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DIRECT TAXES

RIDETERMINATION OF THE FISCAL COST OF LAND AND SHARES

Among the amendments introduced during conversion into law of Law Decree 17/2022 (Decreto Energia) is included the postponement of the deadline until 15 November 2022 for the redetermination of the fiscal cost of land and shares held by individuals, originally scheduled for 1 January 2022. The rate of the substitute tax (imposta sostitutiva) of 14% remains unchanged (Law no. 34 as of 27 July 2022, Decree conversion law no. 17 as of 1 March 2022).

CONTRIBUTION OF PERMANENT ESTABLISHMENT

Italian Tax Authority has confirmed its interpretation regarding the tax status applicable to the following transaction:

- contribution of an EU-company's permanent establishment in Italy to an Italian company;
- allotment of the beneficiary's shares to the EU-company.

Specifically, the contribution of the permanent establishment is fiscally neutral pursuant to Articles 178-179 and 176 TUIR (Italian Tax Code).

The allotment of the shares to the EU-parent company

represents a sale transaction and any capital gain is exempt from Italian corporate tax (IRES) up to 95% if the conditions pursuant to Article 87 TUIR (participation exemption) are met (Italian Tax Authority, answer to request for advance ruling no. 164 as of 6 April 2022).

ANTI-ABUSE TRANSACTIONS

Transactions carried out to take advantage of opportunities and benefits provided by the Tax Law, such as consolidated group taxation, do not constitute an abuse of right, where their achievement is not contrary to the tax regulations providing them or the general principles of Tax Law. This also applies if the consolidated companies are already under liquidation and intend to contribute fully deductible capital losses to the national and worldwide tax consolidation when entering the group taxation scheme. According to the Italian Tax Authority, there is no specific provision or principle within national group taxation which excludes a company under liquidation or one that may be dissolved and/or sold within the upcoming fiscal year or, generally, one that is not prevented from exercising the option for consolidation by imminent interruptions, from the option for tax consolidation (Italian Tax Authority, answer to request for advance ruling no. 165 as of 6 April 2022).

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TRANSACTION COSTS

The transaction costs for the acquisition of the target company's share capital and for the subsequent reverse merger can be entered in the profit and loss account and deducted for tax purposes, if they are not to be capitalised (Italian Tax Authority, answer to request for advance ruling no. 166 as of 6 April 2022).

SUPPLEMENTARY TAX DECLARATION

It is not allowed to submit a supplementary declaration in order to amend the chosen Regional Income Tax (IRAP) calculation method, as there is no error to be corrected (Italian Tax Authority, answer to request for advance ruling no. 187 as of 8 April 2022).

CONTRIBUTION TO PERFORMANCE-RELATED LOSSES

Concerning the contribution to performance-related losses, there is no obvious cause for the deterioration of the result of the fiscal year, which might also be not related to the Covid-19 health emergency (Italian Tax Authority, answer to request for advance ruling no. 199 as of 20 April 2022).

VAT

BUSINESS PROPERTY F/4

Concerning the sale of business property F/4, whose exact composition (i.e., surface area) and intended use have not yet been defined:

- the 10% rate pursuant to no. 127-undecies cannot be applied for VAT purposes, instead the ordinary rate of 22% is applied;
- according to the Italian Tax Authority, rates of 3% and 1% should be applied for mortgage registration duties (Italian Tax Authority, answer to request for advance ruling no. 167 as of 6 April 2022).

DOWNWARD ADJUSTMENTS

For insolvency proceedings started before 26 May 2021, the right to VAT deduction also arises in the case of omitted proof of claim, provided that the taxpayer can prove the unfruitfulness of the insolvency proceedings due to the lack of assets to be liquidated. It being understood that the right to VAT deduction can only be exercised at the conclusion of the proceedings (Italian Tax Authority, answer to request for advance ruling no. 181 as of 7 April 2022).

SETTLEMENT AGREEMENT

The sums agreed upon in the settlement agreement in consideration of the waiver of disputes to obtain damage repair are subject to VAT. According to the Italian Tax Authority, one party's waiver obligation (waiver of disputes) is linked to the sum owed by the other party (Italian Tax Authority, answer to request for advance ruling no. 212 as of 7 April 2022; in this regard, reference is made to the critical position of ASSONIME, newsletter 26/2021).

PERMANENT ESTABLISHMENT

It is not considered a permanent establishment in another member state if a non-resident company holds a subsidiary which provides it with human and technical resources under contracts through which the subsidiary exclusively provides marketing, regulatory, advertising, and representation services which may have a direct impact on the volume of sales (CJEU, C- 333/20 as of 7 April 2022).

CASE LAW

PRINCIPLE OF ACCUMULATION

In the event of failure to pay duties over several years, the principle of accumulation pursuant to Article 12(5) of Legislative Decree no. 472/1997 (Supreme Court ruling no. 11432 as of 8 April 2022) applies.

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VALUE OF INHERITED HOLDINGS

In order to determine the value of shares, which constitute inheritance assets, the taxpayer - additionally to the Italian Tax Authority - must be given the opportunity to provide counterevidence to the legal criteria that emerge from the data of the approved financial statements, as well as proof of the existence of provisions that occurred with respect to the approval and prior to the death that might have altered this value (Supreme Court ruling no. 11467 as of 8 April 2022).

EMPLOYMENT INCOME - PENALTIES

The employer's definition of a violation of failure to pay withholding taxes on employment income, followed by the payment of the relevant tax and the corresponding penalties, does not cancel the penalty for the employee who failed to declare this income. The employee remains subject to income tax and is liable for the failure to declare the income (Supreme Court ruling no. 11337 as of 7 April 2022).

RENTAL LEASES OF COMMERCIAL REAL ESTATE

By contract, the rental lease of commercial real estate contributes to the taxable income (income tax IRPEF) even if it is not received (in this case, the contracting parties agreed that the tenant would undertake the renovation works in the rented property for the first year instead of paying the rental lease (Supreme Court ruling no. 12254 as of 14 April 2022).

Yours sincerely,

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