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Direct Tax

Late revocation of the option for the Tax Consolidation regime | Revenue Agency Answer no. 187/2024

The ruling of the Italian Revenue Agency no. 187/2024 concerns an Italian company (hereinafter "the company Alfa"), which participated, as consolidating company, to a tax consolidation regime related to fiscal years 2020-2022, with the controlled company Beta (hereinafter "the Company Beta") and other controlled companies.

At the end of the three-years period, the companies Alfa and Beta incorrectly renewed the option for the consolidation tax regime although they actually intended to revoke it, starting from January 1st, 2023, cause of a demonstrated economic and financial crisis regarding the entire corporate group.

Therefore, in the light of the fact last mentioned, already underway at the moment in which the said mistake has been made, the taxpayers requested the Revenue Agency regarding the possibility to amend such a mistake through the provision of "remissione in bonis" sets forth by art. 12 of Law Decree n. 16/2012 by carrying out the following tasks:

- revoking the option for the tax consolidation regime, relating to the company Beta, in the first useful tax return;
- paying the fixed penalty provided by art. 11, par. 1, of Legislative Decree n. 471/1997.

The Revenue Agency denied the possibility envisaged by the taxpayer arguing the following considerations.

First of all, by reiterating that art. 12 of Law Decree n. 16/2012 is generally applicable also in the case of lacking of revocation of the tax consolidation regime, the Revenue Agency argued that the legitimacy of a late revocation depends on the fact that the taxpayer maintains a "conclusive behavior" in line with the business income ordinary determination regime and does not exercise other options.

Secondly, the Revenue Agency, noting as in the case at issue the companies Alfa and Beta maintained a "conclusive behavior" not in line with the will geared to exclude the company Beta from the tax consolidation regime, has noted more specifically that in the FY 2022 tax return has been indeed expressed the will to continue such a regime including the company Beta.

At this regard the Revenue Agency argued that art. 12 of Law Decree n. 16/2012 is applicable in case of late fulfillment of a formal requirement, geared to enjoy tax benefits, previously not fulfilled within the deadline cause of a mere forgetfulness of the taxpayer, while instead is not applicable in the case in which the late fulfillment depends on a *"mere afterthought, or on a retrospective choice based on reasons of opportunity".* On the contrary, in the case in question, the taxpayer did not "omit" the formal exercise of the revocation of the option for the tax consolidation regime, but he expressly exercised the will to renew such an option.

Thirdly, the Revenue Agency argued that the option exercised in the tax return is not editable through an amended tax return pursuant to art. 2, par. 8, of the Presidential Decree n. 322/1998, reckoning that the options, like others manifestations of negotiating willingness, can be amended only in presence of violence, fraud or mistake and the latter must be relevant, essential and must not concern "*the motivation*" of the choice.

Own Shares and subsequent Spin-off– No Abuse of Rights | Revenue Agency Answer no. 217/2024

In Response no. 217 dated November 5, 2024, the Italian Revenue Agency addressed a complex corporate reorganization and concluded that there is no abuse of law in the case of the purchase of own shares from a parent company followed by its partial asymmetric spin-off in favor of a newly incorporated company (NewCo), where no fiscal advantage can be considered undue.

In this case, the applicants, namely ALFA Company (a holding company engaged in the direction and coordination of several companies, including BETA, its main asset, and in managing a diversified real estate portfolio), BETA Company, and the shareholders of ALFA, belonging to different family branches and identified respectively as Group 1 and Group 2, ask whether the operation they intend to carry out could constitute an abuse of rights under article 10-bis of Law No. 212/2000 (hereinafter "L. 212/2000").

Specifically, the transaction consists of:

- lifting ALFA's liquidation status, which resulted from ongoing disputes between the shareholders, leading to the expiration of the statutory duration of the company;
- purchasing its own shares from the parent company via a bank loan;
- a partial asymmetric spin-off of ALFA in favour of a newly established company (NewCo).

The sequence of these operations is aimed at ensuring the continuation of ALFA's business activity, avoiding liquidation, and seeks to separate the entrepreneurial paths of the two-family groups involved in the current corporate structure of ALFA.

The purchase of own shares in this context benefits from the participation exemption regime under article 87 of the Consolidated Income Tax Act (TUIR), allowing a 95% exemption on the capital gain realized. The Revenue Agency notes that an alternative transaction involving the distribution of a dividend by BETA to ALFA would result in substantially equivalent tax effects, as the dividend received would also be part of ALFA's income under article 89 of the TUIR, subject to taxation only on 5%.

As previously mentioned, to obtain the necessary funds for the purchase, BETA relies on financing from an independent third-party bank, secured by its own assets. It was the same bank that proposed the purchase of shares as the preferred option for granting the loan.

Regarding the subsequent spin-off (partial asymmetric spin-off) of ALFA, which is subject to the tax neutrality regime under article 173 of the TUIR—ensuring the continuity of the tax values both for the shareholders (who inherit the tax value of the shares held before the spin-off) and the beneficiary company—the Revenue Agency finds no signs of tax avoidance. This transaction is not intended to circumvent the dissolution of the corporate relationship among the shareholders and the formal transfer of business assets to "non-operational" holding companies. Instead, it is characterized as a corporate reorganization aimed at the effective continuation of business activity by each participating company, preserving the financial investments made.

In the specific case, no corporate assets are used to achieve exclusively personal or family interests, nor is there any intention to divert financial resources or cash from the business activity. The companies involved will continue to operate in the commercial sector (being as such activities of direction and coordination).

Regarding the combination of the two transactions (the purchase of own shares and the spin-off), the Revenue Agency observes that the simultaneous transfer of a shareholding in BETA from ALFA to BETA itself is intended to provide ALFA with the liquidity necessary to maintain the economic values obtained by the shareholders as a result of the subsequent asymmetric spin-off. This ensures that the spin-off does not lead to an inequitable distribution of values (i.e., ensuring the shareholders receive the same economic values they held prior to the spin-off). The Agency concludes that this does not result in any undue advantage in terms of exploiting the tax neutrality under article 173 of the TUIR, and the overall conduct is not contrary to the rationale of tax laws or general legal principles.

The conclusions of this response are, however, conditional on the fact that no corporate assets are employed for personal or family objectives, or any interests unrelated to a business context, and that no financial flows, other than dividends, are directed from the beneficiary company to the shareholders (for example, in the form of loans or guarantees).

It is useful to recall that, in a similar case of family reorganization, the Agency (cf. Response no. 84 dated March 29, 2024) previously ruled the merger of two companies into a third as abusive, where all three companies were equally owned by the same three family members and involved in real estate rental activities. The Agency considered that such reorganization pursued exclusively the interests of individual shareholders, lacked economic substance, and was designed solely to avoid taxation on capital gains arising from the difference between the market value of the shares being transferred and their tax value.

Tax Residence of Companies – Effective Management and Principal Ordinary Operations | Circular Revenue Agency no. 20/E/2024

With circular no. 20/E of November 4, 2024 (hereinafter "*Circular*"), the Italian Revenue Agency provides clarifications regarding the tax residence of companies, following the amendments introduced in the TUIR by Legislative Decree No. 209/2023 (*hereinafter "the amendment").*

The new provisions affect the criteria for determining the tax residence of both limited liability and partnership companies. Specifically, the amendment retains the formal criterion of the legal seat and introduces, in replacement of the previous substantial criteria of the seat of administration and the main object, the criteria of "*effective place of management*" and "*primary ordinary management*".

In this context, it is necessary to analyze the practical impact of these changes, with particular attention to the phenomenon of corporate groups and the delicate balance between the activities of direction and coordination and management interference.

As mentioned, the amendment introduced, alongside the traditional criterion of the legal seat, two new substantial criteria: the effective place of management and primary ordinary management. According to the new wording of the amended provisions (articles 5 and 73 of the TUIR), the effective place of management is the location where the "continuous and coordinated decision-making regarding the company or the entity as a whole" occurs, while primary ordinary management refers to the *"continuous and coordinated performance of acts of ongoing management concerning the company or the entity as a whole."*

These criteria aim to make the domestic rules on tax residence more consistent with international best practices and double taxation treaties. The declared objective is to align the tax residence of companies with the rules on permanent establishments, preventing multinational companies from abusing unclear rules to shift their tax residence to more favorable jurisdictions.

One of the main aspects to consider when approaching the new criteria is certainly the role of direction and coordination within corporate groups. This activity involves the parent company controlling the strategic and operational decisions of subsidiaries, in a process that entails the centralization of business activities through an organizational structure that tends to concentrate decision-making.

On this point, the Circular states that the decisions of shareholders, although they may affect the management of the company, do not determine the effective place of management, except for those with a managerial content. In this regard, it is emphasized that the ordinary activities of supervision and monitoring carried out by the parent company are not sufficient to determine the tax residence of the subsidiary.

However, the border between supervision and high-level management can be blurred, especially in small companies or those with flexible corporate governance models. Indeed, when the direction and coordination go beyond mere strategic guidance and take on the characteristics of high-level management, there is a risk of meeting the effective management criterion. This underscores the need for a case-by-case assessment that takes into account the specifics of the governance model and any shareholder agreements.

The second new substantial criterion, primary ordinary management, refers to the location where the day-to-day management activities of the company take place, i.e., where the "continuous and coordinated performance of acts of ongoing management concerning the company or the entity as a whole" occurs. This is therefore a purely executive moment, the day-to-day management, which does not concern strategic direction but rather the ordinary administration and operational management.

This criterion is particularly relevant in multinational groups where many administrative and operational functions are delegated to subsidiaries or third parties (e.g., legal, accounting, tax, treasury, marketing, IT, and payroll services).

In such groups, the services provided by the parent company or subsidiaries can impact the actual day-to-day management of the subsidiary, leading to the risk of determining, in practice, its tax residence. Again, a case-by-case assessment is necessary to exclude such a circumstance.

Deductibility of interest expense for real estate companies | Supreme Court Decision no. 28855/2024

The original wording of the art. 1, paragraph 36, of law no. 244/2007 considers interest expenses *"relating to loans guaranteed by mortgages on properties intended for rental"* entirely deductible as they are excluded, as a result of a favorable housing development policy, from the more rigid provisions of the art. 96 of the TUIR.

In sentence no. 28855 of last November 8th, the Court of Cassation ruled that the concept of destination "*implies a causal, and not temporal, relationship between financing and leasing, although said connection must be proven objectively"* and, therefore, *"even though possible maneuvers are hypothesized elusive actions by taxpayers aimed at guaranteeing a broader deductibility value of interest expense, it should be noted that deductibility also has the purpose of encouraging company capitalization".*

Otherwise, in the process, the Revenue Agency considered only the interest relating to loans stipulated to finance the purchase or construction of a property (subject of mortgage) to be fully deductible, as well as that *"the rental should be subsequent to the financing itself".*

The Supreme Court did not accept these considerations, establishing the absolute deductibility of interest expense on mortgage loans relating - therefore - also to pre-existing properties or properties already rented.

No considerations appear to emerge from reading the sentence in relation to the use of the financial resources obtained with the taking out of the mortgage.

IRAP - Non-deductibility of IMU on capital properties - Constitutional Court Decision No. 171

Constitutional Court Ruling No. 171 of October 29, 2024, combined several issues of constitutional illegitimacy of the rule that does not allow the deduction of IMU (Imposta Municipale Propria ex L. n. 160/2019) from IRAP (D.P.R. n. 446/1997), finding them all inadmissible.

The issue for violation of the principle of ability to pay was found to be manifestly unfounded. Indeed, Judgment No. 262 of 2020, on the non-deductibility of IMU on capital goods from IRES, is also not applicable to the different hypothesis of non-deductibility from IRAP.

The violation of art. 3 of the Constitution in contrast with the prohibition of double taxation does not apply to the case at hand, since this prohibition, positivized by art. 67 of Presidential Decree no. 600/1973 (Common provisions on the

assessment of income taxes) and art. 163 of Presidential Decree no. 917/1986 (Consolidated Income Tax Act), would only concern the phenomenon of double (or multiple) legal taxation, "*being, conversely, compatible with the system the double (or multiple) taxation, on the economic level, of the same economically assessable fact".* The aforementioned judgment no. 262 of 2020 has in fact already specified that the non-recognition of the deductibility of IMU on capital goods from IRES does not give rise to *"a phenomenon of legal double taxation (because the conditions of IMU and IRES are different)".* The same argument clearly applies also with reference to the prerequisites of IMU and IRAP.

Finally, the issue raised with reference to the equality principle of Article 3 of the Constitution is also unfounded.

Deductibility of interest expense for the purchase of real estate | Supreme Court Order no. 27862/2024

The Supreme Court no. 27862, Oct. 29, 2024, has intervened on the issue of the subjective requirement provided by Article 96 of the TUIR for the purposes of full deduction of interest expense related to mortgage financing secured by real estate intended for rental, reiterating what has already been expressed (*See Supreme Court, V, No. 2472/2023) previously, namely, that interest expense is not relevant for the purposes of Article 96 TUIR. (and are, therefore, fully deductible) interest expenses related to financing secured by mortgage on property intended for rental."*

Moreover, this orientation was also expressed by the Revenue Agency in Circular No. 37 of July 22, 2009, where it was clarified that the scope of application of the aforementioned paragraph 36 is limited to so-called real estate management companies, i.e., companies whose activity consists in the passive use of real estate assets.

In the specific case, the qualification of management real estate applies to the company that carries out the activity of managing a shopping mall whose premises are leased to companies that carry out trade there, due to the absolute prevalence of the passive management component of the real estate against a minimal provision of ancillary services.

Non-deductibility of the “difference” from withdrawal in corporations | Supreme Court Order no. 27460 of October 23, 2024

The subject of the Supreme Court's ruling no. 27460 of October 23, 2024, is the recovery for taxation of the shareholder's withdrawal difference, amounting to the difference between the amount paid and the nominal value of the share capital of the cancelled shares, entered in the company's balance sheet as a depreciable multi-year charge.

The shareholder's withdrawal produces its effects directly in the company's sphere of assets and in the relations among the shareholders, constituting, as to the latter, the anticipated liquidation of the value of the equity shares in the company of which they are the owners. This, however, does not imply that the operation can entail reflections on the company's income statement: it is entirely logical to consider, with regard to the “capital shares used to meet the withdrawal that they find reference in undistributed profits or future profits, latent in the balance sheet, incurring, therefore, the prohibition of allocation to the income statement sanctioned by Article 109 of the TUIR.

Civil law, moreover, does not provide that the charge resulting from the payment of the withdrawal difference can be charged to the company's income statement when there are available reserves.

The Ordinance therefore recalls the principle of law according to which “*On the subject of business income, the negative component constituted by the charge borne by the joint-stock company and relating to the so-called ‘withdrawal difference,’ paid to the shareholder on the occasion of withdrawal, must be qualified as remuneration, an anticipated liquidation of future income or latent profits in the financial statements, which therefore falls under the provision of non-deductibility set forth in Article 109, paragraph 9, lett. a), of the Tuir, as can be deduced from the express reference that this rule makes to Art. 44 of the Tuir, and confirmed by Art. 47, paragraph 7, of the Tuir, pursuant to which the sums or normal value of the assets received by the partners in the event of withdrawal constitute profit for the part that exceeds the price paid for the purchase or subscription of the cancelled shares or quotas; the assessments to be made with reference to partnerships, in which the difference from withdrawal instead has the nature of participation income, are different” (Cass. Sez. T., 22.4.2024, n. 10815)."*

In fact, the aforementioned provisions do not exclude that they can be used as part of the same reorganization project consisting of several successive and/or simultaneous contribution operations. These provisions, by identifying a realizable value of the contributed equity interests, make it possible to *''keep''* their capital gains latent or to ''induce'' the tax neutrality of the contribution transaction, even where the contributed equity interests *''originate''* from a previous contribution in relation to which neutrality had already been *''induced''* or *''controlled''* the emergence of the relevant capital gains.

Concatenation of contributions of shareholdings - Absence of abuse | Revenue Agency Answer no. 216/2024

The Agency considers that there are no elements that hinder the possibility that shareholdings subject to a first contribution made benefiting from the controlled-realization regime pursuant to Article 177 of TUIR are subsequently subject by the same

transferee to a further contribution in favor of another company applying the controlled-realization regime provided for by Article 175 of TUIR and consequently inducing the tax neutrality of the latter contribution.

This conclusion does not change in the case where a transferee company is the beneficiary of simultaneous contributions, some made under Article 175 (e.g., by corporations) and others under Paragraph 2 (e.g., by individuals not under a business regime) as long as the respective prerequisites are met.

Patent Box Credits - Reverse Merger | Revenue Agency Answer no. 204/2024

The answer to ruling no. 204/2024 analyzed the case of a company (Alfa) incorporated in 2017 following the contribution of a going concern executed by its sole shareholder, as a result of which the transferee had taken over the Patent Box benefit initially requested by the sole contributing shareholder (this approach was already confirmed by a separate ruling response).

Before concluding the Patent Box agreement, the sole shareholder, in 2018, had de-merged part of its assets in favor of Beta, which had elected, together with the applicant, for the tax consolidation regime acting as consolidating company.

During 2019, the applicant finalized the (reverse) merger by incorporation of Beta, with accounting and tax effects backdated to 1 January 2019: as a result of the merger, the tax consolidation between the two companies had been interrupted.

On December 28, 2023, Alfa filed an amendment tax return for FY2018 including the Patent Box benefit and, as incorporating company of the former consolidating company, the amendment tax return regarding the fiscal unit. As a consequence, a higher CIT credit arose, that can only be used for debts accrued starting from 2024.

With the request for a ruling, Alfa asked the Italian Tax Authorities to clarify the proper procedure to be followed to recognize the above-mentioned CIT credit.

In the answer in question, the Italian Tax Authorities clarified the below:

- the CIT credit carried forward remains in the exclusive availability of the consolidating company. Therefore, following the interruption of the consolidation, the CIT credit remains in the hands of Beta;
- Alfa takes over the availability of the CIT credit accrued under the tax consolidation period;
- Alfa must file the FY24 CIT tax return, filling in the "DI" section with the higher CIT credit arising from the filing of the fiscal unit amendment tax return for FY2018, as well as with the Beta's tax code.

Indirect Tax |VAT and Registration Tax

Corporate transaction between foreign companies – Transfer of warehouse | Revenue Agency Answer no. 194/2024

With the ruling no. 194/2024, the Italian Revenue Agency clarified that the transfer between non-EU companies of a stock of goods located in an Italian warehouse cannot fall within the out of scope VAT regime provided for the TOGC and is therefore to be considered as an independent supply of goods relevant for VAT purposes in Italy, to the extent that the remaining part of the going concern transferred is located outside the EU.

In particular, two companies – both resident outside the EU and with a VAT number in Italy – further to a separation of the business units, have concluded abroad a sale of a business unit located outside the EU, which also includes assets located in Italy, kept in an Italian warehouse.

Italy, by implementing art. 19 of EU Directive, provided at article 2, par. 3, letter b) of Presidential Decree no. 633/1972 that the TOGC (and transfer of Business unit as well) are out of VAT scope.

Regarding the difference between the transfer of a business and the mere transfer of assets, the Supreme Court, according to the principles of the EUCJ, clarified that a transfer of a business occurs when the object of the transfer is an organic complex considered as a unit, for which the overall aptitude, even if only potential, for the exercise of the business arises. As also confirmed several times by the Tax Administration, the reference to the concept of going concern must be understood in a broad sense, i.e. also including the sale of business complexes relating to individual business units.

The Revenue Agency, clarified that, for applying the VAT exclusion:

- the business unit to be transferred must be located in the territory of a Member State that has opted for the introduction of the VAT out of scope regime;

- the objective, subjective and territorial requirements for the transfer must be verified in advance.

In the case at hand, the transfer takes place between two non-EU parties and has as its object a business unit located in said non-EU country: therefore, in Italy it is envisaged mere stock of goods and not a business unit. This means that, according to the Tax Authorities, the VAT out of scope regime provided for by art. 2, paragraph 3, letter b) quoted is not applicable for the transfer of the stock located in Italy.

The fact that the companies are located outside the EU territory precludes the possibility of considering an asset located in a country other than that in which the remaining business unit is located to be considered as part of business unit as well.

Nor is applicable the provision of letter f) of the same article 2, par. 3, which provides that *"the transfer of assets as a result of mergers, demergers or transformations of companies and companies"* is out of VAT since the extraordinary transaction at hand cannot be qualified as a demerger.

Bankruptcy – Issuance of credit note due to unilateral waiver of credit | Revenue Agency Answer no. 203/2024

With the ruling no. 203/2024, the Italian Revenue Agency ruled negatively on the possibility of issuing a credit note following an unilateral waiver of a credit that can no longer be recovered, as it is not comparable as a case to those provided for by article 26, par. 2, of Presidential Decree no. 633/1972 (nullity, annulment, revocation, rescission, termination).

In the case at hand, the company requested clarification on the possibility of issuing a credit note following the non-payment of a consideration resulting from an open bankruptcy against the counterparty and started before 26 May 2021 (subject to the former legislation with respect to the amendments made by Legislative Decree no. 71/2021).

The applicable rules *ratione temporis* established that the credit note could be issued only following the fruitlessness of the insolvency proceedings. In the view of the Company, the unilateral waiver of the credit claimed against the bankruptcy constituted a valid prerequisite for the issuance of the VAT variation note, being not dissimilar to the cases of termination, rescission, annulment, or dissolution due to mutual dissent, since in all these cases the credit, for the waived part, cannot be satisfied in any way by the insolvent counterparty.

However, the Tax Authorities have clarified that the cases ruled by article 26 relate to specific cases which, unlike the waiver of the credit pursuant to article 1236 of the Italian Civil Code, are not attributable to a mere unilateral determination of one of the parties which, in order to produce extinguishing effects, requires communication to the other party is the latter's conclusive conduct.

It follows that this waiver is not comparable to the hypotheses provided for by art. 26, paragraph 2, since the original economic transaction that led to the exercise of the tax recourse does not cease, nor is the taxable amount reduced, since the relationships already concluded between the parties have not even changed.

Consequently, the note of variation can only be issued at the unsuccessful end of the bankruptcy procedure.

Split payment – credit note due to non-payment of the consideration | Revenue Agency Answer no. 210/2024

With the ruling no. 210/2024, the Italian Revenue Agency provided clarifications in relation to the possibility for the supplier to issue a credit note beyond the annual deadline provided for by article 26, par. 2, of Presidential Decree no. 633/1972, if it has failed to collect the amount invoiced to the counterparty subject to the split payment regime.

The Tax Authorities confirmed the possibility of issuing such a credit note upon condition that the customer has not anticipated the tax point at the time of receipt/registration of the invoice subject to the split payment regime.

First of all, it should be noted that the split payment regime provides that the purchaser subject to the split payment:

- is required to pay VAT on the date on which the tax becomes due, i.e. at the time of payment of the consideration;
- can opt for the anticipating the VAT liability at the time of receipt/registration of the invoice.

Therefore, in the event of split payment, since the liability for VAT is linked to the payment of the consideration (except for the case in which the purchaser opts for anticipating the tax point), in the event that the consideration is not paid (in whole or in part), VAT does not become payable (in whole or in part) despite the fact that the transaction has been invoiced.

Therefore, assuming that the consideration has not been paid and that the purchaser does not opt for anticipating the tax point at the time of receipt/registration of the invoice, it is possible to proceed with the issuance of a credit note, even if one year has elapsed since the issuance of the original invoice.

The variation made by the transferor/supplier is relevant only for accounting purposes, in the sense that it is sufficient to make the appropriate adjustments in the VAT registers, after the issuance of the credit note, even though the year has elapsed since the issue of the invoice.

Even the purchaser, not having opted for anticipating the tax point, will have to make a mere accounting reversal of the transaction.

Indirect Tax | Customs

Customs Reform | Legislative Decree No. 141/2024

As of the 4th of October 2024, Legislative Decree No. 141/2024 **('National Complementary Provisions to the Union Customs Code' or 'DNC'**) became effective, which, by repealing Presidential Decree No. 43/1973 ('TULD') and Legislative Decree No. 374/1990, is the new national legislation on customs matters.

The DNC, following the lead of EU Reg. No. 952/2013, introduced some important changes: i) VAT on importation is now included among border duties; ii) direct customs representative requires special conditions for its use; iii) the criminal penalty system based on smuggling has been rearranged; iv) the administrative penalty system has been renewed; v) the excise crimes provided for by Legislative Decree No. 504/1995 are now included among the crimes listed under Legislative Decree No. 231/2001.

New EU Customs Tariff | Reg. (EU) 2024/2522

On January 1, 2025, the **new version of EU Customs Tariff** will come into force (Regulation (EU) 2024/2522, amending Annex I of Regulation (EEC) 2658/87 concerning the tariff and statistical nomenclature and the Common Customs Tariff).
The EU Customs Tariff is based on the Harmonized Commodity Description and Coding System, common at a six-digit level among the countries adhering to the World Customs Organization. The Tariff is **periodically updated** to include changes in statistical requirements, trade policy and technological and commercial developments.
The **changes** concern the **introduction of new NC codes** in the **agri-food** (Chapters 3 and 7), **biofuels and fertilizers** (Chapter 27 and 31); **wood** (Chapter 44); **electrical machinery and equipment** (Chapter 85).

Duties on electric vehicles from China

On October 30th, 2024, the EU Commission concluded its anti-subsidy investigation by imposing **definitive countervailing duties on imports of battery electric vehicles (BEVs) from China.** These measures will remain in effect for five years. The Commission's investigation revealed that the BEV supply chain in China benefits from unfair subsidies, posing a threat of economic harm to EU BEV manufacturers. As from the entry into force of the measures, sampled Chinese exporting producers will be subject to the following countervailing duties – such as, BYD (17.0%), Geely (18.8%) and SAIC (35.3%). Other cooperating companies will be subject to a duty of 20.7%, while all other non-cooperating companies will have a duty of 35.3%. Following a substantiated request for an individual examination, Tesla will be assigned a duty of 7.8%.

EU Deforestation Regulation (EUDR)

On Thursday, November 14, 2024, the **European Parliament approved a one-year delay in the entry into force of the EU Deforestation Regulation (EUDR).**

The postponement came in response to concerns raised by EU member states and businesses that they would not be able to fully comply with the rules if applied as of end of 2024. Large operators and traders will now have to comply with the obligations as of 30 December 2025, whereas micro- and small enterprises will have until 30 June 2026.

The European Parliament also proposed several amendments, including, among the others, the creation of a new countries category of ***"no risk",*** in addition to the existing three categories of "low", "standard" and "high" risk. "No risk" countries may be defined as those with stable or increasing forest cover, where minimal or almost no due diligence requirements would apply.

Please note that on 20th November, **the EU Council firmly reiterated its support to postponing the EUDR date of application by 12 months.** It should be recalled that the proposal of the Commission needs to be adopted, signed and published in the Official Journal before 30 December 2024.

The **EUDR** aims to fight climate change and biodiversity loss by preventing the deforestation related to EU consumption of products from cattle, cocoa, coffee, palm-oil, soya, wood, rubber, charcoal and printed paper.

The list of dual-use items

On November 7, the **Delegated Regulation (EU) 2024/2547** of the European Commission was published in the Official Journal of the EU. This regulation amends Regulation (EU) 2021/821 of the European Parliament and Council, which concerns the list of **dual-use goods.**

The revised regulation introduces some **amendments and additions to Annex I**, which contains the list and technical descriptions of dual-use items. Key updates include the inclusion of new types of facilities for the production or concentration of heavy water, the addition of new chemical substances (such as iodine pentafluoride, dipropylamine, and neosaxitoxin), and the listing of new machinery and related equipment under specific categories. Furthermore, new detailed technical specifications have been added for certain listed goods.

Centralized Clearance System | Circular Custom no. 23/2024

Italian Customs Authority issued the **Circular no. 23/2024** on October 30, 2024, concerning the centralized clearance mechanism outlined in Article 179 of the EU Customs Code.

The **centralised clearance for import** (CCI) system began its initial implementation phase in July 2024. **For exports, the system is scheduled to take effect in December 2024**, and by June 2025, it will be fully operational for all goods entering the EU territory. However, the Italian Customs Authority has not yet provided specific information on when centralized clearance will be fully functional in Italy.

The CCI system allows traders to submit a customs declaration to the customs office in the Member State where they are established, while the goods themselves can be physically presented at a customs office in another Member State. This system enables efficient and coordinated digital processing of customs declarations and the physical release of goods between the customs offices of the various Member States involved.

Employment Income and Personal income taxation

Life Insurance and tax deduction | Revenue Agency Answer no. 218/2024

In the ruling no. 218/2024, the Italian Revenue Agency addressed the tax treatment of **insurance premiums paid by employers for collective life insurance policies covering the risk of death for the employees.**

This clarification focuses on whether employees can simultaneously benefit from two tax incentives under the Italian Income Tax Code (TUIR): the 19% deduction for death risk insurance premiums pursuant to article 15, paragraph 1, letter f) of the TUIR, and the exclusion of these premiums from the calculation of employment income under the article 51, paragraph 3, of the TUIR.

The query arose from an employer, acting as the withholding tax agent, who had collectively subscribed to such policies for its employees, assuming that both tax benefits could be applied. The Revenue Agency, after reviewing the relevant legislation and practice, clarified that in cases where the premiums are paid by the employer, can be deducted by employees only if the premiums are included in the employees' taxable income.

The premiums in question are considered a taxable component of employment income under the article 51, paragraph 1, of the TUIR, unless the provision under paragraph 3 of the same article applies. According to paragraph 3, the value of non-cash benefits (in this case, the premium amount) does not contribute to the calculation of employment income, provided that the combined value of any non-cash goods and services granted to employees does not exceed €258.23 during the tax period. Exceeding this threshold results in the full amount being subject to ordinary taxation, not merely the portion exceeding the limit (as an exception to this limit, new maximum thresholds have been set for 2023 and 2024).

The Circular note n. 326/1997 clarified that premiums for health, life, and non-work-related accident insurance contribute to taxable income, while premiums for work-related accident insurance are excluded from taxation for the employee.

Therefore, premiums paid by the employer can only be deducted by the employee if the corresponding amounts have been subject to taxation as employment income. In conclusion, for an expense to be deducted under the article 15 of the TUIR, it

must be incurred by the taxpayers and effectively borne by them, contributing to the calculation of their taxable employment income. If the premiums do not form part of the total taxable income, they cannot be deducted by the employees.

New Guidelines on the Tax Residence Rules | Italian Revenue Agency Circular Note n. 20/2024

With circular note n. 20/E dated November 4, 2024, the Italian Revenue Agency outlines the new rules on **tax residence** for individuals, companies, and entities introduced by Legislative Decree n. 209/2023 (International Taxation Decree). Focusing specifically on natural individuals, it is highlighted that Delegated Law n. 111/2023 entrusts the government with reforming the rules on tax residence to align them with the best international practices and with the Conventions for the avoidance of double taxation signed by Italy. The introduced changes, aimed at ensuring greater legal certainty, are highly significant as they affect the establishment of tax residence in Italy, a fundamental basis for taxation under Italian law, which adheres to the principle of worldwide income taxation. It should be noted that the establishment of tax residence cannot be addressed by filing an advance tax ruling and any requests aimed the assessment of the residence for tax purposes are not admissible (Circular n. 9/E/2016).

The new definition of residence for tax purposes of natural persons

Starting from January 1, 2024, the introduction of the new definition of tax residence for individuals under the Income Tax Code (TUIR) significantly reshapes the criteria for determining tax residency for income tax purposes. The amended article 2, paragraph 2, of the TUIR establishes that individuals are considered tax residents in Italy if, for the major part of the tax year (183 days in a calendar year, or 184 days in a leap year), they meet at least one of the following conditions:

- **Physical presence** in the territory of the State, also considering fractions of a day;
- **Residence in Italy,** as defined by the article 43 of the Italian Civil Code (i.e. the habitual abode in a certain place);
- **Domicile in Italy** as the principal place of personal and family relationship;
- **Enrollment in the Italian Population Register**

As previously clarified in Circular 25/E of 2023, establishing an individual's tax residence in Italy (excluding the Resident Population Register) requires a factual assessment to be conducted on a case-by-case basis involving a concrete analysis of the factors indicating physical presence, residence, or domicile in Italy as of January 1, 2024.

The Explanatory report of the Decree also confirms that for the purposes of calculating most of the tax period, non-consecutive periods are also considered.

As a consequence, for Italian tax purposes, connecting criteria provided for by the provisions are not required to be verified continuously and uninterruptedly, being sufficient that these criteria are fulfilled for 183 (or 184 days in a leap year) during the calendar year.

Practical guidelines from the Circular Note

- **The new physical presence criterion**

The Decree introduced a new and **independent criterion for establishing residence**, absent in the previous version, based solely on the physical presence in the territory of the State. This is an objective and purely factual criterion that requires only the physical presence of a person in the State, regardless of the reasons and independently of the fulfillment of other criteria. The circumstances in which this criterion may be met are various (vacation, work, study, visiting family or friends). The novelty, compared to the previous formulation, is that it will no longer be necessary to meet the requirements of **civil residence**, **domicile**, or **enrollment in the population register**, as the simple physical presence in the territory is sufficient. The evaluation of physical presence can be determined based on elements that prove the actual stay in the State for the major of the tax period, for a **specific number of days or fractions of days, even if not continuous.** Regarding the calculation of the days and fractions of days, the Agency provides an operational example of a taxpayer not registered in the Population Register and without residence or domicile in the State, who arrives in Italy at 11:00 PM on July 1, 2024, and stays continuously until 1:00 AM on December 31, 2024. Since 2024 is a leap year, and the days of July 1 and December 31 are to be considered in full, the taxpayer is considered physically present in Italy for 184 days, thus considered fiscally resident in Italy for the entire 2024 tax year.

- **The Physical Presence criterion and smart working**

Due to the new criterion the use of "*working from home"* in Italy for 183 (or 184 in case of a leap year) days automatically establishes tax residence in our country. Regarding the second category (i.e., workers in smart working from abroad), it remains understood that **individuals working remotely from a foreign country where they are physically present for 183 days**

a year (or 184 days in a leap year), who meet at least one of the other three criteria outlined in article 2, paragraph 2, of the TUIR, during most of the tax period, will also be considered tax residents of Italy.

- The Civil Residency criterion

The reform has not modified the criteria for civil residence as article 43 of the Italian Civil Code, which remain governed by the clarifications provided in previous practice notes, as well as by case law. The assessment of residence must take into account the coexistence of two elements: the **objective** element of staying in a place for a prolonged period, significant even if not predominant from a quantitative perspective, and the **subjective** element represented by the intention to reside there permanently, as demonstrated by daily habits and the conduct of normal social, family, and emotional relationships.

- The new criterion of Domicile

Regarding the new domicile criterion, the Decree has replaced the reference to the civil definition with a new notion applicable for tax purposes, according to which "domicile is defined as the place where personal and family relationships of the person mainly develop." The circular note clarifies that the new definition prioritizes personal and family relationships over purely economic ones and aims to resolve uncertainties that have arisen over the past years due to the previous reference in article 2 of the TUIR to the civil definition of domicile. Therefore, in evaluating domicile, it is necessary to conduct a review that considers not only personal and family relationships in the "typical" sense (such as marriage or civil union), but also any stable personal relationships (such as cohabiting couples) that demonstrate a connection to the territory of the State, as well as stable social ties, such as annual membership in a cultural or sports club, which are considered "concrete acts" through which the individual expresses the intention to maintain a meaningful connection with the State's territory.

- The criterion of the enrollment in the Population Register

Regarding the criterion of the enrollment in the register of the resident population, the circular note points out that this requirement has been revised and now holds the value of a rebuttable presumption allowing taxpayer to prove that the results do not correspond to a factual situation. This presumption can be disregarded if the taxpayers is able to demonstrate that, for the major of the tax period, they did not meet any of the alternative criterion—other than the registration criterion—outlined in the amended Article 2, paragraph 2, of the TUIR.

- The rebuttable legal presumption of residence for black- list countries

The rebuttable legal presumption of residence in Italy remains unchanged for Italian citizens who move to countries or territories with a privileged tax regime, as provided by paragraph 2-bis of article 2 of the TUIR. The list of countries subject to this presumption has been recently updated, with Switzerland being removed from the black-list effective from January 1, 2024.

- Tax new criterion of residence versus the tax regimes for individuals relocating to Italy

Special attention is given to the tax regimes for individuals who transfer their residence to Italy (Article 24-bis, 24-ter TUIR, and the impatriati workers). It is clarified that, since the new rules introduced by the Decree apply starting from the 2024 tax year, the requirement of not having been a tax resident in Italy in previous years, which is a prerequisite for accessing these tax regimes, will be evaluated in light of the new article 2, paragraph 2, of the TUIR, only for the tax periods from January 1, 2024, onwards. The previous regulations will remain in force until the 2023 tax year.

Interaction with Double Taxation Conventions

A significant focus is placed on the relationship between domestic tax laws and the provisions of the Double Taxation Conventions signed by Italy, particularly regarding the role of the tie-breaker rules outlined in article 4, paragraph 2, of the OECD Model Convention. The new regulations introduced by the Decree may create new instances of residency conflicts that will need to be resolved through the application of these treaty rules. One notable example is the case of daily cross-border workers from neighboring countries, who, while often spending a significant portion of the year in Italy, may only be present for part of the time. **Such workers could potentially meet the new criteria for residency in Italy** based on physical presence criterion. The circular note clarifies that, if the conditions are met, the residence conflict between the worker's home country and Italy can be resolved by applying the tie-breaker rules from the relevant Double Taxation Convention.

Tax Litigation

Tax self-defense proceeding *("annullamento in autotutela")* | Circular no. 21/E/2024.

Some of the clarifications brought by the Circular Letter are recalled below, with reference to the most relevant issues.

- **Compulsory and optional self-defense proceeding (as follows "self-defense")**

With the new regulations, the institution of self-defense has been distinguished into two cases, the so-called "compulsory" self-defense (provided for in certain cases exhaustively listed), and "optional" self-defense.

In both, the power refers to cases of "*illegitimacy or groundlessness of the act*" (i.e. any act that expresses authoritative power with detrimental patrimonial effects on the taxpayer), and can be exercised "*even ex officio and pending judgment or in the presence of final acts*", while it is precluded when the act has been the subject (i) of a res judicata favorable to the Administration (excluding purely procedural *res judicata*, or the substantive res judicata based on reasons other than those on which the self-defense is based); (ii) any form of settlement of the claim, including facilitated (assessment with adhesion, acquiescence, conciliation).

The distinction between the two cases mainly concerns the following profiles:

- the illegitimacy or groundlessness which, in the case of compulsory self-defense (i) must be "*manifested*", i.e. without objectively uncertain interpretative issues, for example due to jurisprudential conflicts; (ii) it refers by law to cases that are exhaustive and strictly interpreted, i.e. the error of person, of calculation, on the identification of the tax, the easily recognizable material error, the error on the tax assumption (to which, according to the Tax Authority, cases of obvious logical error, double taxation, of the requirements for deductions, deductions and concessions are in any case attributable), the failure to take into account payments, the lack of documentation subsequently remedied within the established terms;
- the nature of the power which, in cases of optional self-defense (i.e. all cases not attributable to the cases of compulsory self-defense), is "*discretionary and not an instrument of protection of the taxpayer*";
- in line with this lower protection of the taxpayer, in cases of optional self-defense (i) the Tax Authority is not required to conclude the procedure with measure expressed, nor is it required to deal with requests on issues already subject to previous adversarial proceedings; (ii) tacit refusal cannot be challenged in court.

- **The procedure**

In case the taxpayer, by mistake, submits the application to the wrong office of the Tax Authority, the latter must promptly transmit it to the competent office, informing the applicant.

The self-defense application must exhaustively represent all the elements (in fact and in law) on which it is based, with all the appropriate documentation to demonstrate the defects in the deed, as well as the data referring to the applicant or his or her attorney, if any.

In turn, the Tax Authority promptly proceeds with the preliminary investigation, guaranteeing full and transparent collaboration and, in cases of greater complexity or value, may request the prior opinion of the *"Direzione Regionale"*.

As already provided for in the previous regulations, the power of self-defense also includes the power to suspend the effects of the act, which can always be exercised at the discretion of the Tax Authority pending the investigation.

At the end of the investigation, in the event of acceptance of the application in self-defense, if there has been no judgment on the merits of the dispute, the Tax Authority may reissue the act amended by defects (so-called substitute self-defense): according to the Tax Authority, the issuance of a new act does not violate the principle of uniqueness of the assessment action (so-called prohibition of bis in idem), as this principle is without prejudice to *"the amendability of formal and procedural defects"* (art. 9-bis L. 212/2000).

The taxpayer's right to the refund of what has been paid and no longer due as a result of self-defense remains unaffected, except for what has been paid during the facilitated settlement of the dispute, unrecoverable sums according to consolidated jurisprudential principle.

Clarifications are therefore provided about the facilitated definition of penalties following a partial self-defense measure, provided that the administrative act subject to self-defense has not become final (and, therefore, has been challenged or the deadline for appeal is still pending), and provided that the taxpayer waives the appeal.

Transfer Pricing

Transfer pricing methods and role of the OECD Guidelines | Supreme Court Decision no. 26432/2024

With Judgement n. 26432 issued on July 10, 2024, and published last October, the Supreme Tax Court has once again addressed the selection of transfer pricing methods in compliance with the arm's length principle, in the light of the qualification and role of the OECD Guidelines[1] within the domestic legal framework.

The case involved a tax assessment notice issued by the Italian Revenue Agency, challenging the incorrect application of the *Comparable Uncontrolled Price ("CUP")* method by an Italian company, acting as manufacturing entity of a multinational group, to test the arm's length nature of the transfer prices of goods sold to its foreign related party distributors, considering instead applicable the Transactional Net Margin Method ("TNMM"), as more reliable in the specific circumstances in question.

The taxpayer appealed against the tax assessment notice before the Tax Courts, which ruled against the company, which consequently appealed to the Supreme Tax Court, arguing, among other reasons, the incorrect application of art. 110, par. 7 of the Consolidated Income Tax Code ("TUIR"), in light of the OECD Guidelines indications, claiming that the transfer pricing adjustment was illegitimate, having the Tax Office given priority to the TNMM over the CUP method, notwithstanding the latter, according to the company, was more suitable, along with the resale price method ("RPM"), to identify *"arm's length"* transfer prices as required by the tax legislation.

The Supreme Tax Court judges, with their decision, took the chance to review the Supreme Tax Court's positions on methods and models referred into the OECD Guidelines and about the nature of the Guidelines and their position within the hierarchy of legal sources.

In particular, the Supreme Court clarified that the OECD, as a supranational organization of a conventional nature, aims to develop recommendations, best practices, accounting principles, mathematical models and knowledge tools in general, to harmonize practices among member countries, to ensure the comparability of their operational approaches. On this basis, the Supreme Tax Court stated that OECD recommendations, being *"technical rules derived from mathematical, accounting, and actuarial models"* traditionally subordinated to legislative and regulatory provisions, due to their own nature fall outside of the hierarchy of legal sources. In this sense, it is misleading to search the OECD Guidelines for a method in abstract prevailing over another method, being the setting of priorities of methods out of the institutional purpose of the Organization and of its conventional duty, which is only to propose "models". On the other hand, it is the responsibility of individual contracting states, exercising their sovereign taxing authority, to possibly establish "an order of precedence" among the methods outlined by the OECD.

On the basis of this reconstruction, the Supreme Court excluded therefore the existence of a hierarchy among the methods for the determination of transfer prices as codified by the OECD, establishing instead that it is up to the interpreter to choose which one is, among those outlined by the OECD "*technical rules",* the method that in practice more closely adheres to the case in exam, keeping in mind the purpose pursued by the domestic law. Furthermore, the Supreme Judges stated that, while the motivation for the choice of the calculation criterion or mathematical model is scrutinized by the judge of merit (i.e. by the lower degree Tax Courts) in terms of actual adherence of the selected criterion or model to the concrete case, it is instead questionable in terms of legitimacy (i.e. before the Supreme Tax Court), through the claim of the law violation, the unmotivated application, in relation to the specific case, of a model or of a calculation system, precisely identifying the trial court's error in applying the law and indicating at the same time the alternative method deemed more appropriate to the specific case.

In application of these principles, the Supreme Court rejected the taxpayer's appeal, confirming that in the specific case the TNMM was more reliable than the CUP to verify the "arm's length nature" of the prices applied in the intercompany sales of the goods in question, since the company undertook, in those transactions, a limited risk profile, being the only manufacturing unit of the group, essentially operating on the basis of already acquired orders. Therefore, the profit margin, on which the TNMM is based, represents a more indicative and more suitable criterion than the CUP, whereas the price applied in other transactions is not the result of arm's length deals comparable to intercompany transactions.

The decision in question is of interest for two reasons: firstly, it underlines the role of the OECD Guidelines, now widely recognized also by the Tax Administration, as a technical support tool for the correct application of transfer pricing rules and, secondly, it provides indications regarding the selection of the best method to determine transfer prices, reaffirming the so-called "*best method rule".*

[1]

At the same time, the Supreme Tax Court's decision may give rise to some doubts regarding the contemporaneity to the case in question of the principles applied by the Judges: in fact, the case submitted to the Supreme judges dates back to fiscal year 2008, and is therefore precedent to the publication of the July 2010 edition of the OECD Guidelines[2], in which the OECD expressed its opinion recommending the selection of the method most suited to the circumstances of the case ("best method"), having regard to the characteristics of each method, the nature of the transactions, the availability of reliable information, the functional and risk profiles of the parties to the intercompany transactions, as well as the comparability of the latter with the independent ones available. In the 2010 edition the OECD departed from the July 1995 edition of the Guidelines, in force at the time of the challenged transactions and in which the so-called "traditional transactional" methods (such as the CUP, the resale price and the cost plus) were indicated as the methods to apply first, availing of the so-called "*profit*" methods (such as the TNMM and the profit split) only if the former were not validly applicable. Similarly, in the Italian legislation and practice it was necessary to wait for the Ministerial Decree of May 14, 2018 in order for the "best method rule" to be reflected in the domestic law and the OECD Guidelines to be explicitly recognized as a tool to interpretate the transfer pricing legislation, definitively overcoming the practice dating back to the Circular of the Ministry of Finance n. 32 of 1980, which established a hierarchy of methods, referring to the OECD 1979 report Transfer Pricing and Multinational Enterprises.

[1] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

[2] The most recent edition of the Guidelines is the one published in January 2022.

Government Incentives

The "rent to buy" contract for the purpose of Industry 4.0 tax credit | Revenue Agency Answer no. 198/E

The Revenue Agency has clarified that a company cannot benefit from the Industry 4.0 tax credit in case the acquisition of an asset is carried out through a "rent to buy" contract. Indeed, this type of contract does not meet the tax credit requirements. In support of this conclusion, the Revenue Agency specifies that, for these cases, the assets are, at the time of their purchase, already used by the same company and, therefore, do not match the essential requirement of the novelty of the asset being invested.

Indeed, in general, in the "rent to buy" contract, the buyer immediately obtains the availability of the asset against the payment of rents, with the right to subsequently purchase (transfer of ownership) the asset after a predetermined period of time.

The purchase of an asset already used by the virtue of a free loan contract for the purpose of Industry 4.0 tax credit | Revenue Agency Answer no. 221/2024

According to the clarifications provided by the Revenue Agency, the purchase made in 2023 of an asset already used by the virtue of a free loan contract entered into force in 2021 is not eligible for the Industry 4.0 tax credit. In this case, indeed, at the time of purchase, the asset has already been previously used without interruption by the purchaser and therefore the essential requirement of the novelty of the asset being invested cannot be met. In the case in question, the absence of the novelty requirement at the time of purchase is evident from the following elements:

- The machinery was used under a free loan contract that lasted for a period of more than two years;
- The free loan contract is expressly stipulated in order to allow the Applicant to start its production activities;
- The loan period cannot be assimilated to a "trial period", as the free loan contract does not provide for any "option" to purchase the machinery, but only a date by which it will be purchased by the company.

The 2024 Single ZES' integrative communication model | Prot. n. 406943/2024 tax credit

On 6 November 2024, the Revenue Agency published the Document registered with no. 406943/2024, with the aim of updating the integrative communication form for the tax credit related to investments in Special Economic Zones (SEZs), as provided for in the Decree-Law no. 155/2024. With the following measure, operational changes have been introduced to allow economic operators to declare additional investments beyond those already reported in the tax credit "booking" communication to be submitted by 12 July 2024.

We remind that such integrative communication must be submitted by Dec. 2, 2024.

International Tax

Global Minimum Tax – SBIE | Enacted the Italian implementing Decree

On 23 October 2024, the implementing decree (Ministerial Decree of 11 October 2024) governing the so-called Substance Based Income Exclusion (SBIE) was published in the Italian Official Journal, as part of the set of rules related to the entry into force of the Global Minimum Tax. The decree was issued in application of Article 35 of Legislative Decree 209/2023 and takes into account the clarifications provided in the OECD Administrative Guidance dated 13 July 2023.

The Global Minimum Tax rules aim to ensure that multinational groups, or large domestic groups, incur a minimum level of effective taxation, through the payment of a so-called Top-Up Tax (TUT) if the Entities are located in low-tax jurisdictions (i.e., ETR lower than 15%).

However, not all of the relevant income (Net GloBE Income) is subject to top-up taxation. The TUT is instead charged on Excess Profit only. The latter is equal to the difference between the jurisdiction's Net GloBE Income and the portion related to the substantial economic activity (SBIE) of the specific country. The rationale is not penalize groups established in a low-tax jurisdiction for economic purposes other than tax savings.

The exclusion is calculated by applying a rate to the Eligible Payroll Costs (the definition of which also includes "*self-employed persons participating in the ordinary activities of the multinational and national group under its direction and control")* and Eligible Tangible Assets value (which also includes leased assets and rights related to the use of immovable properties or the exploitation of natural resources of a given country), reflecting the expected economic return on these investments, which in turn are indicative of the economic substance of the location in a given jurisdiction.

The reduction from substantial economic activity, when fully implemented, will be equal to 5% of the book value of the eligible expenses. However, the decree provides for higher rates when the Global Minimum Tax rules are first applied and gradually decreasing during the 2024-2032 period, both for tangible assets (from 7.8% in 2024 to 5.4% in 2032) and payroll costs (from 9.8% in 2024 to 5.8% in 2032). It is not allowed the carry-forward, as well as the carry-back, of any SBIE's excess over the relevant Net GloBE Income. Moreover, if the administrative burdens associated with the calculation of the SBIE exceed its benefits in terms of TUT, it is possible to disallow it by applying the relevant election in the GloBE Information Return.

The data are those used for the preparation of the consolidated financial statements of the Ultimate Parent Entity or, in case of the determination of the Domestic Minimum Tax, on the basis of local GAAP, if used for the preparation of the separate financial statements of the entities or the individual statements of the Joint Ventures.

New double taxation agreement between Italy and China

The Italian Senate, in the session on November 5, 2024, definitively approved the bill for the ratification of the Convention against double taxation between Italy and the People's Republic of China (signed in Rome on March 23, 2019), which is now set to be ratified by the President of the Republic for publication in the Official Gazette.

This new treaty will replace the current one dating back to October 31, 1986, adapting several provisions to the more recent OECD 2017 model. The content of the new agreement is in line with the OECD/G20 BEPS guidelines and with the multilateral instrument (MLI) signed by China and Italy.

In the new preamble, the two countries express their common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or tax avoidance, and through commercial agreements, including *"treaty shopping"* schemes.

For the new version of the agreement to come into effect, it will be necessary to wait for China to complete the ratification procedure as provided by domestic regulations and for the respective acts to be subsequently notified: from the thirtieth day following the last notification, the Treaty will definitively enter into force. The entry into force is scheduled for January 1, 2025 and promises to bring significant benefits to bilateral Italy-China investments, allowing Italian companies to plan repatriation policies with greater flexibility.

Hereinafter we will analyze the main novelties of the new version of the Convention.

Regarding the attribution of **tax residency**, the drivers remain mostly the same, but the related procedure has been modified. More in detail, in the previous version, in case of residency in both contracting states, the criterion for resolving the issue was based on the company's headquarters or its actual place of management; the new formulation, instead, requires the contracting states to reach an agreement on the country of residence of the entity, agreement that shall be based on the company's place of actual management, the place of incorporation, or other relevant factors. In the absence of an agreement, the entity will not be entitled to any treaty benefit, except as agreed upon by the contracting states.

Changes have also affected the **permanent establishment,** as the new version of the treaty, among other things:

- extends to 12 months the period beyond which a construction site, a construction project, assembly or installation activities, or related supervision activities constitute a permanent establishment (in the previous version, the minimum period was 6 months) and to 183 days in any twelve-month period the period beyond which service provision related to the same project or a related project constitutes a permanent establishment;
- integrates the so-called "negative list" along the provisions of Article 162, 4-bis of the Italian Income Tax Code (subsidiary nature of the overall business);
- in line with the new paragraph 7 of Article 162 of the Italian Income Tax Code, narrows the scope of the independent agent when the activity is carried out exclusively or mostly on behalf of one or more closely related enterprises

Dividends were subject, before the recent legislative changes, to tax in the source state at a 10% rate on their gross amount; the new version of Article 10, paragraph 2, provides:

- a reduced rate of 5% for companies (that are beneficial owners of the dividend) holding at least 25% of the capital of the company paying the dividends, provided that the shareholding is held for a period of at least 365 days including the day of dividend payment;
- in all other cases, the maximum rate of 10% applies.

As for **interests**, the Article 11(2) maintains the previous general rate of 10%, introducing, however, a reduced rate of 8% if the interest is paid to a financial institution (also in this case, it must be the beneficial owner) in relation to loans granted for investment projects for a period of not less than 3 years. Paragraph 4 specifies that interests from Italy to an beneficial owner resident in China are exempt from Italian tax if they come from the Bank of Italy, CDP, SACE, or Simest.

In the field of **royalties**, the new wording of Article 12(2) provides for a differentiation in rates between compensation of any kind paid for the use or granting of a copyright on literary, artistic, or scientific works (including software, films, television or radio broadcasts, patents, trademarks, designs or models, projects, formulas, or secret processes, or information concerning industrial, commercial, or scientific experiences) - subject to tax at a maximum 10% rate - and compensation of any kind paid for the use or granting of industrial, commercial, or scientific equipment - whose tax is always applied at the maximum rate of 10%, but the taxable basis is equal to the 50% of the gross amount of the royalties.

Paragraph 4 of Article 13 regarding the **taxation of income from the sale of shares in real estate companies** has been amended, introducing the so-called "land-rich clause" which can allow taxation in the source country. Therefore, in the event of the sale of shares in a company whose value derives directly or indirectly more than 50% from real estate, the capital gain can be taxed in the country where the properties are located. When the "land-rich clause" does not apply, paragraph 5 provides that, under certain circumstances, capital gains from the sale of shares held in companies' resident in one state by individuals resident in the other state may be taxed in the first state.

Regarding **employment income**, concurrent taxation is triggered when the beneficiary stays for more than 183 days in a period of twelve months that starts or ends during the fiscal year in question.

In terms of **tax deductions**, the new text of Article 23, paragraph 2 excludes the deduction of foreign tax if the income generated abroad is subject to taxation in Italy through a withholding tax or substitute tax "whether requested by the income beneficiary or not" (in the current Treaty in force, "at the request of the beneficiary").

Finally, a new Article 24 has been added, introduced in accordance with the **OECD/G20 Base Erosion and Profit Shifting project,** to limit the use of this Convention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including treaty-shopping agreements.

It is clear that some of the above-mentioned changes could have a significant impact on the future structuring of investments from Italy, favoring, from a tax perspective, direct investments rather than the indirect ones usually made through a sub-holding located in Hong Kong.

FSI

Loans provided through peer-to-peer lending platforms | Revenue Agency Answer no. 196/2024

With Ruling no. 196 of 2024, the Italian Revenue Agency provided clarifications on the tax treatment of capital income pursuant to article 44 of the TUIR deriving from loans granted through so-called "peer to peer lending" platforms.

It should be noted that article 44, letter d-bis of Income Tax Code qualifies as “capital income” those interest income stemming from loans granted through peer-to-peer lending (or "P2P") platforms, managed by financial intermediaries referred to in article 106, or by payment institutions falling within the scope of application of art. 114 of the Consolidated Banking Act.

Article 1, paragraph 44 of the 2018 Budget Law establishes that a 26% withholding tax shall be applied by the P2P platform’s manager on interest income paid to individuals.

In the present case, the Claimant is a payment institution registered under the mentioned Article 114-septies of Legislative Decree no. 385 of 1993, which has agreed with the company "Alfa" the co-management of a P2P platform, in order to provide non-professional lenders with a series of preparatory services for the conclusion of loan agreements.

In particular, Alfa has developed the platform and operates as its primary manager, while the Claimant, as co-manager, deals only with the management of tax aspects, including the execution and payment of withholding taxes.

In addition, the P2P platform collaborates with an electronic money institution ("EMI") for the purpose of providing payment services (such as the opening of payment accounts and the receipt and transmission of funds between payment accounts) to the users of the platform.

Furthermore, neither Alfa nor EMI fall within the scope of mentioned Article 44, paragraph 1, letter d¬bis), TUIR, since they cannot be qualified as financial intermediaries or payment institutions, registered under the Consolidated Banking Act.

Considering the above background, the Claimant asks the Italian Tax Authorities whether the income stemming from the loans granted through the P2P platform are subject to the regime set forth by me mentioned article 44, letter d-bis, even if the Claimant acts as a co-manager of such a platform.

Firstly, the Revenue Agency specifies that the 26% withholding tax on income deriving from investments on P2P lending platforms applies provided that the following two requirements are met:

I. the lender must be exclusively an individual (outside the exercise of a business activity);
II. the platform operator must be a registered financial intermediary or a payment institution pursuant to the regulations provided for, respectively, by Articles 106 and 114 of the TUB, authorized by the Bank of Italy.

The Revenue Agency also refers to Ruling no. 56/E of 2020, which specified that, if the P2P lending platform’s manager does not qualify as a financial intermediary or payment institution pursuant to the aforementioned legislation, the income deriving from investments made through a P2P platform are qualified as "interest and other income deriving from mortgages, deposits and current accounts" referred to in article 44, paragraph 1, letter a), of Income Tax Code.

After analyzing the functions performed, the Tax Administration considers that the Claimant may not be regarded as the platform’s manager (as required by Article 44, letter d-bis of the TUIR), as the services rendered by the Claimant within the complex platform management activities are qualified as “possible and optional”, namely depending on the will of the users of the platform.

That said, the Revenue Agency concludes that the Claimant may not apply the 26% withholding tax on 26% of the proceeds deriving from investments made by individuals on the P2P platform.

Start-ups and innovative SMEs – investments through investment funds | Revenue Agency Answer no. 219/2024

With Ruling no. 219 of 6 November 2024, the Italian Revenue Agency provided some clarifications with reference to those investments in innovative start-ups and SMEs, benefiting from to certain tax incentives under Article 3 of the Ministerial Decree of 2019 (“eligible investments”).

In particular, in order to promote investments in innovative start-ups and SMEs, article 29 of Legislative Decree no. 179 of 18 October 2012 and article 4, par. 9, of Legislative Decree no. 3 of 2015 grant certain tax benefits to individual investing in the share capital of such companies, directly or indirectly, through undertakings for collective investment (UCIs) or other companies that invest mainly in the aforementioned start-ups and innovative SMEs.

In this respect, article 2 of Ministerial Decree of 7 May 2019 establishes that the eligible investment can also be made indirectly through qualified intermediaries (including UCIs) holding, at the end of the relevant tax period, shares or quotas of innovative start-ups or eligible innovative SMEs with a value of at least 70% of the total value of the invested assets (so-called "70% threshold requirement").

The present case concerns an independent asset management company ("Claimant") that has established an alternative, closed-end investment fund ("Fund") which mainly invests (i.e. at least 70% of its assets) in innovative SMEs eligible pursuant to article 4, par. 9, of Legislative Decree no. 3/2015.

In this regard, it should be noted that these investments can be made either through cash contributions or through the purchase of shareholdings for consideration.

Given such a background, the Claimant requests confirmation from the Revenue Agency with reference to:

I. whether, for the purposes to meet the 70% threshold requirement, all the shareholdings held by the Fund in the eligible innovative SMEs may be considered, regardless of the related method of acquisition – namely, through cash contributions recorded in the capital or share premium reserve, or through the purchase and sale. If so, it is asked how the documentary obligation provided for by Article 5, paragraph 1, of the Ministerial Decree of 2019 should be fulfilled in order to demonstrate the transactions linked to the eligible investments;
II. the possibility to receive from the innovative SMEs a self-certification, instead of a copy of the business plan (as required by article 5, par. 1, letter b), of the 2019 Ministerial Decree).

With reference to the first question, the Revenue Agency confirms that eligible investments'' refer exclusively to cash contributions, made both at the time of establishment of the innovative SME and at the time of the increase in share capital (see Article 3 of the Ministerial Decree of 2019 and Revenue Agency Circular no. 16/E of 11 June 2014).

Therefore, shareholdings purchased for cash cannot be considered for the purposes of 70% threshold requirement.

Given the negative answer to the first question, the Italian Tax Authorities does not take a position on the documentary obligation provided for by article 5, par. 1, of the Ministerial Decree of 2019.

As for the second question, the Italian Revenue Agency notes that it is based on the fact that the documentation to be provided by an innovative SME listed on an MTF could result in the potential disclosure of ''inside information'', not allowed under regulatory framework.

The Italian Tax Authorities does not provide an answer to the second question, as it lacks a detailed and specific description of the specific case. In particular, the Italian Revenue Agency concludes that such question is based on general considerations, lacking a clear identification of the information whose disclosure would be not allowed under the regulatory framework.

Cross-border merger of sub-funds – Tax neutrality and Entry Tax regime | Revenue Agency Answer no. 206/2024

With Ruling no. 206 of 18 October 2024, the Italian Revenue Agency has provided some clarifications regarding the tax implications resulting from the merger between the sub-funds of a foreign collective investment undertaking ("UCI") and Italian UCIs.

The claimant is an Italian insurance company ("Claimant") which, in order to comply with regulatory requirements, allocates specific assets to cover the commitments undertaken towards policyholders. A portion of the assets of the segregated management is invested in sub-funds of a Luxembourg SICAV ("SICAV"), which is established and regulated under the UCITS Directive (2009/65/EC). The SICAV is managed by a management company that has delegated the management of the sub-funds, in which the Claimant invests, to two asset management companies ("ManCo"). In order to optimize the management model, the Claimant intends to proceed with the cross-border merger of the SICAV sub-funds into UCIs under Italian law compliant with the UCITS Directive, managed by one of the two aforementioned asset management companies.

Preliminarily, the Claimant notes that the transaction is aimed at ensuring continuity of management and investments, providing for the transfer of assets without changes in portfolio, value, risk/return profile or legal nature.

Considering the above background, the Claimants seeks confirmation regarding: (i) the tax neutrality in Italy of the cross-border merger pursuant to article 10-ter of Law No. 77 of 23 March 1983 (or any other tax regulations); (ii) the non-application of the so called "entry tax regime" under Article 166-bis Income Tax Code (ITC), for direct tax purposes.

The Claimant is of the opinion that such a cross-border merger transaction is fiscally neutral for the Italian investor, as neither article 10-ter of Law no. 77 of 23 March 1983, nor other domestic tax provisions provide that such a transaction constitutes a tax condition in Italy. Furthermore, the Claimant considers that the entry-tax regime under article 166-bis does not apply.

Based on the following considerations, the Italian Revenue Agency confirms the solution proposed by the Claimant.

Preliminarily, the Italian Tax Authorities points out that the regulatory provisions – UCITS IV Directive 2009/65/EC, articles 40-bis and 40-ter of the Consolidated Law on Financial Intermediation (TUF) and the Bank of Italy's Regulation on collective asset management – provide for the possibility of carrying out mergers between UCI sub-funds, even if located in different EU Member States.

On this basis, with reference to the first question, the Revenue Agency refers to article 10-ter of Law no. 77 of 23 March 1983, which provides that Italian investors may realize capital income and other income financial income, deriving from foreign UCIs units (other than real estate UCIs) in case of: (a) distribution of proceeds during participation in the investment undertaking; (b) redemption or liquidation of units or shares; (c) transfer of units or shares; (d) transfer of units or shares to a different holder; (e) conversion of units or shares from one sub-fund to another of the same fund ("switch"). On this point, the Revenue Agency note that the merger between sub-funds of a foreign UCI and Italian funds does not constitute, in general, a taxable event for the unitholders, as it does not fall within any of the tax cases indicated above. In addition, the Revenue Agency notes that the exchange of shares shall occur in such a way as to attribute to the investors of the absorbed sub-funds a stake in the absorbing fund of a value equal to that held in the absorbed sub-fund.

Since the merger involves only the dissolution of the merged sub-funds, with the transfer of the related assets and liabilities, without liquidation or redemption of the shares, the Italian Revenue Agency concludes that the merger represents a "tax neutral" transaction. Furthermore, the transaction does not involve the transfer of the shares or quotas of the absorbed sub-funds to different unitholders, thus excluding the possibility to consider the merger as a "sale" or a "transfer" to third parties. In addition, the merger cannot be regarded as a "switch" transaction, as defined in the Bank of Italy's 2015 Regulation, which considers such a transaction a "redemption" of existing units followed by a "subsequent subscription" of new units.

With reference to the second question, the Italian Revenue Agency notes that the entry-tax regime under article 166-bis, ITC applies both in the case of direct and indirect transfer of tax residence to Italy, including in case of mergers (article 166-bis, paragraph 1, letter e). In these cases, the tax value of the incoming assets and liabilities is assumed to be equal to their market value. However, considering that article 166-bis applies to entities that carry out commercial enterprises, and that SICAVs (and UCIs in general) are not considered commercial entities, the Italian Revenue Agency concludes that the merger of sub-funds of a Luxembourg SICAV into Italian funds does not fall within the scope of entry-tax regime under Article 166-bis, ITC.

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