RSM PALEA LAURI GERLA

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

TAX NEWS

2015 – 9

RSM

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LAWS AND REGULATIONS

Voluntary Disclosure – extension of the terms for the election (Italian Legislative Decree no. 153 of September 30th, 2015)

The "regularization of foreign capital", better known as Voluntary Disclosure, is proceeding apace.
The entry into force of the legislation, together with the various amendments of the national and international rules, which basically put an end to the bank secrecy behind which assets and income concealed from the tax authorities lurked, has led to the fact that such regularization has been elected by a lot of Italian taxpayers.
Also in light of such a huge amount of people electing this procedure (and also taking into account that many operational explanations were provided by the Italian Revenue Agency only in August), it was thus agreed to extend the deadline for the application to have access to the above procedure from September 30th to November 30th, 2015.
Likewise the deadline for the submission of the accompanying report and of the related documents to the Italian Revenue Agency (new deadline: December 31st, 2015) has been extended.
Finally, the Italian Revenue Agency has now a new and only deadline for the payment of the taxes and of the sanctions related to the procedure (December 31st, 2016).

For further information please see the Tax News 2014/12 and 2015/1.

Abuse of the law – green light to the new legislation (Italian Legislative Decree no. 128 of August 5th, 2015)

The work of approval of the tax reform implementing decrees, an issue repeatedly addressed in the Tax News of the last two years, continues.

Since October 1st the new discipline ruling *the tax avoidance/abuse of the law*, which completely replaces the previous provision of art. 37-bis of the Italian Presidential Decree no. 600/73, is fully effective.

Reserving a more detailed analysis of the news in an upcoming issue of the Tax News, it shall be pointed out that according to the new general rule (contained, not surprisingly, in the "Statute of the taxpayer's rights"), *one or more transactions not bearing an economic nature, which, despite formal observance of the tax rules, essentially achieve undue tax advantages, represent an abuse of the law.*

These transactions cannot be objected in front of the Authorities, which disregard the advantages, determining the taxes on the basis of the rules and principles evaded and taking into account the amount paid by the taxpayer as a result of such transactions.

Among the most significant news, it shall be pointed out that the new text aims at recognizing, as physiological, those situations that in the past, based on the previous text of the law, often encouraged the Italian Revenue Agency to challenge (in a very aggressive way) transactions that were lawful.

The validity of transactions, which are based *on valid reasons bearing an extra-tax and not marginal nature* (also of *organizational or management* character) even if they lead to a tax advantage, is now recognized; moreover, the possibility for the taxpayer to *freely choose* among the different optional regimes offered by the law and among the transactions involving a different tax burden is expressly recognized.

Last but not least, it is now established that the abusive transactions do not give rise to illegal acts which

are punishable under the criminal-tax laws.

FOCUS ON EMPLOYMENT

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Ruling of the month

The employer's disciplinary power and proportion of penalties compared to the accusation
The Milan Court, Employment Section, with her sentence, rejected an appeal submitted by three employees of our Client, who had challenged some conservative disciplinary sanctions inflicted on them (specifically suspension from work and pay), considering them disproportionate since the employer (i) had tolerated their minor breaches for years and (ii) had given them a warning for identical errors. The Judge did not agree with the findings of the plaintiffs "*since as admitted in the same appeal, the company in the face of the plaintiffs' errors, evidently the result of a lack of effort in performing their work, had first punished their negligent conduct with a warning and only after repetition of the same error, inflicted the suspension of work and pay*". In the ruling the Judge also explained that the fact that the company had tolerated the plaintiffs' errors "*evidently to show faith in the workers for the future (...) did not exempt the plaintiffs from the obligation stated in article 2104 of the Italian Civil Code to correctly and diligently perform their jobs*".

LAWS

- **Jobs act: between phase two and reform drafts**

The first phase of the implementation of Jobs act is drawing to a close with the publication of the remaining 4 legislative decrees on 23 September 2015 in Italy's Official Gazette. It started 6 months ago with the contract with increased protection based on seniority. Phase two is set to begin where the Ministry of Labour will be asked to adopt implementation measures for the new legal provisions for a

total of around 60 decrees. Subsequently, the Government's attention should turn to review the rules regarding representation and bargaining. Prime Minister Matteo Renzi made some important statements in this regard. He said that he hoped social partners would reach an agreement for a reform on the union negotiating system which should pursue two fundamental aims: (i) alignment of the Italian system with that of the most important European countries, which guarantees the possibility for the company contract to not only deviate from, but even replace the national contract and (ii) the definition of new representation requirements for trade unions.

- **Remote controls and the "new" art. 4 of the Workers' Statute**

The Legislative Decree containing the provisions regarding employment and equal opportunity, published in the Official Gazette 23 September 2015 that became effective on 24 September, has rewritten art. 4 of the Workers' Statute regarding remote controls. Specifically, employers have been given the possibility to collect information (i) from instruments used by workers to perform their jobs and (ii) from recording devices for entry and attendance without a trade union agreement or administrative authorisation (confirmed instead for audio-visual systems and other instruments used for remote control of job activity). The only obligation is to comply with privacy laws. Information collected in this manner can be used for all purposes connected with employment, including disciplinary. It should be noted that a careful reading of the law indicates that the companies will be exempt from the above authorisation procedure within the above limits but, give the aforesaid information obligation, they will not be relieved from preparing (or revising) company policies which introduce precise rules on the use of work instruments, as well as issuing suitable information notices pursuant to art. 13 of Italian Legislative Decree no. 196/2003.

CASE LAW

- **European Court of Justice: for workers with no habitual place of work, the home – customer journey is considered working time**

The European Union Court of Justice – asked to rule on the EU directive no. 2003/88 concerning working time – established with its decision on 10 September 2015 issued for case C266/14, that journeys by employees with no fixed or habitual place of work (so-called travelling workers), from their homes to that of their first or last customer, designated by the employer, fall into the case of "working hours". The Judges decided based on the assumption that the workers, within the timeframe of their job, are at the employer's disposal, and must follow the employer's instructions and thus cannot pursue their own interests.

- **Cassation Court September 1st, 2015: succession of contracts and illegality of probation period**

With its ruling no. 17371 of 1 September 2015, the Cassation Court established that a probation period cannot be included in the employment contract, if the hired employee had already performed an identical job at a different company, but that company had had the same contract. The judges further stated that regarding this principle, it was completely irrelevant if the jobs had a different name: what counts, are the actual contents of the duties given to the employee. Based on this, if the contents remain unchanged in the transfer from old to new employer – contractor – it is not possible to include a second probation period. Worthy of note is the explanation provided by the judges, according to which in cases of succession of contracts, this principle is only valid if the sector collective contract excludes the possibility for the enterprise taking over to hire personnel of the old enterprise in the same jobs with probation period.

- **Cassation Court August 7th, 2015: the worker and refusal to work on midweek holidays**

With its ruling 16592 of 7 August 2015, the Cassation Court declared disciplinary sanction null, specifically a fine, imposed by a clothing company on a salesperson who did not go to work the day of Epiphany, which

at the time was during the week. According to the Cassation Court the worker, in accordance with article 2 of Law no. 260/1949, had the complete right to be absent on the occasion of midweek holidays regardless if religious or government, the only exception being in the presence of an agreement between the parties. What is more surprising is that the Supreme Court considered this principle applicable even when there is industry collective bargaining, as is the case here, which allows the employer to demand work even on holidays.

PRACTICES

➢ CCNL: negotiations for 23 worker categories to start

Autumn 2015 looks like it is going to be a hot one as negotiations are set to start for the renewal of 23 different national collective contracts. The renewal of the most important contracts includes the metalworking sector and chemical-pharmaceutical industry. The negotiations will take place in a context where important employment-related legal reforms have occurred that have created more than a little tension within the Trade Unions.

➢ Laws overhauling contracts: relaunch of second level contracts

With the enactment of the "*Laws overhauling contracts*", namely Italian Legislative Decree no. 81/2015, a new phase is starting in contractual dynamics and trade union bargaining. There is a significant expansion of the areas where second level agreements can deviate from the general rules of various contractual regulations thus allowing employers to adapt them to the company realities. One example of this is article 51 of the Decree, which puts national agreements and company (or territorial) agreements on the same level, as long as they are signed by the most represented trade unions on a national level and – in the case of company agreements – by their trade union representatives or joint trade union representatives. Thus the second level collective contract will become the privileged venue for legalising flexible work.

SPECIAL FOCUS

New rules for the international taxation of the companies

On September 22nd the Italian Legislative Decree no. 147/2015, implementing the tax delegation in the field of international taxation, was published in the Official Gazette, becoming State law.

There are many and important news contained in the "internationalization decree": please find below a brief summary of the most interesting and frequent provisions for companies, reserving to give further details when the Italian Revenue Agency will issue the expected resolutions explaining these news.

Advance agreements for companies carrying out international activities

The "international ruling", existing since 2003, is substantially changed.
According to the news introduced, it is now expected that companies with international activities have access to a procedure aimed at entering into *advance* agreements, with main reference to the following areas:

- advance definition in cross-examination of the methods for the calculation of the normal value of intercompany transactions *(transfer pricing)* and of the output or input values in case of transfer of tax residence;

- application to a concrete case of provisions, also resulting from an agreement, concerning the allocation of profits and loss to the permanent establishment of a company or resident entity in another State or to the Italian permanent establishment of a non-resident subject;

- advance assessment of whether the requirements defining a permanent establishment located in the State's territory exist or not;

- application to a concrete case of provisions, also resulting from an agreement, concerning the delivery or receipt of dividends, interest and royalties and other income to or from non-resident subjects.

The advance agreements bind the parties for the tax years during which they are entered into and for the four subsequent tax years, unless there are changes in the factual or legal circumstances being relevant to the agreements signed and to the agreements resulting from the same ones: if the factual and legal circumstances on which the agreement is based occur for one or more of the tax years *preceding the entering into* (but not prior to the one existing on the date of the application submission), with reference to those tax years, the possibility for the taxpayer to benefit from the retroactive effectiveness of the agreement itself is granted.

The request for advance agreement is submitted to the competent Italian Revenue Agency Office, according to what will be ruled with an upcoming provision of the Director of the above Agency (to be issued by January 5th, 2016). In this same provision, the way in which the competent Office will check the compliance with the terms of the agreement and with the occurred change in the factual and legal conditions on which the agreement is based will be defined.

Ruling on the new investments

Companies wishing to make investments in Italy:

- amounting to not less than 30 million euro,

- with "significant and lasting" implications for the employment,

can submit to the Italian Revenue Agency a request for ruling concerning the *tax treatment* of their investment plan and of any extraordinary assumed transactions for its realization.

The advance assessment about the possible absence of the tax law or tax avoidance abuse, the existence of the conditions for the non-application of anti-avoidance provisions and the access to these possible regimes or rules provided by the tax legislation can also be the subject of the request.

The written and motivated answer of the Italian Revenue Agency is given within 120 days, being subject to an extension of further 90 days, in case additional information is needed.
If the reply is not received by the taxpayer within the aforesaid terms, it means that the Tax Authorities *agree* (with a tacit approval) with the interpretation or the behavior expected by the applicant.

With a specific decree of the Italian Minister of Economy and Finance, to be issued by December 6th, 2015, the guidelines for the application of the ruling will be identified, while with a further measure (in this case issued by the Director of the Italian Revenue Agency) the office responsible for issuing the answer and for checking the correctness of the request will be identified.

Dividends received by residents in Countries or territories with a favorable tax regimes
Dividends received from companies located in blacklisted countries are currently fully taxable.

However, in light of the new changes full taxation will be limited to those situations where the Italian parent company can fully exercise control over the blacklisted subsidiaries, namely:

- ✓ in case of direct participation in the blacklisted company;
- ✓ in case the parent company – even indirectly – has the control in one or more intermediate companies not located in blacklisted countries which receive profits (i.e. dividends) from blacklisted companies.

The news are already effective from 2015.

Loan interest
Some changes are made to the regime of deductibility of the loan interest, ruled by art. 96 of the TUIR (i.e. Income Tax Consolidation Act) based on the new features introduced:

- ☐ in the calculation of the "ROL" (i.e. gross operating profit) dividends from foreign controlled companies are also included, in order to recognize the deduction of loan interest based on the cash flow return actually related to the foreign participation investment;
- ☐ it is no longer possible to "virtually" use, within the tax consolidation, the "ROL" surplus amounts of the companies of the group located abroad.

Finally, it is provided that the *property management companies* can fully deduct the loan interest related to financing guaranteed by mortgages on real estate to be leased.

Provisions on blacklist costs and on normal value
Starting from the tax year 2015, the rules related to the deduction of costs for purchases (of goods or services) carried out in blacklisted Countries radically change.
In the previous regime an ordinary regime of non-deductibility was provided, unless proven otherwise (by the taxpayer) that the foreign supplier carried out a real commercial activity or that the transaction showed objective reasons of cost-effectiveness.

In the new regime said costs are deductible within the limit of their "normal value" (i.e. market value) for the portion of the excess cost, the taxpayer shall justify the transaction from an economic point of view.

National tax consolidation
The discipline of the tax consolidation is adjusted to certain standards set out by the European Court of Justice.

In particular there is the possibility (hitherto denied) that two sister companies located in Italy can join in a tax consolidation, even if the parent company is a foreign company (provided that it is located in an EU country).

Similarly, it is now possible to set up a tax consolidation regime among Italian permanent establishments of companies located in the EU, provided that they are controlled by the same parent company.

The news already apply from 2015, but a special provision has to be issued for this purpose.

Permanent establishments

The taxation system of the permanent establishment is changed, in order to incorporate the latest trends emerging at OECD level.

The reference articles (arts. 151-154 of the Income Tax Consolidation Act) are therefore rewritten, providing briefly that:

- the income of the permanent establishment shall be determined based on the profits and loss referable to such entity, calculated according to the rules of the IRES (i.e. corporate income tax) taxable subjects;

- to determine the tax due it will be necessary to draw up a separate income statement and balance sheet, based on the accounting rules provided for the residents with similar characteristics.

The news are effective from 2016.

Discipline of the controlled and of the foreign affiliated companies (CFC)

Significant changes also concern the tax regime of the "CFC" (i.e. *controlled foreign companies*).
Up to now such regime implied that Italian companies holding a participation in blacklisted companies (both in controlled or in affiliated companies) have to declare in Italy the profits gained from these subsidiaries, even if not actually received.
Among the changes introduced (effective from 2016) it shall be pointed out that:

- the regime will be applicable only in those situation where the Italian parent company has the control over the blacklisted subsidiary);

- the CFC ruling is no longer mandatory, but optional;

- the computation of the taxable income for those profits received from blacklisted subsidiaries will be based on the same rules applied for the calculation of the corporate income taxes (IRES).

Lists of the Countries allowing an adequate exchange of blacklist information and coordination

The logic, with which the so-called "blacklists" identifying the tax havens are drawn up, changes.

In the new lists that will be issued, the criteria difficult to be applied, such as the one that should have identified the Countries with a taxation "significantly lower" than the Italian one, will be abandoned, while the criterion of the appropriate exchange of information will find room.

Transfer of the residence within the State territory

From 2015, in case of transfer to the Italian headquarters of foreign companies, the following values are recognized as fiscally important "input" values in Italy:

- ☐ the *current values* of assets and liabilities transferred (if the company comes from "whitelisted" Countries);

- the lower amount among the cost of purchase, the balance sheet value and the normal value (in the case of assets) or the higher amount of the same values (in case of liabilities), if the company comes from tax havens.

Exemption of the profits and loss of permanent establishments of resident companies (branch exemption)

Under the new "*branch exemption*" rule, resident companies that have permanent establishments ("PEs") abroad may choose not to include the income of these permanent establishments in the computation of its taxable income (principle of "force of attraction"). However, the credit for taxes paid from the PEs in the source state will be no longer permitted.

The option is *irrevocable* and must be applied to all the permanent establishments of the company abroad (special rules continue to apply in cases where the PEs are located in blacklisted Countries).

The application of the new measure will ruled through a specific provision.

Tax credit for foreign income

From 2015 onwards the possibility to carry-forward and carry-back the foreign tax credit which exceeded the limit provided by the Italian legislation (IRES at 27,5%), is extended to those individuals who do not hold business income as well.

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