RSM PALEA LAURI GERLA

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

TAX NEWS

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RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

EU agreement – the Principality of Monaco for the exchange of tax information

On June 23rd, 2016 an agreement entered into with the Principality of Monaco was approved by the European Parliament. It deals with the exchange of tax information. The agreement shall be now examined by the European Council.

More specifically, based on such an agreement, originally signed in February 2016, the Member states of the European Union and the Principality of Monaco will carry out the automatic exchange of information on bank accounts of the respective residents, starting from 2018, and of the information collected from January 1st, 2017.

The information that will be communicated concern both income (such as interest and dividends), balances and profits from sales of financial assets.

Such agreement is similar to the one signed on March 2nd, 2015 with our country. Based on this agreement the exchange of tax information "on request" is allowed, according to the principles set by the OECD in the field of the "Tax Information Exchange Agreement" (TIEA).

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Limits and conditions for the amendment (in favour) of tax returns

(Italian Supreme Court, sitting in Joint Chambers, Judgment no. 13378 of June 30th, 2016)

For years there has been a clear contrast, both at doctrinal and jurisprudential level, about the limits on the possibility to amend a tax returns.

In other words, there has been much dispute (with contrasting rulings) in relation to the deadline by which mistakes and omissions – that involve a lower tax liability or a greater credit –should be asserted.

The reference framework is unfortunately characterized by different rules relating to various sectors of the tax law (assessment, litigation, collection), which, being introduced at different times, tend to be in contrast with each other or tend not to integrate clearly.

Given the above, the issue was examined again in 2015 by the joined Chambers of the Supreme Court, which on June 30th gave its opinion about the limits on the possibility to amend tax return.

More specifically, the Court was asked to determine:

- If the taxpayer, in the case of income tax, is empowered to amend the tax return, to correct mistakes or omissions that have determined a greater income or a greater debt or a lower tax credit, only within the term set out for the submission of the tax return relating to the following tax period;

- If this latter term is provided only for off-setting purposes, according to which the above-mentioned amendment is also possible by means of a tax return to be submitted by December 31st of the 4th year following the one in which the tax return was submitted;

- If both in case of reimbursement (in compliance with the relevant prescriptive dates and/or periods of limitation), and within the trial (in order to object to a greater tax claim put forward by the Tax Authorities) it is still possible to amend the original tax return.

Following a very clear analysis of all the existing rules, the Court set out the following principles:

- it is possible to amend the tax return, to correct mistakes or omissions that have determined the indication of a higher tax basis or of a greater tax liability or a lower credit, by means of a supplementary tax return (pursuant to art. 2, paragraph 8 bis of the Italian Presidential Decree no. 322/1988) to be submitted no later than the term set out for the submission of the tax return related to the following tax period, with offsetting of the possible resulting credit;

- it is possible to amend the tax return resulting from mistakes or omissions able to determine a *damage for the Tax administration*, no later than the deadline set out by the Italian Presidential Decree no. 600 of 1973, art. 43 (i.e. within the deadline for the assessment).

- the reimbursement of direct payments (pursuant to art. 38 of the Italian Presidential Decree no. 602/1973) shall be carried out within the expiration term of 48 months from the date of payment, regardless of the terms and conditions of the additional tax return;

- the taxpayer, regardless of the terms and conditions set out in the additional tax return and of the claim for reimbursement, can always object, within legal proceedings, to the greater tax claim of the Tax Authorities, by attaching mistakes of fact or law carried out while drafting the tax return and influencing the tax obligation.

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Tax (and penal) considerations on the deduction of expenses supported by generic invoices

It often happens, in the professional practice as well as during tax assessments, to register invoices that have "generic" descriptions and that refer to agreements for the sale of goods or to the provision of services not formalized in agreements but being only verbal.

In such cases the real risk for the company which deducts such charges based on generic invoices consists in the denial of the deduction for the income tax purposes and of the VAT deduction.

Please find below a brief description on the issue, based on recent both national and Community judgments.

Deductibility for income tax purposes

A cost, in order to be deducted for tax purposes, shall have very specific conditions required by the legislation.
In particular, with reference to the Testo Unico (i.e. Internal Revenue Code) related to the income taxes, the principles that rule the deductibility are the following:

- **existence** of the transaction that has generated the cost;
- **inherence** between business expenses and business revenues;
- **certainty and objective determinability**: according to this principle the charges being subject of *estimates* may not be immediately deducted for tax purposes, but it will be necessary to wait till such charges (both from a quantitative and substantive point of view) acquire a precise detectability and "immutability";
- **allocation** on the income statement;
- **accruals**;
- **congruity**: even though such principle is not expressly codified, for a long time there has been a trend (supported by judgments) that denies the costs regarded as "uneconomic", meaning that are opposite to the normal canons of reasonableness which the entrepreneur is subject to while carrying out his activity.

The invoices' comprehensive description of the charges received and the documentary support of the service provisions are a natural consequence of the inherence principle: it is stated that these elements are necessary in order to evaluate the congruity of the expense.
Therefore, if during the tax assessments, the absence of the minimum requirements necessary to prove the cost inherence is found, the deduction of these latter is denied for lack of congruity, as per art. 109 of the TUIR (i.e. Internal Revenue Code.

Jurisprudence

Tax Commissions of first and second instance and the Supreme Court have provided a theoretical support that legitimizes the behaviour carried out by the Italian Tax Authority.
Therefore, it is possible to state that:

- the taxpayer has to prove the congruity of the cost;

- to such an extent, it is sufficient that there is a supporting documentation from which it is possible to understand, besides the amount, the reason and its economic congruity, resulting legitimate the denial of deductibility of costs not attributable to the object of enterprise;

- the burden of proof cannot be considered as fulfilled when the description of the service provision in the invoice is generic and laconic or when the documentation of the agreement which led to that service provision is not sufficient or missing, with the result that the Tax Authorities cannot check the actual congruity of the expense incurred on the business activity.

In this sense the Supreme Court issued the judgment 7231 of April 13th, 2016. It has examined the (non)deductibility of an invoice issued by a professional with the wording "business consulting service rendered" and has checked other invoices issued by a third company for providing intermediation services in buying goods from foreign companies. In both cases, the invoices contained generic terms, i.e. generic references to the services rendered, but sufficient documentation of this latter was not found.
Moreover, it shall be underlined that:

- considering the company's burden of providing a proof, it is necessary that the proof of the deductible costs is *properly documented*, so that from the relevant documentation it is possible to get the congruity of the goods or service purchased with the business activity, regarded as *inherence* of the goods or service compared to the activity from which profits or other revenues – forming the business income– come.

This is what the Supreme Court stated in the judgment no. 21184 of October 8th, 2014: such a judgment concerned the (in)sufficiently, for the purposes of tax deduction, of a charge for" technical and commercial assistance" of over Euro 400 thousand and justified by an invoice regarded as laconic (and related to the" technical and commercial consulting for the month of ...") as well as justified by an agreement "of just 10 lines".

More recently, the Supreme Court (judgment 9846 of May 13th, 2016) has ruled the non-deductibility of costs for commissions, on the assumption that the preparation of debit invoices and the vagueness of the agreements did not allow, even in this case, justifying the tax deduction of such costs.

VAT deduction

The denial of the deduction accompanied, almost automatically, by the denial of the related VAT deduction.

This happens (sometimes in an improper manner) because the Tax Authorities extends the missed condition of the pertinence as per article. 109 of the TUIR to the analogous (though not equal) concept contained in art. 19 of the Italian Presidential Decree no. 633/72.
The denial of the VAT deduction is also justified by the non-compliance of the elements that have to be mentioned in the invoice (according to art. 21 of Italian Presidential Decree no. 633/72) and in particular by the insufficient/absent description of the "nature" and "quality" of the goods / services invoiced.

With reference to VAT, the opinion of the European Court of Justice shall be mentioned: in the judgment of May 8th, 2013, case C-271/12, the Court was called upon to assess whether a national legislation (in this case the Belgian legislation) denying the VAT deduction for incomplete invoices, even if the incomplete data aimed at proving the effectiveness, the nature and amount of the invoiced transaction are integrated in a later stage, is consistent with the EU legislation.
The case that has generated the dispute concerned the provision of services whose invoices did not indicate, in particular, the unit price and the number of hours worked by the staff of the companies providing the services, making it extremely difficult for the Tax Authorities to carry out audits.

The Court, after making an excursus on the fundamental principles ruling the VAT deduction, has reminded that the sixth VAT directive only sets out the issuance of an invoice that shall contain certain "basic" information, giving to the Member States of European Union the power to set out further information, within the limits necessary to ensure the collection of VAT and its control by the Tax Authorities.

For the European Court the fundamental principles of the VAT legislation do not preclude a national legislation, such as the Belgian one, based on which the right to VAT deduction may be *denied in* the presence of invoices being *incomplete and lacking* the data required by law. This assumption, the Court states, does not conflict with the principle of VAT neutrality, since the denial of the deduction is the consequence of a breach of the rules that require the indication of precise information in the invoice.

Penal aspects

Finally, it shall be pointed out that in case the vagueness of the invoices hides "non-existent transactions", the fraudulent behaviour determines the occurrence of a crime.

As a matter of fact, according to art. 2 of the Italian Law Decree no. 74/2000 (declassified as" Fraudulent tax return by the use of invoices or other documents for non-existent transactions") it is provided that:

Anyone, who – in order to evade income taxes or VAT, by using invoices or other documents for fictitious transactions – shows unlawful liabilities in one of the returns relating to these taxes, shall be punished with imprisonment from 1 year and 6 months to 6 years.

The fact is considered as committed by using invoices or other documents for non-existent transactions when such invoices or documents are registered in the compulsory accounting records or are kept as proof for the Tax authority.

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

Judgment of the month

Lawful dismissal for cause in the case of behaviours that, as a whole, are considered to imply a certain degree of seriousness

The Labour Division of Milan Court, declared **that the dismissal for cause** by one of our Client Company of a foundry worker **is lawful** (i) **given that the worker challenged the instructions** of the shift supervisor and plant manager, using **offensive language;** (ii) from a different and separate point of view, because it was later ascertained that the worker **had come to work under the influence of drugs;** (iii) and because the same, with his behaviour, **had jeopardized his own safety and that of his colleagues,** to the point of requiring the intervention, during the night, of the plant manager and, later, the police; (iv) because the above worker **denied the charges made against him both during the justification and appeal stages** of the dismissal procedure. In the case in question, the Presiding Judge pointed out that the behaviours of the worker, if considered individually, would not constitute cause for dismissal. The same Judge however considered that the simultaneous behaviours of the worker as a whole must be judged in a different manner, and accordingly ruled that *"the behaviours (...), considered as a whole, imply a level of seriousness which is certainly not secondary, above all given the particular dangerousness of the workplace and processing carried out therein, that justifies the dismissal of the defendant*".

REGULATIONS

The first corrective decree of the Jobs Act

On 11 June 2016, the Ministries' Council preliminarily approved the **first corrective decree** of the Jobs Act, which contains a number of changes and revisions. On the question of **"accessory" work,** the Government states that employers who use this type of work service, must forward to the competent Labour Inspectorate of the territory, by text message or certified e-mail, the details of the worker, including the place and duration of the work service, at least 60 minutes before the work service starts. In the case of breach, an administrative fine ranging from 400 to 2,400 Euro will be applied against the Employer for each worker for whom such information is not notified. Moreover, ***"defensive"* job security agreements may be transformed into *"expansive"* job security agreements** in order to increase the workforce and encourage the insertion of new skills. As regards the **placement of persons with disabilities:** (a) workers who are disabled before finalisation of the employment relationship may be included, even if they are not employed under mandatory employment, if the working disability is at least or more than 60%; b) the amount of fines applied for breach of the obligation to submit the notice and failure to cover the mandatory quota has been associated to the amount of the exemption contribution; c) the injunction procedure was considered to be applicable in the case of breach for failure to cover the mandatory quota.

PRACTICE

Video surveillance: note of the Ministry of Labour no. 1241 dated 1 June 2016

Pursuant to note no. 1241 dated 1 June 2016, the Ministry of Labour stated that a video surveillance **system cannot be installed prior to, or without, specific agreements with the workers trade unions** or, failing this, **an authorisation issued by the relevant Territorial Department of Labour.**

On one hand, the Ministry stated that violation exists even if the equipment has been installed but **is not yet operational** or **prior notice thereof** has been given to workers or **control is discontinuous;** and, on the other hand, explained the approach that the inspector who ascertains the violation must follow. In particular, the inspector must order the **immediate removal of the device,** and apply a fine ranging from **154.00 to 1,549.00 Euro,** or a penalty of **imprisonment from 15 days to one year,** unless the fact constitutes a more serious crime. It is advisable therefore to obtain the relevant agreement or authorisation to avoid the application of the above penalties.

CASE LAW

Court of Cassation: no objective responsibility on injuries

With its judgement no. 12347 dated 15 June 2016, the Court of Cassation held that the **civil responsibility of the employer** as set forth by article 2087 of the Italian Civil Code may only be asserted if the **injury is caused by breach of the behavioural obligations set forth by law or skills relevant to the work carried out,** given that the inadequacy of the protection measures adopted cannot automatically be inferred from the fact alone that the damages have occurred. In the case in question, an employee of a consortium, who carried out maintenance works at the plant of a principal, ran into another employee of the plant while riding a bicycle. The Court pointed out that the owner of the plant in question cannot be considered to be liable for the accident given that **an employer cannot be held responsible for all and any events that may harm the health of its employees,** but only for events caused by its own negligence, carelessness, improper use or failure to comply with applicable laws, regulations, orders or legislations. This judgement therefore excludes a sort of objective responsibility of the employer in case of injuries incurred by its employees.

Court of Cassation: the reasons for dismissal must always be stated

With its judgement no. 11595 dated 6 June 2016, the Court of Cassation ruled that in the case of dismissal of public servants who have reached the seniority age limit, the reasons for dismissal must always be given, even if applicable laws do not set forth the obligation to do so. The judgment refers to a petition filed by two workers of a Municipality in Lombardy Region who were dismissed in 2008 after accruing a contribution period of 40 years. According to the Court, **the dismissal of an *"elderly"* person may be considered to be discriminatory if it is not objectively and reasonably justified** for a legitimate reason. Substantially, the person in question may not be dismissed without adequate justification, since the employer's objectivity and lack of discrimination may be ascertained from the reasons provided.

Busto Arsizio Court: irregular use of a part-time contract implies the transformation thereof

With its judgement no. 224 dated 15 June 2016, Busto Arsizio Court held that **the intention of the parties to change the employment relationship from part time to full time is implied, if the employee is constantly asked to work a number of working hours equal to or more than those worked by his or her colleagues on a full-time contract.** In the case in question, the court pointed out that in order to reconstruct the intention of the parties, it is not what the same set forth in a written agreement that is important, but **the way the work is actually carried out**. Therefore, if a worker on a part time contract is prepared to work a full working day and the employer expresses its need to receive and then receives such services, the relationship necessarily becomes a full-time relationship due to conclusive facts. Substance, therefore, supersedes form which, in some cases, is an instrument that legitimises the illegal use of provisions of the law.

Court of Cassation: interest and the temporary nature of a service legitimise secondment

With its judgement no. 8068 dated 21 April 2016, the Court of Cassation was called to settle a case law dispute involving the question of secondment in company groups. In this regard, the Judges of the Court start from an argument in order to provide a broad interpretation of the matter in question. Pursuant to article 30 of Legislative Decree no. 276/2003, a worker may be assigned to perform his or her job with a third party, if this decision is dictated by the need to **pursue a temporary interest of the seconding subject**. The interpretation of the above requirements has for many years been restrictive and based on an assumption of illegality. With the above judgement, the Court introduces a driving force for a new season for the recognition of a "**contrary assumption**", i.e. the assumption that the interest in the secondment always exists between group companies and that the temporary nature thereof must be recognised when the secondment is not final. The judgement follows the socio-legal approach which now recognises the importance of flexibility even in terms of secondment, in order to facilitate the movement of human resources, above all outside the national context.

Brescia Court: dismissal of persons who make improper use of a company computer is lawful

With its judgement no. 782 dated 13 June 2016, Brescia Court held the **dismissal** of an employee who was caught **using the company computer** during office hours to access social networks, games, music and other activities unrelated to her work to be legitimate. The Court considered the behaviour of the employee to be undoubtedly serious given that the same had carried out about 6000 accesses in 18 months (of which 4500 to Facebook) on an average of three hours of work and that these accesses lasted even tens of minutes at a time. As regards the way the **employer** had discovered the facts in question, the Judge explained that the employer **had limited itself to printing the history and type of access to the web** from the PC of the employee, and that this did not imply any **violation of privacy.** The Judge also pointed out that in the case in question, **there is no violation of** the provisions of **clause 4 of the Workers' Statute** because the activities carried out were **control activities relevant to behaviour and not to performance of the work.** The decision in question, which reflects the technological evolution of our times, is thus in line with the early approach of case law on the use of social networks and their significance in the working context.

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