NEWSLETTER NO. 5 - 2023

DIRECT TAXES

NOTIONAL INTEREST DEDUCTION (NID AND SUPER NID)

The "neutralization" under section 1 (6-bis) of the Italian law-decree 201/2011 does not apply vis-à-vis companies that do not operate with the public and are included in a group of entities that provide insurance services neither for regular NID purposes nor for so-called "innovative NID" purposes (Italy tax authority, answer to request for advance ruling 228 of 1 March 2023).

If the regular NID relating to business years before 2021 is negative, the 2021 increases (net of the 2021 decreases) must be taken into account for calculating the super NID, without penalizing the
super NID relating to any contingent "negative" NID base relating to previous business years (Italian tax authority, answer to request for advance ruling 229 of 1 March 2023).

The reductions of increases in net equity under section 10 of the ministerial decree dated 3 August 2017 to be ascribed to increases in equity for which to benefit from innovative NID - are only the ones deriving from transactions carried out between 1 January 2021 and 31 December 2021 (Italian tax authority, answer to request for advance ruling 229 of 1 March 2023).

The Italian tax authority provided clarifications on the application of section 5(8) of the NID decree, according to which: "Reserves from profits [...] a) derived from capital gains recorded further to business or business branch contributions" are not relevant for the determination of the increase under paragraph 2 (b) - if the shareholdings received due to the contribution are subsequently disposed of (Italian tax authority, answer to request for advance ruling 262 of 21 March 2023).

DEMERGER OF REAL ESTATE BRANCH

A non-proportional partial demerger intended to separate the "core" business from the real estate business is not deemed tax-avoidant. From a fiscal point of view, net equity attributed to the recipient company shall be deemed to be formed in accordance with the type (equity or profit) of the net equity items present in the demerged company and with equal proportions, as provided for under section 173 (9) of the Italian tax code, which refers to section 172 (5) and 172 (6) of the Italian tax code (Italian tax authority, answer to request for advance ruling 233 of 1 March 2023).

LIQUIDITY-ONLY DEMERGER

A proportional demerger structured as follows:

- setting up of a bank loan by the recipient company to be repaid in a very short term;
- use of the liquidity obtained from the recipient company for the repayment of its debt towards the demerged company formed of interest-bearing loans previously made available by the demerged company;
- reimbursement to the recipient company of liquidity received from the demerged company through a proportional partial liquidity-only merger and repayment of the bank loan,

is abusive insofar as its purpose is to circumvent the provisions for real capital increases (through liquidity from the shareholders' direct availability or through the prior distribution of dividends by the demerged company) or for virtual capital increases (through waiver of the claim of the demerged company vis-à-vis the recipient company) (Italian tax authority, answer to request for advance ruling 263 of 21 March 2022).

TRANSACTION COSTS

After the merger through which:

- Bidco purchases the shareholding in the target company;
- Bidco capitalizes transaction costs (i.e., strategic, legal, financial, and tax advisory and other ancillary services to the merger) on the cost of the shareholding in the target company, in accordance with the OIC accounting principles,
- Bidco is merged into the target company,

the last financial statements before the Bidco merger (OIC) are adjusted by applying the IAS principles adopted by the target company and the transaction costs are charged to the profit and loss account. However, such costs cannot be deducted in the business year anyway by the target company since they have already been charged to the cost of the shareholding held by the merged company (Italian tax authority, answer to request for advance ruling 235 of 2 March 2023).

CONTINGENT ASSETS

The non-existence of a liability arising from components that did not add to the taxable income does not constitute taxable contingent asset under section 88 of the Italian tax code. In this sense tax repayments constitute taxable contingent asset only if the taxes they refer to were included in the determination of taxable income, whereas if the taxes to be reimbursed were fiscally non-deductible, their repayment does not give rise to taxable contingent assets (Italian tax authority, answer to request for advance ruling 240 of 6 March 2023).

INTERPOSED TRUST

If the trust is simply a formal shield and the availability of the assets that form its equity are to be attributed to other persons (settlors or recipients of the trust), it must be deemed as a pure interposed entity and the assets (as well as the income) must be traced back to the persons that have actual availability thereof (Italian tax authority, answer to request for advance ruling 251 of 16 March 2023).

RESIDENCE FOR TAX PURPOSES

The Italian tax authority provided clarifications on the splitting of the tax period if an individual resident in Italy transfers her/his tax residence Switzerland during the year (article 4 (par. 4) of the Double Taxation Agreement between Italy and Switzerland, answer to request for advance ruling 255 of 17 March 2023).

FOREIGN DIVIDENDS

The 95 percent exemption of "remuneration for equity participation" of foreign company can be benefited from provided that the so-called "double equity" criteria is met, i.e., "total correlation with economic results" and "total non-deductibility" in the determination of the issuing company's foreign income (Italian tax authority, answer to request for advance ruling 256 of 17 March 2023).

BUSINESS CONTRIBUTION AND SUBSEQUENT TRANSFER OF SHARES

As to a transaction that is structured as follows:

- contribution of a business branch to a newly incorporated company,
- transfer of the entire shareholding in the newly incorporated company to a third and independent company,
- signature of a business lease between the newly incorporated company and the purchasing company,

the Italian tax authority does not detect any tax avoidance aspects, provided that the transactions occur at market conditions (Italian tax authority, answer to request for advance ruling 260 of 21 March 2023).

NEW INVESTMENTS

The Italian tax authority provided clarifications on the advance ruling on "new investments" under section 2 of the Italian law-decree 147/2015 (Italian tax authority, newsletter 7 of 28 March 2023).

CONTINGENT ASSETS RESULTING FROM A JUDGMENT

If a positive income component results from a judgement, such component must be recognized in the profit and loss

account in the business year, in which the judgement is issued, regardless of the force of res *judicata* acquired by that judgement and in a more general sense of the ongoing litigation. For the component to be recognised in the accounts, it is indeed not necessary that the obligation that has arisen is immutable.

In any case, the absolute nature of the principle of accrual-based recording of positive components does not imply that they are excluded from taxation at the time of their appearance, albeit late, in the financial statements, but requires them to be subjected to taxation in accordance with the principle of derivation in the accounting period of recognition (Italian tax authority, answer to request for advance ruling 264 of 21 March 2022).

VAT

GUARANTEE FOR VAT REFUND

Upon a business sale, the requirements under section 38-bis of the Italian DPR 633/1972 to benefit from the waiver of the obligation to provide a guarantee must be verified on the purchaser (Italian tax authority, answer to request for advance ruling 227 of 1 March 2023).

REGISTRATION WITH THE VAT INFORMATION EXCHANGE SYSTEM (VIES)

In accordance with the new section 41(2-ter) of the Italian law-decree 331/1993, the reporting of a valid VAT identification number is no longer a mere requirement of form, but a substantive condition for the application of the non-taxable status. Consequently, if the purchaser did not provide the supplier with a valid VAT identification number registered with the VAT information exchange system (VIES) at the time of purchase, the transaction cannot benefit from the non-taxable status and must be subjected to VAT in Italy by applying the Italian VAT rate (Italian tax authority, answer to request for advance ruling 230 of 1 March 2023).

SETTLEMENT ARRANGEMENTS

According to the Italian tax authority, a settlement arrangement by which one of the parties assumes the obligation not to do something (or to forego disputes) and the other party waives the right to claim the reimbursement of a security deposit amount constitutes a synallagmatic link and hence the objective VAT prerequisite pursuant to section 3 (1) of the Italian DPR 633/1972 (Italian tax authority, answer to request for advance ruling 232 of 1 March 2023).

CIVIL LAW ISSUES

DECREE IMPLEMENTING THE EU WHISTLEBLOWING DIRECTIVE

EU Whistleblowing Directive no. 2019/1937 (the "*Directive*") was issued to: *i)* uniform the Italian provisions aimed at protecting those who inform on infringements of Community law provisions inside a (public or private) organization, and more specifically to *ii)* ensure that they are better protected *as* well as to iii) create save internal communication channels that allow for reporting by whistle-blowers inside and outside an organization.

Whistleblowing is an important **corporate compliance means** by which a (public or private) employee reports any contingent criminal offence of general interest encountered during her/his activity in a confidential and save manner (so-called "*whistle-blower*").

So far whistleblowing practices in Italy were regulated, even if to a limited extent only, and more specifically with reference to the private sector, under the Italian law no. 179/2017. Now, under recently issued Italian legislative decree no. 24/2023 implementing the directive (the "Decree") whistleblowing regulations have been substantially implemented under the following aspects:

Protected entities

The Decree's protection is addressed to those who report on infringements they have become aware within their working environment in their capacity as:
employees or other staff,
employed and self-employed people,
self-employed professional,
other staff categories such as volunteers and (even unpaid) interns,
shareholders and persons with management, direction, control, surveillance, or representation functions.
Furthermore, the protection measures apply also to so-called "facilitators", colleagues, relatives, or close family members of whistle-blowers.

Scope of application

From a subjective point of view, the Decree is aimed not only at public-sector but also at private-sector entities

meeting the following requirements:
50 employees with permanent or fixed-term employment contracts on average during the last year;
that fall under the scope of application of the acts of Union law (on financial services, products and markets, and on the prevention of money laundering and terrorism financing, environmental protection and transport safety), even if they do not have 50 employees on average;
that adopt the organisational and management models provided for under the Italian legislative decree 231/2001 (OMCM), regardless of their number of employees.

From an objective point of view, the Decree applies to all administrative, accounting, civil or criminal law conduct deemed illegal, as provided for under Italian legislation and under Community law, detrimental to the public interest or the integrity of the public administration or the private-sector entity.

Internal reporting

The Decree requires the above-mentioned entities to activate an internal reporting channel (the "*Channel*") that ensures full confidentiality as to the whistle-blower's identity, the identity of any third parties mentioned in the reporting and the content of the reporting by using encrypted systems.
The Channel must be entrusted to an independent, internal, or external, person or office, trained to manage this type of fulfilments (i. e. external professional or supervisory body).
The reports must be stored, verified, and analysed within the framework of a specific procedure.
For private-sector entities with less than fifty employees internal reporting only is permitted. Hence, it is impossible to use the external channel and public disclosure.

External reporting

The Decree regulates also the circumstances under which to resort, subordinately and/or subsequently, to external reporting channels, i. e. reporting addressed to an office outside the entity. For this purpose, the Italian anti-corruption authority (ANAC) is the receiving authority also for the private sector.

Privacy compliance
The person receiving the report must provide the information required under article 13 GDPR. If the reporting channels are shared by several obligated persons, the same must sign an agreement pursuant to article 26 GDPR (joint data controllers). If the Channel is entrusted to a third party, the entrusted party must be appointed as the external data controller pursuant to article 18 GDPR

Penalties
from EUR 10,000 to EUR 50,000 annually: if it is ascertained that retaliation was committed against the whistle-blower or if it is established that the reporting was obstructed or attempted to be obstructed or that the whistle-blower's duty of confidentiality was breached;
from EUR 10,000 to EUR 50,000: if it is ascertained that no reporting channels are in place, that no procedures for making and handling reports have been adopted and that such procedures are not compliant with those laid down, as well as if it is ascertained that the reports received were not verified and analysed.
from EUR 500 to EUR 2,500, if the whistle-blower is found to be criminally liable for the offences of defamation or slander;
Private-sector entities adopting Organisational, Management and Control Models (OMCMs) set forth sanctions against offenders in their disciplinary systems.

Entry into force of the Decree
The Decree will apply after four months from the date of its entry into force, i. e. as of 15 July 2023. Private-sector entities only – if they employed an average of up to 249 employees with permanent or fixed-term employment contracts during the last year – have time until 17 December 2023 to set up an internal reporting channel.

Conclusion: The new legal obligations will requires companies to review and, where appropriate, to update their compliance programmes and/or 231 models: on the one hand, it will be essential to evaluate the adequacy of the reporting systems already in place (or to set them up from scratch) and on the other hand it will be necessary to ensure that they have implemented all the safeguards that allow them, also by using external resources, to verify the allegations contained to the received reports with due diligence and in a timely manner.

The new civil proceedings after the Cartabia reform

The civil proceedings reform entered into force on 1 March 2023.
The main news are, inter alia,:
- the increase of the time limit between the service of the

summons and the first hearing, which is now 120 days (as opposed to the previous 90)
- the reduction of the time limit for the defendant's appearance in court, who must file the statement of appearance and response at least 70 days before the first hearing (as opposed to the previous 20 days)
- the filing in advance of the three preliminary pleadings, which are now exchanged between the parties before the first appearance hearing (whereas previously the judge granted the time limits after such hearing)
- the personal attendance of the parties at the first hearing to be questioned on the facts of the case to attempt conciliation.
This means that the person who may be the addressee of a writ of summons must
- react in a timely manner;
- provide the trusted lawyer with all the evidence within a short period of time.
Please be advised also that the reform under review introduced assisted negotiation in labour matters (albeit not as a condition for proceeding in court), allowing employer and employee to sign agreements with a lawyer's certification, without going through the conciliation commission.

MAXIMS OF THE NOTARY COUNCIL OF FLORENCE ON CORPORATE LAW

The Notary Council of Florence (the "*Council*") expressed a favourable opinion in maxims no. 78/2022 and no. 83/2022 respectively on the following issues: *i)* on the admissibility of the appointment of a non-partner director in partnerships and *ii)* on the legitimacy of a capital increase decided upon incorporation of corporations, subjects to the following essential specifications and limitations.
As to the power to manage a partnership, the Council accepts that such power may be attributed to a third party who is not a partner:
in general partnerships (SNC) because, in the absence of express legal provisions to the contrary, the joint and unlimited liability of each partner vis-à-vis third parties is in any event guaranteed by law (section 2291 (2) of the Italian civil code);
in simple partnerships (SS) because, as in general partnerships (SNC), there are no statutory provisions expressly to the contrary, and if there are no covenants excluding or limiting the liability of all shareholders.
On the contrary, according to the Council, the appointment of a non-partner director is not permissible in limited partnerships (SAS), because the legislator expressly states that: "the management of a company may be entrusted to general partners only" (section 2318 (2) of the Italian civil code);
As to the increase of capital upon incorporation of a corporation, the Council deems it plausible that the shareholders may decide directly thereon (subject to registration with the companies' register) on the grounds that the law already allows them, again at the time of incorporation, to empower the directors to increase the capital, within predetermined limits (section 2443 of the Italian civil code).