NEWSLETTER NO. 2 - 2023

DIRECT TAXES

DTA CONVERSION

The conversion of "deferred tax assets" (DTA) into tax credits pursuant to section 44-bis of the Italian law-decree 34/2019 applies to all disposals of non-performing loans (NPL) occurred as of the date of entry into force of the original provisions until 31 December 2021 (Italian tax authority, answer to request for advance ruling 139 of 23 January 2023).

NOTIONAL INTEREST DEDUCTION (NID) IN THE EVENT OF A MERGER

In the event of a merger by acquisition, the acquiring company assumes the NID base of the company being acquired.

However, if the company being acquired benefited from contributions in cash made by the acquiring company in the previous year, the positive change in the transferee's net equity is annulled after the merger: the annulment of the equity does not impact on the ordinary NID scheme, whereas it eliminates the so-called super NID scheme.

This is because the super NID scheme is subject to the condition - not required for the ordinary NID scheme - that the net equity increase accrued during 2021 is maintained even in subsequent tax periods (Italian tax authority, answer to request for advance ruling 135 of 23 January 2023).

EMPLOYEE INCOME

Income received by employees for work performed in Italy based on smart working arrangements with non-resident employers is taxable in Italy (Italian tax authority, answer to request for advance ruling 127 of 20 January 2023.

INCOME PAID IN THE YEAR FOLLOWING THE ONE IN WHICH THE SERVICE IS RENDERED

If an individual:

- in (year X) is resident in Italy and works in Italy:
- in X+1 is not resident in Italy anymore, but in Switzerland, works in Switzerland and receives a bonus for the work performed in Italy in X,

such bonus is subject to tax in Italy in any case (Italian tax authority, answer to request for advance ruling 126 of 20 January 2023).

TAX RESIDENCE

For tax purposes, to obtain an entry visa for residence of choice is not the same as to enrol with the Register of residents as provided for under section 2 (2) of the Italian Tax Code (TUIR) (Italian tax authority, answer to request for advance ruling 119 of 20 January 2023).

SOFTWARE LICENCE FEES

The Italian tax authority provides clarifications on the withholding tax applicable to software licence fees as regards the different double taxation agreements entered into by Italy (Italian tax authority, answer to request for advance ruling 116 of 20. January 2023.

GOODWILL IN THE EVENT OF BUSINESS TRANSFER

In the event of a sale of business for consideration, the fiscal capital gain is determined by calculating even the tax value of the goodwill not deducted yet at the time of sale, just like all other assets. Conversely, in the event of a fiscally neutral business contribution, the goodwill is not transferred, and the transferor continues to deduct it pursuant to section 103 of the Italian Tax Code (TUIR) (or by eighteenths) (Italian tax authority, answer to request for advance ruling 109 of 20 January 2023).

CHARGEBACK OF COMPANY CAR EXPENSES

A holding company that purchases company cars to make them available to subsidiaries, according to their needs (i.e., corporate use, private and corporate mixed use, assignment to employees for personal usage) may deduct the relevant cost from income and deduct the relevant VAT from VAT due, without any limitation.

Conversely, the deduction thresholds for expenses under section 164 Italian Tax Code (TUIR) and the deduction of VAT under section 19-bis (1) of the Italian DPR 633/1972 apply vis-à-vis the lessee subsidiaries (Italian tax authority, answer to request for advance ruling 107 of 20 January 2023).

PARTICIPATION EXEMPTION

The remuneration paid to managers of the sold subsidiary, that worked to make it more profitable and enhanced in terms of purchase price, form charges specifically connected to the achievement of tax-exempt capital gains and, hence, are non-deductible at 95 percent (Italian tax authority, answer to request for advance ruling 94 of 19 January 2023).

VAT

MERGER BETWEEN EU TAXPAYERS

In the event of a cross-border merger by acquisition between VAT payers, the transfer of goods in Italy by a Dutch company (company being acquired) to a Belgian company (acquiring company) is a transaction outside the scope of IVA pursuant to section 2 (3.f) of the Italian DPR 633/1972 (Italian tax authority, answer to request for advance ruling 157 of 24 January 2023).

EXPORT SALES

In the event of "chain" sales, where:

1. an EU supplier sells goods in Italy to an EU intermediary identified in Italy,
2. the EU intermediary sells goods to a non-EU taxpayer,
3. the goods are shipped from Italy to a non-EU country by an EU intermediary within the subsequent 90 days,

the sale under 1) above is not an indirect export pursuant to section 8 (b) of the Italian DPR 633/1972, since the shipment outside the EU customs area is made by the EU intermediary acting as seller (and not as purchaser).

Hence, the EU supplier must identify itself or name a tax representative in Italy and subject the sale against the EU intermediary to VAT (Italian tax authority, answer to request for advance ruling 136 of 24 January 2023).

REGISTRATION FEES

"FIRST HOME" BUYERS TAX BENEFITS

The "first home" buyers' tax benefits are granted for one property only. Such property can be formally constituted even by two cadastral parcels with different ownership (e.g., one owned by the husband and the other owned by the wife) provided that:

(i) the parcels are "de facto linked" for tax purposes, as they lack functional and income autonomy,
(ii) the status is evidenced in cadastral archives (Italian tax authority, answer to request for advance ruling 155 of 24 January 2023).

ANTI-MONEY LAUNDERING

APPLICATION ISSUES IN THE IDENTIFICATION OF THE BENEFICIAL OWNER OF CORPORATIONS

The anti-money laundering provisions set forth the obligation to identify the beneficial owner, i.e., the individual (or the individuals) other than the client in whose interest (or whose interests) a continuing relationship is ultimately established, a service rendered, or a transaction performed.
In practice, the verification of individuals to be deemed "beneficial owners" is not always straightforward, due to the different cases that may arise. Nonetheless, ASSONIME (the association of Italian joint-stock companies) addressed important interpretation issues with Case 1/2023 and offers a useful guide for the solution of individual cases. Please find below a summary thereof.

According to the hierarchical order under section 20 of the Italian legislative decree 231/2007 (i.e. the provision on the determination of the beneficial ownership of clients other than individuals - amended by the Italian legislative decree 125/2019), the beneficial owner of a corporation coincides with the individual or the individuals, to which i) the direct or indirect ownership, ii) the control, iii) the powers of representation, management and direction of such company are attributed.

i. Ownership criterion
The relevant ownership interest threshold is that of more than 25 percent of the corporate capital. Hence, all individuals with a (direct and/or indirect) ownership interest of more than 25 percent must be deemed owners and, hence, qualify as beneficial owners.

Indirect ownership
In assessing whether the threshold is exceeded, indirect ownership must also be taken into account, if an ownership interest of more than 25 per cent of the client's equity is held through subsidiaries, trust companies or intermediaries.
From the wording of the new article 20 it seems to follow that the 25 percent+1 threshold must be taken into account in relation to the client's equity and that, hence, the rise in the shareholding chain could be interpreted on the basis of a control relationship, as provided for under section 2359 of the Italian civil code (subsidiaries and affiliated companies).

However, there is a tendency (also at European level) to consider this threshold in relation to the corporate capital of the client and of any entity along the shareholding chain. As a consequence, according to Assonime, it seems to be prudent to adhere to the interpretation that the 25 percent+1 criterion is relevant at every level of the shareholding chain: Example: The client company A is owned by company B at 30 percent (whereas company B is owned by three individuals with a share of 53 percent, of 26 percent and of 21 percent) and by company C at 70 percent (whereas company C is owned with a share of 70 percent and of 30 percent): to identify the beneficial owner the individual or the individuals owning an interest in company B of 26 percent and of 53 percent and the individuals owning an interest in company C of 70 percent and of 30 percent must be identified.
Aggregation
The direct and indirect ownership interests must be considered as an aggregate.
Usufruct
In the event of ownership interests, on which there is a right of usufruct, it seems more prudent to support the interpretation that both the bare owner and the usufructuary should be regarded as beneficial owners, as practiced widely by intermediaries obliged to verify the beneficial owner.

ii. Control criterion
If no (direct or indirect) owner can be unambiguously identified, the criterion of control applies, according to which beneficial ownership should be attributed to the individual or the individuals to whom control of the company can be attributed through: a) the majority of the votes exercisable at the ordinary shareholder meeting; (b) the availability of sufficient votes to exercise a dominant influence at the ordinary shareholder meeting; (c) the existence of specific contractual

constraints enabling a dominant influence to be exercised.

Control "through other means"
Directive (EU) 2015/849 (art. 3(6)), in defining the criterion for identifying the beneficial owner in companies, states that the beneficial owner is to be identified in the individual(s) who own(s) or control(s) the company, inter alia, 'through other means'. Some examples of control 'through other means', according to the EBA (European Banking Authority) are, inter alia, the existence of close family relationships, historical ties or contractual relations, or the use of assets owned by the client.

That being said, reference should be made - rather than to the literal wording of the aforementioned directive - to how these notions have been implemented at national level: according to article 20, the notion of control is always referable to the availability of voting rights or to contractual relationships that confer the power to exercise a dominant influence on the company, directing its strategic and management choices. This would mean that in our legal system, it is excluded that forms of control relevant to the provisions examined herein can find a place, if no voting rights or contractual relationships are available.

iii. (Residual) criterion of administrative and management bodies

According to the new wording of article 20 it is excluded that all individuals with administrative and management powers (i.e., all board members and senior managers), considered cumulatively, are deemed to be beneficial owners. More specifically, a beneficial owner must be identified in a precise manner and traced back to the individual or the individuals, who have the power to bind the company externally.
By way of example, a) the managing director or b) the holder of the power of legal representation, i.e., usually the chairman of the board of directors, in the event of a lack of delegation, or c) those individuals in the company, who have the power to make binding decisions for the classes of acts relevant to the provisions herein, would qualify as beneficial owner.

iv. Registry of Beneficial Owners

The Register of Beneficial Owners, which is a national archive on the beneficial ownership of companies with legal personality (limited liability companies, joint-stock companies, limited partnerships with share capital and cooperative corporations), private legal persons (foundations and recognised associations), trusts producing legal effects relevant for tax purposes and similar legal institutions, was established under the inter-ministerial decree 55 of 11 March 2022.
The deadline for complying with the obligation to notify the beneficial owner is set forth at 60 days from the moment the technical specifications are adopted and the functionality enabling the notification to be sent is activated. The implementing decree by the Italian ministry of economic development (MISE) is expected to be published shortly.