RSM PALEA LAURI GERLA

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

TAX NEWS

2017 – 04

RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

Tax implications of the corrective measure 2017

On April 24th, the decree law no. 50, with which urgent financial provisions were introduced, was approved.

Considering that the decree is subject to conversion and that therefore the text may be subject to more or less significant changes, please find below a summary of the main tax measures contained in the decree.

VAT – Split Payment Expansion (article 1)
The tax decree ***expands*** the scope of the *split payment* regime.

It shall be reminded that, up to the entry into force of the Italian decree Law no. 50/2017, pursuant to the provisions contained in the Italian Law no. 190/2014 (which introduced article 17-ter in the Italian Presidential Decree no. 633/72), it was already provided that in case of sales of goods and of services provisions documented by invoice, not falling within the scope of the *reverse charge* and carried out towards subjects belonging to the public administration, the *tax was paid by the buyers*.

In other words, according to the *split payment* mechanism, in relation to purchases of goods and services made by public administrations, the VAT charged by the supplier in the related invoices must be paid by the purchasing administration directly to the tax authorities rather than to the same supplier, "splitting" the payment of the related amount from the payment of the relevant tax.

The Tax Decree 2017 extends the scope of the split payment (the new provisions will be applied to the transactions for which the **invoice is issued from July 1st, 2017**), according to 3 principles:

- the obligation to apply the splitting mechanism is extended to all administrations, entities and subjects included in the consolidated account of the public administration;

- the transactions carried out towards the following subjects are subject to the regime:

    - companies directly controlled by the State;
    - companies directly controlled by the local public authorities;
    - companies, directly or indirectly, controlled by the above-mentioned subjects, even though these latter are included among the public administrations as per law no. 196 of December 31st, 2009;
    - listed companies included in the FTSE MIB index of the Italian Stock Exchange. To such an extent, it is provided that, with decree issued by the Italian Ministry of Economy and Finance, an alternative reference index for the stock market may be identified;

- elimination of the cause of objective exclusion, related to transactions whose considerations are subject to tax withheld at source and which are now included within the split payment 's scope: the clearest case concerns the services rendered by *professionals*, which, as known, are subject to withholding tax as payment on account.

As one of the natural (and negative) effects of split payment consists in the physiological tendency of the seller/service provider to generate **a surplus of deductible VAT** (resulting from the impossibility of offsetting his own VAT payable with the VAT receivable), the VAT legislation on **reimbursements**

(article 30 of the Italian Presidential Decree no. 633/72) is also amended, adjusting those taxpayers subjects to split payment and who can access the "priority" reimbursement procedure to the new provisions.

Finally, it shall be pointed out that the adoption/extension of the split payment mechanism was subject to a special EU **authorization**: an authorization that was formalized (up to 2020) in the implementing decision (EU) 2017/784 of April 25th, 2017 published in the Official Journal of the European Union on May 6th.

VAT – amendment to the right to deduction (article 2)

Art. 19 of the Italian Presidential Decree no. 633/72 related to the terms by which it is possible to deduct the VAT on goods and services purchased or imported is amended.

According to the legislation previously in force, this right to tax deduction existed when the tax became collectable and could be exercised, under the conditions existing at that time, at the latest with the return relating to the second year following the one in which the right to deduction started to exist.

In the light of the changes introduced, it is now provided that the right to deduct the tax paid on purchases or imports may be exercised at the latest with the annual VAT return *related to the year in which the same one arose.*

Changes are also made at the end of the registration of the purchases; in the light of the new provisions, the purchase invoices must be indicated in the relevant register:

- prior to the periodic liquidation in which the right to deduct the relevant tax is exercised and, *however*,
- within the deadline for submitting the annual return related to the year in which the invoice is received and with reference to the same year.

Amendments to the legislation on tax offsetting (article 3)

Another tightening measure on tax offsetting is introduced, as the objective scope of the ***stamp of approval*** has extended and also as the obligation to exclusively use the electronic services, made available by the Italian Revenue Agency to allow those subjects holding a VAT number to carry out the offsetting, has extended.

Therefore, the amount – above which the receivables related to VAT, to income taxes and related surtaxes, to amounts withheld at source as tax, to substitute taxes of income taxes and to IRAP can be offset *only by affixing the stamp of approval* on the return from which they come or the alternative undersigning of the subject in charge of the statutory audit – is reduced and homogenized to **euro 5.000**.

Moreover, it is also provided that if the offsetting of said receivables are made ***in the absence*** **of the stamp of approval** or of the alternative undersigning , or in the presence of the stamp of approval or of the alternative undersigning affixed by non-authorized subjects, the office shall carry out, besides the recovery of interest and the issuing of sanctions, also the recovery of the credits used without complying with the rules providing for the affixing of the stamp of approval on the returns from which the receivables emerge.

A further piece of news is the *generalization*, for those subjects holding a VAT number, of the obligation to use – for the offsetting carried out – the electronic channels made available to the Italian Revenue

Agency: therefore, the amount of the credit itself is not taken into account (previously the obligation existed in case of amounts offset exceeding 5,000).

- *Clarifications of the Italian Revenue Agency – Resolution no. 57 of May4th*

Given the operational impact of the provisions on offsetting, the Italian Revenue Agency has already issued a practice document on such a matter.

The most relevant aspect concerning the news introduced is certainly the one related to their **effective date**: for this purpose, it has been pointed out that the new rules are applied to all conducts held after their entry into force and, therefore, with reference to the receivables included in the **returns submitted from April 24th, 2017**.

Therefore, for the returns already submitted by April 23rd and lacking the stamp of approval (i.e. VAT form 2017, but also, for example, the returns related to income taxes and IRAP of subjects whose tax year does not coincide with the calendar year), the *previous constraints remain applicable* (i.e., the payment delegations which, although filed after April 24th, uses offset receivables emerging from returns already submitted for amounts lower than Euro 15,000, cannot be rejected).

Finally, the resolution specifies that, in view of the technical time needed to adapt the IT procedures, *the check* on the compulsory use of the electronic services of the Italian Revenue Agency, in case of F24 form submitted by VAT holders who intends to offset receivables, will begin only from June 1st, 2017.

Tax regime on short-term lease agreements (article 4)

The tax treatment of short-term lease agreements, i.e. of residential lease agreements not exceeding 30 days and *entered into by individuals outside the scope of the business activity*, both directly and through real estate brokers, also through the management of on-line portals, is ruled: agreements providing laundry and premises cleaning services (as well as those subleased and those terminated by the borrower) are now included.

The income arising from the above-mentioned short-term lease agreements (i.e. **"with services"**), entered into with effect from June 1st, 2017, can be subject, upon option, to the provisions relating to the **flat tax** with rate of 21%.

Among the fulfillments introduced, it is provided, in particular, that those subjects who

carry out real estate brokering, also through the management of online portals, by connecting people looking for a property with people who have real estate units to be leased,

are obliged to submit to the Italian Revenue Agency the data relating to the agreements entered into with their involvement.

Where the same subjects receive the fees or amounts, it is mandatory to apply, as withholding agents, the *withholding tax* of 21% at the time the credit is made and to provide for the related payment: this withholding tax, in case the option for the flat rate regime has not been exercised, is considered as *payment on account*.

Amendments to the economic growth aid (i.e.ACE) mechanism (article 7)

With reference to the corporations, the methods to determine the reference basis for calculating the notional return for ACE purposes are amended. As a matter of fact, the "fixed" reference of the capital

as at December 31st, 2010 is eliminated and a "**mobile" basis** is introduced. It consists of the increase in capital compared to the one existing at the closing of the 5th year preceding the one for which the ACE benefit is applied (in the example proposed by the Italian Revenue Agency, the change in capital in 2017 shall be evaluated no more compared to the capital existing as at December 31st, 2010, but to the one existing as at December 31st, 2012, while in 2018 the reference capital will be the one at the end of 2013).

Tax Litigation – extension of the claim/ mediation (article 10)

The (mandatory) scope of the claim/mediation is **extended** to disputes whose value exceeds € 20,000 (previous limit) and up to € 50,000 (new threshold).

The increase in the threshold from Euro 20,000 to **Euro 50,000** will be applied with reference to the **documents notified from January 1st, 2018**.

Settlement of pending tax disputes (article 11)

Similarly to the rules on the settlement of tax bills, it is possible to definitively settle the pending tax disputes.

More specifically, the settlement:

- concerns the disputes that are pending at the date of entry into force of the decree, for which the taxpayer has appeared before the court at first instance by December 31st, 2016;

- provides for the submission of a special claim by the taxpayer and the full payment of the sums referred to in the challenged act which have been the subject of the claim and of the interest for late entry in the tax-rolls; **the sanctions connected with the tax and interest for late payment are not due.**

If the pending dispute only concerns default interest or non-tax-related penalties, 40% of the challenged amounts is due for the settlement.

The settlement is completed with the payment of the amounts owed or of the first installment**, by September 30th, 2017**. For payments, the following is provided:

- the **payment extension** is allowed only for amounts over € 2,000;
- the installment payment must be made in 3 installments: the first, equal to 40%, expiring on September 30th, 2017; the second, also equal to 40%, expiring on November 30th, 2017; the third, equal to the remaining 20%, to be paid by June 30th, 2018.

The amounts to be paid are calculated **net of what has already been paid** during the proceedings or of the amount due for the settlement of tax bills: as in the case of the similar settlement measures it is provided that **no sums already paid are returned**, even though they exceed the amount due for the settlement itself.

Changes to the Patent Box regime (article 56)

In order to make the rules of the Italian Patent Box regime compliant with the OECD standard, company **trademarks** are **excluded** from the list of intangible assets that may benefit from the favorable tax treatment.

With regard to the effective date of the new provisions, it is established that trademarks in the "Patent Box" cannot be subject to favorable tax treatment from the tax period for which the options are exercised after December 31st, 2016, meaning for those subjects with tax year coinciding with the calendar year, no tax reliefs can be applied to trademarks from **January 1st, 2017**.

Transfer Pricing (article 59)

The transfer pricing legislation is also changed with the amendment of art. 110, paragraph 7 of the TUIR (i.e. Italian consolidated law on income tax) and with the introduction of article 31 quater in the Italian Presidential Decree no. 600/73.

The new wording of art. 110 of the TUIR now contains an express reference to ***the principle of free competition*** in place of the ***normal value***.

The new art. 31-quater of the Italian Presidential Decree no. 600/73 widens the hypothesis of recognizing the tax relief on taxable income arising from the proper application of the principle of free competition, identifying three distinct assumptions following which the Tax Authorities can recognize a tax relief on taxable income as a result of an adjustment of the taxable base – due to non-deductible costs – of the foreign affiliated company carried out by another State:

- within the execution of the agreements entered into with the competent authorities of the foreign Countries following the friendly procedures provided by the international conventions against double taxation on income or by the convention no. 90/436 / EC of July 23rd, 1990;

- after the conclusions of the checks carried out within the international cooperation activities whose results are shared by the participating States;

- following a request from the taxpayer, based on an adjustment due to non-deductible costs compliant with the principle of free competition and carried out by a State with which an agreement to avoid double taxation on income is effective, agreement that allows an adequate exchange of information. In any case, the taxpayer's right to request, where the conditions are met, the activation of friendly procedures (the terms and conditions for the submission of the claim will be determined by a subsequent provision of the Director of the Italian Revenue Agency) remains in force.

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DEADLINES – MAY 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

Wednesday 31st

Communication of VAT liquidations

By this date, taxpayers have to electronically submit the summary accounting data of monthly or quarterly VAT periodic liquidations carried out in the previous calendar quarter (new fulfillment).
Please note that:

- the communication is also submitted in case of liquidation with credit surplus;
- taxpayers who are not obliged to submit the VAT annual VAT return or to carry out periodic liquidations are exempted from the submission of the Communication, provided that, during the year, said conditions for the exemption are always fulfilled;
- in case of tax separate determination in the presence of more business activities, the taxpayers have to submit only one summary Communication for each period.

The non- submission of the communication, the incomplete or untruthful communication of the periodic liquidation data is punishable by an administrative penalty ranging from € 500 to € 2,000. The penalty is reduced to half if the submission is carried out within fifteen days after the expiration date, or if, within the same term, the correct submission of the data is made.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

... did you know that there are new rules regarding joint liability for tender contracts??

Law decree No. 25 has been converted into Law No. 49 dated 20 April with which, among other things, on the topic of tender contracts, the benefit of prior discussion of the main debtor (introduced in 2012) has been abolished. Therefore, the client may be attacked even before the contractor for any wage claims, social security contributions and insurance premiums, without prejudice to the right to bring forth legal action against the latter to obtain reimbursement of what was already paid.

JUDGEMENT OF THE MONTH

Minutes of the conciliation meeting: voided if the worker has been deceived

The Court of Cassation, with judgement No. 8260 dated 30 March 2017, reforming the judgement of the Court of Appeal with jurisdiction in the territory, accepted the complaints of a worker who had signed the **minutes of a conciliation** meeting at the union's and then requested them to be **voided** with the goal of having the court verify the invalidity of the dismissal ordered during a collective dismissal procedure. In particular, the worker asserted that in the case in hand, there was defect in consent deriving from a deceiving manoeuvre that led him to sign the **minutes of conciliation** on the assumption that his professional position fell among those in excess and that such assumption, shortly after, proved to be false when the company hired another employee to hold the same position he had held previously. According to the Court of Cassation, the judges in charge of the matter were incorrect in not assessing whether the behaviour of the employer company was such to deceive the worker. This because, even a «**conduct of malicious silence**» may lead to **deceit** and, therefore, to defect of consent based on fraudulent non-disclosure. In fact, according to the Court of Cassation, also in the employment contract, lack of disclosure and reluctance from one of the parties regarding situations of interest to the counter-party, whenever such reluctance is part of an overall pre-planned behaviour, with malice or trickery, intended to implement the deceit being pursued, represent fraudulent non-disclosure pursuant to article 1439 of the civil code. According to such principle, the Court of Cassation then ordered the Court of Appeal to verify the corporate conduct regarding fraudulent non-disclosure against the employee.

REGULATIONS

The Legislative Decree that amends the procedures for the fight against bribery and corruption in the private sector has been approved. There is news also for the Organizational Models

On 30 March 2017, **Legislative Decree No. 38/2017**, related to the **fight against bribery and corruption** in the private sector has been approved. This piece of legislation extends the range of **active subjects** committing the offence as detailed in art. 2635 of the civil code, including – in addition to those that hold **actual key management and control roles** within the company – all those that carry out **any management function**. In addition, the conducts that may be subjected to penalties are expanded, including, among others (I) **mere solicitation** of undue money and other benefits by company employees as well as (ii) the **offer of undue money or other benefit** by an external subject to the company employees so that they may carry out violations or omit to carry out acts according to

the obligations of their office or loyalty obligations. The decree also amended the text of **Law Decree No. 231/2001**, amending letter s-bis of art. 25-ter, paragraph 1. Specifically (I) **monetary fines** already established **for the predicate offence of "*Corruption between private parties*" have been increased**, ranging now from a minimum of 400 up to a maximum of 600 units; and **(ii) the predicate offence of "incitement to corruption between private parties" has been introduced**. In this case, monetary fines range from 200 up to a maximum of 400 units. In both cases, in addition, **disqualification penalties** shall apply. Therefore, the management and control models already implemented will have to be updated in order not to fall under the aforementioned penalties.

The decree implementing the so-called "*Ape sociale*" has been

On 19 April 2017, the President of the Council of Ministers signed the decree implementing the so-called "*Ape sociale*". This is an experimental measure, effective from 1 May 2017 to 31 December 2018, designed to accompany to retirement disadvantaged workers or those who are under conditions of distress. In particular, the workers who can benefit from this measure are those who (i) are at least **63 years old** and (ii) have accrued **30 years of pension contributions** if they are unemployed, disabled or with first degree relatives affected by severe disability or **36 years of pension contributions** if they performed heavy work. This measure is under the responsibility of the State and the amount is paid by INPS (on request) up to reaching the age necessary to claim the old-age pension o meeting the requirements to access the early retirement pension. Pending publication on the Official Gazette, the text will have to undergo the review of the Council of State.

CASE LAW

Dismissal is acceptable if exceeding the protected period is due to another illness

The Court of Cassation, with judgement No. 9395 filed on 12 April 2017, issued a ruling on the dismissal ordered to a disabled employee for exceeding the protected period, declaring the legitimacy of the order. In fact, the Court has confirmed the line of thought according to which **absences connected to the status of disability cannot be calculated to exceed the protected period** if the disabled person is assigned to tasks that are incompatible with his/her health conditions. This because the impossibility to perform derives from the violation from the employer's part to meet the obligation to protect the physical integrity of the worker. At the same time, the Court has also clarified that **if the absences** (as in the case in hand) **are due to other reasons or illnesses**, the disabled worker can be **dismissed for exceeding the protected period,** just like the other employees. The Court has also pointed out that the exclusion of the days of inability to work is valid also if the illness affecting the worker is **pre-existing at the time of hiring**, as long as it does not fall within those that led to the obligatory hiring of the worker into the company.

Court of Cassation: dismissal of working mothers is void

The Court of Cassation, with judgement No. 475, filed on 11 January 2017, intervened in the matter of **dismissal of working mothers**, stating once again that dismissal ordered to a working mother at the beginning of the pregnancy until her child is one year old is void and ineffective. In the specific case, the Court corrected the decision of the judges ruling on the merits, which, by considering unlawful the dismissal, ordered the employer company to re-hire the worker, or failing to do so, to reimburse her damages in the amount of five monthly salaries equal to the last wage paid. On the matter, according to the Court of Cassation, the Court having jurisdiction had erroneously applied art. 8 of Law No. 604 of 1966, since the "*the regulatory measures as per Legislative Decree No. 151 of 2001 do not refer at all to*

Law No. 604 of 1966 and Law No. 300 of 1970; thus, ***dismissal is void*** *pursuant to* ***art. 54 of Legislative Decree No. 151 of 2001 and such rule is fully unrelated to the concept of just cause and justified reason***". Consequently, in the case in hand, the relationship must be deemed as never interrupted and the worker has the right to wages since the day of dismissal up to the actual re-admission into service. In other words, during the protected period, employment is ensured.

Court of Milan: growing protection, voiding of the probation clause does not imply reintegration

The Court of Milan, with judgement No. 730 dated 8 April 2017, ruled again on the matter of applicable protection in the event of a voided probation clause for those who are hired under a contract with growing protections. In the matter in hand, a female worker was notified of termination due to failed passing of the probation period. The worker then filed her complaint at the Court of Milan, requesting, among other things that **the probation clause be voided due to failure to specify the tasks that represented its scope.** The Judge of first instance accepted the claims of the worker, ordering the probation clause void on the basis that (i) the term "analyst consultant" used in the letter of employment did not correspond to any of the professional profiles listed in the sector's collective bargaining agreement, (ii) nor the scope of the clause could be understood from it, also in consideration of the peculiar establishment of the relationship which followed a mandatory hiring and, therefore, lacking pre-hiring negotiations and in full freedom of selection of the employee from the employer's part. Regarding the protection rules applicable, the Court noted that the **termination was** "*(merely)* ***unjustified because ordered outside of the at-will provision****, thus falling under the rules established in art. 3, paragraph 1, of Legislative Decree 23/15, which governs dismissals ordered in absence of just cause or justified objective or subjective reasons*". This judgement then appears in contrast with the decisions on the matter issued by the Court of Turin with judgement dated 16 September 2016, and by the Court of Milan itself with judgement dated 3 November 2016.

PRACTICE

INPS Message 1652 dated 14 April 2017; vouchers and transitional period

As known, with decree No. 25/2017, approved in March by the Government and converted into law by Parliament (law No. 49/2017), the regulation regarding casual work has been repealed and, consequently, the abrogative referendum has been cancelled. INPS, with **message No. 1652** dated 14 April 2017, has thus issued **instructions** to guide the operators in determining how to deal with vouchers purchased within the final abrogation period (31 December 2017). In particular, it clarified that employers will have the possibility to **use** all the job vouchers for which the **purchase procedure** is **finalised within 17 March 2017** and to **notify the work tasks, which must be carried out by 31 December 2017**. Instead, **it will not be possible to register** through the casual work electronic procedure **those work tasks that are not related to job vouchers whose purchase has been finalised within 17 March 2017**. Solely for electronic vouchers, payments performed through the post office, bank wire transfer, F24 and payment portal after 17 March 2017 cannot be used and therefore they will be reimbursed by the competent local offices of INPS, upon verification of actual receipt of funds.

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