RSM PALEA LAURI GERLA

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

TAX NEWS

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

FOCUS ON TAX AND ACCOUNTING TOPICS

Tax news of the Decree Law "Milleproroghe"

(Decree Law no. 244/2016, converted into Law no. 19 dated February 27th, 2017)

Last February 22nd the Decree Law "Milleproroghe" was approved. Such a Decree contains, as usual, several provisions, even bearing a tax nature.

Please find below a brief summary of the main tax news - of general application - contained in said decree.

"Spesometro"- new timing for the submission 2017

Only for the year 2017, the electronic submission of all data of the invoices issued and received (i.e. the new spesometro) to the Italian Revenue Agency will be carried out on a six-month basis (rather than on a quarterly basis): the term for the analytical communication of the data of the invoices related to the first half-year is extended from July 25th to September 16th, 2017. For the communication related to the second half-year the term is February 2018.

The change introduced does not relate to the other periodic communication of 2017 (communication of the data related to the *VAT periodic liquidations*), for which the original deadlines are applied (see Tax News 2016/12).

Intrastat lists

Up to December 31st, 2017, the Intrastat communications related to intra-Community purchases and provision of services rendered by EU subjects are restored: curiously, the piece of news, which introduces new burdens on taxpayers, is classified under the heading "fulfillments simplifications"...

More in details:

- up to December 31st,2017, it is again compulsory to send the communication of the data related to intra-Community purchases of goods and to the provision of services received by subjects located in another EU Member State;

- from January 1st, 2018, the legislation is amended as follows:

    - it is explained that the submission of the recapitulative lists to the Customs and Monopoly Agency is carried out also for statistical purposes;
    - the submission obligations no longer concern even the recapitulative lists of the services rendered;
    - the subjects identified for the application of the law on VAT territoriality (bodies, associations and organizations, including non-taxable subjects, identified for VAT purposes), only submit a recapitulative list of the intra-Community purchases (and therefore no longer the recapitulative list of the provision of services received by taxable subjects located in another EU member State);
    - a new provision (to be adopted within 90 days after the entry into force of the Decree Milleproroghe) defines the meaning of "significant measures for the simplification of the submission obligations by the taxpayers";

- the provision, which excluded from the summary lists of the provision of services those transactions for which no tax of the Member State – where the recipient is located – is due, is not re-proposed.

Repeal of the rule on communication of assets to shareholders

The disclosure to the Italian Tax Authorities regarding the granting of business assets to be enjoyed by shareholders or by entrepreneur's family members (as specified in paragraphs 36 and 36-sexiesdecies-septiesdecies of article 2 of the Decree Law no. 138 of 2011) is repealed.

The legislation – under which the granting of corporate assets to shareholders / entrepreneur's family members determines, for these latter, an *IRPEF taxable income* equal to the difference between the market value of the right to use the assets and the amount paid by the shareholder to the company for such enjoyment – remains in force (art. 67, paragraph 1, lett. h-ter) of the TUIR – i.e. the Italian consolidated law on income tax).

Favorable tax treatments for workers who return to Italy

The deadline for opting the favorable tax treatment applicable to workers who return to Italy is extended to April 30th, 2017, pursuant to:

- Law no. 238/2010, or alternatively
- article 16 of the Italian Decree Law no. 147/2015.

Briefly, it is about two favorable regimes that, under certain conditions, allow the workers previously residing abroad and who move to Italy, to benefit of a decrease in the IRPEF tax base resulting from the income from employment, income from self-employment or from business income, carried out in Italy after he returned.

VAT deduction for purchases of energy saving property units

The deduction of the VAT paid for the purchase of residential property of energy class A or B by the building companies is extended to 2017.

Based on this favorable treatment, 50% of the VAT paid for the purchase, carried out by December 31st, 2017 (rather than by December 31st, 2016), of residential property units of energy class A or B in accordance with the current legislation, is deductible from IRPEF, up to the taxable amounts, if such units are sold by the building companies. The deduction is divided into 10 annual installments.

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Green light to the checks on "fictitious" foreign residences

(Italian Revenue Agency, provision dated March 3rd, 2017)

Within an increasingly tight, also international, fight against tax evasion, the Italian Revenue Agency has issued a provision that identifies the criteria to select, for the purpose of a tax inspection, those who, from January 1st, 2010, have registered with the Register of Italians Resident Abroad (AIRE) and who, at the same time, have not applied to the regularization of capital held abroad (i.e. Voluntary Disclosure).

The provision implements the legislation contained in the Decree Law no. 193/2016 (art. 7, paragraph 3), based on which the data of those applying for AIRE registration are provided to the Italian Revenue Agency, in order to create *selective lists* for inspections relating to financial assets and foreign equity investments not declared.

Based on the content of the provision dated March 3rd, the criteria to be used for the creation of selective lists, "also based on distinguishing elements related to the stay of the subjects in Italy", are the following:

- residence declared in a "black listed" country;
- existence of capital movements to and from foreign countries, reported by financial operators according to the law provisions;
- information related to real estate and financial assets held abroad, sent by foreign tax authorities within the European Directives and the agreements on automatic exchange of information;
- residence in Italy of the household of the taxpayer;
- acts of register proving the actual presence of the taxpayer in Italy;
- active electric, water, gas and telephone utilities;
- availability of cars, motorcycles and watercraft;
- holding of an active VAT number;
- significant participations in resident partnerships or restricted shareholder base companies;
- holding of corporate offices;
- payment of contributions for domestic workers;
- information provided by withholding agents with the Certification of withholding taxes (i.e. CU) and the 770 form;
- information related to transactions relevant for VAT purposes.

With reference to the provision, it shall be pointed out that- beyond the data already known and inferred from the tax registry, the data received within the automatic exchange of information from foreign tax authorities, based on the European directives and international agreements, are of particular importance.

Reference shall be made, in particular:

- in the field of the EU, to the Council Directive 2011/16 / EU (the so-called DAC1), amended by the Council Directive 2014/107 / EU (so-called DAC2), which provides for the exchange of the information related to the foreign property held by resident subjects, as well as for the mandatory exchange of financial information on accounts held abroad;
- at extra-EU level, the agreements with the governments of other foreign countries concerning the automatic exchange of financial information according to the "Common Reporting Standard", protocol being effective from January 1st, 2017 and involving a hundred countries;

- finally, with regard to the USA, it is necessary to make reference to the agreement "FACTA" based on which the Italian* Revenue Agency receives information about the accounts held in the US by subjects being already resident from the reference year 2015.

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Validity of the intra-Community transactions without registration with the VIES

(The EU Court of Justice, Case C-21/16, judgment of February 9th, 2017)

The archive "VIES" (VAT Information Exchange System) is a database created at European level, which allows the operators to obtain the confirmation of the VAT number of their trading partners and allows the national tax authorities to check the intra-Community transactions and to detect any irregularity. Each Member State rules the access and the registration with the VIES in a particular way.

In the past, Italy, in particular, had provided that it was possible to carry out intra-Community transactions only if the company was registered with the VIES, making the above inclusion an essential requirement for the effectiveness of the companies at Community level. Subsequently, companies have been allowed to carry out intra-Community transactions, even in the period between the request and the granting of the registration with the VIES, although the "obligation to be included in the Vies archive in order to carry out intra-Community transactions" remained – obligation "affecting all those subjects carrying out business activities in the State's territory or setting up there a permanent establishment" (source: Italian Revenue Agency website).

In the case examined by the European judges, the carrying out of intra-Community transactions (and therefore within VAT exemption) - by a Portuguese company - provided in favor of a VAT taxable subjects located in Spain and *not registered* with the VIES was challenged.

The Court of Justice had to give its opinion about the validity of the "intra- Community" transactions carried out without the registration of one of the two counterparties with the VIES.

In this regard, the judges in Strasbourg have pointed out that:

- as a general rule, the Member States shall exempt the supply of goods sent or transported to a destination outside their respective territory but within the European Union, from the seller, from the purchaser or on their behalf, carried out on behalf of another taxpayer;

- the exemption of intra-Community supply becomes applicable only when the power to dispose of the goods as owner is transmitted to the buyer and when the seller proves that such goods have been sent or transported in another Member State and that, following this dispatch or transport, they have physically left the territory of the selling member State;

- the existence of the VIES system meets the need, provided by article 27 of the provision no. 1798/2003 and, from January 1st, 2012, provided by article 17 of the provision no. 904/2010, according to which the Member States shall have an electronic database containing a register of subjects to whom they have given VAT identification numbers;

- neither the VAT Directive (and in particular article 138, paragraph 1) nor the case law of the European Court of Justice mention, among the *substantial conditions* of an intra-community supply listed in detail, the obligation for the buyer to have a VAT identification number (see the judgment of September 6th, 2012, the case "Mecsek-Gabona", C 273/11), nor the obligation that this latter is registered with the VIES system in order to carry out intra-Community transactions.

Therefore, concluded the judges, neither obtaining a VAT identification number for the buyer, valid for the carrying out of intra-Community transactions, nor his registration with the VIES system represent basic conditions for the VAT exemption of an intra-Community supply.

In both cases, it is only about formal requirements that cannot bring into question the seller's right of exemption from VAT if the substantive conditions for the intra-Community supply exist.

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FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

Adopting a policy on IT tools allows using the data collected also for disciplinary purposes?

The adoption of a policy regulating the use of IT tools (e.g. Internet, email, tablets and smart phones) made available to the employees in accordance with the provisions of the privacy regulations, allows the employer to use the data collected through such tools for all purposes pertaining to the employment relationship, including the disciplinary ones.

JUDGEMENT OF THE MONTH

Lawful dismissal for an employee who sells products of his/her employer on the Internet under a false name

The Labour Division of the Milan Court with judgement no. 4703 dated 20 February 2017, ruled on the appeal pursuant to article 1, paragraph 48 and following of Law 92/2012 filed by an employee against dismissal for just cause ordered by one of our client Companies for having sold on the Internet, under false name, products of such company. The Company decided that such measure was necessary after the conclusion of an investigation conducted by an authorized investigative agency. The plaintiff, both during the reasoning and appeal stages, failed to deny the alleged facts or to provide any rebuttal of them, declaring that he/she was only obligated to make statements "to the investigating authority." In the case in question, the Presiding Judge, first, officially ruled on the claim for non-pecuniary damage reimbursement made by the employee, stating that **with the Fornero appeal "claims other than those referred to in paragraph 47 (of article 1 of Law 92/2012) cannot be made"** and that "therefore, any other additional claim, based on other causes of action (such as the one made here, based on personal damage), must be deemed inadmissible". In addition, the Judge, making reference to numerous previous case law, rejected the plaintiff's request to exclude the document submitted by the Company on the investigative report, because "**an employer can directly control**, through its own hierarchical structure or **even through external personnel** (such as an investigative agency, as in this case) the fulfilment of work performance and therefore **verify specific shortcomings** of employees **that may have already occurred or that are in progress; this regardless of the monitoring method adopted**, which can also be through undisclosed means". Finally, on the existence of the fact at the base of a disciplinary dispute, the Judge stated that the plaintiff "even when explaining the reasons [for the conduct] after the disciplinary dispute, failed to provide any information actually useful to show his/her non-involvement in the facts (...)" stating that "it would have been sufficient to mention the lawful origin of the items to avoid any kind of complication". In this regard, the Judge also remarked that "even during today's hearing [Editor's note: and on occasion of the first employee's hearing] the employee failed to bring forth an adequate objection in support of his/her main assertions, namely the non-existence of the contested fact." The Judge thus reached the conclusion that "**the cunning and fraudulent behaviour of the employee certainly brought forth an irremediable rift of the trust relationship,** which fully justifies the employer's termination" fully rejecting the appeal and ordering the plaintiff to pay the legal costs.

REGULATION

The Chamber of Deputies has finally approved the "Mille proroghe" Decree

At the sitting of 23 February 2017, the Chamber of Deputies finally approved Draft Law C. 4304 for conversion into law, with amendments, related to the Law Decree no. 244 dated 30 December 2016, bearing the extension and definition of terms (the so-called "One thousand extensions decree") Regarding labour law, the measure in question, among others, establishes:
(i) **deferment of one year**, from 1 January 2017 to 1 January 2018, on the obligation of **telematic archiving of the single labour book** at the Ministry of Labour; (ii) **an extension of six months**, from 12 April 2017 to 12 October of the **obligation to report accidents only for statistical purposes with absence from work of at least one day** (excluding that of the event), established by article 18, paragraph 1, letter r) of Legislative Decree. no. 81/2008; (iii) **deferment of one year**, from 1 January 2017 to 1 January 2018, of the obligation to **hire a disabled employee for companies employing from 15 to 35 employees**; (iv) **authorization** during 2017 for **companies operating in a segment under complex industrial conditions** – within a spending limit of Euro 117 million under an agreement signed at the Ministry of Labour and Social Policies, with the presence of the Ministry of Economic Development and the region concerned – **to access an additional extraordinary wage subsidy** up to a 12-month limit. This making an exception to the maximum limits established by regulations issued on the subject matter, or alias the provision introduced by the decree amending the Jobs Act for 2016.

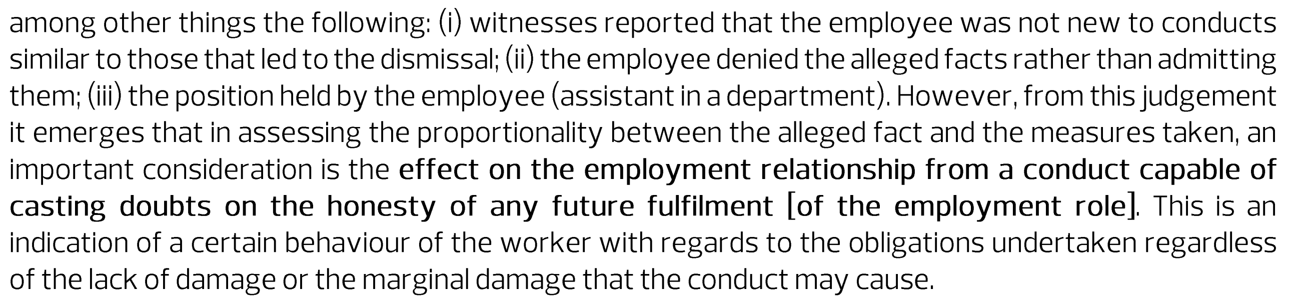
CASE LAW

The relationship between a share capital company and its director is not comparable to a subordinate employment relationship or contract work

The Plenary Sitting of the Court of Cassation, with judgement no. 1545 dated 20 January 2017, replied to the question concerning the nature of the relationship between **a company limited by shares and its director**, alias if it can be classified as a contract work or as self-employment work (that is extraneous to such scenario). Specifically, the Plenary Sitting stated that the sole director or the chairman of the board of directors of a company limited by shares **is tied to the company by a corporate-type relationship that**, even in consideration of the organic identification (i) that takes place between the natural person and the entity and (ii) the absence of the requirement of coordination, **is not included among those established in point no. 3 of article 409 of the Italian Code of Civil Procedure**. In other words, **the relationship in question cannot be compared either to a work contract or to a subordinate employment contract**. The Plenary Sitting thus implemented a change of trend with respect to the judgement it adopted in 1994 (judgement no. 10680) when it stated that within the corporate organization, the director's activity had to be deemed a permanent and coordinated one, in addition to a mainly personal activity and therefore it met the requirements referred to in point no. 3 of article 409 of the Italian Code of Civil Procedure, without considering the partially entrepreneurial nature of the managerial role.

Dismissal for just cause of an employee consuming corporate goods is lawful independently of the marginal damage suffered by the employer

The Court of Bologna with judgement no. 149 dated 10 February 2017, declared **lawful the dismissal for just cause ordered for an employee who consumed company goods (food and beverages) at the workplace**. During the summary case hearing, the Judge of the court where the employee filed the appeal under article 1, paragraph 48, of Law 92/2012, deemed the dismissal unlawful and ordered the employer to pay an indemnity equal to 12 months of salary based on the last remuneration. The Judge of the opposing party, amending the order of the first Judge, with judgement under review, declared the dismissal lawful **despite the marginal magnitude of the corporate damage caused**, pointing out



among other things the following: (i) witnesses reported that the employee was not new to conducts similar to those that led to the dismissal; (ii) the employee denied the alleged facts rather than admitting them; (iii) the position held by the employee (assistant in a department). However, from this judgement it emerges that in assessing the proportionality between the alleged fact and the measures taken, an important consideration is the **effect on the employment relationship from a conduct capable of casting doubts on the honesty of any future fulfilment [of the employment role]**. This is an indication of a certain behaviour of the worker with regards to the obligations undertaken regardless of the lack of damage or the marginal damage that the conduct may cause.

Top managers who do not make use of vacation days are not entitled to receive substitutive allowance

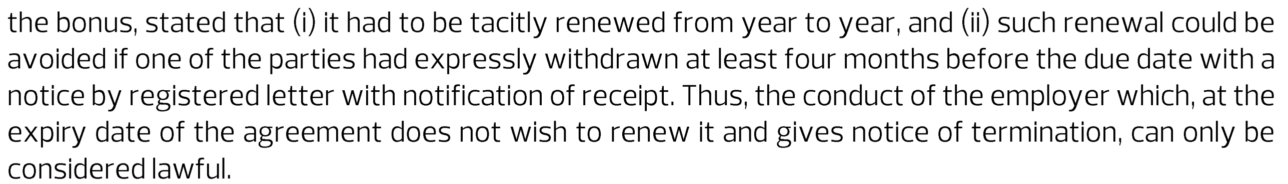
The Court of Cassation, with judgement no. 2000 dated 26 January 2017, ruled once again on the right of top managers to obtain substitutive allowance for any **accrued vacation days not taken** and on the related burden of proof. Specifically, the Court stated that this right (and the resulting burden of proof) is closely connected to the role covered by the manager within the company. Therefore, the so-called **top managers** or any managers who, due to their indisputable role, are in a position not to have to report in detail their personal decisions on vacation days, **are not entitled to receive the related substitutive allowance if they have not taken their vacation days regularly during their employment relationship**, unless they can prove the recurrence of absolutely exceptional and objective company needs, representing impediments to the aforementioned enjoyment. On the other hand, **non-managerial personnel** or otherwise personnel without the power of self-determining their vacation days, **is subjected to the general principle that the employee** in order to obtain the substitutive allowance for vacation days not taken **has only the burden of proving he/she worked** in the days allocated, while **the burden of the employer is to prove that such days were paid**.

Dismissal of an employee who refuses to carry out lower rank tasks, even if he/she is present at the workplace

The Court of Cassation, with judgement no. 1912 dated 25 January 2017, confirmed the decision of the Judges of the Court of Rome, declaring **lawful the dismissal for just cause ordered for an employee who, having been assigned to lower rank duties, repeatedly refused to perform the new tasks at the workplace, assuming a contemptuous and threatening approach** towards top management. In fact, according to the Court of Cassation, the unlawful behaviour of the employer consisting in assigning to the employee lower rank duties with respect to his/her status may justify refusal of work performance provided that "this reaction be characterized by a **positive attitude, resulting proportionate and in line with the principle of good faith**". However, such an assessment, according to the Court, is unnecessary if the employee (such as in this case) did not limit himself/herself to refuse to perform the task requested but took on an "autonomous and unlawful" conduct such as occupying company spaces or using libellous and insulting remarks against the employer or his/her hierarchical superior. However, a "demoted" employee who goes to work waives the non-fulfilment exception against the employer and, therefore, cannot refuse to perform with due diligence, fairness and good faith the work requested.

An employer may terminate the union agreement on performance bonus

The Court of Naples, with judgement no. 342 filed on 7 February 2017, ruled that an **employer may terminate the company collective agreement concerning the performance bonus provided that such option is included in the original agreement and implemented within the terms agreed** between the parties. This is because when a contractual relationship between two parties is established, "*it involves the onset of a bond that cannot be broken by unilateral initiative, unless specific contractual expectations are established to provide the parties the power to unilaterally terminate the relationship*". And in the case in question, the agreement, in addition to establishing an initial duration of



the bonus, stated that (i) it had to be tacitly renewed from year to year, and (ii) such renewal could be avoided if one of the parties had expressly withdrawn at least four months before the due date with a notice by registered letter with notification of receipt. Thus, the conduct of the employer which, at the expiry date of the agreement does not wish to renew it and gives notice of termination, can only be considered lawful.

PRACTICE

The procedures for application of the non-recurring one-time payment established by the Renewal of the National Labour Collective Agreement for the private metalworking sector and the mechanical engineering and plant installation sector have been specified

On **19 January 2017**, following the successful outcome of the certified workers' consultation, the Renewal of the **National Labour Collective Agreement for the private metalworking sector and mechanical engineering and plant installation sector was officially signed** and therefore now fully effective. On that occasion, the Parties also defined the contractual text concerning **the gross non-recurrent one-time payment of Euro 80** to be paid with the salary related to the month of March 2017 to the workers employed as of 1 March 2017. Specifically, these Euro 80 are **subdivided into monthly installments** depending on the duration of the relationship in the period from 1 January to 31 March 2017. It was stated that a portion of a month longer than 15 days is to be considered as a full month. For the purpose of determining the non-recurrent one-time payment, **all the periods of suspension from work or time reduction from work** due to illness, injury, pregnancy and childbirth, parental leave, and marriage leave including all type of Redundancy Fund (CIG), are used. Instead, **unpaid leave is not used** for the aforementioned purpose. It is an amount that includes a direct and indirect impact and **it is excluded from the basis of the severance indemnity calculation.**

Massive, prolonged and indiscriminate monitoring on computer tools provided to employees are forbidden

With **measure no. 547** dated 22 December 2016 and published in the newsletter of 17 February 2017, the Privacy Authority for the protection of personal data reaffirmed that **an employer cannot** access indiscriminately emails or personal data contained in the devices provided to employees. According to the Privacy Authority, the employer, **in spite of having the right to check the proper performance of the service and the correct use of the work tools by the employee**, must in any case safeguard personal freedom and dignity, complying with legal regulations. The labour regulations on remote monitoring (in this case under article 4 of the Worker's Statute in its "new formulation" after the Jobs Act), moreover establishes that it is unlawful **to carry out** activities suitable to achieve, even indirectly, **a massive, prolonged and indiscriminate monitoring** of the employee's performance. And in any case, the Privacy Authority reaffirms that **employees must always be informed clearly and in a detailed manner** about the methods of use of the tools in question and about any monitoring activities. This is because the absence of an explicit policy in this regard may lead to a legitimate expectation by the employee (or a third party) of the confidentiality of certain forms of communication.

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