RSM PALEA LAURI GERLA

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

TAX NEWS

2015 – 5

RSM

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LAWS AND REGULATIONS

Tightening of the "false accounting" (Italian Lax no. 69 of May, 27th 2015)

The entering into force of the regulatory package "anti-corruption" leads, from June 13th, 2015, to a tightening of those sanctions relating to wilful misrepresentation in the financial statements (the so-called "false accounting").

With the amendments to the Italian Civil Code, prison sentences (imprisonment) are, in fact, introduced up to 5 years in case of unlisted companies and up to 8 in case of listed companies.

Those who mention, in the financial statements, reports or other company communications , untrue facts or that omit relevant information, in order to obtain an *unfair profit*, misleading the third parties about the real situation of the company, are punished.
Directors or liquidators, chief-executives, managers responsible for the drawing-up of the corporate accounting documents, as well as statutory auditors and chartered accountants are punishable.

Compared to the past, the minimum quantitative thresholds below which the crime does not occur, disappear, while "minor" facts and "non-habitual" conducts lead to a reduction of the sentence".

Please find below the text of the new law provisions relating to unlisted companies.

« Art. 2621 (False corporate communications)
Except where provided for by art. 2622, directors, chief-executives, managers responsible for the drawing-up of the corporate accounting documents, statutory auditors and liquidators, who, in order to obtain an unfair profit for themselves or for others, in the financial statements, reports or in other corporate communications addressed to shareholders or to the public and provided by the law, intentionally provide relevant material facts that are untrue or omit relevant material facts related to the asset and liability statement, to the economic or financial situation of the company or of the group it belongs to, whose disclosure is required by the law, in a way concretely suitable to mislead other people, shall be punished with imprisonment from one up to five years.
The same penalty applies even if the false statements or omissions regard assets held or managed by the company on behalf of third parties».

«Art. 2621-a (minor facts)
Unless they represent a more serious crime, the imprisonment from six months to three years is applied, if the facts set out in article 2621 are minor, taking into account the nature and the size of the company and the modalities and effects of the conduct .
Unless they represent a more serious offense, the same penalty provided for in the previous paragraph shall apply when the facts as of article 2621 regard companies that do not exceed the limits specified in the second paragraph of article 1 of the Royal Decree of March 16th, 1942, no. 267. In this case, the offense can be prosecuted following the lawsuit brought by the company, the shareholders, the creditors or other recipients of the company communication.

Art. 2621-b (Non-punishability based on particular limited relevance of the fact)
For the purposes of non-punishability based on particular limited relevance of the fact, as of article 131-bis of the criminal code, the judge mainly assesses the extent of any damage caused to the company, to its shareholders or to creditors and subsequent to the facts as of articles 2621 and 2621-bis».

POLICY AND STANDARD PRACTICE

Other policies to be pointed out

The following policy issued by the Italian Revenue Agency over the past few weeks shall be pointed out:

- Resolution no. 19 of May 6th – explanations and updating regarding the tax transaction and the reasons for the indebtedness crisis.
- Resolution no. 52 May 26th – Rules for the allocation of tax values in case of split transactions with exchange.

JURISPRUDENCE

Non-application of conventional remunerations of expatriates (Provincial Tax Commission of Macerata, judgment no. 67 of March 3rd, 2015)

In the field of the business dynamics concerning the secondment of employees abroad, the conventional tax regime, ruled by art. 51, paragraph 8-bis, of the TUIR (i.e. Income Tax Consolidation Act) is certainly recurrently used.

As is well known and briefly, such regime introduced by the Italian Law no. 342/2000, provides, when specific requirements exist, the determination of the IRPEF taxable base of the expatriate worker on a flat-rate/conventional basis rather than on an analytical basis.

Given the noticeable "laconic" nature of what is provided by the law, over the years various resolutions of the Italian Revenue Agency have provided explanations on both theoretical and practical aspects: for example, let's consider the recent Resolution no. 48/E of July 13th, 2013, which (after 12 years) explains the method for the calculation of the IRPEF credit for those taxes paid abroad in case the conventional taxation is used.

One aspect that has not been analysed so far, except by the doctrine, regards the distortions in taxation that the regime of favour may determine.

Considering that, if the conditions of law exists, it seems that tax regime has to be obligatory applied (it is not, in other words, an optional regime), there may be situations where its application may lead to the fact that the worker is subject to taxes higher than those resulting from the application of the ordinary tax regime: such situation is interpreted as abnormal and distortive, since the stated purpose of the legislation aims at promoting tax relief.

Let's consider a case which occur quite often, in which specific production sectors taken into account by the annual decree issued by the Italian Mystery of Labour and Social Policies, the conventional remuneration shall be determine in an amount being higher than the effective one, even after taking into account any possible benefits paid to the employee in case of expatriation.

In such cases is it legitimate to request the non-application of the conventional regime? This question is indirectly answered by the case law, with the judgment no. 67 issued on March 3rd by the Second Section of the Provincial Tax Commission of Macerata.

The case dealt with by the judge concerned a request for tax refund put forward to the Italian Revenue Agency by a worker employed on a continuous basis by his company at a production site abroad, on the assumption of a wrong application of the ordinary tax regime rather than of the conventional one.
More in detail, the reason for the dispute was focused both on compulsory application of the conventional regime and on the ways to count an indemnity agreed with the worker because of the inconvenience of working abroad.

Even if the case in question occurred in terms which are slightly different from the topic being analysed here, the Tax Commission of Macerata, however, has set out some principles which are valid in a broader sense.

The judge has, in fact, pointed out that any tax legislation shall always be interpreted in the light of constitutional requirements (the reference is, in particular, to art. 53 which regulates the tax obligations of citizens based on their ability to pay): in the light of this principle it is necessary that the taxation can only be based on the income actually received by the taxpayer and not on a conventional remuneration being higher.
Arguing the matter from a different point of view, the judge stated, we would be facing a blatant violation of the constitutional provisions, imposing a taxation based on an agreement that produces distortions on the taxpayer.

The conclusions reached by the judge of Macerata appear to be important where they do not determine the automatic and necessary application, purely and simply, of the conventional tax regime, but regard the compliance (to be checked case by case) with the more important principle related to the ability to pay as a limit to its applicability.

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.

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Contacts
De Luca & Partners
Largo A. Toscanini, 1
20122 Milan
Tel. +39 02 365 565 1 Fax +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 1 Fax +39 02 365 930 00 email: info@hrcapital.it
www.hrcapital.it

Ruling of the month

Compromising relationships with customers justifies dismissal.

(case followed by Vittorio De Luca and Valentino Biasi, attorneys-at-law)

The Milan Court, Labour Section, Judge Locati, with a ruling of 30 April 2015 made a decision in a proceeding started by a manager who challenged a dismissal for just cause following a disciplinary proceeding started by the employer (i.e. an asset management company) for having seriously compromised relationships with investors of the managed investment funds. Initially in his appeal, the manager had asked the judge to declare the dismissal null and void since it was served as a reprisal, to ascertain its injurious nature and sentence the employer to reinstating the manager, payment of his remuneration from the dismissal to reinstatement, as well as compensation for professional damages and non-pecuniary damages. Subordinately, the manager had asked for the employer to be sentenced to payment of the notice and supplementary compensation pursuant to the manager national labour contract applied to the employment. To support his allegations the manager also sustained that the dismissal was unlawful given connection of the disputed events with the prerogatives of the employer's board of directors (in this case the position of CEO held by the same) and not those of manager. The Company sustained that the claims made against the manager were specific, timely and related to both the prerogatives of the CEO and manager. The Judge rejected the appeal holding that *all of the charges against the manager* were proven and the *seriousness of such did not allow continuation of the employment*. The Judge also made a decision regarding the manager's allegations concerning the involvement of the employer's Board of Directors' prerogatives in the disputed facts and not those of the manager. On this point, the Judge sustained that, even if *the facts used as a foundation for the various disputes could in part coincide* (editor's note with the office of CEO and position of manager), the same needed to be evaluated solely from an employment law standpoint and thus in relation to the possible injury to the ***relationship of mutual trust that the disputed conduct had caused***.

Press review

➢ Court of Cassation, 16 March 2015, no. 5173: dismissal for justified reason only for unfavourable and not contingent situations

With its ruling no. 5173 of 16 March 2015, the Cassation Court returned to propose an interpretation, regarding the grounds for dismissal for justified reason which are not expressly contained in the law.
Article 3 of Italian Law no. 604 of 1966 provides the following definition: "*Dismissal for justified reason with notice is determined (...) by reasons connected with production activity, organisation of work and its regular functioning*". With its ruling the Court of Cassation goes beyond compliance with the requirements of the law, adding an additional element: "*(...) dismissal for justified reason (...) is determined not by a generic downsizing of the company's activity, but by the need to proceed to eliminate the job (...) which cannot be merely instrumental for an increase of profit, but must be aimed at facing unfavourable and not contingent situations*."
The above principle, which the law of the Supreme Court had already upheld in the past and which is again proposing, we feel may be in conflict with the constitutional principle of free economic activity and the consequent unchallengeable nature of company decisions.

➢ Dismissals for economic grounds and reinstatement

Article 3, paragraph 1 of Legislative Decree no. 23/15 establishes that if it is ascertained that the grounds do not exist for dismissal for justified objective motive "*the judge declares the employment terminated on the date of dismissal*" and sentences the employer to pay an indemnity equal to two months salary of the last remuneration for the calculation of post-employment benefits for each year of seniority at the

company, with a minimum limit of 4 months and maximum limit of 24 months salary.
It should be noted that in terms of dismissal for justified objective reason, the law contains an reinstatement obligation, whereby the employer must prove the absence within its organisation of alternative positions for workers who are dismissed due to elimination of their jobs.
According to some commenters, this legal position should no longer be applicable for cases of dismissal of workers hired with the so-called contract with increased protection based on seniority and consequently, the reinstatement obligation should only be applicable in cases where the applicable protection is that contained in article 18 of Law 300/70. We feel that it is unlikely that the law will change directions on this, at least for the first years of application of the new regulations.

- **Court of Cassation, 30 April 2015, no. 8784: legitimate dismissal for use of time off pursuant to Italian Law 104/92 to go dancing**

With its ruling no. 8784 of 30 April 2015, the Cassation Court declared dismissal of a worker for just cause legitimate in the case of a worker who had requested time off to assist a severely disabled mother as per Italian Law 104/1992 and who, in fact, had gone to a dance. According to the judges the employee's conduct was in conflict with the so-called minimum ethics and therefore the maximum dismissal punishment was justified including in the absence of previous posting of the disciplinary code. With this ruling the Supreme Court once again declared war against employees who, to satisfy personal needs, including futile, abuse time off allowed by law to assist disabled family members. Moreover, as cited by the same Supreme Court, improper use of this time off entails a cost for society on the whole, since it is paid by social security, as well as for the employer.

- **Pensions and the ruling of the Council of State**

With its ruling no. 70 of 30 April 2015, the **Constitutional Court** declared article 24, paragraph 25 of Italian Legislative Decree 201/2011 (so-called Manovra Salva-Italia), converted by Italian Law no. 214/2011 illegitimate, specifically the part which had frozen revaluation of pensions of amounts greater than 1,700 euro gross for the 2012-2013 two year period. According to the Court, with this provision, "*the limits of reasonableness and proportionality have been crossed, with consequent detriment to the acquired right to a pension and with irreparable damage to the expectations legitimately held by the worker regarding retirement*". Therefore affected retirees must be awarded a revaluation for the aforesaid period based on the original law. However, the day after this ruling, INPS (Italian Social Security) promptly explained with message no. 3135/2015 that any requests for re-establishment of pensions submitted for this purpose will not be granted for the time being, because of a lack of specific coverage as per article 81, paragraph 4, of the Italian Constitution. INPS has thus bought time and turned the problem over to the Government so it can adopt the appropriate legal initiatives. And an initial, although partial, prompt response from the Government did not fail to raise issues, particularly with trade unions. Last 18 May the Government gave the green light to a law decree on pensions, in an attempt to modify the obligations to reimburse the involved retirees. Specifically, in the decree published on 21 May 2015 in the Official Gazette and now waiting to be converted into law by the Parliament, a complete reimbursement is allowed for the lower pensions involved and a progressively decreasing one down to zero for pensions equal to 3,200 euro gross per month.

- **Court of Cassation, 6 May 2015, no. 18667: when a contract is illegal**

With its ruling no. 18667 of 6 May 2015, the Court of Cassation confirmed that, for the allegation of an illegal contract it is not sufficient to prove that the customer gave orders to the contractor's employees but it is necessary to investigate the contents of such orders and prove that they regard the provision of work actually performed. This is true if the instructions given to the "contracted" workers only regard the result of their work (which in itself may be the actual subject matter of the contract), without

resulting in grounds for censure and punishment under the law. Specifically, according to the Supreme Court's opinion, the crime of illegal contract occurs when there is simultaneous proof of (i) actual lack of existence of a company risk; (ii) failure to organise, no matter why, the necessary equipment for performance of the contract; (iii) absence of organizational and direct power over the workers, not excluding, per se, any orders given by the customer. This clarification of the principle is worthy of note because it will not only overturns the dynamics of criminal investigations of contracts for services by labour inspectors and the Courts but it will also improve the organisation of labour intensive contracts. Basically, a clear warning to lower court judges not to adhere to preconceived accusatorial arguments.

- **Employers liable for negligence in cases of psychological harassment**

With its ruling no. 10037/15, the Court of Cassation returned to make a decision on the issue of psychological harassment and the relative liability of the employer. The Supreme Court connects the employer's liability for injury from psychological harassment performed by an employee to a form of negligence due to the fact that no measures were adopted aimed at eliminating the performance of the harassing initiatives. The employer's liability is not excluded in the case where such initiatives were performed by an employer with a higher rank than the victim. The Supreme Court underlined that the duration and reiteration of the persecutory actions, combined with the procedures used by the higher-ranking manager to implement the harassing conduct, were such as to consider that the employer was aware of the hostile initiatives that the victim was subjected to.
The phenomenon of psychological harassment has been the subject of many studies and research both from a medical-scientific standpoint, as well as from a strictly legal viewpoint. In terms of the Italian Civil Code, the incidence of harassment on the job is essentially due to violation of article 2087 of the Italian Civil Code. This provision forbids the employer from directly engaging in conduct that is injurious to the psychological and physical well-being of employees, but the employer also has the obligation to prevent, discourage and neutralise any harassing behaviour undertaken by higher ranking employees, people in charge or other employees in performing jobs.
In light of the above, we feel it would be useful to stipulate company and/or territorial agreements, including on a voluntary basis, with codes of conduct and ethics as a guide for the conduct of employers – including based on the principles of social responsibility –, of workers and all involved subjects, in order to improve the levels of protection provided by law.

- **Contracts with increased protection based on seniority and statute of limitations**

The enactment of the contract with increased protection based on seniority raises interpretation questions regarding the statute of limitations for remuneration due for employment.
The Civil Code provisions state that the statute of limitations starts from the day where the right can be exercised, however, in employment relations the employee's inferior position in relation to the employer has been considered, which would not guarantee the full freedom of exercising the rights during the employment. In other words, the employee would waive his rights due to fear of repercussions.
Due to the above, following certain rulings from the Court, in the past the law had created a dual regime for the statute of limitations, differentiating based on the degree of employment "stability": immediate start for employment guaranteed by real protection, and starting only after termination of employment for employment not backed by this type of protection.
Starting with the Fornero Reform, the introduction of the indemnity protection based on article 18 of the Labour Statute had resulted in problems in applying this principle and it was hoped that the Government, Court or law would promptly intervene.
This occurred with Italian Legislative Decree 23/2015 for employees hired on or after 7 March 2015, which decreases the real protection which only covers cases where the alleged material fact does not exist and cases of wrongful dismissal.
We feel that this additional limitation on the application of real protection will result in application of the

principle whereby the *dies a quo* of the statute of limitations starts from termination of the employment for all types of employment regardless of the protection they are covered by.

TAX DEADLINES – JUNE 2015

- This list is not comprehensive of all tax deadlines; the most recurrent administrative deadlines have been omitted
- From January 1st, 2014, the compensation limit has increased from Euro 516,456 to Euro 700,000.

The limitations applicable to compensations shall be reminded, as follows:

- in terms of VAT (see Tax News 2010/09);
- in terms of income tax and IRAP (Regional Income Tax) (see Tax News 2014/9);
- in the presence of expired tax debts recorded in the debtors' list, for amounts exceeding Euro 1,500 (see Tax News 2009/10, 2009/12 and 2010/1).

Tuesday, 16th

Payments of IRES – IRAP – IRPEF

Except for (the usual) "last minute" extensions, by such date, individuals, partnerships and corporations (with fiscal year coinciding with the calendar year), pay the balance 2014 and the first payment on account 2015 (if due) of:

- IRPEF and local surcharges;
- IVIE (tax on the value of properties located abroad) and IVAFE (tax on the value of the financial assets abroad);
- substitute taxes (i.e. Flat rate tax);
- INPS (i.e. an Italian Pension fund) contributions – separate management;
- IRES;
- IRAP;
- Chamber of Commerce contributions.

It is possible to carry out the above mentioned payments by July 16th with a surcharge of 0.4%, and the amounts can be paid, at the taxpayer's option, in instalments.

IMU and TASI – Payment of 2015 first instalment

Deadline for the payment of the first instalment of the Municipal Tax (IMU – i.e. tax on buildings) and TASI (i.e. Tax on Indivisible Services).

It shall be reminded that such taxes are paid in two instalments (expiring on June 16th and on December 16th), the first of which is equal to 50% of the tax due calculated on the basis of the rate and of the deductions expected for 2014, while the second instalment is due as balance payment for the remaining amount.

Tuesday, 30th

Revaluation of participations and land – deadline for the payment of the substitute tax

For those taxpayers who have decided to carry out the tax revaluation of the building land and of the land to be used for agricultural purposes or of participations not traded on the regulated markets, owned as at January 1st, 2015, the term for the payment of the only instalment or of the 1st instalment of the substitute tax (equal to 4% or 8%, according to the different cases), as well as the term for the swearing (by the professional in charge) of the related estimated expert's report, expires.

For those taxpayers who in 2013 or in 2014 have carried out the tax revaluation of the building land and of the land to be used for agricultural purposes or of the participations not traded on the regulated markets, the term for the payment, respectively, of the second and of the third substitute tax instalment expires, in case the payment by instalments had been originally chosen.

IMU and TASI – Return for 2014

By the above mentioned date, the returns regarding real estate amendments occurred in 2014 and which have led to a change in the tax debt should be sent to the related Municipalities.

The occurred amendments "certified" by a notary deed (i.e. trading) and those that determine an increase in taxation compared to the previous period are not subject of the return.

The return must be sent to the Municipality by registered letter.

SPECIAL FOCUS

New package of measures to make the Italian tax system more competitive

On 21 April 2015 the Italian Government issued a package of measures (*International Tax Decree* and *Certainty Decree*) which significantly changes the tax rules applicable to cross-border operations and gives a specific definition to the concept of abuse of law and tax avoidance.

The whole package is even designed to attract foreign investments in Italy, to support the reorganization of existing businesses and to strengthen the competitiveness of Italian companies.

This document provides an overview of the measures included in the above-mentioned Decrees.
In detail, the *International Tax Decree* highlights topics such as:

- ✓ ***Advanced pricing program***: in order to give more impulse to the mechanism at hand, the draft legislation (*Decree*) in article 1 extends the scope of Advance Pricing Agreements ("APA") in order to cover not only transfer pricing issues but also deal with the attribution of profits to PEs. Further, through the new APAs program the taxpayer can define the tax base in the case of inbound and outbound migration. According to the *Decree* the new rulings will be in force for five years, with the

possibility to roll outcomes of APAs back to the beginning of the period in which the rulings have been requested, without incur any penalty. A different ruling has been drafted with article 2 of the *Decree*, for situations where taxpayers make investments of at least € 30 million, with a significant impact on employment. In this case, the scope of the ruling covers the pre-definition of tax consequences for investors according to their business plans and in the case of any merger or acquisition, and gives assurance on the absence of abuse of law as the operation has been structured.

- ✓ ***Blacklisted dividends***: article 3 of the *Decree* confirms full taxation of blacklisted dividends in the case of direct participation of an Italian company in the capital of the underlined subsidiary. In the case of indirect participation, the full taxation will only apply if the underlined subsidiary is held through an intermediate whitelisted company.

- ✓ ***Interest deduction:*** Italian group controlling foreign entities can no longer consider, for the purposes of computing the 30% EBITDA cap to net interest expense deduction, the amount of "theoretical" foreign 30% EBITDA. However, according to article 4 of the *Decree*, Italian entities will be allowed to include dividends received from such foreign subsidiaries in computing the maximum interests deductible amount.

- ✓ ***Blacklisted cost rules***: taxpayers will be now entitled to a deduction of blacklist costs to the extent that these costs have been effectively incurred. However, a free-deduction is limited to the fair market value of the goods and services received. For a full deduction, according to article 5 of the *Decree*, the taxpayer will need to request a ruling proving that the operation has been put in place for a real economic interest and that the transaction has been actually carried out.

- ✓ ***Group tax consolidation***: in light of the ECJ Sentence C40/2013, article 6 of the *Decree* introduces the possibility for two (or more) Italian entities to opt for the tax consolidation regime, being both controlled by a foreign parent resident in any EU country or any qualifying EEA country. At the same, the new provision introduces the possibility for Italian PEs of a foreign company to adhere to this regime, if specific conditions are met.

- ✓ ***Controlled Foreign Companies***: according to article 8 of the *Decree*, a specific ruling to obtain exemption from black-list CFC rules is no longer mandatory. However, in the case of tax audits the taxpayer will need to submit the specific documentation to prove the existence of the *conditions* for the exemption to apply (either "business" test or "subject to substantial tax" test). Similar provision applies to CFC whitelisted, where a ruling is no longer mandatory. Furthermore, the *Decree* repeals the mandatory ruling procedure for affiliated black-list companies (interest of at least 20%, or 10% for listed companies).

- ✓ ***Outbound and inbound migration:*** the *Decree* extends the tax deferral regime also to the transfer of Italian PEs of a foreign company to any EU country or any qualifying EEA country, and to cross-border mergers and acquisitions which realize the outbound migration of Italian PEs. On the other side, where inbound migration is put in place by foreign whitelisted companies, the tax base of the assets and liabilities will be considered at fair value market. However, in the case of foreign blacklisted companies the tax base of the assets will be the lowest among the acquisition cost, the

accounting cost and the fair value. Instead, for liabilities the tax base will be the highest of the three above-mentioned criteria;.

- ✓ ***Branch exemption***: article 14 of the *Decree* introduces the "all in-all out" regime to exempt the income generated by foreign PEs of an Italian company. According to the new provisions, the election is on a permanent basis and for all PEs abroad of the resident entity. At the same, tax losses realized by foreign PEs will be no longer relevant for tax purposes in Italy.

The *Certainty Decree* contains specific principles and definitions of "abuse of law", reviews the requirements to double the ordinary statutes of limitations for tax assessments and introduces specific standards to apply for the "tax compliance program" with the Revenue Agency (through which, by the others, taxpayers can avoid any claim with tax authorities if they give proof to adopt an adequate internal audit model to manage their tax risks).
Under the new rules, abuse of law exists when a transaction "*lack of economic substance, realizes an undue tax advantage and the tax advantage is the main target of the operation put in place*".

Moreover, the *Certainty Decree* while reviewing the new requirements for statutes of limitations subjects the "double of terms" to situations where, before the expiry of the ordinary terms, tax authorities have noticed of a tax violation to the public prosecutor.

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

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