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DIRECT TAXES

TAX CREDIT FOR ENERGY-INTENSIVE AND GAS-INTENSIVE BUSINESSES

In the event of omitted communication pursuant to art. 1 (6) Decree-Law 176/2022 regarding the tax credits accrued by so-called "energy-intensive"/"gas-intensive" and "non-energy-intensive"/"non-gas-intensive" companies (deadline on 16 March 2023), the so-called *remissione in bonis* can be applied, provided that no accesses, investigations, or controls were started yet. In either case, the communication must be made within 30 September 2023 and, in any way, before the credit's set-off. For this purpose, the Italian tax authority has provided for the re-opening of the respective electronic channel (Italian tax authority, resolution no. 27 of 29 June 2023).

Pursuant to art. 4 (1) Decree-Law 17/2022, the energy-intensive tax credits regarding the second quarter of 2022 are not included in the eventual subsidies for the purposes of determining the tax credit regarding the third quarter 2022 (art. 6 Decree-Law 115/2022). Likewise, the increase of the per kWh hourly cost of electricity produced and self-consumed is calculated with reference to the change in the unitary price of gas purchased and used for electricity generation, without taking account of the energy-intensive tax credit for self-consumed energy pursuant to art. 4(2) Decree-Law 17/2022, related to the second quarter of 2022 (Italian tax authority, answer to ruling application no. 355 as of 20 June 2023).

FRONTIER-WORKERS IN SWITZERLAND

On the basis of the new Agreement between Italy and Switzerland, frontier-workers residing in the 20 km border area band are subject to double taxation between the two states within the limits of 80% of the taxes that would be due in the state in which the activity is carried out. The state of residence eliminates the double taxation through the foreign tax credit.

Nevertheless, frontier-workers residing in Italy will still be subject to taxation in Switzerland only if on the date of entry into force of the Agreement they carry out - or between 31 December 2018 and the date of entry into force of the Agreement they have carried out - an activity as employees in the border area for an employer established in Switzerland. The new Agreement will enter into force on the date of receipt of the last notification by which Italy and Switzerland mutually acknowledge the finalisation of the respective ratification-procedures and will apply from 1 January of the year following the year of entry into force (which is, realistically, 1 January 2024) (Agreement between Italy and Switzerland on the Frontier-Workers, Law No. 83 as of 13 June 2023).

DEDUCTIONS AND ALLOWANCES

The Italian tax authority provides a collection of the main practice documents relating to the expenses entitling to income tax deductions, tax allowances, tax benefits, and other important elements for the individuals' tax return and the tax compliance certification (Italian tax authority, newsletter no. 14 and no. 15 as of 19 June 2023 and no. 17 as of 26 June 2023).

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EXEMPTION FROM THE COST OF SHAREHOLDINGS AND LAND

The Italian tax authority provides clarifications on the redetermination of the fiscal cost of shareholdings and land as well as the exemption of capital income and other income from UCITS as well as capital income of insurance contracts pursuant to Law No. 197/2022 (Budget Law 2023) (Italian tax authority, newsletter no. 16 as of 26 June 2023).

CEILING WRITE-DOWN RECEIVABLES

Pursuant to art. 106 of the Italian Tax Code (TUIR), write-downs of on-balance sheet receivables resulting from the sale of assets and from the provision of the services referred to in art. 85(1) are deductible for the amount not covered by an insurance in each financial year up to an amount of 0.50 per cent of the nominal or acquisition value of said receivables. For calculation purposes, the on-balance sheet receivables covered by the maximum amounts provided for in the signed insurance policies are excluded, without taking into account any exemptions that might be provided for (Italian tax authority, answer to ruling application no. 340 as of 5 June 2023).

ANTI-ABUSE EVALUATION OF A DEMERGER

The demerger and the allocation both define transactions suitable for reinstatement of assets in single member companies of the different branches of the family - and thus classified at an equal level of dignity. The tax advantage resulting from the theoretical saving due to the application of the tax neutrality scheme instead of the general principle according to which the contribution constitutes a sale transaction is not considered to be realised if the contribution does not allow to achieve the same legal/framework structure in a more linear and direct way. The favourable judgement related to the non-tax avoidance nature of the transaction is in any case subject to the condition that no asset of the company is used to achieve purely personal or family-related goals, or more generally, goals outside of a business framework, and that no payment flows (other than dividends) are made by the beneficiaries to the shareholders. Basically, the goals pursued by the demerger must pursue the interests of the involved companies and not those of the individual shareholders, whose economic-financial requirements shall be met by proper dividend distributions instead of financing/loan or guarantee transactions in their favour (Italian tax authority, answer to ruling application no. 343 as of 5 June 2023).

The demerger of a series of assets not constituting a business is not considered to be of a tax avoidance nature if the involved subjects continue to carry out their respective business activities and, therefore, there is no separation of the assets involved from the business environment and the corresponding ordinary regime (Italian tax authority, answer to ruling application no. 354 as of 20 June 2023).

TAX CREDIT SEZ

The sale of an asset benefiting from the SEZ (special economic zones) tax credit on the basis of a "sale and lease back" contract cannot be considered as a proper sale of the property, which means that the transaction does not constitute a reason for the forfeiture of the tax advantage (Italian tax authority, answer to ruling application no. 352 as of 20 June 2023).

EXEMPTION BLACKLIST PROFITS

The implementing provisions regarding the exemption of blacklist profits (Italian Ministry of Economics and Finance, decision as of 26 May 2023) and the tax codes for payment have been approved (Italian tax authority, no. 34 resolution 26 June 2023).

INCREMENTAL FLAT TAX

The Italian tax authority provides clarifications on the application of the optional incentive scheme, the so-called "incremental flat tax".

From a subjective point of view, it is pointed out that the incentive is not applied for the taxpayers, who started their business or entrepreneurial activity in 2023, as, in said case, it is not possible to determine the income growth.

However, the incentive can be applied to the taxpayers, for whom the existence of an income growth can be verified in relation to at least one tax period of the years 2020, 2021, and 2022, since for the income comparison it is not required by law that the taxpayer has generated income during the entire three-year verification-period (Italian tax authority, newsletter no. 18 as of 28 June 2023).

COMPLEX AGREEMENT INCLUDING FEES

In the event of a complex agreement, including different activities and mutual concessions, paragraph 11.6 of Commentary on art. 12 emphasises the necessity to divide

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the total amount of the fee due on the basis of the information of the contract or by means of a reasonable division, applying the appropriate tax treatment for each party (Italian tax authority, answer to ruling application no. 361 as of 23 June 2023).

ACE AND TAX BASE FOR SOCIAL CONTRIBUTION PURPOSES

The tax base for social contribution purposes consists of the total business income; since the ACE (aid for economic growth) represents a deductible expense with an impact on the quantification of the taxable business income, it follows that the ACE has an impact on both the fiscal tax base and the tax base for social contribution purposes (Italian Supreme Court, judgement 1723 as of 16 June 2023).

TAX BENEFITS FOR "FIRST HOME" BUYERS

The taxable person, who has moved abroad for work reasons, may have access to the tax benefit "first home" in the context of the acquisition of an apartment with a different building register category than A/1, A/8, or A/9, provided that:

- the person has been resident or has exercised the activity in Italy for at least 5 years;
- the property acquired in Italy is located in the purchaser's municipality of birth or in the municipality in which the purchaser resided or exercised the activity before moving abroad (art. 2 Decree-Law no. 69 as of 13 June 2023).

BENEFICIAL OWNER

The Italian Supreme Court has confirmed the principles according to which the beneficial owner's proof requires the passing of three tests:

- the "substantive business activity test", which verifies whether the beneficiary company carries out an effective business activity;
- the "dominion test", which verifies whether the beneficiary company is free to dispose of the income received or if it must cede it to a third party (the repayment obligation may arise from a contract or be derived from factual circumstances);
- the "business purpose test", which verifies the reasons for the interposition of a company in the cross-border income flows, or whether the beneficiary company has a function in the transaction or if it is a mere special

purpose company whose interposition has the sole purpose of saving tax (Italian Supreme Court, judgment no. 14905 as of 29 May 2023).

VAT

TRANSFER OF RIGHTS

The transfer of the right to enter into a property proceeding falls under the so-called "duty to do, omit to do or permit" and is therefore subject to VAT (Italian tax authority, answer to ruling application no. 334 as of 1 June 2023).

PERMANENT ESTABLISHMENT

The preparatory activity carried out by a permanent establishment located in Italy for the subsequent performance of the services by the parent company vis-à-vis Italian customers is likely to represent a direct intervention of said permanent establishment. Accordingly, from a VAT point of view, the permanent establishment must issue an invoice to the Italian customers (Italian tax authority, answer to ruling application no. 336 of 1 June 2023).

DISCOUNT VOUCHERS

Discount vouchers issued in the context of a specific expenditure reduce the VAT base when they are used (Italian tax authority, answer to ruling application no. 341 as of 5 June 2023).

TRAVEL AGENCIES

The service performed by an Italian VAT taxpayer consisting of the purchase of accommodation serviced from other taxable persons and their resale to other economic operators falls within the special VAT scheme of travel agencies, even if said services do not include any additional services (European Court of Justice, judgement C-108/2022 as of 29 June 2023).

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EXTRAORDINARY CROSS-BORDER TRANSACTIONS: NEW REGIME AS OF 3 JULY

The Legislative Decree no. 19/2023 (the "Decree") has implemented the EU Directive 2019/2121 (the "Directive") in relation to cross-border conversion, merger, and demerger transactions in Italian Law. In this context, Assonime has published newsletter no. 16 dated 7 June 2023 (the "Newsletter"), which analyses the Decree and the new regime.

SCOPE

The scope of the Decree is to favour the circulation of the corporate vehicles and, consequently, the economic activities in a European and transnational framework, by eliminating the restrictions to the freedom of establishment and facilitating the cross-border conversions, mergers, and demergers of the companies in the European Union, further guaranteeing the protection of the minority shareholders, the employees, and the creditors.

The scope of the Decree is more extensive than the mere implementation of the Directive, as it also regulates international extraordinary transactions (which thus concern companies governed by non-European legal systems) and introduces, for example, the so-called demerger with spin-off ("scissione con scorporo"). This defines the possibility (regulated by the new article 2506.1 Italian Civil Code) to carry out a demerger-transaction in which the stocks or shares of one or more newly established beneficiary companies are not transferred to the shareholders of the demerged company but to the demerged company itself. Therefore, the spin-off of assets - not necessarily a business branch but also individual "assets and liabilities" - of the spin-off company itself as well as their contribution to the newly established beneficiary company can take place either by means of a contribution or a demerger-transaction, depending on the choice of the spin-off company.

Field of application

The Decree applies to cross-border transactions:

- involving one or more Italian limited companies and one or more EU limited companies with registered office/central administration/centre of main business activities in an EU country;
- involving companies that are not limited companies or limited companies with no registered office/central administration/centre of main business activities in an EU country;
- which are not covered by the cases a) and b) or

international business transactions pursuant to art. 25 (3) Law 218/1995;

- in which participate non-corporate entities, if compatible, pursuant to art. 25 (3) Law 218/1995.

Furthermore, if compatible, the Decree applies to the cross-border or international transactions relating to companies in respect of which proceedings have been initiated to deal with crisis or insolvency, without prejudice to the application of the special provisions relating to corporate crises.

PHASES OF THE EXTRAORDINARY TRANSACTIONS

The Decree is based on the merger process model, which is completed by relevant references with other procedures related to conversion and demerger.

- Preparatory phase: refers to the preparation and disclosure of the documents, with the purpose of providing the shareholders and the other subjects concerned (creditors and employees) with the information for the evaluation of the transaction.

In this context, the Decree refers to the Italian provisions (in particular, to the phase of preparation of the merger/conversion/demerger project, the reports of the directors, the reports of the experts, and the disclosure regime regarding said documents).

- Decision phase: the shareholders approve the submitted documents and may make modifications within the framework of the provisions of [Art. 2502](#) Italian Civil Code. Assonime also points out that the resolution regarding the approval is subject to the same disclosure regime as the internal business transactions.
- Implementation phase: the notary (for foreign countries: corresponding person in charge of the legal verifications of the transaction) issues the preliminary certificate (the "Certificate") confirming the correctness of the documents and the preparatory formalities for the implementation of the transaction, which are required by law for each party involved in the transaction, so that the process can reach the next phase on the basis of the resulting company's regime.

APPLICATION OF THE PROVISIONS OF THE MEMBER STATES OF THE COMPANIES PARTICIPATING IN THE TRANSACTION

- For transactions and formalities carried out prior to the issuing of the Certificate, the provisions of

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the country of origin of the individual company shall apply;

- after the issuing of the Certificate, the provisions of the country of destination, i.e., the country governing the newly constituted absorbing or beneficiary company resulting from the transaction, shall apply.

FORMS OF PROTECTION

The Newsletter clarifies that:

- the protection of the shareholders is based on the right of withdrawal and on the right to object the exchange ratio and the settlement value;
- the protection of employees aims at preserving the participation regime granted to the employees of the participating companies, without prejudice to the possibility of implementing another regime by mutual agreement;
- the protection of creditors is based on the right to object, in the case of the existence of a specific disadvantage arising from the transaction.

Another form of protection is defined by assigning the notary the task to verify that the transaction is not carried out for "obviously abusive and unlawful" purposes at the time of the issuing of the Certificate. In this context, the Newsletter points out the following: Since the verification involves uncertain operational premises, it could be contrary to the Directive, which aims to promote the cross-border mobility of limited companies. According to Assonime, the analysis of the documents provided and/or received is sufficient for control purposes, with no need to impose further documentation and/or information obligations on the notary.

ENTRY INTO FORCE

The new provisions of the Decree apply as of 3 July 2023 to the cross-border and international transactions in which none of the participating companies has disclosed the project as of that date.

The internal amendment provisions of the Italian Civil Code, including the provision related to the new concept of demerger with spin-off ("scissione con scorporo"), are already applicable as of the entry into force of the Decree (22 March 2023).