RSM PALEA LAURI GERLA

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

TAX NEWS

2017 – 09

RSM

TABLE OF CONTENTS

FOCUS ON TAX AND ACCOUNTING TOPICS

Simplification of INTRASTAT's fulfilments

(Provision issued by the Director of the Italian Revenue Agency dated September 25th 2017)

The Decree-Law no. 244 of December 30th,2016 (article 13, paragraph 4-quater) has provided for the adoption of measures to simplify INTRASTAT's reporting obligations, with the precise aim of avoiding duplication of reporting obligations for VAT taxpayers (given the introduction of the "spesometro"), while reducing at the same time the tax and statistical information to be transmitted to the Italian tax authorities.
The provision of September 25th implements this rule, providing for the following measures:

- abolition of the *quarterly* INTRA forms relating to the *purchases* of goods and services, and contextual exclusive statistical value of the *monthly* INTRA forms relating to *purchases* of goods and services;
- in order to identify the parties obliged to submit lists related to the purchases of goods and services *on a monthly basis*, increase of the threshold for transactions (from Euro 50,000 to Euro 200,000 on a quarterly basis – for at least one of the previous four quarters – for purchases of goods, and from Euro 50,000 to Euro 100,000 on a quarterly basis – again for at least one of the previous four quarters – for purchases of services). The provision specifies that the thresholds work independently, meaning that exceeding the threshold for a single category does not affect the periodicity of the other three categories of transactions (in the example suggested, if, during a given quarter, a taxpayer has realized intra-Community purchases of goods amounting to Euro 300 000 and has received during the same period intra-Community *services* for an amount of Euro10,000, he will be required to submit a monthly summary list of the only intra-Community purchases of goods and not that of the intra-Community services received);
- maintenance of existing INTRA forms for the *sales of goods and services*. For these transactions, the threshold for the monthly or quarterly submission remains Euro 50,000;
- raising of the "statistical" threshold for the lists related to the sales of goods: the compilation of statistical data in these lists is optional for those subjects who do not exceed Euro 100,000 of quarterly transactions;
- simplification in the coding of the type of service rendered/received, by redefining the level of detail required.

The changes apply to the summary lists *with reference period starting from January 1st 2018*.

For further information, please contact:

Dott. Alessandro Carturani
RSM Palea Lauri Gerla
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: alessandro.carturani@rsm.it
www.rsm.it.

(In) completeness of the information contained in the invoice and tax consequences

(Italian Association of Certified Public Accountants, Rules of Conduct no. 199)

It often happens that invoices contain very general descriptions, such that on certain occasions it is not possible to deduce, except by approximation, the services/goods received.
In such cases, the uncertainty of a possible tax dispute arises, given that the Italian Revenue Agency tends to deny the deduction of a cost or the deduction of VAT against invoices lacking in their essential elements.

The recent Code of Conduct no. 199, issued by the relevant Commission set up within the Italian Association of Chartered Accountants, has the advantage of analysing both VAT regulations and income taxes, in order to outline the (tax and non-tax) relevance of what is literally indicated on invoices and the consequences in case of incomplete documents.

For VAT purposes, the primary reference is to be made to art. 21 of the Italian Presidential Decree no. 633/72, which requires the indication – on the invoice – of the *nature, quality and quantity* of the goods and services being the subject of the economic relationship.
Where the description of these elements is partial, incomplete or erroneous, Aidcec thinks that this does not justify the automatic non-deductibility of VAT, since it can prove, with further evidence and documents, that the substantive requirements of the underlying economic transaction are present.

This is because the right to deduct VAT for goods purchased and services supplied, provided for under article 178 of the EU Directive 2006/112/EC, represents a fundamental principle of such tax; this right is also enshrined in various rulings of the European Court of Justice which recognize the right to deduct VAT whenever the *substantive* obligations are fulfilled and even when certain *formal* obligations have been omitted by tax payers.
The above does not provides for the automatic deductibility of VAT regardless of the description on the invoice, but highlights the possibility of providing the Revenue Agency with a different and further evidence of the effectiveness of the transaction and of the existence of substantial requirements to deduct the tax.

In the area of income taxes, the existence of a detailed and exhaustive invoice is a "necessary but not sufficient condition".
Necessary, since the deficiencies in the content of the invoice, even in this case, although not entailing the automatic non-deductibility of cost, oblige to provide additional elements suitable for outlining the transaction and the deductibility of the related charge.
Not sufficient as the accounting entry of an invoice, even if exhaustive, does not automatically determine the tax deduction of the related charge, since the compliance with legal requirements must be checked (see the cost relevance principle, certainty and objective determinability principle, as well as the accrual principle).

The existence of the invoice and the completeness of its content, concludes the rule, besides being indices of orderly administration, also represent the written proof necessary to obtain the protection of the credit during the judicial proceedings, as a proof of the existence of the transaction carried out, putting the burden of proof on the debtor.

Moreover, article 2709 of the Italian Civil Code includes, among the documentary evidence constituting evidence against the entrepreneur, the books and other accounting records of the companies subject to registration, and the Code of Civil Procedure, under art. 634, considers "the authentic extracts from the accounting records required by tax laws" as written evidence .

For further information, please contact:

Dott. Francesco Gerla
RSM Palea Lauri Gerla
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: francesco.gerla@rsm.it
www.rsm.it

Acquisition of fixed assets: when is it possible to deduct depreciation?

(Court of Cassation, sentence no. 16160 of June 28th, 2017)

The acquisition of company assets includes, among the different related tax aspects, the one related to the first period in which depreciation is deductible for tax purposes.

While in the ordinary situation (purchase of the asset during the business activity, and its entry into operation in the same period of purchase) there are no particular problems in this regard, given that art. 102 of TUIR (i.e. Income Tax Consolidation Act) expressly provides for the deductibility of depreciation from the tax year in which the asset enters into operation, there may be situations that are less linear and whose solution is uncertain.

This is the case, for example, of the dispute resolved and decided by the Court of Cassation last June where, following a tax audit of an S. r. l. (i.e. limited liability company), the Italian Revenue Agency had challenged the tax deduction of depreciation shares for the non-compliance with the accrual principle.

In this case, the company had purchased tangible assets to be used in a commercial distribution business. The assets had been depreciated in the year of their purchase, but the tax Authorities had found that the point of sale where these assets were used had not been opened until the following year, when the relevant business license was issued.

The company complained about the misinterpretation of the tax authorities, claiming that the use of a formal parameter to identify the year in which the asset entered into operation (i. e. the granting of a commercial authorization) did not allow to consider that, in practice, the structure had already been used as a deposit and other facilities in the year of purchase, as found during the assessments also carried out by the officials of the Italian Revenue Agency.

The Court of Cassation pointed out that the entry into operation of the asset had been correctly assessed by the auditors, since it is necessary to refer to the *specific destination* of the assets compared to the production activity for which they are acquired (in this case, the sale activity) and there being no other solutions applicable for tax purposes that do not allow the identification of the necessary "instrumental link" between the asset and the activity carried out.

It is useful to remind that the Civil Code referring to the annual period in which depreciation is effective is not perfectly consistent with the tax regulations mentioned above: according to OIC (i.e. Italian Accounting Commission) principle no. 16, depreciation begins from the moment in which the fixed asset is "available and ready to be used" and not from the moment in which it entered into operation.

For further information, please contact:

Dr. Gabriele Giardina
RSM Palea Lauri Gerla
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: gabriele.giardina@rsm.it
www.rsm.it

The new tax credit for advertising investments

Art. 57-bis of Decree-Law no. 50 of April 24th 2017 (converted by Law no. 96 of June 21st, 2017) has introduced a significant favourable measure aimed at encouraging advertising investments in newspapers, periodicals and local television and radio stations.

Please find below a first examination of the tax relief, highlighting that the effectiveness of the bonus is subject to the issuing of a specific implementing measure.

Recipients and purpose of the tax relief

The following subjects benefit from the bonus:

- companies,
- self-employed,

investing in advertising campaigns:

- in the daily and periodic press,
- in local, analogue or digital television and radio broadcasters.

Conditions for benefitting from the tax relief

The rules provide for an "incremental" approach: the bonus is granted to the above subjects who carry out advertising investments whose value exceeds the same investments made in the same media in the previous year by at least 1%.

Amount and form of tax relief

The bonus is paid in the form of a tax credit, equal to:

- 75% of the incremental value of the investments made (ordinary amount),

- 90% of the incremental value of the investments made, in case of *micro, small and medium-sized enterprises and innovative start-ups* (special amount).

It shall be reminded that an enterprise is defined as "micro enterprise" if it employs less than 10 employees and achieves a turnover or if it has assets of up to 2 million euro. The parameters of the small enterprise become, respectively, 50 employees, 10 million euro of turnover and assets; the medium-sized company, finally, employs less than 250 employees and has a turnover not exceeding Euro 50 million or assets of not more than Euro 43 million.

Innovative start-ups are defined as companies which have as their sole or main corporate purpose the development, production and marketing of innovative products or services with a high technological value and which at the same time satisfy precise requirements contained in the Decree Law no. 179/2012 and subsequent amendments and additions.

The tax credit can be used exclusively for *offsetting* purposes, and must be requested by submitting an application to the Department for Information and Publishing of the Presidency of the Council of Ministers.

Effective date of the tax relief

The tax relief is effective from 2018: the increase in advertising made in 2018 compared to 2017 will therefore be subject to a tax relief (according to the modalities mentioned above) and the investments made in subsequent years will be subject to tax relied as well.

Implementation of the tax relief

It is provided that, by means of a specific Decree issued by the President of the Council of Ministers to be published within 120 days from the date of entry into force of the conversion law (i.e. by October 22nd, 2017), the methods and criteria for implementing the bonus are established, with particular regard to:

- investments giving access to the benefit,
- cases of exclusion,
- procedures for granting and using the benefit,
- the required documentation, as well as the carrying out of checks.

The same decree will also determine the amount of such resources available for this bonus.

For further information, please contact:

Dott.ssa Silvia Cirillo
RSM Palea Lauri Gerla
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: silvia.cirillo@rsm.it

DEADLINES – OCTOBER 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

October

Wednesday 25th

730 supplementary form

The term for the submission of 730/2017 supplementary Form "in favour" of the taxpayer expires on such a date.
The recipient of the supplementary form must be a CAF (i.e. Tax advice center) or an authorised professional.

Tuesday 31st

Income tax returns –770 form – submission terms

(Postponed) deadline for the electronic submission of the tax returns 2017 for joint-stock companies and partnerships (if the tax year coincides with the calendar year), as well as for natural persons.

Deadline also extended for the electronic submission of 770 form relating to 2016.

Application for VAT credit reimbursement/offsetting – III quarter – 2017

By this date, companies that meet the requirements provided for by the regulations in force can apply for the reimbursement or the possibility of offsetting the VAT credit related to the III quarter of 2017.
For the (electronic) request the VAT form" TR" must be used.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

... " Did you know that employers can hire a private investigator to make sure that the leaves envisaged in Law no. 104/92 are not improperly used?

The case law is united in believing that employers have the right to hire a private investigator to make sure that the leaves referred to in Law no. 104/92 are not improperly used by the employees. In fact, these leaves cannot be used to meet personal needs (such as dance nights or vacations), since this type of conduct is an "abuse of rights" that infringes the principles of fairness and good faith underlying a normal employment relationship.

JUDGEMENT OF THE MONTH

A settlement agreement must provide for specific waivers

With its judgement no. 20976/2017, the Court of Cassation maintained that a provision signed by the parties at the time of the early termination of employment, whereby an employer agrees to pay a gross amount as an adjustment to the employee severance indemnity, in exchange for the employee waiving his/her right to any other disputes regarding the computation of the employee severance indemnity as a whole, is tantamount to a mere acquittal with no extinctive effect on any future claims of such employee in regard to – as in the case at hand – the impact of overtime work on the severance indemnity. The Court of Cassation, endorsing the interpretation of the trial judge, has confirmed that the payment of an amount "for the mere purpose of averting the risk of any disputes that might arise in connection with the computation of the seniority indemnity as at 31 May 1982 and of the severance indemnity as a whole" is not an effective waiver on the part of the employee, as it contains no reference to the computation of the compensation of overtime work, but it merely contains a generic reference to the seniority indemnity accrued as at 31 May 1982 and to the severance indemnity, which is completely insufficient to root in the employee the awareness to waive demand of the aforementioned computation. In this way, the Court of Cassation has confirmed the case-law approach whereby a final acquittal signed by a worker containing a waiver, in generic terms, of several hypothetical rights in relation to the employment relationship and to its termination, may have the value of waiver or settlement only if it has been ascertained "also in light of the interpretation of the document or due to the co-occurrence of other specific circumstances that can be inferred from another source" that it has been issued being aware of assessed or objectively assessable rights and consciously intending to waive or settle them; otherwise, said statements are tantamount to boilerplate clauses and, therefore, per se are insufficient to prove a real existence of the will of the interested party to provide in this sense. Employee's waiver of possible disputes, mere acquittal, extinctive effect, awareness to waive demand, boilerplate clauses.

CASE LAW

The expiry of the limitation period of wage claims after the Fornero law

With its judgement no. 1091/2017, the Court of Milan has ruled again on the expiry of the limitation period of wage claims, in light of the modifications introduced by Law no. 92/2012 (so-called Fornero Law) to Article 18, Workers' Charter. In particular, the judgement at hand reiterated that following the

entry into force of the Fornero Law, the expiry of the limitation period of wage claims shall be suspended until termination of employment, also in regard to the contracts subject to the regime of novel Article 18, Law no. 300/1970. In fact, the court of first instance has underlined that "*it behoves to acknowledge that the entry into force on 18 July 2012 of Law no. 92/2012, which has modified the real guarantee referred to in Article 18, Workers' Charter, providing, in par. 5 of said Article, for a few instances in which, even in regard to an illegitimate dismissal from work, only a compensatory guarantee remains, with no possibility for the employee to be reinstated, in a similar way to obligatory guarantees (even though with higher compensation amounts)*"; consequently, employees may "*incur in the fear of dismissal when asserting their rights, in light of a diminished resistance of their stability.*" This judgement is consistent with two substantive rulings passed in 2016 by the Court of Milan and by the Court of Turin.

Working while on sick leave does not legitimize dismissal at all times

With its judgement no. 21667 of 19 September 2017, the Court of Cassation has maintained that an employee performing a work activity while on sick leave does not legitimize its outright dismissal at all times. In ruling in this sense, the court has made reference to the case law that maintains that the performance of a work activity while on sick leave constitutes a disciplinary violation if (i) it presumes a lack of the disease itself or (ii) it jeopardizes or delays healing and consequently return to work. With specific regard to the case at hand, the Court of Cassation has clarified that the conduct of the sick worker – consisting of driving his own car to his son's shop to perform certain activities, such as moving light weights as well as raising a shutter – is not a violation per se of the duty of fairness and good faith by which the same must abide not to delay healing. This is so because the extra work activity of the sick worker was so limited that it could be performed without harming his physical integrity, and therefore, without delaying his time to healing. Consequently, the employee dismissal is illegitimate.

A letter of transfer signed in acceptance thereof is valid

With its judgement no. 609/2017, the Court of Milan, acting as Labour Court, has ruled on the issue of the validity of a letter of transfer signed in acceptance thereof. In the case at hand, a worker went to court seeking a declaration of invalidity of a transfer enjoined to him because, in his opinion, it was discriminatory and in any case clearly violated Article 2103, Italian Civil Code, according to which in order for a transfer from a production unit to another to be valid, this must be due to well-proven technical, organizational and production reasons. However, as clarified by this judgement, the letter of transfer of employment had been signed "in acceptance thereof" by the worker, thus expressing his consent to the change of workplace. To make matters worse, according to the Court, since the worker was a member of the provincial executive board of a renowned trade union and performed trade-union activities "one has to assume that he knew the meaning of its consent". Based on the above, it follows that in order to object that the consent is invalid, it is necessary to substantiate and prove that the consent is faulty.

Disciplinary dismissal and provision thereof in the applicable CCNL (National Collective Bargaining Agreement)

With its judgement no. 21062 of 11 September 2017, the Court of Cassation has delivered an opinion on the issue of just cause for dismissal previously confirmed by the Court of first instance of Campobasso, later overturned by the Court of Appeal, which instead found the dismissal legitimate as the facts in question were proportionate to the disciplinary measure adopted. More specifically, the Court of Cassation reiterated that a court, in assessing the grounds for dismissal, shall not be bound by the typical instances of just cause set forth in the collective agreement, as it must assess the seriousness

of the facts in question, the circumstances in which they have occurred and the intensity of the intentional profile, and maintained that a court in any case cannot make an autonomous evaluation of the seriousness of a behaviour considered by the collective agreement a disciplinary violation that corresponds to a disciplinary action short of termination. In essence, in order for a worker to be disciplinarily dismissed, it is necessary that the conduct at hand is not subject to a disciplinary action short of termination according to the collective agreement.

Monitoring of company email messages: European parameters

The Grand Chamber of the European Court of Human Rights, with its judgement no. 61496/08, lodged on 5 September 2017 in the case of Barbulescu vs Romania, condemned Romania because the monitoring by a company of an employee, later dismissed for making a personal use of the company email messaging service, failed to strike a fair balance between the various interests at stake. In particular – on the basis of the assumption whereby the notion of private life enshrined in Article 8 of the European Convention on Human Rights and Fundamental Freedoms must encompass each and every aspect allowing an individual to develop his/her own social identity, including work activities – the Court has clarified that the monitoring by a company of the email messages sent by an employee from the company PC for personal use is allowed only upon fulfilment of a few parameters. These parameters are prior notification, impossibility to adopt less intrusive measures and existence of legitimate reasons to justify monitoring by the company. Therefore, the fundamental principles on privacy at workplaces have been reiterated at a European level. However, these principles were already known to the Italian legislation and case law.

PRACTICE

Apprenticeship and right to take precedence: the clarifications of the Ministry

With its ruling no. 2 of 9 August 2017, the Ministry for Labour and Social Policies has replied to the question posed by Confcommercio on the correct interpretation of the right to take precedence of workers hired under a temporary contract. In particular, the requesting organization asked whether the following constitutes infringement of the right to take precedence of a temporary worker: (i) continuation of the employment relationship in place with the apprentice upon expiry of the related apprenticeship period; (ii) hiring of a new worker under an apprenticeship contract. In response to the first question, the Ministry has clarified that since apprenticeship is a permanent employment contract, violation of the right to take precedence shall be ruled out given that, for the purpose of the exercise of this right, the time of hiring of the apprentice is relevant, which occurs in fact the moment the apprenticeship contract starts and not during the normal continuation of the work relationship at the end of the training period. In response to the second question, the Ministry has specified that the hiring of a new worker under an apprenticeship contract constitutes violation of the right to take precedence of a temporary worker only if said temporary worker has already obtained the professional qualifications required for the job forming the scope of the apprenticeship contract, due to previous temporary employment contracts. This latter instance suggests that the professional experience of a temporary worker should be carefully considered in order to avert the risk of infringing the legislation on right to take precedence.

Early indications from the Data Protection Authority on how to select a Data Protection Officer

The Data Protection Regulation 2016/679, which will become fully effective on 25 May 2018, has introduced among others the figure of Data Protection Officer (DPO). In consideration of the first requests for clarifications on their appointment, the Data Protection Authority, in its Newsletter no. 432

of 15 September 2017, has provided specific indications. In particular, the Authority has clarified that the public administrations, as well as private entities, when selecting a Data Protection Officer, must verify that they have specific competences and experiences, and that, on the contrary, no formal certifications of professional knowledge or registrations in proper rosters are required. In the opinion of the Authority, a DPO must in fact have a profound knowledge of the legislation and standard practice on privacy, and of the peculiar administrative rules and procedures of the relevant sector. In any case, the Authority has reserved the right to provide further indications following the questions and requests for clarification on the Regulation, gathered during specific meetings that the Authority will hold with public and private entities.

For further information please contact

Avv. Vittorio De Luca
De Luca & Partners
Largo A. Toscanini, 1
20122 Milan
Tel. +39 02 365 565 1 Fax +39 02 365 565 05 email: info@delucapartners.it;
www.delucapartners.it

or

Dott. Stefano Turchini
HR Capital
Gall. San Babila 4/B
20122 Milan
Tel. +39 02 365 930 1 Fax +39 02 365 930 00 email: info@hrcapital.it
www.hrcapital.it

RSM PALEA LAURI GERLA

Milan office – Foro Buonaparte 67, 20121 – Milano
Tel +39 02 89095151
Fax +39 02 89095143

Roma – Via delle Terme Deciane 10 – 00153, (registered office and operating office)
Torino – Via Ettore De Sonnaz 19 – 10121 (operating office)

www.rsm.it

P.IVA e CF: IT13174301005

THE POWER OF BEING UNDERSTOOD
AUDIT | TAX | CONSULTING