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DIRECT TAXES

TAX OBLIGATIONS OF A FOREIGN BANK'S PERMANENT ESTABLISHMENT IN ITALY

The Italian tax authority provides clarifications on the tax obligations of a foreign bank's permanent establishment in Italy in case the latter carries out deposit and custody activities of securities in fulfilment of contracts, which were directly entered into by the foreign bank (Italian tax authority, answer to ruling application no. 453 as of 6 November 2023).

INTEREST ON BONDS

From a subjective point of view, the tax exemption scheme pursuant to Article 6 Legislative Decree no. 239/1996 is applied towards foreign institutional investors, which use no leverage (no tax liability) and are resident in whitelisted countries. Those are the entities, whose activity – independently from their legal status and the tax treatment the respective income is subject to in the country they are resident in – consists in carrying out and managing investments on their own behalf or on the behalf of third parties (Italian tax authority, answer to ruling application no. 454 as of 7 November 2023).

PARTIAL DIVISION AND SUBSEQUENT ADVANTAGED CONVERSION

The following transaction:

- proportional partial division of a real estate complex in favour of a specifically established beneficiary (newCo),
- tax-advantaged conversion of the newCo to a civil partnership (*società semplice*) pursuant to Article 1(100-105) Law 197/2022 by opting for the calculation of the normal value on the basis of the cadastral value,
- non-taxable sale of the real estate complex pursuant to Article 67(1) letter b) Italian Tax Code (TUIR) in accordance with the 5-year holding period,
- assignment of the profit of newCo upon the sale to the shareholders,
- winding down of the newCo,

is deemed unlawful pursuant to Article 10-bis Law 212/2000 (Italian tax authority, answer to ruling application no. 456 as of 10 November 2023).

UTILISATION OF THE TAX CREDIT FOR SET-OFF

It is not allowed to set-off an expiring tax credit with the payment of undue VAT and to subsequently claim a VAT refund. This method is aimed at evading the limits on the utilisation of the tax credit within the deadlines provided for by law (Italian tax authority, answer to ruling application no. 460 as of 13 November 2023).

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NON-EXISTENT OR UNDUE CREDIT

In the event the following requirements are jointly met, the credit is non-existent:

- a) the credit (in full or in part) is the result of an artificially created representation or is not meeting the fundamental requirements provided for by law or, although emerging, is already extinguished at the time of its utilisation;
- b) the credit's non-existence cannot be detected by means of the controls referred to in Articles 36-bis and 36-ter of Presidential Decree no. 600/1973 and Article 54-bis of Presidential Decree no. 633/1972: therefore, when the requirement set forth in letter (a) above exists but the non-existence is detected during the formal or automated control, the credit is deemed undue (Court of Cassation, ruling no. 34419 of 11 December 2023).

PURCHASE OF TAX BONUSES

In the event of purchase of tax bonuses pursuant to Article 119 Decree-Law 34/2020, the difference between the tax credit due and the purchase cost cannot be attributed to any of the income categories provided for by the Italian Tax Code (TUIR) and, therefore, does not add to the taxable income of the purchasing professional association (Italian tax authority, answer to ruling application no. 472 as of 30 November 2023).

VAT

VAT RATE APPLICABLE TO SERVICES TO CLIENTS ACCOMMODATED IN WATERCRAFT FORMING THE SCATTERED NAUTICAL HOTEL

The so-called scattered nautical hotel (italian: *albergo nautico diffuso*) does qualify as a lodging facility, to which can be applied the VAT rate of 10% (pursuant to no. 120, of Table A, Part III, attached to DPR 633/1972).

The VAT rate of 10% can be applied to all services enabling the client's accommodation in the lodging facility with the fulfilment of the client's needs and wishes. Further, the reduced VAT rate can be applied to ancillary transactions of said services, such as cleaning, assistance and support at the anchorage ground, booking, surveillance and security

as well as the charges on consumables. However, the following services are excluded therefrom: watercraft-related services (hauling, launching) offered in the context of the parking/station of watercrafts in port, which imply the moving of the boats from water to land and viceversa, as well as the station of the boats on land.

In the case a single articulated service is carried out, which comprises different services with a tourist-recreational purpose for a unitary consideration, the ordinary VAT rate shall be applied (Italian tax authority, answer to ruling application no. 463/2023).

CONCLUSION OF THE ONGOING INSOLVENCY PROCEEDINGS - START FOR THE ISSUANCE OF VAT ADJUSTMENT NOTES

For insolvency proceedings started before 26 May 2021 – in the event of the conclusion of the ongoing insolvency proceeding – the issuance of a VAT (downward) adjustment note pursuant to Article 26(2) of Presidential Decree 633/1972 is allowed once it is certain that the insolvency proceedings are not going to be successful: or, at the conclusion of the ongoing proceedings, following the enforceability of any supplementary dividing plan (when the sums definitively to be distributed to the creditors are certain) (Italian tax authority, answer to ruling application no. 471/2023).

PRO RATA DEDUCTION

For determining the non-deductibility pro-rata, transactions exempt of VAT are relevant when they are part of the business' own activity and they are excluded if the activities are of occasional or ancillary nature. Interest income from financing activities in favour of the parent company is considered to be part of the subsidiary's own business activity if the exempt financing transactions generate a significant amount of interest income (Italian Supreme Court, ruling no. 25116 as of 23 August 2023).

FAILURE TO EXERCISE VAT OPTION

In the event of failure to exercise the option for VAT on the sale of a business property, the seller who has mistakenly subjected the sale to VAT may request a respective refund (Italian Supreme Court, ruling no. 17488 as of 19 June 2023).

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CASE LAW

COMMUNICATION OF THE BENEFICIAL OWNERS

The Administrative Court (TAR) of Lazio has suspended the effectiveness of the decree of the Italian Ministry of Enterprises and Made in Italy dated 29 September 2023 with the "certification of the functionality of the communication system of the data and information on the beneficial owners" (published in the Official Italian Gazette, General Series no. 236 dated 9 October 2023). Therefore, the deadline for the communication of the beneficial owners, set for 11 December 2023, was suspended (Administrative Court Lazio, order no. 8083 dated 7 December 2023).

ASSET FUNDS, SALE OF RESTRICTED ASSETS IS GETTING EASIER

Under its recent order (without precedents in Supreme Court decisions), the Italian Supreme Court deemed valid the agreement between spouses on the amendment of the deed of incorporation of an assets fund setting forth the possibility – even if there are under-age children – to sell, to mortgage, to pledge or to encumber assets of the assets fund without judicial authorisation (in this case, the spouses entered into a subsequent amendment agreement to grant each other the power to take out a mortgage on the property without the judge's authorisation).

Hence, the question asked was if a clause that authorises to exclude the judicial authorisation not contained in the deed of incorporation of the assets fund, may be added subsequently.

Under this order the Italian Supreme Court answered affirmatively, since the parties may derogate from the provisions under section 169 of the Italian civil code (sale of the fund's assets prior to judicial authorisation) starting from the date of the deed of incorporation of the assets fund, they may also add such clause in a legitimate manner at a subsequent stage by entering into a special amending deed without any authorisation being required from the protective judge. However, there are restrictions: indeed, all decisions on legal acts that are in contrast with the family's interests and good are prohibited, since each choice on any legal act to be legitimate must be in line with the family's needs (Italian Supreme Court, order 32484/2023).