RSM PALEA LAURI GERLA

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

TAX NEWS

2017 – 06

RSM

TABLE OF CONTENTS

FOCUS ON TAX AND ACCOUNTING TOPICS

Increase in IRPEF taxation of dividends and gains

(the Italian Ministry of Economy and Finance, Decree of May 26th, 2017, Official Gazette of July 11th)

As is well known, in the presence of "qualifying" holdings in companies subject to IRES, the IRPEF taxation on income (dividends and gains on disposal) achieved by individuals is limited to a percentage of the income itself.

Over the years, this percentage measure of IRPEF taxation has changed, due to the speculative changes made to the IRES tax rate.

Therefore, following the IRES rate *reduction* to 24% (effective from the tax period2017), IRPEF taxation of dividends and gains is *increased* from the previous 49.72% to the new 58.14%.

With particular reference to dividends, the IRPEF tax (attributable to the possession of qualifying holdings) is therefore connected with the year of "accrual" of the profits distributed, according to the following scheme:

- taxation on 40% with reference to dividends relating to profits realized up to the tax year as at 31 December 31st, 2007;
- taxation within the limit of 49.72%, with reference to dividends on profits realized from the tax period following the tax year as at December 31st, 2007 and up to the tax year as at December 31st, 2016;
- taxation on 58.14%, with reference to dividends relating to profits realized from the tax year following the tax period as at December 31st, 2016.

The Decree of May 26th maintains the favorable provision according to which the dividends distributed are allegedly primarily made up of profits realized by the subsidiary up to the tax year as at December 31, 2007, identifying the amount of 40% and only after such profits run out by profits accrued during the years 2008-2016 (taxation on 49.72%) or, lastly, by profits accrued from 2017.

On the other hand, when profits reserves are intended to cover losses, the ones primarily used are those accrued after December 31st, 2007 which, in case of distribution, would be subject to a percentage increased by 49.72% in the hand of the shareholder.

Finally, with regard to gains realized from January 1st, 2018, the tax rate of 49.72% remains unchanged, where the same ones result from transactions carried out prior to January 1st, 2018 all or in part earned from the same date.

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VAT – green light to the extension of the "Split Payment"

As already mentioned in the Tax News 2017-4, the Italian Decree -Law no. 50/2017 has expanded the scope of the "Split Payment" VAT regime, as ruled by art 17-ter of the Italian Presidential Decree no. 633/72.

The recent approval of the Italian Ministerial Decree dated June 27th, 2017 has implemented this legislation by amending in part the text of the decree of January 23rd 2015 (which laid down the modalities and terms for the first version of the regulation on split payment invoices), and also by changing art. 17 ter of the Italian Presidential Decree 633/72 (VAT Law).
An explanatory report providing many clarifications on such changes has also been drawn up.

The changes and the related explanations are largely based on how the split payment affects the *recipients* of the split payment invoices, clarifying the timing for the VAT payment and the methods of accounting.

So said, please note that in the present section there is not an in-depth analysis of such implications (for the recipients) - giving the possibility for the reader to ask our professionals any specific details - opting for an in-depth analysis on such topic focusing on those subjects (suppliers) who issue split payment invoices.

From July 1st, 2017, it is therefore confirmed that split payment invoices shall be issued towards the following subjects:

- public administrations classified in a special Istat list;
- companies controlled by the Presidency of the Council of Ministers, by single ministries and companies controlled by them;
- companies controlled by regions, provinces, metropolitan cities, municipalities and companies controlled by them;
- listed companies included in the Ftse Mib index of the Italian Stock Exchange.

It is also confirmed that *professionals* will also be obliged to issue split payment invoices if they had to issue invoices for their services towards the subjects above.

The main areas of attention on the topic are the following.

How to issue a Split Payment invoice

- With the split payment regime, the seller issues a "normal" with VAT but with the note "split payment"; however, the VAT will not be collected by the supplier, but it will be paid directly to the tax Authorities by the customer;
- invoices in favor of the public administration have to be issued *electronically* (by entering the code "S", which indicates that the invoice is subject to split payment);
- exceptions – the invoice is not included in the split payment regime when:

- the transaction is not subject to tax or the tax is not due (non-taxable or exempt transactions),
- when debt is owed by the customer (for example in all reverse charge cases),
- in cases where the invoice does not mention the VAT or when the tax is indicated but is subject to the flat rate rules. The most common cases concern exempt services ex art 10 of the Italian Presidential Decree no. 633/72, non-taxable transactions carried out with "usual exporters" or cases where the internal transaction is subject to reverse charge ex art 17 par. 6 of the Italian Presidential Decree no. 633/72 (cleaning, plant installation services, etc.). Please note that the exception related to the usual exporter is still subject to confirmation.

Payment of tax and accounting treatment

- The taxpayer is always the supplier, while the customer (public administration or subsidiary or company listed on the Ftse Mib) has to pay the tax to the tax Authorities and not to the seller;

- as taxpayer, the supplier will have to bookkeep the invoices issued in the sales register (article 23 of the Italian Presidential Decree no. 633/72) or in the VAT register (of monthly expenses) (article 24 of the Italian Presidential Decree no. 633/72).
  The supplier must bookkeep the invoice issued under the split payment regime in a different way – for example in a special column or by means of special codes – with the tax rate applied and the amount of the tax.
  However, this amount is not included in the liquidation of the period and the booking in the above-mentioned registers will have to find either an equivalent offsetting entry or directly on the account of the customer with the purpose of "writing off" the VAT payable no longer due, which will not have to contribute to the periodic VAT liquidation.
  As a result, the trade receivable will be increased only by the amount of sales revenues (or of the service provision), net of VAT which will be paid by the customer.

Identification of the companies and public entities subject to split payment

- Art. 5-bis of the Italian Decree identifies the public administrations that must apply the split payment:

  - for transactions for which an invoice is issued from July 1st up to December 31st 2017, reference should be made to the public administrations included in the consolidated income statement, identified by ISTAT (i.e. The Italian Institute for Statistics) as per list published in the Official Gazette no. 229 of September 30th, 2016;
  - for transactions invoiced in 2018 and subsequent years, reference is made to the list published by ISTAT in the Official Gazette by September 30thof the previous year.

- Art. 5-ter identifies those companies that determine the occurrence of the split payment.

  Within the first application, for transactions for which the invoice is issued from July 1st up to December 31st, 2017, the provisions of art. 17-ter of the VAT Decree shall apply to the subsidiaries or to the companies included in the FT5E MIB index as at April 24th, 2017. For this purpose, the list of these companies is expected to be published on the website of the Italian Department of Finance (they are defined as temporal procedures for the constant annual updating of such a list by November 15thof each year) .

  In order to ensure a greater legal certainty for the companies, the Italian Ministerial Decree of June 27th, 2017 provides that the identification of subsidiaries and of companies included in the FTSE MIB index shall occur with the publication of appropriate lists on the website of the Italian Department of Finance.

The Department of Finance has prepared the following lists related to:

- public administrations included in the consolidated account;
- companies controlled by the Presidency of the Council of Ministers and by the Ministries and companies controlled by these latter;
- companies actually controlled by the Presidency of the Council of Ministers and by the Ministries and companies controlled by these latter;
- companies controlled by regions, provinces, metropolitan cities, municipalities, unions of municipalities and of companies controlled by these latter.
- listed companies included in the FTSE MIB index of the Italian Stock Exchange.

- This list (currently being updated) is published on the website of the Italian Ministry of Economy and Finance

  http://www.finanze.it/opencms/it/fiscalita-nazionale/Manovra-di-Bilancio-2017/Scissione-dei-Pagamenti-d.l.-n.-50_2017/

- As it is still not easy to identify the recipients of the split payment invoices, under art. 17-ter of the Italian Presidential Decree no. 633/72 the following paragraph 1-ter has been included

  "On request of the sellers, the buyers as per paragraph 1 and 1-bis must provide a document certifying that they can be subject to the application of the provisions of the present article. The sellers and the buyers possessing this document are required to apply the regime referred to in this article."

  This rule seems to suggest that those ones subjected to split payment are obliged to provide a document confirming their inclusion among the split payment subjects only after the customers make the request. Non-Split payment subjects are therefore not obliged either to provide any response or to give any communication.

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DEADLINES – JULY 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 31st

Voluntary Disclosure 2.0 – application submission

Deadline for the electronic submission of the application for the voluntary disclosure procedure together with the accompanying report.

It is possible to add supplementary information to the application and to the documents attached by September 30th, 2017: by this last date, the payments of the amount due must be carried out (if the taxpayer directly proceeds with the self-payment: otherwise the Tax Authorities will issue proper payment notices).

Tax bills scraping – payment

By the above date taxpayers who elected the "scraping of tax bills"" pay the first or only installment of the amounts due, as previously stated by Equitalia (i.e. the Italian Tax Authorities).

Submission of 770 form

Deadline for the electronic submission of the 770 form related to the tax period 2016.

Submission of the form for the refunding/off-setting of the VAT credit for the 2nd quarter 2017

By the date above, companies that meet the requirements of the legislation in force may apply for refund or for offsetting the VAT credit related to the second quarter of 2017.

Please remind that in certain cases it is necessary to issue a special guarantee towards the Tax Authorities.

The VAT form "TR", *updated in July*, must be used for the (electronic) application.

Payments of IREF–IRES–IRAP

By the above date, individuals, partnerships and corporations (with tax year coinciding with the calendar year), pay the balance 2016 and the first payment on account 2017 (if due) of:

- ☐ IRPEF (i.e. income tax on individuals and employees) and surtaxes;
- ☐ IVIE (tax on the value of property located abroad) and IVAFE (tax on the value of financial assets located abroad);
- ☐ substitute taxes (i.e. flat rate);
- ☐ INPS (i.e. Italian social security institute) contributions – separate management;
- ☐ IRES (i.e. corporate income tax);
- ☐ IRAP (i.e. tax on production activities);
- ☐ chamber contributions,

with a surcharge of 0.4%.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

... "smart working" is now operative?

From 14 June 2017, smart working has become officially operative, as "a way of implementing an employment relationship" carried out in part at the premises of the company and partly at a different location, without a fixed workplace, but within a maximum duration limit of the daily and weekly work hours established by law and the collective bargaining agreement. Such a way of implementing the employment relationship must be established by written agreement between the parties, also through organization by phases, cycles and objectives, with the possible use of technological means to carry out the work activity.

JUDGEMENT OF THE MONTH

Company know-how prevails over the employee's right of defence

The Court of Cassation, with judgement No. 12804 dated 22 May 2017, stated that a disciplinary measure can be applied to any employee who photocopies material representing company know-how, even if such activity is carried out to protect the employee's right in a legal proceeding. In the specific case, the employee, first disciplined and then dismissed, appealed to the Court of Cassation stating that (i) the photocopying of the company material was necessary for his defence since he had been demoted for a long time (ii) the documentation was not confidential, and, in any case (iii) the protection of rights shall prevail over the duty of confidentiality. According to the Court of Cassation, this reason cannot be deemed well founded since, "even from the testimony performed", it appeared that the photocopying did not concern "a mere proprietary material of the company", but "instructions that contained specific information regarding the type of materials, procedures and the tools used (...) thus actual company know-how whose confidentiality is strengthened by the need not to divulge to third parties (including those who may be competitors) knowledge that has a production importance". Therefore, according to the Court, what is emphasized is not "a generic duty not to disclose corporate documents, but a specific obligation to keep confidential documents that concern important and significant aspects of the employer's production organization." Documents that, among other things, the employee, according to the Court, could have requested to obtain through the court under Article. 210 of the code of civil procedures.

REGULATIONS

Co.co.co (contract for continuative and coordinated services): Clarification of Law No. 81/2017

Article 15, paragraph 1, letter a) of the Law No. 81 dated 22 May 2017(the so-called Jobs Act of Self-Employed Individuals), published in the Official Gazette on 13 June 2017 and entered into force on 14 June, in discussing the contract for continuative and coordinated services, introduced, leaving unchanged what was established in Legislative Decree No. 81/2015, a clarification of art. 409, No. 3, of the code of civil procedures. Specifically, it is established that services "are understood as coordinated when, in compliance with the coordination arrangements established in common agreement between the parties, the worker organizes his or her work independently". This means that a "co.co.co" is in place whenever the parties, while agreeing on the coordination arrangements, leave full autonomy to the worker on how to carry out the assignment.

CASE LAW

Unlawful dismissal of employees who posted on Facebook comments against their employers

The Court of Cassation, by judgement No. 13799 dated 31 May 2017, intervened in the case of a dismissal for just cause issued against an employee who had posted on Facebook a few comments against her employer company as well as against her legal representative. In the specific case, the company was ordered at the time of the appeal to reinstate the worker and to pay a compensation equal to the remuneration from the date of dismissal to that of reintegration, but it responded by bringing the case to the Court of Cassation, alleging the non-application of the principle of the new art. 18, Law No. 300/1970, which recognizes reintegration protection only in case the material fact on which the dismissal was based does not exist. The company's objections were deemed unfounded by the Court of Cassation, which, by recalling previous cases in the matter, stated that: "The non-existence of the disputed fact, referred to in art. 18 of the Workers' Charter as amended by Law No. 92 dated 2012, art. 1, paragraph 42, includes the possibility that the fact did exist but that such fact be unlawful, therefore (even) in such case, the reintegration protection applies". According to this principle, posting on Facebook opinions against an employer does not necessarily mean that it is unlawful and thus such to legitimise a dismissal for just cause.

Grouping of companies in the case of fraudulent splitting

The Court of Cassation, with judgement No. 14175/2017, stated once again that, for the purpose of calculating the employment demand and verifying the company's reasons for dismissal, a single centre of interest to which the employment relationship must be addressed applies only in the case of fraudulent splitting demonstrated in the context of different companies belonging to the same group. In particular, the Court, remaining consistent with its earlier judgements, confirmed that in order for such fraudulent splitting to occur, the following requirements must apply: "(A) uniqueness of the organizational and production structure; (B) integration between the activities carried out by the various companies of the group and the related common interest; (C) technical and administrative-financial coordination such to lead to identify a single management entity that conveys the various activities of the individual companies towards a common goal; (D) simultaneous use of the work provided by the various companies, owners of distinct businesses, so that it is carried out in an undifferentiated and simultaneous manner in favour of the various entrepreneurs". This means that only in the presence of these elements the limits of the context of the company where the dismissal took place apply and the group to which it belongs is considered, with all the consequences of the case.

Verbal justifications must always be assessed

The Court of Cassation, with judgement No. 11895/2017, in declaring unlawful the disciplinary dismissal stated that, in the context of a procedure under art. 7 of Law No. 300/1970, an oral hearing requested by the worker constitutes a prerequisite of his/her right of defence. The Court of Cassation has also clarified that this "unfailing procedural requirement" must be guaranteed even at the presence of extensive and potentially exhaustive written justifications. This is because it is the employee's request itself that proves that he/she does not deem them sufficient and in any case such to be integrated or clarified in a subsequent hearing.

Dismissal of an employee who abuses of the internet is lawful

The Court of Cassation, with judgement No. 14862 dated 15 June 2017, declared lawful the disciplinary dismissal (while confirming the conversion performed by the court of appeal from dismissal for just cause to dismissal for a justified subjective reason) ordered to an employee who used the corporate Internet connection for personal purposes in a systematic manner (specifically 47 connections within 60 days for a total duration of 45 hours). In so doing, the employee has, in the opinion of the Court, violated the obligations of loyalty, fairness and good faith underlying a standard employment relationship. In this context, the Court of Cassation also noted that there was no violation of the right to the employee's privacy, since the company "limited itself to verifying the existence of undue access to the network and related connection times, without carrying out any analysis of the sites visited by the employee during navigation or the type of data downloaded." Similarly, also it did not consider any of the above an infringement of Article 4 of the Workers' Charter. This is because such a violation exists when the monitoring concerns the implementation of the task but not the verification of any unlawful conduct of the employee that may damage the company's equity, undermining its normal operation.

PRACTICE

Legitimacy indexes of transnational posting according to the inspectors

With note No. 4833 dated 5 June 2017, the Italian Labour Inspectorate provided clarifications regarding the correct application of the Legislative Decree No. 136/2016 on the topic of transnational posting. With reference to the concept of "provision of services" the provision clarifies that such wide meaning term – which assumes the execution of temporary work activities in favour of a beneficiary located in Italy (that is the "receiving entity") or a production unit of the foreign posting company present in Italy or at a client party – include tenders, sub-tenders and, more in general, any trade agreement having as its scope the exchange of services between companies located in different countries. Regarding the concept of the production unit of the foreign company posting in Italy, the Inspectorate specified that it must be a unit having a minimum level of organization of means and/or people and that, therefore, be an actual centre for handling relationships and legal situations related to the foreign entity. According to the Inspectorate, within the legitimate transnational posting cases fall those in which foreign workers are sent to Italy to work at a branch of the posting foreign entity or at another commercial entity (e.g. the "receiving entity") located in Italy and that, subsequently, are engaged in Italy to carry out a tender at another client company. Lastly, the Inspectorate, on the one hand, excluded from the term "provision of transnational services" the activities carried out at temporary stalls on occasion of expos, fairs and events since a stall cannot be deemed a production unit, while on the other hand it included in the definition the activities to assemble and disassemble the stalls.

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