



## NEWSLETTER NO. 6 - 2023

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### DIRECT TAXES

#### TAX CREDIT IN OPERATIONAL ASSETS

The tax credit in new operational assets does not apply to freely transferable goods of enterprises operating under concession and at a tariff in the energy, water, transport, infrastructure, postal services, telecommunication, wastewater collection and purification, and waste collection and disposal industries, if:

- (i) the investments are a performance of obligations undertaken vis-à-vis the granting public entity;
- (ii) there are mechanisms (i.e., adjustment to the consideration for the service provided, by whatever name it may be known, and/or contribution of the granting entity) that sterilize the economic risk of the investment in new operating assets (Italian tax authority, *Principio di diritto* n. 7 of 11 April 2023).

#### MOBILITY VOUCHERS FOR EMPLOYEES

Mobility vouchers disbursed by a municipality to employees of private and public owned companies that ride bikes from home to work and adhere to the initiative launched by the same municipality to promote sustainable mobility do not add to the employee's income from employment. Indeed, the voucher-allowance does not originate from and is not justified by the employment relationship between the employee (beneficiary) and the business (employer), but by the promotion of virtuous behaviours by the municipality (Italian tax authority, answer to request for advance ruling 274 of 4 April 2023).

#### PATENT BOX

In the case of a business contribution, jointly with the transfer of the PB option from the transferring company to the receiving company the penalty protection is also transferred to the latter for the entire residual duration of the benefit (Italian tax authority, answer to request for advance ruling 276 of 4 April 2023).

#### NOTIONAL INTEREST DEDUCTION (NID)

Innovative NID under section 19 of the Italian legislative decree 73/2021 applies limited to the tax period after the one regularly ongoing on 31 December 2020 i.e., limited to the 2021 tax period only.

In the case of a company incorporated in 2020 (tax period from 1 November 2020 to 31 December 2021) the tax benefit is recognized for the 2022 tax period. Hence, to use the innovative NID in the 2023 REDDITI SC form, the company must:

- determine the amount and use the table of the 2022 REDDITI SC form (as an aid for calculation);
- specify the benefit calculated for the share not "transformed" into tax credit in column 9 of the RS113 line in the 2023 REDDITI SC form;
- specify its tax code in column 8 of the same RS113 line to allow the Italian tax authority to identify the case (Italian tax authority, FAQ, 30 March 2023).

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### WITHHOLDING TAX EXEMPTION OF INCOME FROM REAL ESTATE FUNDS

The withholding tax exemption scheme under section 7 (3) of the Italian legislative decree 351/2001 applies even in the case of direct participation to a real estate fund through another investment fund (Italian tax authority, answer to request for advance ruling 285 of 6 April 2023).

### CAPITAL GAIN

The capital gain obtained from the sale of stock option plan shares is determined by taking into account the cost subjected to tax abroad as income from employed work (Italian tax authority, answer to request for advance ruling 289 of 11 April 2023).

### TRANSFER OF INTEREST EXPENSE TO ITALIAN AND WORLDWIDE TAX CONSOLIDATION SCHEMES

Excess interest expense not transferred to the Italian and worldwide tax consolidation scheme by the consolidated company, despite gross operating earnings (ROL) of other consolidated companies, cannot be transferred in subsequent tax years, but continues to be carried forward individually by the same consolidated company. A supplementary tax return can be filed, if failure to transfer is not caused by an error (Italian tax authority, answer to request for advance ruling 291 of 11 April 2023).

### CROSS-BOARDER MERGER

The transfer of a 100 percent holding owned in an Italian company after the merger between two non-EU companies benefits from the tax neutrality scheme under section 172 of the Italian tax code (TUIR), provided that:

- the transaction is deemed a merger under Italian civil law;
- the interested entities have a legal form similar to the one set forth for companies incorporated under Italian law;
- the transaction has effects in Italy on the tax position of at least one of the involved parties (Italian tax authority, answer to request for advanced ruling 294 of 14 April 2023).

### "LATE" ZERO-BALANCE PAYMENT AUTHORISATIONS

The late submission of zero balance payment authorisations rectifies the initial failure to provide for the payment, if the credit to be used for set-off (accrued before

the debt to be paid off) is still existing and available for use on such date. If this does not occur, the omitted payment may in any case be rectified by applying the regular rules, but with the application of penalties (Italian tax authority, answer to request for advance ruling 297 of 18 April 2023).

### PENALTIES IN THE EVENT OF FAILURE TO SUBMIT INCOME TAX RETURNS

In the case of failure to submit an income tax return followed by a spontaneous tax payment before a tax assessment notice is received, the proportional penalty applies on the entire amount of the tax due based on the omitted tax return, and not only on the remaining amount of taxes payable by the taxpayer. However, the amount of the penalty must be proportionate to the seriousness of the conduct (Italian Supreme Court, judgement 46 of 17 March 2023).

### SETTLEMENT OF LITIGATION

The simplified settlement of tax disputes applies subject to the condition that the Italian tax authority is the beneficiary of the appeal or intervened in the relevant proceedings, either voluntarily or as party to the action by 2022 (Italian tax authority, answer to request for advance ruling 306 of 24 April 2023).

### TAX ASSESSMENTS BASED ON THE OPEN MARKET VALUE

In the case of transactions between companies of the same group, the difference between the lease payment and the "open market value" under section 9 of the Italian tax code becomes relevant as a merely circumstantial parameter of the manifest and evident economic inefficiency of the transaction, to justify the tax assessment with the burden of proof being borne by the taxpayer. This tax assessment is not a breach of the specific interpretative provision contained in section 5 (2) of the Italian legislative decree 147/2015, aimed at excluding the application of section 110 of the Italian tax code (TUIR) on the internal "transfer pricing" but not at limiting its logic-legal scope under section 9 of the Italian tax code (TUIR) (Italian Supreme Court, Tax Chamber, 10422 of 19 April 2023).

### TAX INVERSION

As to "tax inversion", in order to ascertain whether a foreign company is subject to control by an Italian company, the verification of the existence of the case under section

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2359 (1.1) of the Italian civil code requires that the majority of the shares of the foreign company is concentrated in the hands of the sole Italian company (it being irrelevant whether the shareholders of the latter hold any other shares), which is precluded by the provisions contained in section 2359 (2) of the Italian civil code that exclude the calculation of votes granted on behalf of third parties (Italian Supreme Court, Tax Chambers, 9400 of 5 April 2023).

### VAT

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#### CALL-OFF STOCK

For the application of the call-off stock scheme it is essential that the transfer of goods is made "by the supplier or by a third party on behalf of the latter". Furthermore, the supplier must keep ownership of the goods shipped or transported to another EU member state, so that the designated target company may acquire the title over them upon their arrival.

Finally, the tax benefit is limited to an intra-Community sale between the seller/supplier and the purchaser/appointee; hence, in case of a triangular trade, the subsequent sale by the purchaser/appointee to third parties must qualify as a separate and autonomous transaction compared to the previous sale under the call-off stock scheme (see section 17-bis (2.a), VAT directive; section 41-bis (1.a) of the Italian law-decree 331/1993) (Italian tax authority, answer to request for advance ruling 271 of 3 April 2023).

#### TRIANGULAR EXPORT SALES

In case of a triangular sale between:

- A. a first Italian seller,
- B. an Italian promoter;
- C. a non-EU final purchaser;

whereby the Italian promoter undertakes to directly manage - through carriers in its name and on its behalf - the transport and shipment of the goods to the non-EU country (thus assuming all risks of damages and/or loss, if any, of the goods occurred during transport until delivery to the non-EU country of destination), the following VAT scheme applies:

- sale from A to B subject to VAT in Italy;
- sale from B to C non-taxable (VAT) (Italian tax authority, answer to request for advance ruling 283 of 3 April 2023).

#### VAT RATE ON PUBLIC WORKS

The construction of a new pedestrian subway serving skiing facilities - aimed at providing a connection between the car parks and the ski lift access point, with access to the cable way installations without crossing the road - does not seem to be included under the infrastructure works that benefit from the reduced VAT rate of 10 percent, as provided for under the provisions contained under no. 127-*quinquies*) and no. 127-*septies*) of Table A, Part III, enclosed to the Italian DPR 633/1972 (Italian tax authority, answer to request for advance ruling 292 of 11 April 2023).

#### RECALL AND REPLACEMENT OF FAULTY PLANTS

Recalls/replacements of faulty plants are irrelevant for VAT purposes, both within and out of warranties, if the following terms are met:

- the intervention must occur in compliance with specific legal duties on behalf of the producer, even out of warranties, that is obliged to replace the defected product with an identical, non-hazardous product suitable for use;
- the original price of the product must include the charges and expenses relating to replacements (Italian tax authority, answer to request for advance ruling 304 of 24 April 2023).

#### DESIGNATION OF A VAT TAXABLE PERSON

If the invoice issued by the intermediate purchaser does not contain the wording "reverse charge", the final purchaser is not designated validly as tax debtor in the framework of a VAT triangular transaction. This omission cannot be subsequently rectified by the addition of a statement specifying that such invoice is related to an intra-Community triangular transaction and that the tax debt is transferred to the taxable person to whom the goods are intended to be supplied (Court of Justice, 8 December 2022, cause C-247/21).

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### PRESUMPTION OF TRANSFER

As to the presumption of VAT sale and purchase, the offices available to the company may result from the Companies' register records or from the declaration pursuant to section 35 of the Italian DPR 633/1972 and section 1 of the Italian DPR 441/1997, as well as from any other document proofing that the goods are destined to other places, as long as they are recorded in one of the registers in use (Italian Supreme Court, Tax Chambers, 6325, 2 March 2023).

### VAT RATE FOR BUILDINGS OF COLLECTIVE INTEREST

The sale of properties to be used as school buildings, barracks, hospitals, care homes, shelters, camps (*colonie climatiche*), boarding schools, colleges, kindergartens, orphanages and similar purposes are subject to VAT at a rate of 10 percent pursuant to no. 127-*quinquies* of Table A, Part III, enclosed to the VAT decree that includes the buildings under section 1 of the Italian law 659/1961, including those contained under section 2 (2) of the Royal Decree Law 1094/1939, for which not residential use, but purposes of collective interest of an essentially charitable nature are relevant, irrespective of land registry registration (Italian Supreme Court, Tax Chambers, 9337, 5 April 2023).

### REGISTRATION FEES

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#### OFFICIAL REGISTRATION

The deposit of evidence documents in judicial proceedings does not constitute an "official registration", as specified under section 6 of the Italian DPR 131/1986 (Italian Supreme Court, Joint chambers, 7682 of 16 March 2023).