NEWSLETTER NO. 2 - 2024

DIRECT TAXES

REFORM IN RELATION TO INCOME TAX (IRPEF)

The Italian tax authority provides clarifications on the implementation amendments of the reform in relation to the income tax (IRPEF) introduced by the Italian legislative decree 216/2023. More specifically, it concerns the first part of the amendments aimed at the review of:

- the income tax IRPEF, by providing for the restructuring of the tax rates and tax brackets,
- the deductions from employment,
- the deductions,
- the additional taxes.

Said decree also provided for the repeal of the provisions in relation to the Allowance for Corporate Equity (ACE, also known as Notional Interest Deduction – NID). The newsletter points out that "pending the comprehensive review and the rationalization of the subsidies to the companies provided by the delegation to the government", as of the tax period following the one ongoing on 31 December 2023, the provisions in relation to ACE are repealed, provided, however, that "until exhaustion of the respective effects, the provisions relating to the notional return exceeding the total net income of the tax period as of 31 December 2023 shall continue to apply" (Italian tax authority, Newsletter no. 2, 6 February 2024).

PROPERTY UCIs

The transfer of property UCIs shares is not subject to taxation in Italy if the capital gain is achieved by institutional investors established in whitelist countries.

This due to the fact that the capital gain falls within the scope of Article 5 (5) legislative decree 461/1997 according to which "the capital gains and capital losses as well as the income and losses pursuant to letter *cbis)* to *c-quinquies)*" of Article 67 (1) Italian Tax Code (TUIR) , which are "received or incurred by a) subjects resident abroad pursuant to Article 6 (1) of Italian legislative decree no. 239 as of 1 April 1996 and subsequent amendments", do "not add to the taxable income".

On the contrary, Article 5 (5-bis) Italian legislative decree 461/1997 does not apply to the capital gain. Based on said legislative decree, "the provisions pursuant to paragraph 5 do not apply to the income from alienation of shareholdings in companies and corporations, which are not traded on regulated markets, whose value is derived by half, directly or indirectly from properties located in Italy" (Italian tax authority, Resolution no. 76 of 22 December 2023).

EXCEPTIONAL CONTRIBUTION

In order to determine the amount of the total income rate relating to the tax period preceding the one ongoing on 1 January 2023 – which is at least 10% higher than the average total incomes determined for IRES purposes in the tax periods preceding the one ongoing as of 1 January 2022 – the contingent asset recorded after the repayment of the difference in contributions (arising from the removal of the so-called "*spalma-incentivi*"-option) from the Energy Services Operator GSE shall be taken into account as well (Italian tax authority, Answer to request for advance ruling no. 16 of 26 January 2024).

TAX CREDIT FOR INVESTMENTS IN NEW OPERATIONAL ASSETS – EXCLUSION OF COMPANIES OPERATING UNDER CONCESSIONS AND BASED ON TARIFFS

Investments made voluntarily by companies operating under concessions that are related to an activity whose consideration received by the concessionaire does not in any case consist of a price fixed and regulated by the conceding entity (but is determined as a result of free and independent negotiation between the parties), do not fulfil the conditions in relation to the existence of "companies operating under concessions and based on tariffs" set forth in Art. 1 (1053) Law 178/2020. Therefore, the investments are eligible for said tax credit (Italian tax authority, Answer to request for advance ruling no. 14 of 26 January 2024).

IRAP

The gain from the sale of the company's trademark, which takes place as part of an arrangements with creditors (so-called *concordato preventivo*), is relevant for IRAP purposes in accordance with the normal provisions in view of its accounting classification under item A.5) of the profit and loss account (Italian tax authority, Answer to request for advance ruling no. 27 of 31 January 2024).

VAT

VAT CHARGED AS OUTPUT TAX FURTHER TO THE FINAL TAX ASSESSMENT

The seller's right to recourse for the higher assessed VAT pursuant to Art. 60, last paragraph DPR 633/1972, may also be exercised in the event of an amicable tax assessment settlement pursuant to Article 1 (179-184) Law 197/2022. In the aforementioned case, the taxpayer benefits from the application of the penalties at the rate of an eighteenth of the minimum provided for by the Law, but not from a reduction of the tax-amount (Italian tax authority, Resolution no. 481 of 22 December 2023).

COMMERCIAL LAW

BROKERAGE: THE "DOCUMENT PRELIMINARY TO THE PRELIMINARY AGREEMENT" IS NOT ENOUGH TO BE ENTITLED TO A BROKERAGE FEE

As set forth under article 1755 (1) of the Italian Civil Code, the broker is entitled to a brokerage fee if a business deal is concluded due to its intervention. In order for a business deal to be deemed concluded it is not enough that an irrevocable letter of intent is signed by the prospective buyer that offers a certain consideration for the purchase of a good nor that the owner duly accepted such offer, even though the latter gave rise to a binding endorsement of the features due to which the agreement is irrevocably taken and, hence, classifiable as a "document preliminary to the preliminary agreement" (so-called *preliminare di preliminare"*) (Italian Supreme Court judgement no. 34850 of 13 December 2023).

DIGITAL TRANSITION – REGULATION EU (DATA ACT) PUBLISHED

Regulation no. 2023/2854, known also as the Data Act, was published in the EU Official Journal on 22 December 2023 and shall enter into force as of 12 September 2025, except for some provisions that shall apply as of 12 September 2026.

The Data Act addresses the need to ensure a harmonized framework that specifies those entitled to use data generated from the use of a connected product or service (as e.g. smart industrial machines, electrical home appliances etc.), at what conditions and on which legal grounds. The aim of the Regulation is to contribute to the growth of the EU data economy: this is a rather important project considering that according to the European Commission 80 percent of the collected industrial data is not used.

More specifically, the central pillars of the Regulation may be summarized as follows:

1) Introduction of a joint right to use data between the producer and purchaser/user through measures that allow the users of connected devises to quickly access the data generated by the respective use (which are often collected and used by the producers only).
2) Sharing of such data with third-parties to provide post-selling services or other innovative services based on them.
3) Identification of measures aimed at avoiding the abuse of contractual unbalances that impede a fair data sharing: more specifically, SMEs, shall be protected from abusive clauses imposed by a trading party holding a significantly stronger market position. (The EU Commission shall prepare "standard" contract clauses to help market operators to draft and to negotiate fair contracts on data sharing).
4) Access to and use by public authorities of data held by the private sector for specific purposes of public interest under exceptional circumstances or in emergencies (health and natural disasters).
5) Incentive for customers switching to other cloud service providers and concomitantly fight against illegal transfers by the aforementioned service providers.
6) Identification of protective measures against illegal cross-boarder data transfer, with strengthening of the protection of personal data - or even sensitive non personal data, such as industrial secrets - partly already ensured by European harmonized rules and especially GDPR.

The Data Act will stimulate a competitive and innovative data market and unlock industrial data by providing legal clarity as to the respective used and access.

JOINT-STOCK COMPANY: THE SHAREHOLDER'S *AD NUTUM* TERMINATION CLAUSE IS LEGITIMATE

Article 2437 of the Italian Civil Code sets forth that a shareholder of a joint-stock company may withdraw at any time if a company is incorporated for an indefinite term. The question has been raised, however, as to whether a clause contained in the Articles of association setting forth the same option for a fixed-term company is valid.

In its most recent judgement no. 2629/2024 the Italian Supreme Court analysed this issue and confirmed that the clause in the articles of association of an unlisted joint-stock company that grants the shareholder an *ad nutum* termination clause, i.e. the right of withdrawal from the company (by obtaining the payment of its shares at current value) at the shareholder's own discretion to be exercised at any time during the company's term, even in the event of a fixed-term company, is legitimate.

As opposed to what was claimed by the Court of Cagliari, in front of which the arbitration award was challenged, the Italian Supreme Court observed, indeed, that the autonomy of the articles of association was substantially extended under the 2003 reform setting forth that , vis-à-vis the ones provided for under the law, the articles of association may also provide for further causes of termination, in addition to having increased the cases of withdrawal by operation of law. Hence, the aforementioned reform law superseded the idea of a withdrawal based solely on the shareholder's disapproval of some resolutions adopted by the majority. This institute now tends to support the investor's decision to sell its securities also for different reasons not dependant on third-parties decisions not agreed upon with.