RSM PALEA LAURI GERLA

Associazione professionale di Studio Palea, Studio L4C, Studio Gerla Associati

TAX NEWS 2015 - 10

This disclosure, while scrupulously drawn up and checked, may, under no circumstance, entail our firm's liability in case of errors or inaccuracies, nor should it replace professional consulting and advice under any form.



TABLE OF CONTENTS

SPECIAL FOCUS

The new Italian "Patent Box"

FOCUS ON EMPLOYMENT

(IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

SPECIAL FOCUS

The new Italian "Patent Box" regime

The Stability Law of last year (Art. 1, paragraphs 37–45, Law dated December 23rd, 2014, no. 190) introduced in the Italian tax system a so–called "Patent Box" regime, that is a tax relief regime aimed at promoting investment in intangible assets.

The creation of such a regime is based on the recognition that the increasing globalization of the world economy has made it increasingly clear that intangible assets (trademarks, patents and know-how) play a fundamental role in the creation of added value.

Therefore, assuming that many advanced Countries have already introduced similar disciplines since long, an optional system <u>promoting tax relief</u> of <u>income coming from the use</u> of the aforementioned intangible assets, was introduced to the extent of:

- encouraging the placement in Italy of intangible assets currently held abroad by Italian or foreign companies;
- encouraging the maintenance of intangible assets in Italy (or rather, preventing their relocation abroad);
- o encouraging investments in research and development activities.

On October 20th, the final text of the <u>implementation decree</u> of the Patent Box discipline (Decree of the Italian Ministry of Economic Development dated July 30th, 2015), was published, making the discipline effective.

Briefly, please find below an initial summary of the favourable tax regime.

Who is entitled

Those subjects *holding a business income* can benefit from the favourable tax regime, regardless:

- the legal form,
- the size,
- the accounting regime adopted.

Holders of business income <u>not resident</u> in the State's territory also fall within the subjective field of favourable taxation, provided that:

- they are resident in Countries with which an agreement to avoid double taxation is in force and with whom the exchange of information is real,
- they have a permanent establishment in the State's territory, to which intangible assets object of the tax relief are attributable.

The following companies are <u>excluded</u> from the favourable regime:

- companies subject to the bankruptcy proceedings (from the beginning of the tax year in which the bankruptcy declaration is issued);
- companies subject to the procedures of compulsory liquidation (from the beginning of the tax year in which the provision ordering the liquidation is issued);
- companies subject to procedures of extraordinary administration of large companies in crisis (from the beginning of the tax year in which the grounded decree declaring the opening of the extraordinary administration procedure is issued).

In the event of mergers, divisions and transfer of assets, the subject eligible person takes over the exercise of the option made by the assignor.

Eligible activities

The essential condition to benefit from the Patent Box is that the subjects <u>carry out research and development activities</u> (also being outsourced, by entering into research agreements with companies – not belonging to the same group – with universities or research institutions and similar organizations), aimed at the production of intangible assets object of the favourable tax regime.

More specifically, the research and development activity, aimed at <u>developing</u>, <u>maintaining</u> and <u>increasing</u> the value of intangible assets benefitting from the tax relief, is identified by the Decree of July 30^{th} :

the <u>"fundamental" research</u> , meaning the experimental or theoretical work carried out to acquire new knowledge, if subsequently used in applied research and design;
the <u>"applied" research</u> , meaning the planned research to acquire new knowledge and skills, to be used to develop new products, processes or services or to make improvements in existing products, processes or services, in any field of science and technology;
the <u>experimental and competitive development</u> , meaning the acquisition, combination, structuring and use of the existing knowledge and skills bearing a scientific, technological, commercial nature or being of other kind, in order to develop new or improved products, processes or services. Other activities aiming at the conceptual definition, concerning new products, processes or services, and the tests, experiments and trials necessary to obtain the authorizations for the marketing of the products or the use of processes and services also fall within this definition. The construction of prototypes and samples, the demonstration, the realization of pilot products, testing and validation of new or improved products, processes or services, and the construction of plants and equipment required for this purpose fall within the experimental development;
the <u>design</u> , meaning the activities of creation and design of products, processes and services, including the external appearance of them and of each part of them, and the activities of brand development;
the design and realization of copyrighted software;
the <u>preventive research</u> , tests and market research and other studies and interventions also aimed at adopting anti-counterfeiting systems, the storage, the obtaining and maintenance of the related rights, the renewal of the same latter once expired, the protection of these latter, also jointly and in relation to the prevention activities of counterfeiting and the handling of related disputes and agreements;
the <u>activities of presentation</u> , <u>communication and promotion</u> that increase the distinctive character and/or the reputation of the brands and that contribute to promote the knowledge, the commercial success, the image of the products or services, of the design, or of the other materials that can be protected.

The option relates to income derived from the use of:

copyrighted <u>software</u>;

The companies can take advantage, reducing the taxable income related to the use (either

internally or by third parties) of intangible assets arising from R&D activity.

- industrial <u>patents</u> (either granted or about to be granted), including patents for invention, the biotechnological inventions and the related supplementary protection certificates, the patents for utility model, as well as patents and certificates for plant varieties and the topographies of semiconductor products;
- company trademarks, including collective marks, whether registered or about to be registered;
- <u>drawings and models</u> that can be legally protected;
- business information and technical-industrial experiences, including the commercial or scientific ones which cabe protected as secret information, legally protectable.

The implementation decree points out that for the <u>definition</u> of said types of intangible assets and of the requirements for their existence and protection it is necessary to refer to the national, European Union and international provisions and to those contained in the European Union regulations, international treaties and conventions in the field of industrial and intellectual property applicable in the related protection territory.

As mentioned above, the favourable tax treatment is recognized both in case the right to use intangible assets is granted to third parties and in case of direct use¹.

In the first case (right to use granted to third parties) income subjected to tax relief consists of the rental income derived from the right to use intangible assets, through netting of the direct and indirect costs subject to taxation and related thereto; in case of direct use, instead, it is necessary to identify, for each intangible asset object of the option, the <u>economic contribution</u> resulting from this latter and that algebraically contributed to create the business income or the loss.

How it works

The tax relief consists in the exemption from taxation (for IRES / IRPEF-IRAP purposes) of a share of income resulting from the exploitation/use of intangible assets.

More particularly, the agreed percentage of exemption from taxation is the following:

- for the tax year following the year in progress as at December 31st, 2014 and for the one following the current year as at December 31st, 2015, respectively, it is equal to 30 and 40 percent;
- from the taxable period ending at December 31st, 2016 onward, it is equal to 50%.

The share of income subjected to tax relief is determined for each intangible asset mentioned above, based on the ratio² between:

- costs relevant for tax purposes, incurred for the maintenance, increase and development of the intangible asset;
- the overall costs relevant for tax purposes, incurred to produce such asset.

For the proper calculation of this ratio it is also necessary to distinguish between the various tax years subjected to tax relief:

¹ In case of direct use, it is necessary to elect the Ruling procedure in order to define the income object of the tax relief. To such an extent, simplifications in favour of micro-, small- and medium –sized enterprises are expected.

² The Decree of July 30th introduces further specifications related to the modalities to determine the costs to be included to the numerator and denominator of the ratio.

- ✓ for the first tax period of effectiveness of the option, and for two following ones, the costs are those incurred during the tax period the tax return is referred to and in the three previous tax periods and they are considered *altogether*;
- ✓ from the 3rd tax period following the effective one, the relevant costs are those incurred during the tax periods in which those provisions shall apply and are considered separately for each intangible asset.

The direct connection between research and development activities and the intangible assets, as well as between these latter and the related income subjected to tax relief and resulting from <u>an adequate</u> <u>system of accounting or non-accounting recognition.</u>

Therefore, briefly, the determination of the amounts subjected to tax relief requires three steps:

- determining the income flows potentially subjected to tax relief, with different rules depending on whether it is a direct or indirect use of the intangible asset;
- definition of the share of income subjected to tax relief (provided by the ratio between the cost categories identified by the regulation);
- > application of the rate subjected to tax relief (30%–40%, or 50%, depending on the year in question) to the share of income subjected to tax relief.

For a better understanding, let's consider the case of a company that achieves an income equal to Euro 100,000 derived from the granting of the right to use one of its own intangible asset to third parties. If the ratio between the relevant costs was equal to 85%, this would mean that the rate subjected to tax relief would be applied to Euro 85,000 of income: assuming that the tax year is 2015 (rate equal to 30%), therefore, the favourable tax treatment would amount to 30% of Euro 85,000 (Euro 25,500), as a corresponding reduction from the taxable base.

The legislation on the Patent Box facilitates even in case of <u>sale of assets subjected to tax relief</u>: the exemption from taxation of the gain achieved is agreed, provided that 90% of the resulting consideration is <u>reinvested</u> – before the closing of the 2nd tax period following the one in which the sale occurred – in the maintenance or development of other intangible assets subjected to tax relief.

How to carry out the election

The option has a term of five tax years, it is *irrevocable* and is *renewable*.

For the first two tax periods following the one in progress as at December 31st, 2014, the option must be communicated to the Italian Revenue Agency according to the modalities and terms that will be mentioned in a proper Provision of the Director of the Italian Revenue Agency: the option concerns the tax period during which it is communicated and the following 4 ones.

From the 3rd tax period following the year in progress as at December 31st, 2014, the option will be directly carried in the tax return, and will be effective from the tax period to which the same tax return refers.

FOCUS ON EMPLOYMENT

(IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

De Luca & Partners has been specialized in Employment Law since 1976. With its 16 professionals, it assists clients with i) day-to-day advice; ii) industrial relations; iii) extraordinary transactions; iv) restructuring and social safety nets; v) judicial litigation and arbitration.

HR Capital® is the service company established by the partners of De Luca & Partners which, for over 30 years, has been providing services and solutions for outsourced personnel administration payroll and social security contribution processing.

Contacts

De Luca & Partners
Largo A. Toscanini, 1
20122 Milan
Tel. +39 02 365 565 1Fax +39 02 365 565 05 email: info@delucapartners.it;
www.studiodeluca.it

HR Capital

Gall. San Babila 4/B 20122 Milan Tel. +39 02 365 930 1Fax +39 02 365 930 00 email: <u>info@hrcapital.it</u> <u>www.hrcapital.it</u>

Ruling of the month

The reasons justifying use of a temporary work contract

The Court of Appeals of Milan, Labor Section, with its ruling, rejected the appeal submitted by a temporary worker of our Client, who had challenged the temporary work contract requesting, *inter alia*, verification of (i) the nullity and/or illegalness and/or ineffectiveness of the termination date set in the contract and (ii) the existence of open end employment with the user Company from the beginning. The opposing party's argument was all based on the assumption of the general nature of the reasons justifying the use of a temporary work contract and the absence of a temporary or exceptional nature in terms of the company's needs. The Bench did not agree with the appellant's findings, confirming that, "*in the case in question the indication of the client's identification code and the qualification of the relative orders in the periods characterized by an exceptional nature (and, thus, necessarily, con ex ante assessment, of a temporary nature) make the clause supported by a degree of specificness sufficient for meeting the formal requirement of the temporary work contract allowed by article 21, paragraph 1, therein, because it provides adequate mention of the reasons justifying the use of this type of contract, and for this purpose additional details are not required'.*

LAWS

On 15 October 2015 the Council of Ministers approved the draft law concerning the financial maneuver expected for the year 2016 (so-called stability law). The text effects employment policy (i) confirming tax breaks for new hirings with open end contract, even if the benefit will only be for two years, with annual ceiling halved, which thus drops from the current 8,060 euro to 3,250 euro; (ii) providing incentives

for a generational turnover within private sector companies with a possibility offered to workers over 63, to opt for part-time work with full contribution in the last three years of the contract; (iii) including detaxation of bonuses and zeroing out of sums paid for company welfare services agreed upon between the parties and, lastly, (iv) introducing new protections and tax breaks for independent contractors. The new legislation of the Stability Law is in line with the reform program the Renzi government has been following to encourage an economic recovery in Italy and boost employment.

CASE LAW

Court of Rome 30 September 2015: the "new" article 2013 of the Civil Code and its field of application

With the sentence filed last 30 September, the Court of Rome ruled for the first time on the reform of job duties introduced with the Legislative Decree no. 81/2015 implementing the Jobs Act, providing its interpretation on the matter. According to the Court job downgrading constitutes a type of "permanent illegality", which is implemented and renewed every day that the worker is required to perform duties inferior to the ones he has the right to perform, and, thus the assessment of lawfulness or lack of the same in terms of the employer's conduct should be made in reference to the current legislation and contractual provision day by day. This means that, if this legislation changes, authorizing a conduct which not allowed before, the illegality ceases for periods after the change in legislation. The conclusions reached by the Court of Rome in this first interpretation seem to reflect the findings of the literature issued immediately after the decree became effective.

Court of Cassation 12 October 2015: dismissal and defensive controls

With its ruling no. 20440 of 12 October 2015, the Court of Cassation declared a dismissal of an employee by an employer lawful, after having ascertained — based on records from a GPS installed on a company car, as well as on the basis of results from investigations, — that the employee left the company premises during work hours to spend time in cafes or cafeterias to laugh and joke with his colleagues. By thus pronouncing the Cassation confirmed the legality of defensive controls, i.e. controls "intended to detect specific shortcomings and behaviour outside of normal working activity as well as illegal" and even more so when the work is performed off company premises "in places where it is easier to harm the interest in the exact performance of a job and the company's image, without the employer's knowledge. Basically not every control made by the employer can be considered illegal; there are times when the injured party is precisely the employer, who thus must be able to use the technological instruments at his disposal to protect his company's assets.

Court of Cassation 7 October 2015: the 180 days for filing a lawsuit start from sending the out-of-court letter

With its ruling no. 20068 of 7 October 2015, the Cassation Court confirmed that the *dies a quo* for the start of the 180 days for filing an appeal coincide with the date when a letter is sent by the employee challenging the employer's dismissal and not the date the employer receives such letter. This interpretation which is unequivocal in case law, allows the worker to calculate with mathematical certainty the deadline for filing a lawsuit.

Court of Cassation 16 September 2015: recognition of executive position

With its ruling no. 18165 of 16 September 2015, The Court of Cassation recognized an executive position for a credit manager who, despite the lack of formal assignment of such position by top management, performed executive duties. These duties were characterized by the proposal, with broad decision–making powers, to one or more services, which put them in a condition to influence all company activities. A different conviction, according to the Court, would be in direct conflict with the principle of appointment objectivity and the necessary correspondence of the duties actually performed. Basically, for recognition of the position of executive it is not necessary that there be a "formal appointment" by the employer; what counts are the facts.

PRACTICES

National Employment Contract of the chemical/pharmaceutical sector

On 15 October 2015, after just 24 hours of negotiations and more than two months before the expiration date of the current contract, scheduled for 15 December, the hypothesis was signed for renewal of the national collective contract for 2016–2018 for employees of the chemical-pharmaceutical sector. The agreement on one hand confirms the central nature of the national collective employment contract and on the other promotes company bargaining, with the stated purpose of optimizing integration between the two contractual levels. With the new text the social parties have recognized an overall average raise of 90 euro, which will be paid in three instalments starting from the month of January 2017, not before having paid the last portion, totalling 15 euro, included in the previous renewal. The main new feature regards the commitment of the Parties to annually perform an ex post analysis of changes in inflation between the forecasts used in the renewal phase and the actual change of consumer prices. Lastly, in terms of legislation, in order to simplify and implementation in line with the current Government's policy, contractual requirements were clarified where necessary in order to avoid disputes as much as possible over their interpretation and/or application, and laws no longer considered current were eliminated.

Authority for Privacy: privacy and Skype

With its order no– 345 of 4 June 2015, the Authority for Privacy, ruled on the issue of remote control of workers' activities. Specifically, the order in question confirmed that the employer cannot keep Skype conversations of employees, not even to document conduct harmful to the company including if the employee leaves the Skype icon enabled on his workstation computer. The Authority based such ruling on the constitutional rules of secrecy covering correspondence, valid also for electronic and digital communications exchanged by employees for their jobs. Any controls cannot be hidden (the essential characteristics of data processing must be made known to the workers) and cannot determine the collection of personal information, including not pertinent, of a sensitive nature or referring to third parties. The Authority's intervention is significant, in addition to being able to understand the situation offered by the case in question, it makes it possible to create the framework for the implementation procedures for controls by the employer on instruments used by workers, including considering the recent rewriting of article 4 of Italian Law no. 300/1970 as a result of Italian Legislative Decree no. 151/2015.

RSM PALEA LAURI GERLA

Foro Buonaparte 67, 20121 - Milano Tel +39 02 89095151 Fax +39 02 89095143

Roma – Via delle Terme Deciane 10 – 00153, (registered office and operating office) Torino – Via Ettore De Sonnaz 19 – 10121 (operating office)

www.rsm.it

P.IVA e CF: IT13174301005

RSM PALEA LAURI GERLA is a member of the RSM network and trades as RSM. RSM is the trading name used by the members of the RSM network.

Each member of the RSM network is an independent accounting and consulting firm, each of which practices in its own right. The RSM network is not itself a separate legal entity of any description in any jurisdiction.

The RSM network is administered by RSM International Limited, a company registered in England and Wales (company number 4040598) whose registered office is at 11 Old Jewry, London EC2R 8DU.

The brand and trademark RSM and other intellectual property rights used by members of the network are owned by RSM International Association, an association governed by article 60 et seq of the Civil Code of Switzerland whose seat is in Zug.

© RSM International Association, 2015

