RSM PALEA LAURI GERLA

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

TAX NEWS

2015 – 6

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LAWS AND REGULATIONS

VAT refunds – the new form of surety policy has been issued (Italian Revenue Agency, Provision dated June 26th, 2015)

Following the significant changes recently introduced in the context of VAT refunds (see, to such extent, what mentioned in the Tax News 2014/12), the new form for the issuing of the *surety policy* or *bank guarantee* for the carrying out of these refunds has been approved.

The new form has to be used by those taxpayers who request the VAT refund in accordance with articles no. 30 and 38-bis of the Italian Presidential Decree no. 633/72 and who, if required to issue a guarantee, intend to grant it through surety policy/bank guarantee (alternatively, it is possible to use Government Securities or Securities guaranteed by the Government).

The form is filled out by the Company or by the Bank issuing the guarantee and it has to be delivered to the Italian Revenue Agency or Equitalia (i.e. a state-owned Tax Collection Agency) Office which has requested the related submission for the issuing of the refund.

The new form can be freely downloaded from the website of the Italian Revenue Agency and can be already used. However, it will be possible to use the previous forms up to December 31st, 2015.

POLICY AND STANDARD PRACTICE

Other policies to be pointed out

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

- Resolution no. 22 of June 9th – in-depth analysis of the news 2015 regarding the calculation of IRAP;
- Resolution no. 23 of June 9th - clarifications on the voluntary disclosure news.

JURISPRUDENCE

The "POS" (i.e. Point of sale) terminal makes the life of tax evaders hard (Court of Cassation, judgment no. 13494 of July 1st, 2015)

Having purchased goods/services from a tradesman, without having received the receipt for tax purposes, despite having paid for the product with a "debit card" or "credit card" might have happened to anyone once in life.
In such cases, the question of how it is possible to evade the profits of an activity – against a payment traced - has probably arisen.

This reflection is connected with the judgment being mentioned this month and dealing with a similar story.

Following a tax audit, the Italian Revenue Agency challenged the fact that a hotel company failed to declare higher revenues, basing its own assessment on the discrepancy between the declared revenues and those resulting from active transactions arising from the use of credit cards or debit cards and documented by receipts issued by proper devices.

The assessment was objected by the company stating that this alleged discrepancy did not represent a sufficient evidence to justify an assessment.

The first two judgments were in favor of the taxpayer, being provided that the Office had not given any evidence about the number of cash movements and being also stated that the presumption based on which a transaction carried out by credit card has to be necessarily connected with a not declared profit is irrelevant.

The Italian Revenue Agency has applied to the Supreme Court and this latter has overturned the verdict.

According to the Supreme Court, the existence of undeclared assets can be also deduced from mere presumptions, provided that these latter are "serious, precise and consistent" and the inaccuracy of the items inserted in the tax return can, in particular, arise from the incompleteness, inaccuracy and untruthfulness of the accounting records, inferred also by other documents related to the company.

According to the Supreme Court, from this principle the following shall be deduced: within the case in question the discrepancy, not specifically objected, between the amounts collected by the taxpayer through credit card and/or pos terminal and the revenues resulting from the accounting records declared by the company, integrates without any doubt a legal presumption of higher revenues corresponding to the active remittances of the credit card and debit card, in compliance with what has been stated in the field of credits on current bank accounts, unless there is the burden, by the taxpayer, to specifically prove a different destination of such credits.

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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

Onus of proof for salary differences and higher employment category

(case followed by Alberto De Luca and Francesca Tugliani)

The Milan Court, Labour Section, Judge Taraborrelli, with the ruling no. 862/2015, rejected the appeal submitted by a former employee of a Company we represent, who had applied to the aforesaid judge in order to obtain, *inter alia*, salary differences resulting from (i) recognition of a period of irregular work; (ii) recognition of a higher employment category; (iii) from having worked overtime and holidays.

Specifically, the Judge excluded every claim regarding salary differences because no complete proof had been reached regarding the hours of daytime and holiday overtime, the alleged irregular period and the higher employment category. On the last point the Judge confirming the objections contained in our defence brief, stated that (i) in the introductory act the claimed contractual levels were explained but the contractual declaratory judgement related to them was not reported; (ii) the plaintiff had not asked for application of the collective labour contract of which only an overview was attached (iii) none of the overview sheets attached to the appeal showed an indication of the base pay levels.

Press review

1) Code of contracts: outsourcing aligns with the principles of the reform

The so-called "Code of contracts", contained in Italian Legislative Decree no. 81 which became effective 25 June 2015, dedicates the entire 5th section to the outsourcing of work, which has been reinforced in a context of a complete revision of the previous laws as per the Biagi Decree (Legislative Decree 276/2003). With the specific reference to the outsourcing of short-term work, the delegated legislator, on one hand has confirmed the "acausal nature" of the same without time limits (unlike the 36 months established for a short-term contract) and at the same time has introduced new bans. With this Reform, the user no longer has the option to use this type of work or layoffs or redundancy benefits in the event of a company crisis, which were all allowed previously. However, the quotas established by the applied collective contracts remain and thus continue to play an important role in regulating these cases. Nevertheless, the new restrictions on short-term outsourcing corresponds to a "deregulation" of open-ended contract (known as staff leasing) which, even if subject to quotas identical to those for workers hired with short-term contracts (i.e. 20 percent of the number of workers with open-ended contracts on the job at the user as of 1 January of the year the contract is stipulated), the specific reasons part has been removed, which had resulted in de facto limitation on use when the Biagi Decree was in effect.

Lastly, the process for redefining the contractual provisions changed the type in question aligning the outsourcing of short-term work with short-term contract and giving greater flexibility to staff leasing as open-ended contractual type.

2) Jobs Act: project contracts superseded

The enactment of the legislative decree on the subject of overhaul of contract types has resulted in the repeal of the provisions of articles 61 – 69 bis of Italian Legislative Decree 276/2003. The aforesaid legislative provisions shall continue to be applied only for contracts existing as of that date, while it will

no longer be possible to stipulate new ones. In addition, as of 1 January 2016, for work considered "performance of work that is exclusively personal, continual and with performance procedures organised by the customer including in terms of the times and place of work" a presumption of employment shall be applied, with the sole exceptions of: (i) work governed by collective bargaining; (ii) work provided in exercising intellectual professions for which registration with a board is required; (iii) activities performed by members of administration and control bodies of companies; (v) work for amateur sports associations; (v) work for which certification of absence of employment requirements shall be requested from the commissions as per article 76 of Italian Legislative Decree 276/2003.
Overall, the interventions on project work should pursue the aim of progressively leading to superseding the contract type which, probably more than all the rest, was instrumentalised to get around the requirement of actual employment contracts.

3) Jobs Act: with the new article 4, Law 300/1970 for work instruments an information sheet is sufficient

The draft of the legislative decree on simplifications, rejected in its first draft by the Government last 11 June, enacting article 1, paragraph 7, letter f) of Law 183/2014, rewrites the text of the Workers' Statute in terms of remote controls. In its new formulation basically the trade union and/or authorisation procedure handled by the local employment office (DTI) for installation of audio-visual systems shall remain the same, while provisions will be introduced regarding work instruments. For the latter (e.g. PCs, tablets or mobile phones) no trade union agreement will be necessary, but to implement the instructions provided by the Authority for Privacy in recent years, the employer will be liable for providing adequate information on the use or the instruments and collected data as well as on control procedures. Lastly, the new text of article 4 Law 300/1970 expressly includes the option of using the data collected by the employer for all purposes connected with the employment, and thus even in terms of disciplinary issues.
The new provisions, if they are approved at the terms described above, introduce a clear simplification on the subject and bring it up to date. The reform basically entails a "modernisation" of the laws on controls, making it less restrictive compared to the normal dynamics of current company situations and, de facto, implementing legal orientations that have been confirmed progressively.
This intervention generated harsh criticism from those who consider the protection of workers' privacy weakened, which, nevertheless, is believed will be protected by the Authority, which, with its directives, will act as an attentive supervisor.

4) Jobs Act: the reform of article 2103 of the Civil Code and two cases of *ius variandi*

The Legislative Decree on contracts passed by the Council of Ministers reforms article 2103 of the Civil Code including the possibility for employers to unilaterally change a worker's job duties within the same level and contractual legal employment category.
Thus it will no longer be necessary to perform an evaluation on the equivalence of the duties for the purpose of clarifying the legitimacy of *ius variandi*.
In this sense the legal orientation has been superseded, which had become consolidated on the point, whereby to verify the employer's legitimate exercising of *ius variandi*, it was necessary to verify the actual uniformity between duties later assigned to the worker and the original duties, in terms of their concrete equivalence compared to the skills requested, professional level reach and use of the professional background acquired by the employee. This without being significant that from a formal standpoint, both types of duties are part of the same operating area.
Superseding of this orientation will certainly result in a significant reduction in the number of disputes concerning demotion, this is also based on the fact that this possibility of modification does not even require particular formalities.
A change in duties which determines a lower level, with the same legal category, will be possible in two cases: a) when it is based on a "*change in company structure that affects the worker's job*" and b) in cases

included in collective contracts.
The hypothesis in letter a) raises questions regarding interpretations which will presumably be resolved in light of the idea of objective justified reason connected in turn to "*reasons connected with production activity, organisation or work and its regular functioning*".
In the latter cases unilateral modification of duties requires complying with certain limits: it can take place only within the same category (manager, middle manager, white collar worker, blue collar worker) and must be notified in writing, or it is invalid. In addition, the worker shall have the right to maintain the current employment level and salary, with the exception of remuneration elements connected to particular procedures for performing the previous job.
Lastly, in the interest of the worker to maintain his job, acquire a new profession or improve working conditions, the possibility has been included to stipulate various agreements changing the duties, legal category, employment level and related salary, in a trade union venue before a judge or certification commissions.
This solution adopted in practice already in the past for private employment, definitively clarifies its legitimacy.
The greater flexibility introduced by the revision of article 2103 of the Civil Code changes the legal orientations into law that were reached trying to provide answers for the current job market.

5) Risk of stalemate for job on call

In the new provisions for temporary work contracts, contained in the implementing legislative decree of the Jobs Act on the overhaul of contract types, the referral to applicable "objective cases" governed by Ministerial Decree of 23 October 2004 was not spared. It in turn referred to activity of a non-continuous nature already identified by a Royal Decree of 1923. While waiting for a specific ministerial provision, the objective cases where temporary work can be used will only be those identified in collective bargaining, based on the "needs" indicated therein. The same fate also awaits call-in pay, in the cases not governed by national collective contracts. At present it appears that the provisions of Ministerial Decree of 10 March 2004 are not applicable. They had established the minimum call-in pay at 20% of the remuneration included in the applied national collective contract. While waiting for this to change, however, given the explicit reference to "*needs identified by collective contracts*" of the Jobs Act implementing decree, this legal shortcoming could be remedied by applying trade union agreements including of a territorial and/or company nature, where existing.
Regardless of the possibility of adopting this latter solution, the consequences of which are not yet completely clear, it is certain that the new provisions under consideration carry a serious risk of freezing the use of temporary work contracts in those product and sector areas where collective bargaining does not govern the objective cases for which job on call can be used and that, ironically, are those where the use of these contracts is the most widespread.

6) Jobs Act: part-time contract becomes simpler

The code of contracts brings some significant changes to laws regarding part-time work.
To cite only the most important ones, in terms of overtime the reform states that the employer's request for performance of overtime may regard more than just single days, but also weeks or months and, even without specific collective provisions, the employer can ask the employee to perform additional work compared to the reduced hours, for up to 25% of the agreed upon weekly hours of work. The worker, in turn, may refuse to perform the overtime work if he demonstrates proven work, health, family or professional training reason.
Another innovation, again aimed at simplification, regards superseding of the distinction between "elastic" and "flexible" clauses, combining both cases into a single definition of "elastic" clauses possible also in the absence of a relative inclusion in collective bargaining as long as they are signed at certification commissions.

Again the reforming interventions concerning part-time work seem aimed at simplification, flexibility and greater liberty of determination of the parties, the main principles used as inspiration for the reform of contract types.

7) Jobs Act: life-work reconciliation for improvement of employment quality

Some of the most important changes introduced by implementing decree no. 80 which became effective on 25 June 2015 and containing the measures for reconciliation between family needs and work, include the possibility of asking for parental leave to use up until the child is 12 years old, which is paid at 30% up to six years, and the possibility of using parental leave in hours, alternatively to part-time at 50%. Lastly, incentives have been included for telecommuting and second level bargaining aimed at reconciling professional life and private life as well as monthly leave for women who have been victims of violence in general. All of the interventions in question, along with the reform of contract types which we hope can support a growth in employment, should also permit an improvement in the quality of employment (mainly to support families and women), a sure sign of progress in a country.

TAX DEADLINES – JULY 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).

Monday 6th

Payments of IRES – IRAP – IRPEF taxes (subjects being beneficiaries of the extension)

(Extended) term for the payment of the 2014 balance and for the first payment on account of 2015 IRPEF-IRES-IRAP taxes and for the taxes payment expiring on the same date on which the income taxes payment term expires.
It shall be reminded that this extension only applies to those taxpayers holding a VAT number, whose activity falls within the scope of the sector studies (excluding those with revenues exceeding 5.164 million), to the shareholders of partnerships or corporations in transparency regime and to the shareholders of professional associations.

The payment can be carried out by the deadline of August 20th, 2015 with an increase of 0.4%.

Thursday 16th

IRPEF – IRES – IRAP payments (subjects not being beneficiaries of the extension)

Carrying out of the payment (with the increase of 0.4%) of the 2014 balance and of the first payment on account of 2015 IRPEF-IRES-IRAP taxes and taxes payment whose expiring date coincides with the one of the income taxes payment, to be carried out by those subjects *not* benefiting from the extension: individuals without VAT number and without participations in transparent companies fall into this category.

Thursday 23rd

(Extended) term for the submission of the 730 form

According to the extension provided at the end of June, the term for the *submission* of 730/2015 forms is postponed to the above mentioned date. The postponement of the deadline (from July 7th to July 23rd) concerns the Caf (i.e. government offices for tax assistance and information) and the certified professionals.

Friday 31st

Submission of ordinary and simplified 770 forms

Deadline for the electronic filing of the ordinary and simplified 770 forms related to the fiscal year 2014.

Submission of the VAT credit refund/VAT credit offsetting form of the II quarter 2015

By the above mentioned date, the companies meeting the requirements provided by the rules in force can request the refund or the possibility to offset the VAT credit related to the II quarter 2015.

Please note that in certain cases it is necessary to issue a specific guarantee towards the Exchequer.

In order to apply (electronically), the "TR" Vat form shall be used.

SPECIAL FOCUS

The tax reform progresses (slowly)

On June 26th, the Government has preliminarily approved the drafts of five decrees implementing five chapters of the so-called "tax proxy".

It shall be reminded that the tax proxy (analyzed in-depth in the Tax News 2014/3) aims at redefining, in many aspects, the current tax system, entrusting the government with the following:

- redefinition of the real estate cadastre mechanism;
- rationalization of the tax system;
- reforming of the right abuse discipline;
- changing of the criminal and administrative sanctions regime;
- changing of the tax dispute;
- changing of IRES, IRAP and IRPEF taxes.

Last month the "initial" approval of the new rules concerning the following aspects was issued:

- ✓ collection;
- ✓ penal and administrative sanctions;
- ✓ tax dispute.

Now the texts approved by the Government will be vetted by the different Parliamentary Committees and, in a few months (hopefully), should result in the provisions definitively approved.
Please find below a summary of the main contents, focusing on 3 of the 5 decrees approved that represent a greater interest for taxpayers.

Changes to the tax collection system

The changes to be introduced aim at creating a collection system that promotes the taxpayer's spontaneous election to fulfill the obligations regarding the payment of taxes, also through the use of wider forms of *installment payment* of the tax debts.
Among the hints offered by this first delegated decree, the following shall be pointed out:

- in case of agreed definition of an assessment notice, the payment of the amount due shall be carried out by quarterly installments (up to a maximum of 16 installments);
- a less tough policy towards those people who pay the amounts due with a "slight" delay is implemented: as a matter of fact, the principle of *"slight breach"* is introduced. According to this principle, short delays or small mistakes will not cause the automatic loss of the installment payment benefit;
- Equitalia and the collection agents will grant a deferred payment of the amounts in question, up to a maximum of 72 monthly installments, upon simple request of the taxpayer who claims to be in a temporary situation of objective difficulty: for amounts exceeding Euro 50,000, the extension can be granted only if the taxpayer provides adequate documentation;
- the benefit of paying in installments shall lapse in case of non-payment of five installments, also not consecutively (currently the limit is 8 installments);
- in case of *partial self-defense* by the Tax Authorities, the remaining amount due can benefit from the reduced sanctions in case of acquiescence;
- the collecting commission (or remuneration) reserved to Equitalia for the collection service will be reduced to 6% (today it is equal to 8%);
- the interest rate for the payment, the collection and the refunds of each tax will be possibly determined in a *unique amount,* between 0.5% and 4.5%, through a proper Decree that will be issued and updated each year.

Reform of the sanctionative, both criminal and administrative, tax system

The guidelines inspiring the text of the reform aim at:

- ✓ increasing the thresholds that determine the carrying out of tax offenses,
- ✓ tightening the penalties for those offenses that are based on fraudulent conducts,
- ✓ easing the sanctions in case of conducts which, although illegal, are not characterized by fraudulent elements and, therefore, are less serious.

Tax fraud

The framework of the penalties related to fraudulent, simulative conducts or conducts aimed at creating and using false documents is tightened.
On the one hand, the current article related to fraudulent misrepresentation by using invoices or other

documents for non-existent transactions remains unchanged: therefore, the imprisonment up to 6 years remains unchanged and the *lack* of quantitative thresholds for the carrying out of the offense is confirmed.
With reference to the fraudulent misrepresentation by using "other devices" (also in this case the offender can risk imprisonment up to 6 years) the punishment is expected for those who, in order to evade taxes,

- carry out transactions which are objectively or subjectively simulated or use tricks in order to hinder the assessment activities,
  or
- use false documents or other fraudulent means,

in order to hinder the assessment and to mislead the Tax Authorities.

The crime is carried out when, jointly;
- each tax evaded exceeds Euro 30,000;
- the total amount of the assets not subject to taxes exceeds 5% of the total amount of the assets mentioned in the tax return or, in any case, exceeds Euro 1.5 million, or when the total amount of the credits and of the fictitious withholding taxes exceeds 5% of the tax amount (or, in any case, Euro 30,000).

Misrepresentation
The threshold of criminal liability is increased to Euro 150,000 of evaded taxes (previously the amount was equal to Euro 50,000).
Besides this threshold, the offence exists when there is also a taxable amount evaded exceeding Euro 3 million (previously the limit amounted to Euro 2 million) or, in any case, exceeding 10% of the revenues total amount.

It is also provided that to the extent of determining the offence, the following is *not* taken into account:
- "incorrect" classifications;
- evaluations of "objectively existent" assets and liabilities, in relation to which the criteria concretely applied were inserted in the financial statements or in other documentation relevant for tax purposes;
- violation of the criteria to determine the relevant fiscal year;
- non-inherence;
- non-deductibility of the real liabilities.

Missed submission of the tax return
The missed submission of the tax return is considered as an offence if each unpaid tax exceeds Euro 50,000 (Euro 30,000 is the current threshold).

Non-payment of the certificated withholding taxes
The offense exists if the amount of the certificated withholding taxes not paid exceeds Euro 150,000 (instead of Euro 50,000).

Non-payment of VAT
The threshold of criminal liability, which will become equal to Euro 250,000 for each tax year, has increased: below this threshold administrative sanctions shall apply.

Undue offsetting
Based on the new law, "undue" credit offsetting for amount exceeding Euro 50,000 per year shall be punished with imprisonment up to 2 years; the penalty is increased up to 6 years in case of offsetting of

"non-existent" credits.

Administrative sanctions
The principle according to which the *sanction* must be *proportionate* to the *conduct* is codified, adjusting the former to the conduct of the taxpayer.
So, for example, in case of fraudulent conducts an increase of 50% of the sanction is provided, but, at the same time, if the higher taxes assessed amount to less than 3% compared to what is declared, the sanctions are reduced by one third.
Among the several changes, the following should be pointed out:

- in case of *failure* to submit an *annual tax return*, the basic sanction will be reduced by a half , if the return is submitted within the following year;
- subsequent to the amendment of the rules on the *letters of intent*, the sanction to be borne by the habitual exporters' providers will become fixed and won't be proportional anymore;
- for VAT purposes, delayed registrations/certifications, if *not influencing* the periodic payments, will be sanctioned in a fixed amount and not in an amount proportionate to the tax anymore;
- the administrative sanction for failure to pay the VAT by means of the reverse charge mechanism will be reduced (it will range from a minimum of 90% to a maximum of 180%).

Changes in the tax disputes and in the advance ruling
With reference to the tax disputes there are three guidelines on which the text of the reform is based:

1) the extension of the "*deflationary*" tools of the dispute;

2) the extension of the *interim protection* at the tax trial;

3) the immediate *enforcement* of the judgments for all the parties.

In order to reduce the huge quantity of tax disputes, the tool of *mediation* will be developed. This latter will be extended to all disputes, regardless of the tax authority, therefore including the local authorities disputes: the quantitative limit currently provided remains in force (those disputes with a value not exceeding Euro 20,000 are subject to mediation).

The tool of *reconciliation* shall apply also to the rehearing (up today reconciliation is only possible within proceedings of first instance), and the so-called "interim protection" will be extended to all stages of the tax trial. "Interim protection" means the possibility to request the *suspension of the tax collection* until the judgment is issued and, therefore:

- the taxpayer may require the suspension of the contested act in the presence of a serious and irreparable damage;
- the parties can always ask for the suspension of the effects of the judgment, both at first instance and appeal, as is provided for in the Italian Code of Civil Procedure.

The judgments will become "executive": the immediate enforcement of the judgments will concern those ones having object the appeal against a notice of assessment or the return of taxes in favour of the taxpayer.
With regard to the enforceability of the judgments *in favour of the Tax Authorities*, the mechanism of "fractional collection" of the tax will remain in order to avoid a worsening of the taxpayers' situation: for the immediate enforcement of the judgments *in favour of the taxpayer*, it is provided that in case of payments related to amounts exceeding Euro 10,000 a proper guarantee can be requested. The burden

of this latter shall be carried by the party who will definitely lose his case.

Ruling

The decree, in line with the provisions of the delegated law, aims at rationalizing the ruling (i.e. the possibility for the taxpayer to ask in advance the Tax Authority's opinion about the tax consequences of certain transactions/situations).

Therefore, 5 categories of ruling are provided:

- ✓ ordinary ruling (request of an opinion in case of objective uncertainty on the interpretation and application of tax rules);
- ✓ qualification ruling (request of a proper tax qualification of a given situation);
- ✓ evidential ruling (request of the possibility of applying/non-applying/accessing specific regimes, such as those relating to the deductibility of "black list" costs, of "shell companies", etc. ...);
- ✓ anti-abuse ruling;
- ✓ disapplication ruling.

For all the ruling the *tacit consent* rule is provided. Therefore, if a response is not received by the expected deadline (varying between 90 and 120 days, depending on the cases) the solution proposed by the taxpayer becomes valid. The answer to the ruling, written and reasoned, binds the Tax Authorities with exclusive reference to the matter in question and only to the applicant.

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

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