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DIRECT TAXES

PATENT BOX

The Italian tax authority provides clarifications on the optional tax incentive scheme for companies owning rights to commercial exploitation of specific intangible fixed assets, as specified under section 6 of the Italian law decree 146/2021, which provides for a higher tax deduction for research and development expenses incurred in relation to eligible intangible fixed assets (Italian tax authority, newsletter 5 of 24 February 2022).

For patent box purposes the predecessor-in-title's position can be assumed only in the event of tax neutral (mergers, de-mergers, etc.) transactions that under civil law qualify as successions or in the event of solely tax neutral transactions (business contribution). Hence, in the event of a sale of a business the successor-in-title may not automatically assume the option exercised by the predecessor-in-title (Italian tax authority, answer to request for advance ruling 194 of 7 February 2022).

TAX CREDIT FOR ENERGY-INTENSIVE BUSINESSES

The Italian tax authority provides clarifications on the calculation of cost increase for newly incorporated companies that produce electricity for self-consumption (Italian tax authority, answer to request for advance ruling 193 of 6 February 2022).

SALE AND LEASE BACK

In the event of a sale and lease back with transfer of title any contingent capital gain from the sale of the assets must be recorded as deferred income and gradually stated in the profit and loss account, based on the term of the finance lease agreement. The same accounting principle applies to the final lessee, even if:

- the lessee (first seller) sells the asset to its controlling company;
- thereafter, the controlling company sells the asset to the leasing company;
- the leasing company leases the asset under a finance lease to the final lessee (first seller) (Italian tax authority, answer to request for advance ruling 198 of 7 February 2022).

TRANSFER OF VAT CREDIT TO ITALIAN AND WORLDWIDE TAX CONSOLIDATION

The VAT credit transferred to Italian and worldwide tax consolidation relating to the tax year X may be used to offset the corporate tax debt - as final balance for the same tax year X and as prepayment for the tax year X+1 - resulting from the consolidated tax return (Italian and worldwide tax consolidation) relating to the tax year X (Italian tax authority, answer to request for advance ruling 220 of 22 February 2022).

ASSUMPTION-BASED TAX ASSESSMENT

In the event of a presumptive tax assessment, based on legal presumptions of income not recorded resulting from unjustified bank drafts, the taxpayers' taxable income must

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be redetermined by assigning a lump-sum percentage deduction of costs that is proportional to the income assessed (Italian Supreme Court, judgement 5586 of 23 February 2023).

PARTICIPATION EXEMPTION

The requirement of a trading activity for the participation exemption scheme to be applicable is not met, if the subsidiary limits itself to solely use financial means and to manage own capital for productive purposes, as it may be the case in the event of a purchase of land and the construction of a building thereupon (Italian Supreme Court, order 4825 of 16 March 2023).

REMINDER FOR LATE FILING OF ELECTRONIC INVOICES

The Italian tax authority's chief executive announced in decision no. 61196 of 6 March 2023 to sent reminders for late filing of electronic invoices and late submission of daily receipts. If these late filings have no effect on VAT settlements, the delays can be corrected by making recourse to the provisions on the regularization of formal errors under section 1 (166-173) of the Italian law 197/2022 (please refer to the relevant section of this newsletter). If, however, these delays do affect periodical VAT settlements, the taxpayers may avail themselves of the special provisions on the voluntary correction of errors ("ravvedimento operoso") under section 1 (174-178) of the above-mentioned law for the 2021 tax year and the previous years.

DISCOUNTED SETTLEMENT OF FORMAL ERRORS

Section 1 (166-173) of the Italian law 197/2022 (2023 Italian Budget Law) introduced the possibility to settle so-called formal errors at a discounted amount.

Please find below the main features of such discounted settlement:

This tax amnesty allows to regularize formal errors occurred until 31 October 2022 with no effect on the tax base, the settlement, and the payment of:

- income taxes and relevant surcharges
- VAT
- regional tax on productive activities (IRAP)
- substitute taxes
- withholding taxes
- tax credits.

All taxpayers can avail themselves of this regularization, regardless of the business carried out, the accounting scheme adopted and the legal nature.

Regularization occurs through the payment of a sum of EUR 200 for each tax period to which the error relates to by using the F24 payment form.

The payment can be made:

in two instalments of equal amount, the first one by 31 March 2023 and the second one by 31 March 2024; or in a single instalment by 31 March 2023.

The errors must be removed by 31 March 2024 at the latest, even in the event of assessed formal errors, of errors for which a penalty has been charged or errors otherwise pointed out to taxpayers.

VAT

SALE AND LEASE BACK

By means of a sale and lease back agreement:

- a company sells an asset owned and instrumental for its business to a leasing company,
- the leasing company leases the same asset to the selling company.

However, in some cases, the agreement's purpose may not be the transfer of title but the financing. More specifically, this is the case if (i) there are clauses that exclude or significantly limit the leasing companies authority to legally dispose of the asset as an owner, (ii) the lessee of the asset is granted particularly incisive and stringent powers, so as to presume that the latter maintains the right to dispose of the asset "as if it were the owner" (Italian tax authority, decision 3 of 3 February 2022 and answer to request for advance ruling 206 of 7 February 2022).

REVERSE CHARGE SCHEME

If the VAT payer

- erroneously subjected a transaction to VAT, which is actually exempt - by using the reverse charge scheme,
- did not deduct the recorded VAT debt,

it can file a request for reimbursement under section 30-ter within two years from the date of payment. To this end, the applicant must provide evidence that it did not deduct VAT and that VAT recorded as a cost is subjected to taxation (Italian tax authority, answer to request for advance ruling 203 of 7 February 2022).

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PRESUMPTION OF SALE

To reverse the presumption of VAT on sale and purchase, it can be proved that further company locations are available - in addition to registration with the companies' register, even by means of other documents evidencing that the goods are destined to a different place. However, such documents must be recorded in one the registers used, since it is not sufficient to simply provide the invoices and transportation documents stating such different place (Italian Supreme Court, judgement 6325 of 2 March 2023).

"LATE" DIRECT IDENTIFICATION

If direct identification occurs only after the transaction to be reimbursed is concluded, this shall be of no hindrance to a reimbursement application being filed pursuant to section 38-bis (2) of the Italian DPR 633/1972, provided that such identification occurs within a reasonable term (Italian Supreme Court, judgements 2746 and 2756 of 30 January 2023).

INHERITANCE AND GIFT TAX

EXEMPTION OF TRANSFERS OF CORPORATE SHAREHOLDINGS

The tax exemption scheme under section 3 (4-ter) of the Italian legislative decree 346/1990 is applicable to transfers of corporate shareholdings that ensure corporate control pursuant to section 2359 of the Italian civil code, provided that the donated shareholdings grant the recipients the power to directly and immediately influence the company's business and to direct the management and business decisions as well as to decide on the possibility to continue to maintain the control over the company itself. According to the Italian tax authority, "formal" control through voting rights is therefore not sufficient (Italian tax authority, answer to request for advance ruling 185 of 3 February 2022).

The tax exemption scheme under section 3 (4-ter) of the Italian legislative decree 346/1990 applies also to transfers of shareholdings in companies not resident in Italy, but inside the EU, and is subject to the same conditions required with respect to shareholdings in companies resident in Italy, i.e.

- with the donation or inheritance, the successors-in-title supplement or maintain de jure control over the

subsidiary and

- the successors in title undertake to maintain control of the company for at least five years from the date of transfer by means of a statement released at the time of filing the inheritance statement or the deed of gift (Italian Supreme Court, judgements 5674 and 5692 of 23 February 2023).

The tax exemption scheme under section 3 (4-ter) of the Italian legislative decree 346/1990 does not apply to shareholdings in real estate companies since the company must carry on an actual business activity (Italian Supreme court, judgement 6082 of 28 February 2023).

REGISTRATION FEES

ORAL FINANCING AGREEMENT

An oral agreement on the financing of a company is not subject to registration within a fixed term, but only if it is mentioned in another deed and is not taxed in accordance with section 22 (2) of the Italian law on registration fees (TUR)

- if such financing agreement is stated in the meeting minutes,
- and is no longer effective upon waiver of reimbursement by the shareholders expressed in the same meeting minutes (Italian Supreme Court, judgement 3839 of 8 February 2023).

CORPORATE LAW ISSUES

TAX FRAUD SANCTIONED ONLY BY TAX LAW, NOT BY CORPORATE LAW

Contracts concluded to circumvent tax law provisions are not void under civil law, but subject to penalty under tax law only. This is confirmed by the Italian Supreme Court order 3170/2023 stating that the prohibition of tax law circumvention is a principle applied by the tax authority only, and therefore has no impact on the validity of the contract in the relations between the contracting parties. In other words, the abuse of right under tax law must be clearly distinguished from the abuse of right under civil law: indeed, as to contracts, circumvention focuses on the relations between the parties and is not used to protect the interests of third parties that are independent from the parties. Therefore, what matters is the misuse of a power related to the ownership of a right and not - as is the case in the

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tax law - the protection of a public interest specific to the tax authority (Italian Supreme Court, order 3170/2023).

APPOINTMENT OF THE SUPERVISORY BODIES IN LIMITED LIABILITY COMPANIES

After some amendments further to corrective measures adopted over the past two years, section 379 of the Code of businesses under distress [Italian legislative decree 14/2019] provided the current version of section 2477 of the Italian civil code on the appointment of the supervisory body. Section 2477 of the Italian civil code sets forth reduced size limits compared to the past.

The appointment of the supervisory body or the auditor is mandatory if the company:

- is required to prepare consolidated financial statements,
- controls a company required to have its statutory accounts audited,
- has exceeded at least one of the following limits for two consecutive years:
 - EUR 4 million of total assets
 - EUR 4 million of income from sales and services
 - 20 employees on average during the business year.

The effectiveness of these limits was linked to the approval of the 2021 financial statements; by such date the companies should have complied with the obligation to appoint.

Section 1-bis of the Italian law-decree 118/2021, introduced by the Italian law 147/2021 during conversion, provided for a further postponement and further to such amendment the appointment of the supervisory body based on the new requirements will become mandatory upon approval of the 2022 financial statements.

Therefore, the companies shall examine whether a supervisory body or an auditor must be appointed after the approval of the 2022 financial statements (spring 2023).

SIMUL STABUNT SIMUL CADENT CLAUSE FOR BOARD MEMBERS IN ARTICLES OF ASSOCIATION: ABUSIVE APPLICATION

The "*simul stabunt simul cadent*" (they will either stand together, or fall together) statutory clause may be abusive or instrumental if the resignation of the director(s), which might cause the forfeiture of the entire management body, is solely or predominantly motivated by the purpose of eliminating unwanted directors without worthy cause, thus avoiding the obligation to pay the residual remuneration

(and generally compensation for damage) to which they would be entitled if they were ceased to hold office.

This principle was expressed in judgement 8088/2020 of the Court of Milan - enterprises matters specialised section - which showed that the resignation of two directors occurred only after numerous attempts had been made to rebalance the company's management, which had been disturbed for some time due to the disagreement between the director initiating the judgement on the one hand and the two defendant directors on the other.

In this context, the court rejected the claims of the plaintiff on the grounds that the resignation of the two directors did not contribute to the disruption and disturbance of the balance within the management board, but rather solved an irreconcilable personal conflict between the directors that was harming the management of the company, in accordance with the statutory provisions.

NO REPÊCHAGE OBLIGATION IN CASE OF DISMISSAL OF AN EXECUTIVE

In the case of dismissal of an executive due to a corporate reorganisation, the employer's obligation for repêchage, i.e., the obligation of reinstatement in other related positions within the company, does not apply. This was announced by the Italian Supreme Court in order 2895 dated 31 January 2023, which emphasizes that repêchage is impossible, as it is incompatible with the executive position supported by a regime of free resignation by the employer. Indeed, the executive's employment relationship is not subject to the provisions limiting individual dismissals (cfr. section 1 and section 3 of the Italian law 604 of 15 July 1966), which only concern subordinated personnel such as workers, employees, and middle managers. Hence, the differences in the treatment of employees and executives is as follows: In the case of employees, the employer must assess the possibility of repêchage, and thus reinstatement in the company, before dismissal. In the case of executives, this is not required in the event of a crisis: in such case it is sufficient that the reason for dismissal formally stated is identical to the actual reason found during trial (Italian Supreme Court, order 2895 of 31 January 2023).