RSM PALEA LAURI GERLA

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

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FOCUS ON TAX AND ACCOUNTING TOPICS

The "Super" and "Hyper" amortizations analyzed from a tax point of view

(Italian Revenue Agency, circular no. 4 of March 30th, 2017)

The Italian Revenue Agency has issued a long and analytical interpretative circular commenting and analyzing the tax legislation 2017 regarding the "super" and "hyper" amortizations.
The topic has been analyzed in depth in the latest Tax News, prior to the issuing of said circular: the analysis carried out in March, supplemented with the main ideas offered by the Italian Tax Authorities, is proposed again (only the list of the assets subject to favorable tax treatments, as per annex "a", has been amended, so that it is the same as the one mentioned in the appendix to the circular).

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The "Stability Law 2017" (Law no. 232/2016, art. 1, paragraphs 8-13) provided for the extension of the tax relief better known "Super amortizations" to all 2017, *broadening the* tax relief to some types of investment.

More specifically, the latest Stability Law has extended the 40% increase in amortizations provided for the year 2016, establishing a new 150% increase in case of investments on "high tech" assets (the so-called "Industry 4.0").

Please find below the most important features of the tax relief: taking into account that many of the rules already stated within the topic of super-depreciations "2016 edition "have been mentioned, please refer to the in-depth analysis contained in the Tax News 2016/1 for a complete examination.

Effective period of the investments subject to favorable tax treatment
The favorable tax treatment, with reference to the *transactions carried out* by December 31st, 2017, is extended to *June 30th, 2018*, if the investments are related to:

- *orders accepted by* the seller *by the date of December 31st, 2017* and provided that,
- by the same date, the *payments on account* have been carried out to an extent lower than 20%.

➢ *Clarifications*

In relation to the extension of the favorable tax treatment until June 30th, 2018, the Tax Authorities has refused such conditions in the presence of investments that do not involve the purchase, specifying that:

- *with reference to the assets acquired under lease, by December 31st, 2017, the related lease agreement shall be undersigned by both parties and the payment of a maxi rent equal to at least 20% of the capital share due to the lessor shall be carried out: in this case, the super amortization is also due for the lease agreements for which the "carrying out of the investment" (delivery of the asset to the lessee or positive result of the test) has occurred after December 31st , 2017 and by June 30th, 2018;*

- *with regard to the assets made by means of a tender agreement, it is necessary that by the date of December 31st, 2017 the agreement is undersigned by both parties and that the payments on account are carried out to an extent of at least 20% of the total cost provided in the agreement. In such a case, the super amortization is also due for the tender agreements* for which the carrying out of the investment (date of completion of the service provision or, in case

of work in progress, date on which the work or the portion thereof has been checked and accepted by the buyer) has occurred after December 31st, 2017 and by June 30th, 2018;

- *in relation to goods realized in economy, the condition provided by the rule about the acceptance of the order by the seller will not affect the extension of the benefit of the super amortization to the investments carried out by June 30th, 2018: the benefit can be achieved if within December 31st, 2017 the costs incurred are equal to at least 20% of the total costs incurred during the period January 1st, 2017 – June 30th , 2018..*

The super amortization of 140%

Paragraph 8 extends the 40% increase in the amortization shares and in the rents of operating assets in case of investments in new operating tangible assets, as well as for those vehicles used exclusively as *operating assets* in the business activity.

With reference to the investments in vehicles and other means of transport, unlike the tax relief of 2016, the favorable tax treatment is now recognized *only* provided that the same ones are characterized by an *instrumental* use within the business activity (in practice, the investments in vehicles which may lead to a limited tax deductibility are not included).

It should be reminded that the tax relief is due in case of purchase (or enjoyment under lease agreement) of operating and new assets.
Going back to the concepts already expressed in the past by the Tax Authorities,

- assets of durable use that are used as instruments of production within the company production process (see the circular 5/E of February 19th, 2015) shall be considered as operating assets;

- an asset is considered as "new" under the legislation if it has *never been used by other subjects*: therefore, it can be subject to a favorable tax treatment when the purchase from the manufacturer or reseller, by a subject other than the manufacturer or the reseller themselves and if it has never been used for any purpose either by the seller or by any other subject.
  It has already been specified that an asset can be considered as new also when it is displayed in a show room and used by the reseller only for display purposes.

The hyper amortization of 250%

As mentioned, the Stability Law 2017 introduces a new and greater benefit for investments in new operating tangible assets *with high technological content*, aimed at promoting the technological and digital transformation processes according to the "Industry 4.0" (included in the annex A of the law mentioned below).

In case of these investments, the increase in the purchase cost recognized is equal to 150%, allowing to amortize an amount equal to 250% of the purchase cost.

➢ ***Clarifications***

The circular provides an extremely important clarification about the notion of "new" asset for the use of the hyper amortization to 250%, highlighting that the Annex A includes, among the assets being functional to the technological and/or digital transformation of the companies according to the model "Industry 4.0", also devices, instruments and intelligent components for the integration, sensing and/or interconnection and automatic control of the processes used also in the ***modernization*** *or* ***revamping*** *of existing production systems.*

Such devices, instruments and components, as stated by the Tax Authorities,

"are subject to tax relief provided that they ensure that the asset subject to the modernization comply with the mandatory features and the additional characteristics mentioned in annex A.
The reason for the provisions on hyper amortization consists, therefore, ***in promoting the shift*** *to the model "Industry 4.0"* ***through the modernization or revamping of already existing assets.***
Therefore, considering the fact that the assets (devices, instruments and components) are relevant for the purposes of hyper amortization, ***it is believed that they may benefit from the 150 % increase even in case they are eventually book-kept to increase the already existing assets not subject to favorable tax treatment and which are not subject to modernization or revamping****"*

- ☐ *Always with reference to the notion of new assets, in case of investment in "complex assets", made up of both "new" and "used" components, the same ones will be subject to favorable tax treatment (in their entirety) if the cost related to the assets used is "not significant" compared to the overall cost incurred. If the complex asset is acquired by a third party, the seller must prove such "non-significance " of the component used compared to the total cost.*

- ☐ *The tax relief exists if the asset subject of the investment, which has been subject to a favorable tax treatment, then become subject of a sale and lease back agreement: in this case, the tax relief will continue to be enjoyed, in the form of an increase of the original cost of acquisition, in accordance with the temporal dynamics initially determined, as the lease agreement entered into is not relevant.*

Assets subject to 250% favorable tax treatment (Annex A)
These are operating assets whose functioning is controlled by computerized systems or is managed through appropriate sensors and actuators:

- machine tools for removal,
- machine tools working with lasers and other energy flow processes (for example, plasma, waterjet, electron beam), electro-discharge, electrochemical processes,
- machine tools and plants for the realization of products by means of transformation of materials and raw materials,
- machine tools for the plastic deformation of metals and other materials,
- machine tools for assembling, joining and welding,
- machines for wrapping and packaging,
- machine tools of de-production and repackaging to recover materials and functions from industrial waste (for example machines for disassembly, separation, crushing, chemical recovery),
- robots, collaborative robot and multi-robot systems,
- machine tools and systems for the assignment or change of the surface characteristics of the products or the functionalization of the surfaces,
- additive manufacturing machines used in the industry field,
- machines, being also engine and operating, instruments and devices for loading and unloading, handling, weighing and automatic sorting of the pieces,
- automated lifting and handling devices, AGV and conveying and handling systems being flexible and/or equipped for the recognition of pieces (for example RFID, viewers and vision and mechatronic systems),
- automated warehouses interconnected to the factory management systems.

All the machines mentioned above must be equipped with the following characteristics:

- control through the CNC (Computer Numerical Control) and/or the PLC (Programmable Logic Controller)
- interconnection to factory IT systems with remote loading of instructions and/or part program,
- automated integration with the logistics system of the factory or with the supply network and/or with other machines of the production cycle,
- simple and intuitive interface between man and machine,
- compliance with the latest safety, health and hygiene standards.

Moreover, all the machines mentioned above must be equipped with *at least 2* of the following features to make them comparable or integrated with cyber- physical systems:

- tele-maintenance systems and/or tele-diagnosis and/or remote control,
- continuous monitoring of the working conditions and of the process parameters by means of suitable set of sensors and adaptivity in order to reduce possible production defects,
- characteristics of integration between physical machine and / or plant with the modeling and / or simulation of its own behavior in the carrying out of the process (cyber- physical system).

The following are considered as assets functional to the technological and/or digital transformation of businesses according to the model "Industry 4.0":

- intelligent devices, instruments and components for the integration, sensing and/or interconnection and the automatic control of the processes used also in the modernization or in the revamping of existing production systems.

Systems for assuring the quality and the sustainability:

- coordinate measuring systems and non- coordinate measuring systems (being contact, non-contact, multi-sensor or based on three-dimensional computed tomography) and related instruments for the check of the micro and micro geometrical requirements of the product for any dimensional level scale (from the large scale to the micro-metric or nano-metric scale) in order to ensure and trace the quality of the product and which allow to qualify the production processes in a provable manner and connected to the factory IT system,
- other monitoring systems to ensure and trace the quality of the product or of the production process and which allow to qualify the production processes in a provable manner and connected to the factory system,
- systems for the inspection and characterization of materials (e.g. materials testing machines, machines for the testing of manufactured products, systems for non-destructive testing, tomography) able to check the characteristics of the input or output materials within the process and that represent the resulting product at a macro level (for example, mechanical characteristics) or micro (for example, porosity, inclusions) and able to generate appropriate test reports to be included in the corporate IT system,
- intelligent devices for the test of metal powders and continuous monitoring systems that allow to qualify the production processes by means of additive technologies,
- intelligent and connected systems for the marking and traceability of production lots and/or of the single products (e.g. RFID -Radio Frequency Identification),
- systems of monitoring and control of the machines working conditions (e.g. forces, torque and processing power; three-dimensional wear of the machine tool; status of components or subsets of machines) and of the production systems interfaced with factory IT information and/or cloud solutions,

- tools and devices for the automatic labeling, identification or marking of products, with connection to the code and the serial number of the product itself in order to allow maintenance personnel to monitor the constancy of the product performance over time and to act on the design process of future products in synergy, allowing the recall of defective or dangerous products,
- intelligent components, systems and solutions for the management, efficient use and monitoring of energy and water consumption and for the reduction of emissions,
- filters and water, air, oil, chemicals, powders treatment and recovery systems with systems indicating the filtering efficiency and the presence of anomalies or substances unknown to the process or dangerous, integrated with the factory system and capable of alerting the operators and/or of stopping the activities of machines and plants.

Devices for man-machine interaction and for the improvement of the ergonomics and safety in the workplace as per model «4.0»:

- desks and workstations equipped with ergonomic solutions able to be adapted in an automated manner to the physical characteristics of the operators (for example, biometric characteristics, age, presence of disability),
- systems for the lift/shift of heavy parts or objects exposed to high temperatures able to facilitate in an intelligent/robotic/interactive manner the operator 's work,
- wearable devices, appliances for the communications between the operator/operators and production system, increased reality and virtual reality devices,
- intelligent human-machine interfaces (HMI) which assist the operator for the purpose of safety and efficiency of the manufacturing, maintenance, logistics operations.

Paragraph 10 of the law grants to the subjects who benefit from the hyper-amortization at 250% and who invest in *operating intangible* assets (included in Annex B of the law, or software functional to facilitate a transition to the above-mentioned technological processes, as per list below) the possibility of benefiting from an amortization of these assets with an increase of 40%.

The Italian Ministry of Economic Development, in the *FAQ* related to the tax relief, has further clarified that if the software is "embedded" (and therefore it is bought together with the asset) and it is necessary for the functioning of the "hyper-technological" tangible asset, the same one shall be considered as subject to a favorable tax treatment with the hyper-amortization of 250%.

The Ministry was also asked to explain whether the super-amortization of 40% can be applied to an intangible asset included in Table B, if such asset has been purchased in 2017 and applied in the same year to an asset theoretically included in Table A, *but not subject to the tax relief because already purchased some years ago by the company*.
On such point, it has been specified that the benefit is granted to those "subjects" who benefit from the 150% increase. The rule, therefore, according to the Ministry,

"relates the intangible asset with the "subject" who benefit from the hyper amortization and not with a specific tangible asset ("object" subject to tax relief)"

and therefore, the software included in Annex B may benefit from the 40% increase provided that the company uses the hyper amortization of 150%, *regardless of the fact that the intangible asset is or not specifically attributable to the tangible asset subject to tax relief*.

➢ *Clarifications*

The "third part" of the circular analyses in depth one by one the cases of assets subject to tax relief listed in Table A, providing useful operational indications.
It also pointed out that in order to gain certainty about the possibility of benefitting from favorable tax treatments for investments, the companies can request a feedback to the Italian Ministry for Economic Development, acquiring and keeping the "technical advice" received.

Intangible assets subject to tax relief (Annex B)
List of intangible assets (software, system integration and systems, platforms and applications) related to investments in tangible assets as per «Industry 4.0»:

- software, systems, platforms and applications for the design, definition/ qualification of service provisions and production of artifacts in unconventional materials or of high performance, capable of enabling the design, 3D modeling, simulation, experimentation, prototyping and simultaneous checking of the production process, of the product and of its features (functional and environmentally friendly) and/or the digital and integrated filing in the corporate IT system of the information on the life cycle of the product (EDM, PDM, PLM, Big Data Analytics systems)
- software, systems, platforms and applications for the design and re-design of the production systems that take into account the flows of materials and information,
- software, systems, platforms and applications to support the decisions able to interpret the data analyzed from the field and able to show specific actions to improve the product quality and the efficiency of the production system to the online operators,
- software, systems, platforms and applications for the management and coordination of the production with high characteristics of integration of the service activities, such as the factory logistics and maintenance (such as intra-factory communication systems, field-bus, SCADA, MES, CMMS systems, innovative solutions with features related to the I-T paradigms and/or cloud computing paradigms)
- software, systems, platforms and applications for the monitoring and control of working conditions of the machines and of the production systems interfaced with factory IT systems and / or with cloud solutions,
- software, systems, platforms and virtual reality applications for the realistic study of components and operations (for example assembly), in immersive or visual contexts,
- software, systems, platforms, reverse modeling and engineering applications for virtual reconstruction of real settings, software, systems, platforms and applications able to communicate and share the data and information both among themselves and with the environment and the surrounding acting subjects (Industrial Internet of Things), thanks to a network of interconnected intelligent sensors,
- software, systems, platforms and applications for the dispatching activities and inclusion of products in production systems,
- software, systems, platforms and applications for quality management within the production system and the related processes,
- software, systems, platforms and applications for the access to virtualized, shared and configurable resources to support production processes and processes for the management of the production and/or the supply chain (cloud computing)
- software, systems, platforms and applications for industrial analytics dedicated to the treatment and processing of big data coming from the I- T sensors applied in the industrial sector (Data & Analytics Visualization, Simulation and Forecasting)
- software, systems, platforms, artificial intelligence & machine learning applications that enable machines to show a skill and/or an intelligent activity in specific fields in order to guarantee the production process quality and the reliable functioning of the machine and/or plant,

- software, systems, platforms and applications for the automated and intelligent production, characterized by high cognitive ability, interaction and adaptation to the context, self-learning and reconfigurability (Cybersystem),
- software, systems, platforms and applications for the use along the production lines of robots, collaborative robots and intelligent machines for the safety and health of workers, the quality of the final products and the predictive maintenance,
- software, systems, platforms and applications for the management of augmented reality through wearable device,
- software, systems, platforms and applications for devices and new interfaces between humans and machines that allow capturing, conveying and processing the information in vocal, visual and tactile format,
- software, systems, platforms and applications for the intelligence of the systems that ensure energy efficiency mechanisms and decentralization mechanisms in which the production and/or storage of energy can also be delegated (at least partially) to the factory,
- software, systems, platforms and applications for the protection of networks, data, programs, machines and systems from attack, damage and unauthorized access (cybersecurity)
- software, systems, platforms and virtual industrialization applications that, virtually simulating the new environment and uploading the information on cyber-physical systems at the end of all tests, enable avoiding hours of tests and downtime along the real production lines.

➢ *Clarifications*

☐ *Even with reference to the intangible assets subject to tax relief, in the "third part" of the circular there is an in-depth analysis of each case of assets subject to tax relief listed in Table B.*

☐ *Software is among those investments subject to tax relief provided that it has been purchased for license purposes and always provided that it can be registered as intangible assets under the item "industrial and other patent rights" (Item B13 of the Balance Sheet).*

Documentary charges

Given the investments that enable the hyper-amortizations and the related investments in intangible assets, the law imposes some charges to the businesses that want to take advantage of such benefit:

- a special statement of the legal representative, provided in accordance with the Italian Presidential Decree of December 28th, 2000, no. 445 (for purchases of unit cost up to Euro 500,000)
- a special sworn technical report issued by an engineer or an industrial expert enrolled in the respective register or by an accredited certification body (for purchases of unit cost exceeding Euro 500,000).

These documents must certify that the asset:

- possesses technical characteristics that enable it to be included in the lists as per attachments mentioned above,

- is *interconnected* to the company's system of production management or to the supply network. The interconnection is present when the asset:

    - exchanges information with internal systems (e.g. management information system, planning systems, design and product development systems, monitoring, even remotely, and control, other factory machinery, etc.) and/or external systems (e.g. customers, suppliers, partners in the design and collaborative development, other production sites,

supply chain, etc.) by means of a link based on documented specifications available publicly and internationally recognized (examples: TCP-IP, HTTP, MQTT, etc.);
- is uniquely identified, in order to recognize the origin of the information, through the use of addressing standards internationally recognized (e.g.: IP address).

The statement of the legal representative and any report must be acquired by the company within the tax period in which the asset comes into operation, or, if later, within the tax period in which the asset is interconnected to the company's system for the production management or to the supply network.
It shall be pointed out that, in the latter case, the tax relief will be used only with effect from the tax period in which the interconnection requirement is met.

The Italian Ministry of Economic Development specified that the report must be carried out for *each* single asset acquired for € 500,000, being not possible to include all the assets whose value is greater than said threshold and that have been acquired during the year.

➢ ***Clarifications***

- *According to the Tax Authorities it is "appropriate" that the report / certificate is accompanied by a" technical analysis" that includes:*
  - *the technical description of the asset – subject to the tax relief – which shows, in particular, its inclusion in one of the categories defined in Annex A or B, with the indication of the cost of the asset and its components and accessories (as provided by invoices or lease documents);*
  - *the description of the operating assets' characteristics necessary to meet the legal requirements for the purposes of the tax relief;*
  - *checking of the interconnection requirements;*
  - *the description of the methods able to show the interconnection of the machine/plant to the production management system and/or to the supply network;*
  - *the representation of the flows of materials and/or raw materials and semi-finished products and information that define the integration of the machine/plant in the user's productive system (for this purpose, appropriate representation methodologies may be used such as, for example, blocks diagrams, flowcharts, results of simulations, etc.).*

- *The interconnection requirement is <u>essential</u> to benefit from the hyper amortization and the favorable amortization for intangible assets.*

- *In case the interconnection occurs in a year subsequent to the one in which the investment took place and entered into operation, the use of the benefit shifts to such subsequent period. In this case the asset, in the tax period in which it enters into operation, can temporarily take advantage of the super amortization and, in order to avoid a duplication of benefits what already previously obtained as (temporary) super amortization must be deducted from the amount of the increase related to hyper amortization (which can be used from the interconnection tax period).*

<u>*Tax Advances*</u>
The determination of the advances due for the current tax period as at December 31st, 2017 and for the following one is carried out considering, as tax of the previous period, the one that would be determined in the absence of the provisions introduced.

<u>*Exclusions*</u>
Paragraph 13 reiterates that the assets for which the Italian Ministerial Decree of December 31st, 1988 provides depreciation rates lower to 6.5 percent (amortization longer than 15 years), the premises, the

buildings and the assets listed in Annex 3 attached to the aforesaid stability law are excluded from the possibility of increasing the value of the asset to be amortized; moreover, increases in the acquisition cost do not produce effects for the application of sector studies.

- ***Other explanations***

  - *The cost of assets subject to tax relief shall be considered gross of any possible contributions against plant investments (and this regardless of the accounting way of the contribution itself).*

  - *With reference to the cumulability of the rules with other favorable measures, the 40%(or 150%) increase, as a general measure, can be used also in the presence of other tax reliefs, unless these latter do not provide for an express prohibition on cumulation with general measures.*

  - *In case of acquisition of the asset under a finance lease, the basis of calculation of the benefit do not apply to the entire lease fee, but only to the share capital: for the spin-off of the interest rate, the lump criterion provided for the analogous counting for IRAP purposes can be taken as reference.*

  - *If, in a tax period, the benefit is used in an amount lower than the expected one, the differential not deducted cannot be brought forward and therefore is lost.*

  - *In case of investments in photovoltaic and wind power plants, taking into account changes in the legislation on accounting and tax treatment of these assets, only the costs related to the plant parts not considered as "immovable property" can take advantage of the super depreciation.*

  - *In the event in which the asset is sold prior to the full enjoyment of the tax relief:*
    - *in the year in which the asset is sold, the increase will be determined according to the "pro rata temporis" criterion;*
    - *the increase shares not deducted can no longer be used, either by the transferor or the transferee (who buys a "used" asset);*
    - *the increase shares deducted will not be returned by the transferor since the legislation in question does not provide for any recapture mechanism.*

  - *In the first year of tax relief, the super amortization is reduced by half, like the ordinary depreciation on tangible assets.*

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Entry into force of the favorable tax regime for foreign high net worth individuals

The "Stability Law 2017" (Law no. 232/2016, art. 1, paragraphs 152-154 and 157-159) has introduced, with effect from 2017, a favorable tax regime (transferred into new art. 24-bis of the TUIR – i.e. Italian Income Tax Code), which aims at attracting individuals with high property/ income in Italy, in order to (in particular, but not only) possibly apply a substitute flat rate on foreign income.
Please find below a summary of the main features of the regime.

Subjects benefitting from the legislation, access conditions and methods of taxation

The subjects benefitting from the legislation are individuals transferring their *tax residence* from abroad to Italy: such subjects must not have been resident in Italy for at least 9 of the 10 tax years preceding the start of the period during which the option is effective.
At discretion of such subjects, the income they produce abroad are then subject to a *substitute tax*, calculated on a *lump sum* basis (meaning regardless of the amount of foreign income actually received) to the extent of € 100,000 for each tax period in which said option is valid: this amount is reduced to € 25,000 for each tax year for each family member who also moves to Italy.
Family members who may benefit from the regime are those identified in article 433 of the Italian Civil Code: they are, in particular, spouse, children, parents, sons-in-laws and daughters-in-laws, parents-in-law, brothers and sisters.
The main incomes from abroad falling within the withholding tax application field are:

- ☐ incomes from land and buildings produced abroad;
- ☐ property incomes received by non-residents;
- ☐ income from employment, from pseudo self-employment and self-employment rendered abroad;
- ☐ corporate incomes rendered abroad through a permanent establishment;
- ☐ incomes different from activities carried out/held abroad.

The substitute tax is not applied, by express provision, to the gains realized by means of a transfer, for consideration, of "qualified" participations made in the first 5 tax periods in which the option is effective.
The substitute tax is paid in a single payment by the date expected for the final payment of the income tax balance and it is not deductible from any other tax or contribution.

It shall be pointed out that the regime does not affect the taxation of incomes produced in Italy, which therefore follow the ordinary rules of determination.

Finally, the regime is also theoretically applicable to those who previously emigrated from Italy to a black listed country: in this case, within the ruling (see below) a proof of the actual emigration must be provided, ignoring the provisions of art. 2, paragraph 2-bis of the TUIR, paragraph 2-bis of the TUIR, according to which people emigrating to black listed countries allegedly reside in Italy unless they give evidence to the contrary to the Tax Authorities.

Duration of the regime

The option to benefit from the regime can be revoked and in any case, expires after 15 years from the first tax year in which the option is effective.
The option shall be considered as automatically renewed from year to year, unless there is a case of *termination* of the effects, of option *revocation* or *lapse*.

How to benefit from the regime

On March 8th, 2017, the Italian Revenue Agency has issued the implementing decree no. 47060, which rules how to benefit from the tax regime.

It is possible to benefit from the regime by submitting the tax period related to the tax period in which the subjects have transferred their residence in Italy, or by submitting the tax return related to the tax period following the transfer.
Moreover, it is possible to submit a specific request for ruling, showing:

- the personal data and, if already given, the tax code and, if already resident, the related address of residence in Italy;
- the status of non-resident in Italy for period at least equal to nine tax years during the ten tax years preceding the start of the period in which the option is effective;
- the jurisdiction or jurisdictions in which the subject has had the last tax residence before exercising the effective option; with reference to this disclosure, the Italian Revenue Agency then transmits this information, through the appropriate administrative cooperation instruments, to the tax authorities of the jurisdictions mentioned as the place of the last tax residence before exercising the effective option;
- states or overseas territories for which there is a will to exercise the option of *not* applying the substitute tax pursuant to paragraph 5 of article 24-bis of TUIR.

With reference to this last point, it should be pointed out that the subject that benefit from the regime may decide *not* to apply the substitute tax in relation to incomes earned in one or more states or overseas territories, *giving specific instructions* when exercising the option or with a subsequent change of the same one.
Only in this case, for incomes produced in these states or foreign territories *the ordinary tax regime* is applied and the *tax credit* for foreign incomes is relevant (pursuant to art. 165 of the TUIR). The list of States "excluded" from the application of the substitute tax (in relation to foreign income earned there) may be *supplemented* with additional states or territories in a tax return related to one of the tax periods *following* the one in which such exclusion option was exercised.

In the request, the taxpayer indicates the existence of those elements necessary for having access to the substitute tax regime on income produced abroad, by filling in the appropriate *check list* attached to the provision of March 8th, 2017 and by submitting the related supporting documentation, if relevant.

The request for ruling must be submitted by the taxpayer to the Italian central directorate for tax assessment by hand delivery, by sending a registered letter with acknowledgment of receipt, or by PEC – i.e. certified email address (in this latter case with a petition signed digitally).

The request for ruling can be submitted even if the terms to establish the tax residence in Italy (and therefore before the existence of such essential requirement for using the regime is found) have not expired yet.

Finally, in case the taxpayer does not submit the request for ruling, the same information required must be indicated in the return in which the exercise of the option for the regime of substitute tax on incomes produced abroad by the taxpayer is finalized.

Revocation and lapse of the regime
The taxpayer who has exercised the option, or the family member to whom the same one has been extended, may revoke the option in the tax return related to one of the tax periods following that in which it has been exercised.
The regime lapses in the presence of:

- omitted or partial substitute tax payment by the date expected for the payment of the income tax balance with effect from the tax period within which the payment should have been carried out;

- transfer of tax residence to another State or territory, with effect from the tax period in which the tax residence in Italy for tax purposes is no more effective.

The revocation or lapse of the regime excludes the exercise of a new option.
The expiration of the effects, the revocation of the option and the lapse of the regime of the subject exercising the option result in the expiration of the effects of the option even with reference to the family members to whom it is extended, *unless* these latter exercise an autonomous option being effective for the remaining tax periods up to a total of 15 tax years.
However, the exclusion of one or more family members from the regime due to the failure to pay or to the partial payment of the substitute tax do not involve the exclusion from the regime for individuals who have personally exercised the option.

<u>Other effects of the election of the regime</u>
In addition to the introduction of the "flat tax" on foreign income, those who elect the regime (like the family members):

- are not required to meet *tax monitoring* obligations (RW section);

- are exempt from paying IVIE (i.e. tax on the value of property located abroad) and IVAFE (i.e. tax on the value of financial assets held abroad);

- limit the scope of the taxes on *donations and inheritance*: in fact, for the open inheritance and donations carried out during the tax periods in which the option sis effective, the related taxes are due *only for the existing assets and rights in the State at the time the inheritance or the donation is carried out*.

With a special decree issued by the Italian Ministry of Foreign Affairs and International Cooperation, together with the Interior Ministry, ways to ease the process related to applications for entry visa and residence permit applicable to those who transfer their tax residence in Italy, as per article 24-bis of the TUIR will be identified, in order to promote the entry of significant investments in Italy, even aimed at increasing employment levels.

The effects of the option for the application of the withholding tax on income generated abroad cannot be combined neither with the incentives for the return of Italian researchers residing abroad (as per article 44 of the Italian Decree-Law no. 78 2010), nor with the tax reliefs for the return of skilled workers (article 16 of the Italian legislative decree of September 14th, 2015, no. 147).

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DEADLINES – APRIL 2017

- 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.
  Please remind the following limitations applicable to compensations:

  - ☐ in terms of VAT
  - ☐ in terms of taxes on income and IRAP
  - ☐ in the presence of tax debts entered on the tax roll and expired for amounts exceeding Euro 1,500

Monday 10th

Filing of "spesometro" 2016

By the above date, the 2016 list of customers and suppliers (i.e. "spesometro") must be electronically filed by taxpayers carrying out monthly VAT payment.

Taxpayers who make quarterly VAT payment can submit the spesometro by an extended deadline, meaning April 20th.

Sunday 30th

(deadline extended to Tuesday May, 2nd)

Submission of the request for refund/ VAT credit off-setting for the first quarter 2017

By the above date, companies that meet the requirements provided by the current legislation may request the refund or the possibility to offset the VAT credit related to the first quarter 2017.

For the (electronic) request the VAT form "TR" should be used

Stamp duty – bi-monthly installment payment

By this date, those who have opted for the "virtual" payment of the stamp duty, following the authorization of the Italian Revenue Agency, shall pay, by F24 form, the second bi-monthly installment for 2017.

Favorable tax regimes for the return of workers

By this day, those who are eligible and intend to take advantage, alternatively, of the favorable tax regimes for the return of workers from abroad (Italian law no. 238/2010 and art. 16 of the Italian Legislative Decree no. 147/2015) must submit proper application to the employer.

For 2016 the benefit shall directly be managed in the tax return by the subject involved, while from 2017 the employer, based on the application submitted by the employee, shall apply the lowest tax withholdings.

The content and methods for the submission of the application are ruled in the Provision of March 31st, 2017 issued by the Italian Tax Authorities.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

the employer is entitled to modify the duties, the legal category and the contractual enrollment as well as the salary of the employee?

Pursuant to article 2103 of the Italian Civil Code as recently reformed, the employer can enter into an individual settlement agreement with the employee - to be signed in front of public authorities – providing for the change of the duties, the legal category of employment and the contractual enrollment as well as the relevant salary. The foregoing may occur in the sole interest of the concerned employee to (i) keep his job or (ii) acquire a different professionalism or even (iii) improve his life conditions.

JUDGEMENT OF THE MONTH

Disciplinary dismissal: double checking by the judge

The Court of Cassation, with judgement No. 7166 dated 21 March 2017 has once again deliberated on the subject matter of disciplinary dismissal. In this specific case, the employee, holding the position of emergency technical manager was dismissed after a disciplinary proceeding for having refused to respond to two subsequent support calls respectively for a loss of pressure and a gas leak. The worker filed a claim at the Court of First Instance to declare the dismissal unlawful, but his case was rejected. Therefore, he appealed. The Territorial Court, in a reversal to the judgement of the previous court, declared the dismissal unlawful and ordered the employer to reintegrate the employee in his/her role. In fact, the Court noted that the charge filed against the employee fell within the cases that the National Collective Bargaining Agreement -- applied to the work relationship-- punished, lacking recurrence, by way of a disciplinary action short of termination. Against the Territorial Court judgement, the employer filed an appeal at the Court of Cassation. The Court of Cassation judges, in the judgement in hand, clarified that the trial judge must double check the **correspondence of the disciplinary collective provisions** respect to what is established in **article 2106 of the Italian Civil Code** and determine the **invalidity** of those that establish **as just cause or justified reasons for dismissal the conducts that are by their nature subject only to disciplinary actions short of termination**. According to the Supreme Court, the trial judge **cannot** instead do the opposite, that is expand the list of just causes or justified reasons for dismissal beyond what is established by the independence of the parties. On that basis, the Court of Cassation established that in terms of disciplinary actions, it is necessary to assess the **gravity of the breach from an objective and subjective stand point** as well as from the stand point of **future reliability** of the employee regarding the performance established in the contract.

REGULATION

Italian Draft Law No. 25/2017: Goodbye to vouchers and news on tenders

Italian Law decree No. 25 dated 17 March 2017, published on the Official Gazette, has **revoked the regulations on ancillary work**, voiding completely the instrument already weakened by the latest legislative interventions applied by the amendments to the Jobs Act. Now new legislative policy instruments will have to be designed to fight unreported employment and at the same time ensure the accessibility to casual work. Meanwhile, there are many applicative uncertainties, especially concerning

the limitations of use of the vouchers purchased until Friday, 17 March and usable by 31 December. For now, on 21 March, a **note from the Ministry of Labour** intervened to clarify that **vouchers**, in the transition period, **shall be used** "***in compliance with the regulations on the matter of casual work established by the regulations being revoked by the decree***". The same decree has also introduced **news in the matter of tenders**. Specifically: (i) the **abolition of the benefits of prior discussion**, introduced by the Fornero Law, with the consequence that the client can be attacked even before the contractor and (ii) the **cancellation of the possibility**, for the social partners to **modify the rules of joint liability at the time of second level negotiation** in a manner that differs from what is established by the law.

Approved at the Chamber the draft law on self-employment and the "smart working"

The Chamber, in the session dated **9 March 2017**, has **approved the Italian Draft Law** detailing measures for the protection of non-entrepreneurial **self-employment** and measures aimed at favouring the flexibility in terms of time and place for employed work (the so called **smart working**). The **provision now is sent back to the Senate for final approval**. During the review at Montecitorio, **significant news have been introduced in terms of self-employment**. More specifically the following are worthy of note: (i) possibility for the self-employed woman, upon approval of the client, to be replaced during maternity by a trusted colleague having the necessary professional credentials; (ii) expansion of the deductible expenses and possibility for professionals to participate in public contests and call for tenders for the appointment of consulting or research tasks; (iii) concerning compensations, the application of Italian Legislative Decree No. 231/2002 has been confirmed. In reference to the **smart working,** it has been confirmed that it is an **instrument** and not a type of contract, in order to make it usable by those who carry out tasks that are compatible with it. Thus, all that is needed now is its final approval.

CASE LAW

The "new" 2103 of the Italian Civil Code: Stricter repêchage obligation

The Court of Milan, with judgement No. 3370, filed on 16 December 2016, has stated that the employer, in case of dismissal for financial reasons, in verifying whether to assign the employee to other tasks within the company (the so called **repêchage obligation**) cannot limit itself to tasks equivalent to the ones performed by the extra worker, but must consider all **the tasks that can fall within the same legal job level and category**. This because the amendments to article **2103 of the Italian Civil Code** introduced by the Jobs Act, led to **overcome the notion of equivalence of tasks** that represented in the past the binding parameter on whose basis the employer assigned new tasks to its employees. Therefore, if on the one hand the "new" wording of article 2013 of the Italian Civil Code made more flexible the organization of work for the company, on the other hand it has introduced stricter obligations in the verification of "repêchage".

Unlawful dismissal for reduction of costs if the employer does not demonstrate the effectiveness of the downsizing

The Court of Cassation with judgement No. 5323 dated 2 March 2017, expressed once again its opinion on the lawfulness of dismissal for objective just cause in order to define its contents and limitations. In the specific case, an administration clerk challenged his dismissal, ordered for a needed corporate cost reduction. The Company, even if it had proven in court of having lost several calls for tender and to be in a position of weakness respect to its competitors, **failed to discharge the burden of proof concerning the effectiveness of the functional downsizing of the corporate organizational setup**

with related removal of the position held by the worker. The Court of Cassation, with the judgement in hand, in rejecting the appeal submitted by the Company, confirmed the correctness of both trial judgements that had verified the failure to prove the justified objective reason [for the dismissal], **failure of proof that was sufficient to determine the unlawfulness of the termination**.

Retrocession to the Client of the contracted company may mean a corporate transfer as per article 2112 of the Italian Civil Code

The Court of Cassation, with judgement No. 6770 of 15 March 2017, overturned the decision of the Court of Appeal of Rome establishing *a contraris* that, the **retrocession to the Client company of the contracted services** does not exclude the possibility that a **corporate transfer** may occur according to article 2112 of the Italian Civil Code. This would happen when such retrocession would imply a **transfer of assets, including personnel**, such to make possible the **carrying out of a specific business activity**. Supporting such assumption, the Cassation – in addition to drawing from its own principles originating from previous judgements it issued– recalled a number of rulings of the European Court of Justice where the judges had identified as an element necessary for the existence of a corporate transfer the fact that the economic entity in question would maintain its identity independently from the change of the effective owner and, therefore, from the instruments used for the succession in the underlying legal relationships. Therefore, in the case of a transfer of an organized group of assets from an entrepreneur to another, a corporate transfer will occur according to article 2112 of the Italian Civil Code inasmuch as the economic entity transferred – as a consequence of its transfer and independently of the legal instrument adopted – maintains its identity and is such to allow the continuation or the resumption of its management. This is valid also in the case when an organised group of assets is constituted solely by a group of employees.

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