NEWSLETTER NO. 2 - 2021

INCOME TAX

NOTION OF REGULATED MARKET

For income tax purposes, "regulated markets" are those defined as such for regulatory purposes and recognised by the respective Italian sectoral authorities (CONSOB and Bank of Italy). In addition to the market recognised by CONSOB and the market listed in the register of the European Securities and Markets Authority (ESMA), "foreign regulated market" means "any other regulated market that operates regularly, is recognised and open to the public".

Hence, "foreign regulated markets" include markets in EU or EEA Member States; other markets recognised by CONSOB and indicated in the corresponding list; markets classified as regulated by the professional associations of asset management companies in view of the sector-specific regulations.

Moreover, except in special cases, the notion of "multilateral trading system" may generally be equated with that of "regulated market" for income tax purposes. In both cases the price of listed or traded shareholdings may be established on the basis of objectively ascertainable values (Italian tax authority, newsletter no. 32 as of 23 December 2020).

REPATRIATES TAX REGIME

The Italian tax authority provides clarifications on the legal amendments to the repatriates tax regime pursuant to section 16 of Italian legislative decree 147/2015, referring in particular to the personal and material conditions to benefit from such tax regime, the conditions to benefit for a further five-year period, the time frame of application of the tax regime and the legal amendments to the condition of registration with the Registry of Italians Resident Abroad (AIRE) to benefit from the tax regime (Italian tax authority, newsletter no. 33 as of 28 December 2020).

SALE OF SHARES AND SUBSEQUENT TAX ASSESSMENT OF THE TRANSFERRED COMPANY

In the event of sale of shares, the seller may undertake in respect of the purchaser to assume any tax claims that should be levied against the transferred company following a tax assessment.

In this case, the amounts refunded by the seller to the purchaser may be classified as income of the buyer (Italian tax authority, answer to request for advance ruling no. 566 as of 04 December 2020).

EXCHANGE OF EQUITY INVESTMENTS

In the case of a contribution by exchange of equity

investments the tax regime under section 177(2) of the Italian Tax Code (so-called "*realizzo controllato*") is not affected by, and may not exclude, any subsequent capital increase by cash payment that should affect the transferee (also by the same shareholder by means of a tax-neutral equity investment) (Italian tax authority, answer to request for advance ruling no. 568 as of 09 December 2020).

BUSINESS CONTRIBUTION OF PERMANENT ESTABLISHMENT

The contribution of the entire business of an Italian permanent establishment of an EU company to another Italian permanent establishment of another EU company is tax neutral under section 176 of Italian Tax Code (TUIR).

However, if the shareholding acquired as a result of the contribution:

- is assigned to the "contributing" permanent establishment and then transferred to its parent company, or
- is assigned directly (upon contribution) to the parent company, or
- is not functionally connected with the permanent establishment,

the capital gain, if any, realised by the "contributing" permanent establishment is taxable (possibly under the PEX regime if the conditions are met) (Italian tax authority, answer to request for advance ruling no. 633 as of 31 December 2020).

REVALUATION OF COMPANY ASSETS

The tax-free revaluation referred to in section 6-bis of Italian Decree-Law 23/2020 may also be carried out by the lessor that has leased the hotel business to another company by means of two agreements, namely a business lease agreement for the hotel business and, at the same time, a lease agreement for the hotel property (Italian tax authority, answer to request for advance ruling no. 633 as of 31 December 2020).

VALUE ADDED TAX

SPLIT PAYMENT

When invoicing under the split payment scheme the VAT subsequently turns out not to be due, the supplier may issue a VAT adjustment to the public administration as principal, which may thus recover the VAT paid in excess.

However, if the supplier does not issue a VAT adjustment in accordance with section 26 DPR 633/1972 (e.g. if he may no longer be traced or no longer has a VAT ID or has died without the heirs continuing the business activity, etc.), the public administration may not offset the VAT paid in excess against subsequent VAT payments under the split payment scheme. In these cases, however, the public administration may file a refund request with the Italian tax authority in accordance with section 21(2) Italian legislative decree 546/1992, thereby proving that the VAT paid in view of the invoice received and claimed for refund is actually no longer due and that there is an objectively undue payment or unjust enrichment by the tax authority in relation to such VAT paid (Italian tax authority, decision no. 79 as of 21 December 2020).

CONSIDERATION FOR THE PROVISION OF SERVICES

Under a contract for work for the provision of services the principal may - in order to avoid the application of the provisions on the joint and several liability of the principal - pay the contractor corresponding sums that the latter must pay to its workers as severance pay.

In this case, said payment by the principal to the contractor (the contractor subsequently pays these sums to his employees) constitutes an integral part of the consideration for the provision of services under the work contract and is therefore subject to VAT (Italian tax authority, answer to request for advance ruling no. 575 as of 10 December 2020).

TRIANGULATION WITH EXPORT TO NON-EU COUNTRY

In case of triangulation with export to a non-EU country

where:

- the first supplier is an EU business identified for VAT purposes in Italy;
- the promoter is an Italian business;
- the final customer is a business in a non-EU country;

the VAT exemption scheme under section 8(a) DPR 633/1972 may also apply if the export goods are assembled in advance in Italy by the promoter of the triangular transaction. The fact that the goods are assembled by the promoter of the triangular transaction is not sufficient to establish the "availability of the goods" for the promoter of the triangular transaction (if this availability existed, the VAT exemption scheme would not apply).

In the case of the non-taxable supply pursuant to section 8 DPR 633/1972 between the first supplier (business identified for VAT purposes in Italy) and the Italian promoter, the reverse charge tax scheme pursuant to section 17(2) DPR 633/1972 does not apply. In fact, said tax regime applies to transactions carried out in Italy by a non-resident, provided that they are taxable in Italy.

The VAT exemption scheme under section 8 DPR 633/1972 applies to the transaction provided that the transport of the goods outside the EU is directly arranged by the supplier, irrespective of who handles the transaction for customs purposes.

The first supplier may provide proof of exportation

- by affixing the customs endorsement to the invoice issued to the promoter and filed upon export;
- by subsequently adding a reference to the exit of the goods from the EU or, alternatively, by providing a copy of the customs export document made out to the promoter together with a reference to the triangular transaction and a printout of the exit declaration.

The promoter of the triangular transaction, on the other hand, may prove that the export has taken place by means of the electronic message "Exit results" in the AIDA customs system (Italian tax authority, answer to request for advance ruling no. 580 as of 10 December 2020).

INTRA-COMMUNITY TRIANGULAR TRANSACTION

In the case of an intra-Community triangular transaction where:

- the first supplier is an Italian taxable person;
- the promoter is a German taxable person;
- the final customer is an Austrian taxable person;

and the supply from the first supplier to the promoter takes place ex-works with transport from Italy directly to Austria by the promoter of the triangulation, the transport of the goods may be proved in different ways.

Both before and after 1 January 2020, there are two levels of protection for the taxable person to prove the carriage of the goods:

- a basic level, where the taxable person may rely on the documents provided for by Italian legal practice (confirmed by newsletter 12/2020) to prove that the Italian tax authority considers the transport to have taken place (a "suitable" CRM signed by the recipient, invoices, bank documents proving the amounts collected in relation to the supply, declaration of receipt of goods by the final customer, documents relating to the contractual obligations entered into and Intrastat lists);
- a second level in which possession of the documents pursuant to section 45-bis of EU Regulation 282/2011 entails legal presumption that the transport has taken place in another EU Member State (with reversal of the burden of proof for the tax authority) (Italian tax authority, answer to request for advance ruling no. 632 as of 29 December 2020).

BUSINESS ACTIVITY SEPARATION

In the real estate sector, the business activity separation under section 36(3) DPR 633/1972 requires not only a different VAT regime for the transaction (exemption or

taxation), but also a different cadastral category of the building (residential or non-residential).

Hence, business activity separation based solely on the tax regime (exemption or taxation) is not permitted for the sale or rental of operating property.

In other words, the business activity of renting tax-exempt operating buildings may not be separated from the activity of renting taxable operating buildings (Italian tax authority, answer to request for advance ruling no. 608 as of 18 December 2020).

SALE OF PROPERTY SUBJECT TO REMEDY PROCEDURE FOR CONSTRUCTION BREACHES

The sale of a property subject to procedure to remedy construction breaches in accordance with section 36 of Italian Construction Law is VAT-exempt (or, upon exercise of option right, subject to VAT) in accordance with section 10(8-ter) of DPR 633/972.

Under the procedure for remedying construction breaches pursuant to section 36 of Italian Construction Law, the competent authority does not authorise the implementation of new building measures, but merely takes note of previous building measures (which do not comply with the submitted project) and certifies their compliance with the provisions of urban planning and building regulations. Hence, under the above procedure, no construction measure is materially implemented that results in the sale of the building being subject to mandatory VAT scheme. To this end, it does not matter that the seller formally holds a certified notice of commencement of (construction) works (SCIA) that could in abstract terms qualify the seller as a "construction or renovation company" (Italian tax authority, answer to request for advance ruling no. 611 as of 21 December 2020).

VAT DEDUCTION ON COMPANY CARS

In the case of company cars used by employees for business and personal purposes, and where the "private" use of the vehicle is taxed as fringe benefit without charging the employee any remuneration, VAT cannot be deducted in full (Italian tax authority, answer to request for advance ruling no. 631 as of 29 December 2020).

TAX CREDITS

REPORTING OF TAX CREDIT TRANSFER

The new form for reporting the transfer of tax credits has been approved for:

- tax credits for shops and stores in accordance with section 65 of Italian Decree-Law 18/2020;
- tax credit for non-residential properties and business lease rentals under section 28 of Italian Decree-Law 34/2020;

pursuant to section 122(2)(a)(b) of Italian Decree-Law 34/2020 (Italian tax authority, decision no. 2020/378222).

ADJUSTMENT OF REPORTING FORM

In the event of incorrect completion of the form for exercising the right to opt for the tax credit pursuant to section 14 of Italian Decree-Law 63/2013 in the form of a discount on the invoice, any errors made by the beneficiaries of the tax deduction may only be corrected before the tax credit is claimed by the same or by the supplier/purchaser (Italian tax authority, answer to request for advance ruling no. 590 as of 15 December 2020).

SUPERBONUS AND REAL ESTATE USED FOR BUSINESS AND PRIVATE PURPOSES

In the case of energy-efficiency improvement measures that are eligible for the so-called superbonus and are implemented on residential buildings that are also used for the exercise of artistic or self-employment work or commercial activity, the tax deduction is reduced to 50 percent (Italian tax authority, answer to request for

advance ruling no. 570 as of 04 December 2020).

REGISTRATION FEES

BUSINESS SALE

The sale of a set of assets, including marketing authorisations for medicinal products, trademarks, internet domains and the warehouse may constitute a business sale subject to registration fees (Italian tax authority, answer to request for advance ruling no. 574 as of 10 December 2020).

Conversely, the sale of a list of members, i.e. a sort of archive of user data and information (customers and/or potential customers) accessing the electronic platforms operated by the transferor - despite the possible use of a systematic collection of information essential and functional to online sales - does not constitute a business sale, but a sale of a single asset (Italian tax authority, answer to request for advance ruling no. 609 as of 18 December 2020).

TRANSFER OF ENTIRE BUILDINGS TO CONSTRUCTION OR RENOVATION COMPANIES

The tax benefit provided for by section 7 of Italian Decree-Law 34/2019 for the transfer of entire buildings to construction or renovation companies, consisting of the application of the registration, mortgage and cadastral fees at a fixed amount, also applies to the transfer of the real estate exchange agreement (Italian tax authority, answer to request for advance ruling no. 613 as of 22 December 2020).

Yours sincerely,

HAGER & PARTNERS