NEWSLETTER NO. 5 - 2024

DIRECT TAXES

POSTPONEMENT OF DEADLINES FOR THE FILING OF THE INCOME AND IRAP TAX RETURNS

The deadlines for the filing of the income and IRAP tax returns relating to the tax period ongoing on 31 December 2023 are set forth as follows:

- the filing deadline for individuals (IRPEF payers) is postponed from 30 September 2024 to 15 October 2024;
- the filing deadline for corporate taxpayers (IRES payers) is postponed from the last day of the ninth months following the end of the tax period to the 15th day of the tenth months following the end of the tax period (i.e. 15 October 2024 for taxpayers whose business year coincides with to the calendar year).

The regular deadlines, recently amended under the so-called *Adempimenti* decree (article 11 (1a) of the Italian legislative decree no. 1/2024), i.e. 30 September for individuals (IRPEF payers) and the last day of the ninth months following the one in which the tax period ends for corporate tax (IRES) payers (article 38 of the Italian legislative decree no. 13 of 12 February 2024), will apply again as of the tax period ongoing on 31 December 2024.

EXCESS PROFITS OF BANKS

The Italian tax authority provided clarifications on thspecial tax owed by banks on the increased interest margin pursuant to article 26 of the Italian law-decree 104/2023 (Italian tax authority, newsletter no. 4 of 26 February 2024)

FIXED BASE ACCORDING TO THE DTA BETWEEN ITALY AND GERMANY

In accordance with article 14 of the DTA between Italy and Germany <<a structure with a psycho-educational purpose for disadvantaged foreigners permanently managed in Italy by a foreign resident, that obtains the respective income from a foreign association, forms an independent educational and pedagogical activity, and is taxed as such in Italy. The "fixed base concept for the operation of businesses", as specified under article 14, is intended to be totally identical to the permanent establishment concept, as provided for under article 5 of the same DTA, in accordance with the commentaries to the OECD Model Tax Convention. The above provision contains a non-exhaustive list of permanent establishment models, according to which income obtained by non residents - based on Italian legislation and more specifically under article 162 of the Italian Tax Code (TUIR) - is subjected to tax in Italy, provided that such income is compliant with the general criterion specified under the above article 5, according to which "a fixed place of business through which a business is operated in part or as a whole is deemed a permanent establishment" and hence an establishment (place of business) of the business connected to the foreign business (business connection test) permanently (permanence test) set up on the territory of the levying State (fixed place), i.e. a place of business capable of yielding income alone, even only potentially (suitability for production or carrying on of the business enterprise), available to the enterprise itself (right of use)>> (Italian Supreme Court judgement 2116 of 22 January 2024).

RIGHT OF USUFRUCT ON TRADEMARKS

To classify the consideration for the purchase of a right of usufruct on a trademark

- as "business profit" under article 7
  or
- as "fee" for the use or the concession in use of a right under article 12

of the DTA, it is required to actually ascertain the DTA's material content (with a special focus on the subject, the extension, the restrictions, the type and term of the transferred right; and on the entity, the method of determination and payment of the consideration that may be linked or not to the number of times for which the right is used by the purchaser) to establish the actual and essential functional and economic features of the transaction from time to time (Italian Supreme Court judgement 2465 of 25 January 2024).

BUILDING LAND

To classify land as building land, i is required that an actual general urban planning legislation has already been adopted by the competent Municipality (regardless of the Region's approval and of the adoption of implementing measures by the same) and, hence, that at least an amendment of the general urban planning project (*variante al piano regolatore generale*) has already been approved. Until the urban planning legislation that changes the intended use of the agricultural land into building land is amended, the intended use at the time of purchase only is relevant (Italian Supreme Court, judgement 1881 of 17 January 2024).

DEDUCTIBILITY OF MUNICIPAL PROPERTY TAX ON IMMOVABLE PROPERTY USED FOR BUSINESS PURPOSES

The question as to whether the part of article 14 (1) of the Italian legislative decree 23/2011 setting forth that the Municipal Property Tax paid for property held for business purposes is totally non-deductible for IRAP purposes is to be deemed constitutionally unlawful is unfounded. The arguments that lead to its unlawfulness for corporate tax (IRES) purposes cannot be extended to the tax on productive activities (IRAP), since the two types of taxes are totally different (Italian Constitutional Court judgement 21 of 20 February 2024).

DEDUCTIBILITY OF COSTS FOR IRAP PURPOSES

Costs may not be deducted for IRAP purposes solely because they were allocated to the statutory profit and loss account. The Italian tax authorities may challenge their business-relatedness if costs deducted are higher than the deductible share for corporate tax (IRES) purposes, since there are limits for the deduction of this type of expenses from corporate tax (IRES). However, they may be deductible for IRAP purposes in a higher amount than the one set forth for corporate tax (IRES) purposes if the taxpayer (and not the tax authorities) is able to prove their business-relatedness (Italian Supreme Court judgement 781 of 9 January 2024).

ALLOCATION OF TAX CREDITS DURING DE-MERGERS

In the event of a partial de-merger the following tax credits

- R&D tax credit under law 160/2019,
- R&D tax credit under law 145/2013,
- benefit corporation tax credit under article 38-ter of the Italian law-decree 34/2020,
- tax credit for non-energy intensive companies under article 3 of the Italian law-decree 21/2022,
- tax credit for advertising investments under article 57-bis of the Italian law-decree 50/2017,
- disinfection tax credit under article 32 of the Italian law-decree 73/2021,

do not fall under the "individual items" under article 173 (4) of the Italian Tax Code (TUIR) to be allocated in proportion to the book net equity. These tax credits are separate equity items of the de-merged company which, as such, are eligible for allocation in the de-merger project, according to the parties' will (Italian tax authority, answer to request for advance ruling 48 of 22 February 2024).

AMENDMENT OF VALUE ADJUSTMENT OPTION

If the option for value adjustment according to the scheme under article 176 of the Italian Tax Code (TUIR) - as specified in the financial statement disclosure - instead of the more favourable scheme under article 1 (696 et seq.) of the Italian law 160/2019 is exercised, the tax return must be rectified by exercising the same option as the one specified. It is, however, possible to file a refund request for the higher taxes paid by specifying the reason for which the taxes are deemed not due (Italian tax authority, answer to request for advance ruling 42 of 9 February 2024).

ASYMMETRIC DE-MERGER

An asymmetric de-merger towards two beneficiaries is not deemed elusive, if the transaction

- is strurctured as corporate reorganisation aimed at the actual continuation of the business on a going concern basis by each of the companies involved in the transaction;
- is not aimed at hiding the dissolution of the corporate bond by the shareholders (or by one of them) and the assignment to the same of the corporate equity through formal allocation of the relevant assets to non-operational companies with the sole purpose of holding such assets and with the purpose of postponing sine die the taxation of latent capital gains on the transferred assets and of benefiting from the tax neutrality scheme (Italian tax authority, answer to request for advance ruling 35 of 8 February 2024).

DE-MERGER AND CONCOMITANT MERGER

The de-merger of company A and the assignment to company B of the equity interest held in company C and the concomitant merger of company C into the beneficiary B is not deemed elusive. Indeed, the cancellation of company C may be lawfully achieved by a merger by absorption which is a "full-fledged alternative" to the liquidation of the company itself from a fiscal point of view (Italian tax authority, answer to request for advance ruling 37 of 8 February 2024).

HEDGING DERIVATIVES

Earnings from early withdrawal from a commodity swap subscribed to cover natural gas purchase price fluctuations for the 2022-2026 period, equal to the derivative's fair value, add to income for corporate tax purposes, according to correct time allocations recorded in the balance sheet, in compliance with the reinforced derivation principle. In accounting terms the earnings are not entirely recorded in the business year in which they are cashed in (i.e. 2022), but in each business year of the 2022-2026 period, according to the actual execution of the highly probable planned transaction in the course of time, i.e. the procurement of the "underlying" natural gas or if coverage becomes ineffective since the future cash flows are no longer foreseeable or the planned transaction is no longer forecasted as being highly probable (Italian tax authority, answer to request for advance ruling 36 of 8 February 2024).

SPECIAL VOLUNTARY DISCLOSURE

The provisions contained in article 1 (174-178) of the Italian law 197/2022 on the regularisation of tax returns are extended to breaches relating to validly filed tax returns for the tax period ongoing on 31 December 2022. To this end, the sums owed are payable as follows:

- in one single instalment by 31 March 2024
  or
- in four instalments of equal amount payable respectively by 31 March 2024, by 30 June 2024, by 30 September 2024 and by 20 December 2024. Interest at 2 percent is due on all instalments after the first one.

The regularisation is closed if the sums due are paid in a single instalment or if the first instalment is paid by 31 March 2024 and the irregularities or omissions are removed. The voluntary disclosures already in place at the date of entry into force of the conversion law continue to be valid and no refund will be made (Italian law-decree 215 of 30 December 2023, amended and converted into law 18 of 23 February 2024).

VAT

INTEREST ON VAT REFUNDS

If VAT paid in excess is refunded further to

- the failure to exercise the right to deduct input VAT and
- the retroactive amendment of the method of calculating deductible VAT,

Community law must be interpreted in the sense that interest payments are not mandatory for VAT payers as of the date of payment of VAT in excess (European Court of Justice, case C-674/22 of 2 February 2024).

VAT NOT OWED

The purchaser alone may not correct the invoice issued by the seller (in the meantime admitted to insolvency proceedings). However, the purchaser that proves to have paid taxes undue, may obtain a refund pursuant to article 30-ter and deem the completion of the insolvency proceedings, in which the seller was involved (limited to the tax not refunded during the procedure) as the starting date on which the relevant application began to run

(Italian tax authority, answer to request for advance ruling 29 of 2 February 2024).

REGISTRATION FEES

WAIVER OF SHAREHOLDER LOANS

The deed of waiver for a non-interest bearing loan granted to the company by a shareholder - to avoid capital reduction pursuant to article 2446 and article 2447 of the Italian civil code - falls under the deeds of remittance of debts under article 6 of the tariffs enclosed to the Italian Registration Fees Code (TUR) subject to proportional registration fees at 0.5 percent (and not under article 4 of the tariffs relating to the deeds of corporations, including capital increases, subject to registration fees at fixed rate; deeds of corporations are formed solely by deeds that express the shareholder meeting's will and not the shareholder's will) (Italian Supreme Court, judgement 4754 of 22 February 2024).

GOODWILL

To calculate the value of the business goodwill pursuant to article 51 of the Italian DPR 131/1986, the profitability percentage must be benchmarked against the average proceeds (and not against the operational profits) ascertained or filed for income tax purposes in the three tax periods before the one in which the business is sold. The multiplier set forth under the (repealed) article 2 (4) of the Italian DPR 460/1996 that is the minimum parameter for the relevant calculation must be applied. If the tax authorities applied a coefficient lower than the one under article 2 (4), the taxpayer must prove that the enterprise's profitability is actually lower. Moreover, goodwill must be calculated, net of inherent liabilities, whereas non-inherent liabilities form a debt assumption to be included in the tax base (Italian Supreme Court, judgement 2802 of 30 January 2024).

REDUCED FEES

In accordance with article 10 of the Italian law 212/2000, the relationship between the tax authorities and the taxpayers must be based on the principles of collaboration and good faith. Therefore, when calculating the fees owed, the tax authorities must verify whether the conditions for the application of reduced fees are met, according to the criteria clearly specified in the deed, even if they differ from those specified by the taxpayer (Italian Supreme Court, judgement 2288 of 23 January 2024).