parent companies due to the application of art. 15 of the EU- Switzerland Agreement and subsequent amendments (the "Agreement"). In particular, the Agreement extended article 27-*bis* application to Swiss companies and amended (i) the minimum shareholding (25% instead of 10%) and (ii) the holding period, which is set at a minimum of two years instead of one year.

The issue at hand concerned the holding period, given that the distribution would have taken place before the expiry of the two-year period.

The company pointed out that the Agreement does not provide that the 2-years holding period shall be met when the dividend is distributed, but it would be possible to grant the exemption based on a declaration of the parent company to hold the shareholding for the 2-years minimum period (including a period subsequent to the distribution).

ITA denied the WHT exemption proposed by the company considering that the exemption provided by the *Parent-Subsidiary* Directive is subject to the completion of the minimum holding period, to be verified at the date of distribution.

Nevertheless, in this case, the company had been admitted to the cooperative compliance regime (Articles 3 end seq., Legislative Decree no. 128/2015), thus ITA stated that by virtue of the constant dialogue with the tax authorities, it is deemed possible to derogate from the holding period rule and allow the exemption even where the distribution occurs before the completion of the two-year period. The ruling also recalls the ITA "duties" related from the cooperative compliance regime (Article 5 of Legislative Decree No. 128/2015), which include the "*implementation of specific simplifications of tax obligations, as a result of the information provided by the taxpayer (...)*".

Lastly, the ruling states that the taxpayer should pay the withholding tax where, after the dividend distribution, the condition that "*the parent company directly holds at least 25% of the capital of the subsidiary for a minimum of two years*" is no longer met.

## **Pillar 1 and Pillar 2 | Venice G20 Outcomes (10-11 July 2021)**

Finance Ministers and Central Bank Governors at the G20 Venice Summit held on 8-11 July 2021 adopted the key elements of international tax reform designed to address the tax challenges of globalization and the digitalization of the economy. An OECD Report summarized the key findings, signed by 131 States and territories (now 134) out of the 139 total members of the Inclusive Framework. The new system is based on a two pillars solution developed by the OECD: Pillar One aims to ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs, Pillar Two seeks to introduce a global minimum corporate taxation.

Pillar One in-scope companies are the multinational enterprises (MNEs) with global turnover above 20 billion euros (to be reduced to 10 billion euros in the future) and profitability above 10% (i.e. profit before tax/revenue). Where these requirements are met, between 20-



30% (still to be defined) of residual profit defined as profit in excess of 10% (so-called Amount A) will be allocated to the market jurisdictions, (i.e. the States where goods or services are used or consumed) using a formulaic approach. A physical presence (i.e. a permanent establishment) would no longer be necessary to levy tax in a certain jurisdiction. Amount A will be allocated to market jurisdictions where the in-scope MNE derives at least 1 million euros in revenue (for smaller jurisdictions with GDP lower than 40 billion euros, the nexus will be set at 250,000 euros). The amounts allocated to the different States will not represent additional taxes for the MNEs: double taxation will be relieved by traditional systems (exemption or tax credit).

The scope of Pillar One excludes Extractives and Regulated Financial Services companies. Also, the entry into force of the new rules should lead to the removal of the Digital Taxes implemented by some Countries.

The new nexus and profit allocation rules (Amount A) will be implemented through a new multilateral instrument (MLI) which will be available for signature in 2022 and are scheduled to come into effect in 2023.

Finally, Pillar Two (GloBE) provides rules for a minimum global taxation and it will apply to MNEs that meet the 750 million euros threshold (same as the country-by-country reporting). A minimum top-up tax (at least 15%) if the profits are allocated to one or more jurisdictions with lower than 15% tax rate.

The Pillar Two rules will have the status of a common approach: Countries will not be required to adopt them, but if they choose to, implementation must be in a manner consistent with the model rules and Inclusive Framework guidance. The income inclusion rule (IIR) will result in additional "top up" amounts of tax being payable by a parent entity of the group to its tax authority. The undertaxed payment rule (UTPR) will apply as a secondary (backstop) rule where the IIR has not been applied.

Moreover, the subject to tax rule (STTR) will allow limited source taxation on related party interest, royalties, and a defined set of other payments. The rule will be incorporated into bilateral tax treaties by countries that apply nominal rates of tax below a minimum rate to such receipts where requested by developing country members of the Inclusive Framework.

Government entities, international organizations, non-profit organizations, pension funds or investment funds that are Ultimate Parent Entities (UPE) of an MNE Group or any holding vehicles used by such entities, organizations or funds are not subject to the GloBE rules. The G20 set an October 2021 deadline for finalizing the agreement on the two-pillar approach, as well as a framework for effective implementation in 2023.

# Ecobonus

## OIC | Accounting of Ecobonus incentives in OIC-adopters' financial statements

OIC has recently published the final answer to the Agenzia delle Entrate regarding the accounting of Ecobonus incentives in OIC-adopters' financial statements.

The document has clarified that:

- for the entity that receives the incentive, the tax credit has to be accounted for as a grant related to assets, independently from the way it will be realized (tax deduction or direct sale);
- for the entity that executes the works, revenues are measured by reference of the present value of the tax credit received;
- in case of sale of the tax credit, the seller account for the difference between price of sale and accounting value as financial gain or loss; the purchaser recognizes the financial asset at the price paid.

# Indirect Tax | VAT

## Zero-Rated Regime applicable to Leisure Boats – Approval of the declaration Form

Declaration containing the certification of the percentage of use of non-short-term leases, including financial ones, rental and similar services in the EU, of leisure boats - declaration containing the certification of fitness for navigation on the high seas for tax exemption purposes – Provision no. 151377, dated June 15, 2021 and Resolution no. 54, dated August 6, 2021

With the Provision at stake – pursuant to what provided by art. 1, par. from 708 to 712 of Law no. 178 of December 30, 2020, it has been approved the declaration form for the certification of the percentage of use of non-short-term leases, including financial ones, rental and similar services in the EU, of leisure boats – and the declaration form containing the certification of fitness for navigation on the high seas for tax exemption purposes. Such declaration has to be submitted by the purchaser in order to benefit of the zero-rated regime for the purchase of goods and services, according to art. 8-bis of Presidential Decree no. 633 of 1972.

Such declaration represents the legal requirement to apply the zero-rated regime to purchases for navigation on the high seas. It must be submitted electronically through the official Italian tax authorities' system Fisconline/Entratel. After submission, a receipt is provided, containing the protocol number, that must be quoted on the invoice issued by the supplier, in order to apply the zero-rated regime.

For the sake of completeness, we recall art. 1, par. from 708 to 712 of Law no. 178 of December 30, 2020, according to which in order to apply the zero-rated regime *"a leisure boat is considered as used for navigation on the high seas if it has performed in the previous year, or in case of first use, it performs in the current year, a number of high seas journeys higher than 70%. For travel on high seas it is meant a journey between two landing points during which the limit of territorial waters, calculated on the basis of the low tide line, is exceeded, regardless of the route followed. People wanting to benefit of the possibility to purchase or import without VAT have to submit a declaration"*.

The declaration form is composed as below:

- Front cover, where (i) the data of the declarant, (ii) the data of the eventual representative, (iii) the protocol number of the declaration, and (iv) the date of the undertaking are indicated;
- PART A, where it is attested the certification of the percentage of use of non-short-term leases, including financial one, rental and similar services in the EU, of leisure boats. It must be indicated: (i) the data of the services provider, (ii) the data of the boat, (iii) the data of the lease contract, (iv) the percentage of use of the boat within the EU;
- PART B shall be used to certify a number of journeys on the high seas exceeding 70 percent in the calendar year preceding the one in which the transactions referred to in the first paragraph of art. 8- bis of the Presidential Decree no. 633/1972 were carried out, or, in case of first use, the intention to navigate on the high seas for a number of journeys exceeding 70 percent in the current calendar year in order to benefit from the right to make purchases or imports without applying the VAT.

With Resolution no. 54 of August 6, 2021, Italian tax authorities provided certain clarifications on the declaration at stake:

- Declaration submitted by foreign taxpayers: foreign taxpayers can submit the declaration, by indicating their fiscal code that needs to be previously obtained, by sending it to the Pescara tax authorities' office, together with an ID document. The Pescara office will then communicate to the declarant the protocol number.
- Submission of the declaration in case of indirect suppliers: it has to be highlighted that also indirect suppliers of the declarant can benefit of the zero-rated regime on purchases. It has been clarified that the declarant must submit the declaration by indicating the data of the direct suppliers in section II of the box B. The direct supplier, once received the copy of the declaration, shall submit it

with its protocol number to its suppliers (the indirect suppliers of the declarant) in order to let them benefit of the zero-rated regime. Each supplier must indicate the protocol number on the output invoice issued.

- Simplifications are provided also in case of boats under construction.

Italian tax authorities on September 1, 2021 have updated the instructions to the form in order to acknowledge the simplifications clarified with Resolution no. 54 above.

Further to the clarifications provided with the Resolution abovementioned, there are still certain unclear points on the indirect supplier. If this latter issues a zero-rated invoice to the direct supplier that, subsequently, issues an out of scope invoice or subject to reverse charge one towards the foreign ship owner that does not want to submit the declaration, it should be allowed the possibility for the direct supplier to submit an autonomous declaration to be used towards its suppliers.

In conclusion, a supplier that issues a zero-rated invoice for a vessel used on the high seas without the attestation by the customer or without verifying that an attestation has been filed, will incur a penalty ranging from 100% to 200% of the amount of VAT.

## Credit Notes

### Credit notes issued according to art. 26, par. 2 of Presidential Decree no. 633 of 1972 – Italian tax authorities Guidance no. 11 of August 6, 2021

Italian tax authorities provided certain clarifications on the possibility to issue a credit note in case of contractual termination, according to art. 26 of par. 2 of Presidential Decree no. 633 of 1972, that does not perform any distinction between judicial and contractual resolution. More in depth, the right to issue the credit note could be the missed payment agreed in the contract or the expiration of the term notified in writing to the defaulting party.

Based on that, Italian tax authorities provides clarifications also based on what already expressed on Tax Ruling no. 13, of April 2, 2019, on which a credit note was issued after the judicial challenge of the of the conditions for the activation of the express termination clause. It has been specified that the effects of the termination clause demanded during the judicial proceeding to issue the credit note must be subject to the end of the same judicial proceeding. Such position of Italian tax authorities must be coordinated also with Resolution no. 449, dated November 21, 2008, according to which when a VAT taxable person starts the procedures for the judicial annulment of a contract, it can issue the credit note before the end of the judicial proceeding, always taking into account the effects of the proceeding. In conclusion, Italian tax authorities confirmed the issuance of a credit note even pending a judicial proceeding that must assess the conditions for the termination clause to be activated, without the need to wait for the official decision, always taking into account the outcome of the judicial proceeding itself.

## Penalties for wrongly applied VAT on Zero-Rated Transactions

### Application of art. 6, par. 6, of Legislative Decree no. 471 of 1997 – Tax Ruling no. 51 of August 3, 2021

The tax ruling at stake provides for certain clarifications on the application of art. 6, raising conclusions that do not take into consideration the EU principle of neutrality and proportionality of penalties.

Italian tax authorities recall the principles stated by Italian Supreme Court of Cassation (decision no. 24289, dated November 3, 2020) according to which the purchaser cannot deduct the VAT wrongly paid on a zero-rated/exempt transaction, such right being granted only if the mistake relates to the application of a wrong (higher) VAT rate.

Accordingly, Italian tax authorities states that:

- in case of wrong application of VAT rate (22% instead of 4%) fixed penalties will apply (from euro 250 to euro 10.000) and the purchaser can deduct VAT;
- in case of application of VAT instead of zero-rated/exempt regime, proportional penalties will apply (from 90% to 180%)

the Tax agency seems not to have taken into consideration both CJEU Case (decision C-935/19 dated April 15, 2021) and local tax commission of Lombardy decision (decision no. 2270/1/2021) recently pronounced on the illegitimacy of such proportional penalties, where VAT has been paid on a transaction that should have been exempt, recognizing the right of deduction on the purchaser.

## Handling of separate Accounts

### Leasing activity handled on separate accounts with other activity according to art. 36, par. 3, of Presidential Decree no. 633 of 1972 – Tax Ruling no. 580 of September 6, 2021

The ruling at stake summarizes the conditions to keep separate accounts (i.e. companies engaged in more than one business activity for which, by law or by choice, they keep separate accounting books, pursuant to art. 36 of Presidential Decree no. 633 of 1972.

More in detail, the company's principal activity was the one of credit recovery (totally not deductible) and wanted to carry out also the activity of purchasing of credits deriving from leasing contracts, together with the purchase of such contracts and the underlying goods.

The company was asking for the possibility to opt for the separate accounts regime, in order to deduct VAT according to the real destination of the goods purchased, and to avoid being penalized by the pro-rata deduction method.

Italian tax authorities have clarified that:

- the separate accounts option assumes that the businesses to be handled separately are objectively divisible and as such capable of being autonomous business activities;
- the businesses are identified by different ATECO codes, even if this criterion is not necessarily to be considered exhaustive;
- the separate accounts option must ensure to the taxpayer to deduct VAT in a more specific way, in line with neutrality VAT principles.

In conclusion, Italian tax authorities confirmed the possibility for the company to opt for the separate accounts (credit recovery and leasing activity).

# Indirect Tax | Customs

## European Commission published the 2021 version of the Compendium of Customs Valuation

Following the update on the Guidance on Customs Valuation occurred the last September 25, 2020 and on the issuing of some EU Court of Justice's judgments (cases C-76/19, C-509/19, C-775/19, C-75/20), the European Commission published, on July 19, 2021, the new version of the Compendium of Customs Valuation (hereinafter "the Compendium"). The Compendium includes legal texts and methods for customs valuation as well as commentaries of the Customs Code Committee and the Customs Expert Group - Customs Valuation Section, business cases analysis and the main judgments of the EU Court of Justice.

As a result, although not legally binding, the Compendium is considered to be an important interpretation of the EU customs legislation and it is applied by Member States customs authorities.

## Starting from 1 September 2021, the new PEM rules (which do not replace the current ones but are alternatives to them)

The Guide on the transitional rules of origin of the PEM Convention was published on 25.08.2021 on the website of the European Commission. The new rules, came into force starting from 01.09.2021, between the EU and some Member Countries of the PEM (Switzerland, Norway, Iceland, Albania, Jordan and the Faroe Islands).

These rules are intended for provisional application, on an optional and bilateral basis, between the contracting countries of the PEM Convention concerned, pending the conclusion and entry into force of the revision of the PEM Convention. The transitional rules, therefore, apply as an alternative to the current rules of the PEM Convention and on an optional basis.

Economic operators can choose, for each individual shipment, which of the applicable rules of origin shall be used: the current rules of the PEM convention or the transitional rules of origin, which have been designed to be more flexible than the "standard" ones.

The new rules of origin in the Pan-Euro-Mediterranean area modernize and simplify the current regulatory framework and require careful analysis by the operators who trade with these countries.

## Dual use: the EU Regulation 2021/821 came into force on 9 September 2021, definitively replacing the (EC) Regulation. n. 428/2009

The new regulation 2021/821 concerns the European Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (i.e. products, including software and technology, which can be used for both civil and military purposes).

The objective set by the EU is to allow greater adaptability to technological progress and facilitate the exchange of information between Member States and third countries. At this regard:

- The new regulation broadens the scope of use of the "Catch-all" clause (used by the competent authorities, or upon notification by a company, to subject any good not included in the list of dual-use products to prior export authorization) introducing the concept of "human security": in fact, Member States may decide to control certain goods and / or technologies, not listed, on the basis of assessments regarding possible violations of human rights.
- An "EU watchlist" will also be published in the Official Gazette (OJEU) regarding the goods and destinations that will require authorization.

- A mechanism was introduced to coordinate the national controls of the various states, by publishing the national lists in the Official Journal, in order to allow greater alignment on the listed goods.
- The Regulation has established certain Due Diligence obligations for exporters; such obligations will be specified through the publication of guidelines.
- In addition, the definitions of exporter and export have been updated, including the transport of goods or data contained in the personal baggage of natural persons.

## **The pre-endorsement of EUR1, EURMED and A.TR certificates has been extended to 31 December 2021**

The deadline for the possibility of printing the EUR.1 certificate on pre-arranged forms for export operations from Italy to the Swiss Confederation was April 30, 2021, as established by the Circular no.16 of 30 April 2021 of the Italian Excise, Customs and Monopolies Agency. The same provision established at July 31, 2021 the limit date for the use of the pre-endorsement method for the release of the above mentioned certificates in relation export operations to countries different than Switzerland.

Most recently, with circular no. 31 of 27 July 2021, given the extension of the state of emergency due to the persistence of the pandemic from Covid 19, the simplified procedure for the issuing of EUR.1 and AT.R certificates has been extended to December 31, 2021, with respect to export operations to Third Countries other than the Swiss Confederation (for which the printing of the certificate of origin EUR1 on forms provided by the Customs Office is no longer possible from May 1<sup>st</sup>, 2021).

# Global Employer Services

## Ministerial practice: remote working and tax residency

The tax treatment of employee remunerations paid to resident and non-resident individuals who, due to the health emergency, perform their work in Italy in remote working, instead of the foreign country of assignment – Ruling answer no. 458 of July 7<sup>th</sup> 2021.

The current pandemic context has caused the disruption of daily work practices, leading to major changes of the ordinary ways of performing the working activity, replaced by remote working.

The execution of the working activity in remote-working at their Italian home by employees, operating both in Italy and abroad, has raised various issues of fiscal nature, only some of which have been clarified by the Tax Authority with recent Rulings answers; in particular, the subject of a recent answer is the situation of some employees who had or are currently undergoing a **forced situation of mobility** due to anti-contagion measures and are forced to perform the working activity in a place different from the contractually established workplace.

The Italian Tax Authority with the recent Ruling answer no. **458 of 2021** qualified remote-working as a criterion capable of **determining and influencing the tax residency of the employee** despite the forced mobility situation caused by the pandemic, paying attention, in particular, to all the variables involved (tax residency of the employee, territoriality of income and notional remuneration).

The case concerns a group of employees hired under an Italian contract by the Italian holding and seconded to the Chinese subsidiaries, who **forcibly** returned to Italy in January 2020 due to the pandemic in progress.

Some of these employees returned to China in July 2020, others left Italy on July 29<sup>th</sup>, 2020, the rest managed to return in the following months of August and September of the same year.

As a direct consequence related to the pandemic in progress, some employees forcibly stayed in Italy for less than 184 days, while others repatriated to China in the following months and spent more than 184 days in Italy for the same causes of force majeure.

During their Italian stay, the individuals continued to work remotely for the foreign companies in China.

With reference to the **criteria of territorial income**, assuming that some employees have maintained the status of **non-resident individuals** pursuant to art. 2 of the Italian Tax Code, the Tax Authority, essentially validates the orientation formalized during “**Telefisco 2021**”: the principle according to which days forcedly worked in the other State for exceptional reasons related to the pandemic are considered as days worked in the foreign State where the work activity was ordinarily supposed to be performed, is valid only in presence of specific agreements interpreting the art. 15 of the OECD model currently signed by Italy with France, Switzerland and Austria, in order to neutralize potential tax distortions caused by the pandemic.

On the contrary, in the absence of specific agreements, in relations with China, the Tax Authority confirms that the ordinary taxation rules apply, with the consequence that:

1. The employment income provided in Italy by the non-resident employee is subject to taxation in Italy if performed in Italy pursuant to art. 23, paragraph one, letter c);
2. Italian taxation could not be avoided nor pursuant to art. 15, paragraph 1 of the Double Tax Treaty between Italy and China (since the work is performed in Italy) nor pursuant to paragraph 2 of the same art. 15 of the Double Tax Treaty (since the remuneration is paid by and on behalf of an Italian employer, given that it falls within the assignment scheme).

Any double taxation in both Italy and China will be resolved through the claiming of a tax credit by China as the state of tax residence of the employees.



In essence, the **interpretative canons** of art. 15 of the Double Tax Treaty would be related to the actual physical presence of the person in the State **regardless of the contingencies related to the state of emergency** that led to the forced stay in the State.

With reference to the consequences of the health emergency on the **tax residency** of workers who have been forced to stay in Italy for more than 184 days, the tax Authority unequivocally confirms the principle according to which art. 2 of the Tax Code **regardless of the circumstance** that a possible stay of the individual derives from reasons of health emergency; consequently, following this approach, all individuals who have had their residence or domicile in Italy for most of the tax period, regardless of the forced stay caused by the pandemic, are considered tax residents by internal law.

Any tax residency conflicts will be resolved, as reaffirmed by the Tax Authority, on the basis of the Treaty provisions and in particular on the basis of art. 4 of the Treaty with China which establishes, in paragraph 2, the so-called *tie - break - rules* to resolve any conflicts of residence between States. These rules state that the following criterion of permanent residence prevail in hierarchical order: the *center of vital interests, habitual residence* and *nationality* of the individual.

Lastly, with reference to the possibility of applying the **notional remunerations** pursuant to art. 51, paragraph 8-bis of the Italian Tax Code to employees who met the tax residency requirements pursuant to art. 2 of the same Tax Code, due to forced residency in Italy, the Tax Authority confirms that this regime cannot be applied since in this case it is recognized the work performed in Italy by resident individuals, confirming what has been already confirmed in the previous answer n. 345 of 2021.

## Ministerial practice: obligations of the employer (as “withholding agent”)

### Non-resident foreign entity without a permanent establishment and tax obligations of the employer – Ruling answer no. 449 of June 25<sup>th</sup> 2021

The Ruling answer no. 449 of June 25<sup>th</sup> 2021 clarifies the issue, repeatedly re-proposed by the most recent tax practice, of the tax obligations for non-resident companies and entities, confirming that they have to act as withholding agents **only in presence** of a permanent establishment in Italy.

This specific case is related to a foreign organization that recruited several translators with a temporary collaboration contract, without having officially a **permanent establishment** in Italy; in fact, the Tax Authority did not consider as mandatory the application of the 20% withholding tax for occasional remuneration related to such services in the absence of a permanent establishment.

The issue arises from the formulation of article 25, paragraph 1, of the Presidential decree no. 600 of September 29<sup>th</sup> 1973, which identifies, among the entities obliged to operate as withholding agents for applying the withholding taxes to the applicable incomes, "*the entities and companies indicated in article 73 of the Italian Tax Code, paragraph 1*" and therefore referring also to "*companies and entities of all types including trusts, with or without legal personality, **not resident** in the territory of the State*". In this respect, even the non-resident entities could act as withholding agents, on the limit of the income paid by their permanent establishment or fixed base in Italy.

A crucial solution to this issue has been already been provided by the Tax Authority with Ruling answers **no. 312 of July 24<sup>th</sup> 2019**, overcoming the law principle **no. 8 of February 12<sup>th</sup> 2019** and **no. 379 of September 11<sup>th</sup> 2019** where it was clarified that the obligations mentioned above do not apply in absence of a permanent establishment or fixed base in Italy. Therefore, only where a permanent establishment or a fixed base has been settled in Italy, the foreign company will be required to request the tax code and fulfill the related obligations as withholding agent (execution and payment of withholdings, wage statements and presentation of the 770 Form of the withholding agents).

On the other hand, if the foreign company **does not have a permanent establishment in Italy**, the latter could fulfill the tax obligations described in relation to the remuneration paid only after having assumed the status of withholding agent (i.e. as it seems stated by the Tax Authority, only after having fixed the permanent establishment or integrated the requirements for which it could be considered as fixed).

Therefore, according to the Ruling answer provided by the Tax Authority, the company would operate separately in the two time frames: the first, in which the permanent establishment is still absent without fulfilling any obligation as withholding agent (it will be an obligation of the single occasional staff to declare in our Country the aforementioned remuneration through the presentation of the Tax

Return, eventually applying the most favorable notional provisions) and in the second, once the permanent establishment has been integrated by fulfilling these obligations as withholding agent.

## Jurisprudence: Credit for foreign taxes and cross – border employment income

### Order of the Supreme Court of Appeal no. 9725 of April 14, 2021

Order of the Supreme Court of Appeal no. 9725 established that the credit for taxes paid abroad is valid even if the taxpayer has not filed a tax return in Italy, and is subsequently contacted by a notice of assessment, requesting the taxes that have not been paid in Italy, on income produced abroad.

The case at issue arises out of an assessment of a taxpayer, resident in Italy, who had worked in Germany for more than 183 days, and who had therefore made the deductions from the German taxes, as per article 15 of the Italy – Germany Agreement.

Although, the argumentative path of the order is not perfectly clear in its reconstruction, it turns out that the second instance verdict, in favor of the offices, is completely overturned: as a direct consequence of this, the omission of the Italian declaration is not considered as an element such as to **preclude the recognition** of foreign tax, as the contrary emerges in paragraph 8 of art. 165 of the TUIR.

Moreover, the Order, through a rather complex and ambiguous line of argument, apparently misapplies art. 15 of the Italy-Germany Agreement with reference to the taxation of transnational employment income.

In fact, paragraph 1 of Article 15 of the OECD Agreement foresees, with reference to income from employment for a taxpayer resident in a Contracting State who receives remuneration for an employment activity, **exclusive taxation** in that State, unless the activity is carried out in the other Contracting State. If the activity is carried out in the other Contracting State, the remuneration received is also taxable in that State (**concurrent** taxation in the State of residence and the State of source).

The Court, in its ambiguous reading of art. 15 of the OECD Agreement questions the adverb “**only**” as it derogates, according to the arguments put forward, from the *world wide principle* with respect to the taxation of income from employment in order to favour the movement of labour. In fact, the adverb “**only**” does not derogate from any *world wide principle*, as the employment income received by Italian residents is always taxable in Italy and double taxation is avoided by the mechanism of tax credit.

Therefore, if a taxpayer resident in Italy carries out a work activity abroad, the latter is taxable in Italy because of his tax residence; he is also generally taxed abroad, with the granting of the tax credit in Italy, except for the case when applying the exemption in the source state, as per paragraph 2 of Article 15 of the Agreement.

# Tax Litigation

## Revenue Agency, Resolution n. 49/E of 22 July 2021 - Cooperative compliance regime: management of constant and preventive interactions

With such Resolution, the Revenue Agency provides clarifications on the actual operation of the cooperative compliance regime (art. 6, paragraph 1 of Legislative Decree no. 128/2015 and Directorial Provision of 26 May 2017).

With reference to the phase of first application of the institution - aimed at enhancing the cooperation between the tax authorities and taxpayers (in possession of an effective tax risk framework and control system) with constant and preventive dialogue for the common assessment of situations likely to generate tax risks - a progressive extension of the subjects admitted was introduced, on the one hand with a link between access to the Regime and an option for the VAT group (art. 70-duodecies, paragraph. 6-bis of Presidential Decree no. 633/1972), on the other with lowering of the access threshold for 2020 and 2021 (turnover or revenues of no less than 5 billion euros, see Ministry of Economy and Finance Decree of 30 March 2020).

The Resolution in question focuses on some aspects regulated by the Provision of 26 May 2017; in particular:

- the so-called constant and preventive interactions initiated by the taxpayer through alternative means to the presentation of the so-called shortened ruling, with clarifications on (i) nature and purpose (more streamlined and informal methods of interaction); (ii) discipline from a technical point of view and differences with respect to the shortened ruling (content, causes of inadmissibility, response terms, effects on the maturation of "silence means assent"); (iii) constraint however expressed by the responses made by the Office to the Administration with legitimate expectations of the taxpayer (art. 10 paragraph 2 and 3 of Law no. 212/2000);
- the so-called postponed positions, i.e. the cases in which, due to the need for complex technical investigations, the parties postpone the investigations to the following year and any discrepancy between the position taken by the Office at the outcome of the investigations and the behavior *medio tempore* adopted by the taxpayer does not give rise to administrative penalties; on this point are highlighted: (i) the rationale of the provision, aimed at protecting legitimate expectations; (ii) the requirement characterizing the "postponed" positions, or the circumstance that these are positions communicated and analyzed in detail in advance and the Office has activated with preliminary deeds, such as the right to be heard or the formal communication of initiation of an in-depth investigation of the initiative; (iii) in any case and in principle, the need for the taxpayer to adopt the most fiscally prudent behavior;
- the cases in which the Office does not agree with the position taken by the taxpayer and the latter can benefit from the reduction of half of the administrative penalties pursuant to art. 6 paragraph 3 Legislative Decree no. 128/2015.

## Supreme Court, sentence n. 17746 of 22/6/2021 - Clause of the beneficial owner: substantive and probative requirements

The sentence in question concerns the case in which (i) an Italian company has paid royalties to a Dutch company, applying the conventional withholding tax of 5% on the basis of the Dutch company's declaration to be the "beneficial owner"; (ii) the Revenue Agency challenged the Italian company for the partial failure to apply withholding taxes pursuant to art. 25 Presidential Decree no. 600/1973 (with a rate of 30%, in addition to the penalty of 30% on unpaid withholding taxes), considering that, as withholding agent, it was responsible for proving the status of "beneficial owner" of the Dutch company recipient of the fees and regardless of the self-

certification produced by the latter; (iii) the sentence of the Regional Tax Commission of Milan, challenged by the Revenue Agency, deleted the assessment, deeming correct the work of the Italian company withholding agent as it is up to the Office to request evidence directly to the substituted subject through cross-border cooperation.

The Supreme Court judges, recalling their orientation (sentences 19 December 2018 no. 32840 and 30 September 2019 no. 24287), delete the sentence of the Regional Tax Commission and postpone to a new examination on the subject, in light of the principles for which: (i) the beneficial owner criterion constitutes a general clause of the international tax system aimed at preventing abuses of the treaties; (ii) the existence of the requisites must be ascertained on fact by the trial judge by verifying the real legal and economic availability of the income received, on the basis of the retention and autonomous use of the income or their transfer to the parent company resident in the foreign state according to the activity concretely performed by the beneficiary company; (iii) the burden of proof lies with the withholding agent who applied the withholding, while the burden of contesting the facts stated by the taxpayer lies with the Office, as the trial position of the Office is expressed in the challenged deed.

## **Measures of extension and suspension of the terms of assessment and collection aimed at favoring the recovery of economic and social activities following the Covid-19 pandemic**

With reference to the measures in question, already commented in the past, the following should be noted in particular.

Following the conversion of the so-called “Sostegni-bis” Decree (Legislative Decree n.73 of 25 May 2021) in Law no. 106 of 24 July 2021:

- the extension from 30 April to 30 June 2021 of the suspension of the payment terms relating to notices of payment, executive assessments, debit notices for incomes entrusted to the Collection Agent (already established by art. 9 of Legislative Decree no. 73/2021 with amendment of art. 68 paragraph 1 Legislative Decree n. 18/2020) has been furtherly extended to 31 August 2021, with the effect that payments due during the suspension period must be made by 30 September 2021 (with the possibility to request an installment within the same term);
- as a result, from 1 September 2021 the activities of the Collection Agent started again, such as (i) notification of notices of payment; (ii) collateral, administrative detention and foreclosures for notices expired before 8 March 2020 (for notices expired in the suspension period from 8 March 2020 to 31 August 2021, these procedures will resume instead from 1 October 2021 ); (iii) default checks that the Public Administrations must carry out before making payments for any reason for an amount exceeding 5.000 euro;
- for taxpayers who have paid the 2019 installments at the legal deadlines, art. 1-sexies Legislative Decree n. 73/2021 (introduced at the time of conversion) provides for greater flexibility for the payment terms of 2020 and 2021 installments relating to the facilitated definitions (“Rottamazione - ter”, “Saldo e stralcio” and “Rottamazione” of EU own resources) with the possibility to pay between 31 July and 31 October 2021 while for the payment of the 2021 installments there is time until next 30 November.

Finally, it should be noted that with the Decree of 14 July 2021 the Ministry of Economy and Finance issued the implementing provisions of art. 4 paragraph 4 of the Legislative Decree n. 41/2021 which provided for the write-off of debts up to 5.000 euro (calculated on 23 March 2021), entrusted to the Collection Agent from 1 January 2000 to 31 December 2010, towards to: i) natural persons who have achieved, in the 2019 tax period, a taxable income for income tax purposes up to 30.000 euro; (ii) subjects other than natural persons who have achieved, in the current tax period as of 31 December 2019, a taxable income for income tax purposes up to 30,000 euros. The aforementioned Decree has set on 31 October 2021 the date of cancellation of the debts concerned (debts are suspended until that date).

# Transfer Pricing

## Group's business interest cannot prevail over the arm's length principle, which in any case must be applied

With Decision no. 1232 of January 21, 2021, the Supreme Court clearly stated that the group interest shall not prevail over the arm's length principle, which must, in any event, be applied in accordance with tax law principles.

In the case under analysis, concerning royalties charged by an Italian parent company to its foreign subsidiaries, at a value deemed by the tax authorities lower than an arm's length one, the "commercial reasons" raised by the company in order to justify the percentage or royalty applied to its subsidiaries, which refer to the business law "theory of compensatory advantages", pursuant to art. 2497 of the Italian Civil Code, have been rejected. Such a "theory" relates to the management and coordination activity carried out by a Parent Company of a group of companies, which "allows the parent company to be exempt from the liability deriving from the management and coordination activity by proving the existence of an overall group result which, although sacrificing the interest of a company belonging to it, in any case determines adequate compensation for the sacrifice, through the demonstration of the overall increase in the group value from which the company, presently sacrificed, will also benefit in the future". In a nutshell, according to this principle, the commercial reasons that lead to a certain price setting may rely on those imposed by the management and coordination activity, which aims at the Group general interest, rather than at that of the individual participants, who may see their own particular interests sacrificed, in favor of an increase in the overall value of the group, from which they may also benefit.

However, according to the Supreme Court, such a civil law principle shall be interpreted in the light of the peculiarities of the tax law and, precisely, of the *ratio* of domestic tax regulations on transfer pricing, which aims to safeguard the application of the arm's length principle set forth in article 9 of the OECD Model Convention.

Therefore, even in the presence of a company policy that pursues a group's interest aimed at allowing foreign subsidiaries to establish themselves in their respective local markets, it will still be necessary to ensure that the arm's length principle is eventually applied when setting intercompany prices/royalties.

## No administrative penalties in case of objective conditions of uncertainty in transfer pricing regulations, even following a mutual agreement procedure

With Judgment no. 2868, published June 24, 2021, the Provincial Tax Court of Milan, accepting the defensive argument of a taxpayer, cancelled the administrative penalties imposed by the Tax Office on a transfer pricing adjustment, even in the lack of penalty protection transfer pricing documentation prepared according to art. 26 of Legislative Decree no. 78/2010, considering that "the complexity on the subject of transfer pricing and the fact that it does not constitute an exact science, give cause, in practice, to objective conditions of uncertainty regarding the scope and sphere of application of the applicable legislation, consisting of articles 9, paragraph 3 and 110, paragraph 7, of the Consolidated Income Tax Act", so as the taxpayer cannot be sanctioned *tout court* in the case of transfer pricing adjustments.

In the present case, the tax authorities claimed a violation of the arm's length principle for IRES and IRAP purposes, assessed an additional taxable income and applied the related administrative penalties, given that the taxpayer had not availed himself of the penalty

protection transfer pricing documentation regime, having not prepared the proper transfer pricing documentation in accordance with the Regulations issued by the Director of the Italian Revenue Agency on September 29, 2010.

In relation to the tax assessments notices, the taxpayer filed an appeal and subsequently started a mutual agreement procedure in order to avoid the double taxation and, as part of the litigation procedure, with reference to the administrative penalties inflicted, claimed the illegitimate application pursuant to art. 10 of Law no. 212/2000, the so-called "Taxpayers' Statute", for having always behaved in accordance with the principles of good faith, transparency and collaboration with the tax authorities having produced, during the tax audit, the transfer pricing documentation, which, although not prepared in accordance with the aforementioned measure, had definitely facilitated the audit activities. With regard to the substance of the matter, the competent Italian and Belgian tax authorities reached an agreement within the scope of the mutual agreement procedure pursuant to the European Convention no. 90/436/EEC, accepted by the company, re-determining the transfer pricing claim challenged by the tax authorities in the tax assessment notices and the related administrative penalties, at a rate of around 15%, with a reduction of around 85%. For the judges of the Provincial Tax Court of Milan, the significant reduction in the tax claim within the scope of the mutual agreement procedure has demonstrated of the complexity of the case and the objective conditions of uncertainty regarding the scope and the sphere of application of the transfer pricing legislation, which also justified the cancellation of the relative administrative penalties.

In conclusion, the present decision is important for a two aspect: on the one hand, it upholds the thesis of many transfer pricing professionals, according to which the evaluative and estimative matter of transfer pricing requires that each case must be analyzed individually and it is not correct to inflict administrative penalties only because the evaluation carried out by the Tax Office on the same income differs from that of the taxpayer, which could in any case be valid. On the other hand, it confirms the possibility, available to many taxpayers who have initiated at the same time the MAP procedures and a litigation procedure, to have the administrative penalties cancelled, where it is possible to demonstrate that the different evaluation carried out with regard to transfer prices is the consequence of an estimate and not of any intention to apply prices not in line with market values.

## **New Regulation on Transfer pricing documentation for penalty protection: a recent Tax Agency's draft Circular Letter provides some clarifications**

On September 20, 2021, the Italian Revenue Agency finally published a long-awaited Circular Letter on transfer pricing documentation that provides important clarifications in relation to New Regulation no. 360494 ("Provvedimento") of the Director of the Italian Revenue Agency published November 23, 2020, which has significantly amended the previous "penalty protection" regime starting from fiscal years ongoing at the date of the publication of the Provvedimento.

The circular letter, published in a draft form "for public consultation purposes", on the one hand provides important indications to taxpayers preparing transfer pricing documentation for fiscal year 2020, to be finalized by the filing date of the relevant tax return, the ordinary deadline of which, for calendar fiscal years, falls on the last day of November 2021, yet, on the other, besides not being "final" (the public consultation period will expire October 12), still leaves some doubts, both from a formal and a substantial point of view, unsolved, as well as grey areas subject to interpretation.

Nevertheless, the draft Circular Letter, provides useful indications on important points, like the Masterfile's content, the definition and treatment of "minor transactions", on the communication of the availability of the transfer pricing documentation (also by means of supplementary tax returns), and offers a possible "remediation" (so-called "*remissio in bonis*" rule) in case of missed filing deadlines. Eventually, it is confirmed that the transfer pricing documentation must be signed by means of an electronic signature along with a mandatory "timestamp", before the filing of the relevant annual tax return, i.e. by the end of November 2021 (for calendar fiscal years and in case the ordinary filing deadline is met) or, in the cases currently envisaged by the draft of circular letter, within the extended 90-day deadline allowed for "late filings".

# Government Incentives

## **Extension of the deadline for filing the income tax return for taxpayers who want apply for the equalized non-repayable grant (Press release by Ministry of Economic Development dated September 6th 2021)**

A press release issued by Ministry of Economic Development on September 6<sup>th</sup> 2021 announced the extension of the deadline for filing the income tax return related to fiscal year 2020 from 10<sup>th</sup> to 30<sup>th</sup> September for taxpayers who want to apply for the equalized non-repayable grant.

Pursuant to a Prime Ministerial Decree, not yet published on the Italian Official Gazette, the deadline provided for by Art. 1, par. 24, Law Decree 73/2021 has been modified, considering the needs raised by professional orders and trade associations.

For all other taxpayers (with fiscal year equal to calendar year), the deadline remain the ordinary one (November 30<sup>th</sup> for taxpayer with fiscal year equal to calendar year).

## **Tax credit for qualifying investments in new assets – Italian Revenue Agency Circular letter no. 9/E dated 23 July 2021**

The Italian Revenue Agency Circular letter no. 9/E dated 23 July 2021, provides clarifications on the rules of tax credit for qualifying investments in new assets provided for by Art. 1, par. 1051-1063 of the Law December 30<sup>th</sup>, 2020 no. 178 (2021 Budget Law).

First of all, the Tax Authority points out that, given the many similarities between the rules governing the tax credit for qualifying investments in new assets and those governing the Super/Hyper Depreciation, it is possible to refer to the clarifications already provided in Circular letter no. 4/E dated 30 March 2017.

It is clarified that the credit is applicable to investments made through financial leasing agreement even if there is no explicit reference in the 2021 Budget Law. This appears a mere lack of formal coordination and not the Legislator's intention to exclude this type of agreements. Moreover, if the asset is purchased through a financial leasing agreement, the cost incurred by the lessor for the purchase of the assets shall be assumed for the determination of the relevant tax credit.

Moreover, as regards to the new assets with a purchased cost lower than € 516.46, it is confirmed that they are eligible for the credit regardless the accounting criteria adopted by the taxpayer (depreciation or deduction in the fiscal year in which the cost has been incurred).

Furthermore, in relation to investment made between November 16<sup>th</sup>, 2020 and December 31<sup>th</sup>, 2020, where the tax credit introduced by the 2020 Budget Law coexists with the similar credit introduced by the 2021 Budget Law, the Italian Revenue Agency clarifies that the 2020 rules can be applied only if within November 15<sup>th</sup> 2020 a binding order and a 20% down payment have been made. Otherwise, the 2021 Budget Law is applicable.

The Circular letter also clarify some doubts with regards to the use of the credit. In fact, in order to utilize it, the taxpayer shall verify the regularity of the social security contributions' payment. To this end, the Tax Authority clarifies that the availability of the Document of Contribution Regularity (so called DURC) valid at the time of the use of the tax credit constitutes proof of the proper fulfillment of the social security obligations. In addition the DURC must be valid at the time of each use in compensation, both in the case in which the taxpayer has request it (and has obtained it), as well as in the case in which, even if it have not requested the DURC, it would have

obtained because he has fulfilled his social security obligations. Otherwise, the “irregular” DURC (requested and not issued or not obtainable when requested) precludes the use of the tax credit. If the credit has been used, in whole or in part, by offsetting other tax liabilities, it must be considered undue, given that the regularity of contributions is a necessary condition for the legitimate use of the tax credit accrued.

Please note that the credit can be used in three annual installments, starting from the year of entry into operation or interconnection. The Tax Authority confirms that if the annual installment (or part of it) has not been used, the residual amount can be carried forward without time limits from the following year. Furthermore, the use of the credit for offsetting other tax liabilities does not require the prior filing of the income tax return. In case of amount exceeding € 5,000 it is not required that the tax return will be signed by an expert in order to confirm the formal correctness, since the tax credit is a tax incentive.

With the Circular letter no. 9/E/2021, the Tax Authority also provides clarifications for cases of late interconnection. If the qualifying asset comes into operation, although without being interconnected, it is confirmed that the taxpayer may benefit from the “standard” tax credit (at the rate of 6/10%) until the year preceding the one in which the interconnection takes place. Alternatively, it may decide to wait for the interconnection and benefit from the tax credit for Industry 4.0. In the first case, the amount of tax credit available from the year of interconnection must be reduced by the amount already used: this value will then be spread over a new three-year period. It is also confirmed that the interconnection may occur in a year following the one in which the investment is made and the asset comes into operation exclusively for the need to acquire or adapt the IT infrastructure to the interconnection requirements. In this context, the incentive is not lost, provided that the technical characteristics are available in the asset prior to its first use.

The Circular letter provides also clarification for the use of the credit in the case of extraordinary transactions. The Tax Authority, confirming its interpretation for the Hyper depreciation. It clarifies that in the case of extraordinary transactions, characterized by the transfer of the company or transfer of an ongoing concern, that include the subsidized assets, the assignee will continue to benefit from the tax credit accrued by the assignor, according to the rules originally determined for the latter, regardless of the subsequent change in ownership of the company. This is justified by the fact that the subsidized assets and the company in which they are included continue to be used as a single complex, technologically transformed, in line with the aim of the rule.

Furthermore, the Tax Authority clarify that the tax credit can be cumulated with other incentive (tax or not) insisting on the same eligible costs, up to the maximum limit represented by the cost incurred. Please note that possible further limitations to the use of the tax credit may derive from the specific rules provided for the other incentives that could avoid the possibility to apply also to other grants or incentive. In addition, the verification of the plafond must also take into account the benefit deriving from the fact that the tax credit is not relevant for IRES and IRAP purposes. It is also confirmed that the cost is gross of any grants, regardless of how they are accounted. Finally, with reference to the relevant documentation, it is confirmed that for investments made from November 16<sup>th</sup> 2020, without a binding order and a 20% down payment made within 15 November 2020, invoices and other purchase documents must include the reference to the 2021 Budget Law. In this regard, in case of mistake, the taxpayer may regularize the documents in accordance with the procedures already provided for by ruling no. 438/2020 and 439/2020.

## **Use of tax credit for investments in research and development activities – Ruling no. 396 dated June 9th, 2021**

With the ruling no. 396 dated June 9<sup>th</sup>, 2021, the Italian Revenue Agency provides clarifications about the possibility of recovering the tax credit for investments in research and development activities according to Art. 3, Law Decree 145/2013, replaced by Art. 1 par. 35, Law 190/2014, by submitting the amending tax return for the years open to the statute of limitation.

In particular, in the document the Tax Authority analyses the case of a company, which made eligible investments in research and development activities in 2015, but did not benefit from the tax credit and did not indicate the amount of the credit in the tax return for the fiscal year 2015 and in the subsequent ones.

First of all, in its analysis, the Tax Authority remind that the Ministerial Decree May 27<sup>th</sup>, 2015 provides for that the credit must be indicated in the tax return related to the fiscal year during which the costs were incurred. In addition, as clarified by Circular Letter



13/E/2017, the credit must also be indicated in the RU section of the tax return related to the subsequent fiscal years, up to the one when its use ends. It is also clarified that, even if the failure to comply with the requirement does not compromise the benefit, it must be correct by filing an amending tax return and indicating the credit in its RU section. It is also confirmed that the applicable penalties is in the range from €250 to €2,000 according to Art. 8, par. 1 of the Legislative Decree 471/1997, with the possibility to reduce the penalties. Finally, the Tax Authorities confirm that, the amending tax return for the fiscal year 2015 had to be sent by December 31<sup>st</sup> 2020, without the possibility to benefit from the longer deadline (February 28<sup>th</sup>, 2022) provided for the emergency period for the notification of the assessment notice, etc.

Therefore, in the case analyzed, the Tax Authority consider that the failure to indicate the amount of the credit in the tax return, related to the fiscal year in which the credit accrued (2015) and in the subsequent ones (up to the year in which the use of the credit ends), is not an obstacle to the eligibility for the tax credit. Instead, the tax return for each fiscal year still open to amend shall be filed, in order to indicate in the RU section the amount of the credit due (accrued in 2015), and to pay, for each year, the related penalty. The taxpayer is also required to prepare the appropriate accounting documentation certified by an auditor or an auditing company.

## Re-opening of the deadline for the Development Contract instrument (Director's Decree of the Ministry of Economic Development dated September 17th, 2021)

A Director's Decree of the Ministry of the Economic Development dated September 17<sup>th</sup> 2021, provide for the re-opening of terms, starting from September 20<sup>th</sup> 2021, for the filing of applications for the Development Contract, which had been closed by means of a Director's Decree dated August 4<sup>th</sup> 2021.

We would like to remind you that the Development Contract supports large-scale investments, and more in detail:

- Industrial development plans, including plans concerning the processing and sale of agricultural products aimed at the production of goods and/or services;
- Development plans for the protection of the environment, i.e. entrepreneurial initiatives aimed at safeguarding the environment;
- Development plans for tourism activities with the aim of developing the tourism offer through the strengthening and improvement of the quality of the accommodation offer and, if necessary, of the supplementary activities, of the support services for the use of the tourism product and, for an amount not exceeding 20% of the total investments to be made, of the commercial activities.

The Development Contract is open to Italian and foreign companies regardless their size. More in detail, there are:

- the proposing company, which promotes the business initiative and is responsible for the technical and economic consistency of the development contract;
- any participating enterprises, which carry out investment projects under the development contract;
- the participants in any research, development and innovation projects.

It should also be noted that the minimum amount of the plans differs according to the type of program. In general, the minimum total investment required is € 20 million, reduced to € 7.5 million only for activities involving the processing and marketing of agricultural products. Moreover, lower minimum expenditure amounts are provided for the different plans mentioned above. On the other hand, the investments proposed by participating companies must not be lower than €1.5 million.

The measure provide for a mix of incentive: subsidized financing, up to 75% of eligible expenditure; interest rate grants; grants on capex, and direct grants to expenditure.

The intensity of the incentive, within the limits of the current state aid rules, will be determined on the basis of the type of project, the location of the investment and the size of the company, it being understood that the amount and form of the grants to be granted will be defined during the negotiation phase.

Applications for access may only be filed online through the dedicated platform on Invitalia's website.

Finally, it should be noted that from September 20<sup>th</sup>, 2021, for the purposes of signing a Development Agreement or a Programme Agreement, which planned an increase in employment, the beneficiaries shall give priority, within the framework of their respective workforce requirements, and subject to verification of professional requirements, to the hiring of workers who are recipients of income

support measures, or who are unemployed following collective redundancy procedures, or of workers from companies in the reference territory involved in crisis tables active at the Ministry of Economic Development.

# FSI

## Consulting services in relation to the management of an AIF by an SGR - VAT exemption - Ruling no. 527 of 2021

With the Ruling no. 527/E of 8<sup>th</sup> August 2021, the Italian Revenue Agency provided some clarifications in relation to the VAT treatment applicable to consultancy services provided to a Management Company of a Venture Capital Fund (hereinafter "Fund"), qualified as an Alternative Investment Fund under Directive 2011/61/EU.

In the case addressed by the Revenue Agency, the Claimant provides to a Management Company consulting services related to the analysis of possible target entities from technological and innovation perspective. In particular, such services consist in the following activities:

- origination and first screening, namely the research of companies with a high technological profile;
- more detailed assessment of technology market where the companies selected in the previous phase operate;
- market and technology due diligence;
- consultancy specifically related to the business development plans of the companies participated by the Fund (or by other schemes managed by the Management Company);
- monitoring of business development strategies and annual review of the technological components of business models.

In order to define the correct VAT treatment applicable to the abovementioned services, the Italian Tax Authority recalls the previous judgements of the EU Court of Justice (see *inter alia* C-169/04 C-464/12 C-595/13 and C-231/19), as well as their previous clarifications (see Ruling no. 628 of 2020, Ruling no. 61/E of 2018 and Ruling no. 65 of 2019).

In the present case, the Italian Tax Authorities confirm that the services described above are basically in line with those services dealt with by clarifications already issued by the Revenue Agency mentioned above. In addition, the Revenue Agency considers that the services under analysis are as significant as the economic-financial information/assessments services rendered to the Management Company. Indeed, information and valuations resulting from the above services are relevant for the investment decisions of the Management Company and they be regarded as a whole service connected to – and essential for – the management of the Fund (namely, the principle the Court of Justice refers to apply the VAT exemption).

On these bases, the Italian Revenue Agency concludes that the above consulting services are connected to – and relevant for – the Fund's management activity performed by the Management Company. Accordingly, such services rendered by the claimant could benefit from the VAT exemption provided for by article 10 of Presidential Decree no. 633/1972, to the extent that the Fund meets the characteristics of UCITS under EU Directives.

## Application of financial, economic and organizational requirements in order to include in a VAT Group Special Purpose Vehicles incorporated under Law no. 130/1999 – Ruling no. 534 of 2021

With the Ruling no. 534 of 2021, the Italian Revenue Agency provided some clarifications in relation to the application of the financial, economic and organizational requirements set forth by article 70-ter of Presidential Decree no. 633 of 1972, in order to include in a VAT group the so called Special Purpose Vehicles ("SPVs"), aimed at carrying out securitization transactions under Law no. 130 of 1999.

In the case addressed by the Revenue Agency, the SPVs are entirely owned by a Group's company and their activities may be described as follows: (i) SPVs buy non-performing loans ("NPLs") from third party banks or, in any case, from companies outside the Group; (ii) NPLs servicing is provided by the parent company and (iii) the notes issued by the SPVs are acquired by the same parties selling the NPLs and/or by institutional investors or other third party investors.

Given the above background, and after having recalled the applicable VAT Law, the Italian Tax Authority confirms the possibility to include also the SPVs in the VAT Group.

Firstly, the "financial requirement" is satisfied since the SPVs are entirely controlled by a company belonging to the Group, pursuant to article no. 2359, para. 1, no. 1) of the Italian Civil Code.

With reference to the so-called "economic requirement", the Italian Revenue Agency specifies that in the present case: (i) according to Law no. 130 of 1999 securitizations transactions shall be carried out only through the SPVs, thus not by any of other Group entities; (ii) services provided by the SPVs complete and complement the credit management Group's business line; (iii) the SPVs benefit from the NPL servicing offered by the Group. On this basis, the Italian Tax authority considers that in present case the so-called "economic requirement" is met, since the securitization operations performed by the SPVs are regarded as strictly related with the Group business – *i.e. "complementary and dependent to"* the Group business as per article 70-ter, para. 2, letter b).

As far as the "organizational" requirement is concerned, this results satisfied where the SPVs are subject to the management and coordination of the Group. Recalling the clarifications already provided, the Italian Tax Authority confirms that in the case under analysis the "organizational" requirement is met since the Group, through the parent company controlling the SPVs:

- influences and limits the decision of the SPVs' management;
- appoints and revokes SPVs' directors;
- identifies possible securitization transaction to be implemented.

Having regard to foregoing, as the three mentioned requirements provided for by the article 70-ter of Presidential Decree no. 633 of 1972 are met, the Italian Revenue Agency confirms the possibility to include the SPVs in the VAT group.

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