RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

2017 – 11

RSM

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FOCUS ON EMPLOYMENT TOPICS

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

FOCUS ON TAX AND ACCOUNTING TOPICS

Implementation of the Country-by-Country Reporting provisions

(Italian Revenue Agency, provisions of November 28th and December 11th, 2017)

Between 2015 and 2016, specific regulations aiming at regulating the exchange of information on tax matters have been introduced at both national and EU level. They provide for a "tax reporting" obligation, country by country, for large-sized companies.

More specifically on the basis of art. 1, paragraphs 145 and 146 of Law no. 208 dated December 28th,2015 and the subsequent Implementing Decree of February 23rd,2016, the obligation of submitting an annual "Country by Country" reporting to the Italian Revenue Agency was introduced. Such reporting shall state the amount of revenues and gross profits, taxes paid and accrued, together with other elements indicating an actual economic activity, by the parent companies, resident in the territory of the State, which are required to draw up consolidated financial statements – achieved by the group of multinational companies in the tax period prior to the reporting period – of at least Euro 750 million and which are not controlled by parties other than natural persons.

The reporting obligation is also extended to subsidiary companies, resident in the territory of the State, if the parent company obliged to draw up consolidated financial statements is resident in a State that has not introduced the obligation to submit the country-by-country reporting or has not entered into an agreement with Italy that allows the exchange of information relating to the country-by-country reporting or that fails to comply with the obligation to exchange information on country-by-country reporting.

With the recent measures issued by the Italian Revenue Agency, the procedures for the submission of the country-by-country reporting and the application of regulations have been defined.

The communication of the data must be sent to the Italian Revenue Agency, electronically, on an annual basis: more specifically, the deadline is the end of the 12th month following the last day of the reporting tax period of the multinational group.
For the first reporting year (starting on January 1st, 2016 or later and ending before December 31st, 2016), the communication should have been sent by December 31st, 2017.
However, this deadline has been postponed by the Italian Decree of December 11th: the 60-day deadline is now provided from such a date (and, therefore, there is a submission deadline on February 9th 2018).

Moreover, it shall be pointed out that besides the list of all group entities, together with the nature of the main activity or activities carried out by each entity, the following information shall be object of the communication:

- tax jurisdictions in which entities belonging to the multinational enterprise group are resident for tax purposes or, in the case of permanent establishments, in which these latter are located;
- revenues, consisting of the sum of the revenues of all entities belonging to the multinational enterprise group in the relevant tax jurisdiction;
- profits/losses before income tax consisting of the "Profit before tax" of all entities belonging to the group resident for tax purposes in the relevant tax jurisdiction;
- income taxes *paid* (on a cash accounting basis) made up of the total amount of income tax actually paid during the relevant tax period by all group entities resident for tax purposes in the relevant tax jurisdiction;

- income taxes *accrued* (year in progress), consisting of the amount of current taxes accrued on taxable profit or tax loss for the year to which the reporting of all entities belonging to the group refers;
- the declared capital, consisting of the sum of the share capital and capital reserves of all entities belonging to the group resident for tax purposes in the relevant tax jurisdiction;
- profits not allocated and consisting of the sum of profits not allocated at year-end of all group entities resident for tax purposes in the relevant tax jurisdiction;
- the number of employees, consisting of the total number of people employed, on a full-time equivalent (FTE) basis, of all entities belonging to the group resident for tax purposes in the relevant tax jurisdiction;
- tangible fixed assets consisting of the sum of the net book values of tangible fixed assets resulting from the balance sheet.

For further information, please contact:

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

For tax residence, the use of a real estate, even if not owned, is sufficient

(Italian Court of Cassation, judgment no. 26638 of November 10th, 2017)

Among the topics of international taxation that concern individuals, the correct identification of the Country of residence for tax purposes is certainly one of the most sensitive.
This is because a misappraisal of the (domestic and conventional) rules aiming to establish the country with which the personal and economic ties are closest can lead to very unpleasant tax consequences: it shall be pointed out that, according to the rules of most developed countries, the country of residence for tax purposes is entitled to tax any income of the taxpayer, wherever it is received (worldwide principle), while the other countries can only make claims on the income produced there.

In the (rather recurring) situation in which two countries, each on the basis of its own internal provisions, define a taxpayer as a tax resident (this is the case of "double residence for tax purposes"), it is necessary to refer to special rules (i.e. "tie breaker rules"), contained in the Agreements against double taxation, which aim to uniquely identify which country should "prevail" over the other for this purpose.

The criteria contained in the Agreements that comply with the OECD standard follow a precise order: first of all, it is necessary to verify if and where the taxpayer has a "permanent dwelling"; if he has such a residence in both countries, it is necessary to verify the nation in which the economic and affective relations are closer. If not, even this criterion is sufficient to resolve the matter, there are further cases/criteria to be checked, and then there is the possibility that the Tax Authorities of the two countries will resolve the case by mutual agreement.

In the dispute arisen before the Court of Cassation last November, the Tax Authorities challenged a Russian citizen for the non-declaration of assets and investments held abroad, with the consequent imposition of sanctions in terms of tax monitoring (fulfilment only required to the taxpayers resident in Italy for tax purposes).

The taxpayer defended himself claiming that he was not resident in Italy, since, according to the *tie breaker rules* laid down in the Agreement between Italy and Russia, the possession of a permanent dwelling in the former Soviet Union must prevail, not having at the same time any real estate property in Italy: according to the taxpayer's interpretation, therefore, the double tax residence issue had to be resolved, taking into account the conventional rules, by making such Russian real estate property prevail.

On the contrary, the Italian Tax Authorities claimed that the "test" for permanent dwelling was not the crucial one. This is because, with reference to the Russian real estate property, the individual resided in a stable way in Italy, at the home of his partner, as emerged during checks. The availability of both homes therefore required a verification of the second "test", relating to the centre of personal and economic relations, which in this case was uniquely identified in Italy on the basis of a series of elements (including the place where his working activity was carried out and the location of a company in which he held participations).

The Court of Cassation, while accepting the arguments of the Italian Tax Authorities, reiterated an important principle in order to identify the presence of a "permanent dwelling": in accordance with the indications provided by OECD, it is not relevant that a real estate is held as a property, but is relevant that its *actual use* is concrete.
The notion of permanent dwelling is to be understood, therefore, as a factual situation: it shall be referred to a home that the taxpayer can use permanently for whatever reason, as the characteristic

of permanence cannot be identified with the property of it, but with the fact that the subject can use it at his own will for indefinite periods of time.

Therefore, staying in a property owned by third parties does not affect the fact that the same one represents, for the taxpayer, a permanent dwelling for tax purposes: in this case, therefore, having "permanent" dwellings in both States, the solution to double tax residence must be found in the following criteria listed in the single Agreement against double taxation.

For further information, please contact:

Dott. Gabriele Giardina
RSM Studio 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 regime for short-term lease: the "Airbnb Law"

Through the introduction of article 4 of Decree Law no. 50 dated April 24th, 2017, converted with amendments by Law no. 29 dated June 21st, 2017, a new regime has been introduced for short-term leases; one of the aims is to counter tax evasion on temporary real estate leases managed by Internet operators.
The regulations have been implemented by the provision of the Italian Tax Authorities dated July 12th 2017, reference no. 132395, and the Italian Tax Authorities have provided a clarification through the circular no. 24/E dated October 12th 2017.
Please find below the main aspects of the new provision.

Definition of short-term lease agreement

Short leases are defined in the first paragraph of article 4 as follows:

"agreements for the lease of residential property with a duration of no more than 30 days, including those providing for the supply of laundry and room cleaning services, entered into by natural persons outside the company's activities, directly or through persons engaged in real estate brokerage activities, also through the management of online portals".

The rule is addressed to agreements entered into directly between the lessor and the lessee, even when there are persons involved in real estate brokerage activities, including the management of online portals. Both parties involved in the lease must be outside the exercise of a commercial activity, even if not usually exercised.
The rule also includes within short-term lease agreements also *sublease* agreements and agreements for consideration entered into by the *bailee* and having as their object the use of goods by third parties, entered into under the conditions referred to in paragraph 1 above. The right over the property by the subject who makes it available is not decisive for defining the scope of application which is determined on the basis of the cause of the agreement.

The buildings object of the agreement must be located in Italy and must have a residential purpose, thus including cadastral categories from A1 to A11, excluding A10, the relative appurtenances or even individual rooms of the dwelling.
The object of the agreement may also include, in addition to the provision of the dwelling, services considered as *strictly functional* to short-term residential needs, such as: the supply of linen, cleaning of premises, the provision of utilities, wi-fi and air conditioning.
However, the rules in question do not apply to agreements which include services not related to residential purposes, such as, for example, the provision of breakfast or meals, cars rental, tourist guides or interpreters, etc.

The circular reminds that the adoption of a particular contractual scheme is not required to indicate the elements of the agreement, and that the 30-day limit refers to each individual agreement. The provisions apply if several agreements are entered into with the same parties during the year, but if the duration of the leases *among the same parties* during the year is longer than 30 days, the agreement must be registered in this case.

Agreements concluded through intermediaries – fulfilments

The Italian Tax Authorities points out that the *notion of intermediary* provided for by the regulations is very *broad* and encompasses all the subjects through whom short-term lease agreements are entered

into and who are involved in the conclusion of the agreement between the lessor and lessee.

The legal status held by the intermediary is not relevant, nor is it relevant that the activity is carried out in an individual or associated form: the status of resident or the way in which the activity, including online and offline platforms, is carried out are not taken into account.

Therefore, intermediaries established in Italy, foreign intermediaries that have a permanent establishment in Italy, but also non-residents without a permanent establishment are attracted by the regulations.

Pursuant to paragraphs 4 and 5 of article 4, intermediaries must perform the following obligations in relation to short-term lease agreements *starting from June 1st 2017*:

- if they are involved in the entering into of the agreements, they must communicate the data relating to them and keep the related documentation; the data to be communicated are identified by the provision dated July 12th, 2017;

- if they collect or are involved in the payment of the lease amount or gross consideration, they must operate and pay a 21% withholding tax and keep the payment details.

As highlighted above, these obligations are to be fulfilled for short-term lease agreements concluded after June 1st 2017, while the date of payment of the consideration or the date of use of the property is not relevant. If the agreements are concluded through intermediaries, the time at which the lessee has received the confirmation of the booking is relevant.
The circular also reminds that intermediaries are required to request the data provided for in the provision, but not also to verify the related authenticity, a responsibility that falls on the lessor, who is solely responsible for the correct taxation of income and the proper fulfilment of any other tax obligations related to the agreement, and must be held liable for any mendacity of his declarations.

Data transmission

Intermediaries are required to submit the data concerning the agreements concluded through them, if they provide a professional or technical –IT support during the finalisation of the agreement: in particular, this happens if the lessee accepts the lease offer through the intermediary itself or if he accepts the lease offer through the online platform.
Otherwise, if the lessee informs the lessor directly of the acceptance of the proposal and the intermediary only offers the property, without being involved in the conclusion of the agreement, the intermediary is not obliged to give this information.
The data that must be communicated, as provided for by article 3 of the provision, are the following:

- the lessor's name, surname and tax code,
- the duration of the agreement,
- the amount of the gross consideration,
- the address of the building.

The notification must be made by June 30th of the year following the one in which the agreement is concluded, through the telematic services of the Italian Tax Authorities and may also be made in aggregate form. Please note that for 2017 the data relating only to agreements concluded from June 1st must be communicated.

Intermediaries are not obliged to provide data in the event of termination of the short-term lease agreement. If the termination is made after transmission, the notification shall be modified in the modalities provided by the Tax Authorities.
In the event of omission, incomplete or unfaithful communication of data, a penalty from € 250 to € 2,000 shall be applied, reduced to half if the transmission is made within 15 days after the deadline.

Withholding tax application

The obligation by the intermediary to make the deduction is provided for when the intermediary is involved in the phase in which the lessee pays the consideration, or in the phase of collection by the lessor.
The material disposition of financial resources requires the intermediary to make a 21% levy on these sums, as a deduction to be paid to the Tax Authorities.
The Italian Tax Authorities point out that:

- the intermediary is not obliged to withhold if the payment is made by bank cheque in the name of the lessor,
- in case of payment of the lease amount by credit, debit or prepaid cards, the authorized intermediaries (banks, payment institutions, Poste Italiane S. p. A., PayPal) are not required to operate the withholding tax as they do not carry out intermediation activities.

The deduction must be made by the intermediary who collects the lease amount or is involved in the payment. If the intermediary delegates a third party to collect the related amount, he must in any case carry out the deduction and fulfil the payment, certification and communication of data obligations.

The withholding tax shall be applied to the amount of the lease or gross consideration specified in the short-term lease agreement, including reimbursements of expenses incurred by the lessor. Penalties, deposits or security deposits are not subject to withholding tax.
The circular specifies that the gross amount must include any provision of ancillary services, including sums charged on a flat-rate basis. Costs for ancillary services do not contribute to the gross consideration only when they are incurred directly by the lessee or are recharged to him by the lessor on the basis of the costs and consumption incurred.

With reference to the commission, it is not included in the fee when it is charged directly by the intermediary to the lessee, or by the intermediary to the lessor, who does not charge it on the lessee: it is instead included if it is retained by the intermediary on the lease amount due to the lessor according to the agreement.

The intermediary applies the withholding tax on the full amount indicated in the short-term lease agreement that the lessee is required to pay to the lessor. The withholding tax is to be paid no later than the 16th day of the month following the one in which it is applied, in accordance with article 17 of the Italian Decree-Law no. 241 of July 9th, 1997..

Intermediaries are required to *certify* and declare the withholding taxes applied and through this certification the data reporting obligations are fulfilled, so no further transmission of information is required.

In the event of failure to apply the withholding tax, an administrative sanction is provided for: given the management difficulties connected with the start of operations and the regulatory uncertainties, the

Tax Authorities may exclude the application of sanctions until September 11th ,2017.

Non-resident intermediaries

Intermediaries attracted by the legislation also include non-residents in the territory of the State. The provision specifies that such subjects:

- if they possess a permanent establishment in Italy, they use it by fulfilling the reporting obligations through the same latter;

- if these subjects have no permanent establishment in Italy, they must avail themselves of a *tax representative*, as tax manager, to be identified among the subjects indicated in art. 23 of the Italian Presidential Decree 600/73, who may act as withholding agent.

Short-term leases tax regime

Finally, it should be noted that the income deriving from short-term lease agreements can be subject, at the lessor's option, to the *flat rate regime (i.e. regime di cedolare secca)*. The substitute tax regime was already applicable to the income from land and buildings deriving from even short-term leases, but from June 1st 2017 it was also extended to other income deriving from sublease agreements and to the agreements entered into by the borrower for granting the use of the residential property to third parties.
With regard to the options modalities for cedolare secca, it is possible to choose among the following:

- in the income tax return for the year in which the lease amounts are accrued or the considerations are collected;
- upon registration of the agreement, if it is voluntarily registered.

The option can be made for each of the agreements carried out by the lessor, except in the case where individual portions of the same house are leased, for periods that coincide in whole or in part: in this case the exercise of the option for the first agreement also binds the regime of the subsequent agreement.

For further information, please contact:

Dott.ssa Valeria Cecchi
RSM Studio Palea Lauri Gerla
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: valeria.cecchi@rsm.it

DEADLINES – DECEMBER 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

DECEMBER

Saturday 16th

(term extended to December 18th)

IMU/TASI balance payment

By this date, the amounts due as balance 2017 for IMU (Municipal Property Tax) and TASI (Municipal Tax for Indivisible Services) must be paid.

Wednesday 27th

VAT payment on account

By this date, the VAT payment on account related to the tax due for the month of December 2017 (for monthly taxpayers) or for the last quarter of 2017 (for quarterly taxpayers) must be carried out.

Liable parties

Subjects registered for VAT purposes who started their business activity before January 1st. 2017.

Operating modalities

The payment on account due can be calculated according to the following methods:

- ☐ the historical method (based on previous year's data);

- ☐ the forecasting method (based on forecasts for the reference period of the current year);

- ☐ the alternative method (calculated on the operations indicated from December 1st to December 20th in case of monthly taxpayers or from October 1st to December 20th in the case of quarterly taxpayers).

The payment on account based on the first two methods (historical and provisional) is calculated to the extent of 88%, while if based on the alternative method it is calculated to the extent of 100%.

The payment shall not be due if the amount is lower than € 103,29.

Duty codes

- ☐ 6013 "Payment on account for monthly VAT";
- ☐ 6035 "Payment on account for VAT".

Sunday 31st

(term extended to January 2nd 2018)

Reduced withholding tax on commissions – communication

By this date, commercial agents who use, on a continuous basis, while carrying out their activity, the work of employees or third parties, can request the clients or principals to apply the reduced withholding tax, commensurate with 20% of the commissions instead of the ordinary 50%.

Operating modalities

The Decree Law no. 175/2014 renewed the communication methods, providing that

"By means of decree of the Italian Minister of the Economy and Finance the criteria, time limits and modalities for the submission of return referred to in the second paragraph are determined.

Those modalities must include

transmission also by certified e-mail address of the aforementioned

return*. The return cannot be limited in time and will be*

valid until revocation or loss of the requirements by the

taxpayer"

Since the aforementioned decree has <u>not</u> been issued yet, the previously effective rules continue to apply, according to which the return is to be sent to the principal, for each calendar year, by December 31st of the previous year by <u>registered letter with acknowledgment of receipt</u> and must contain the identification data of the recipient, as well as the certification that he continues to use the work of employees or third parties.

Tax relief "Hyper-amortization" – deadline for the preparation of the technical report

By this date, those who intend to take advantage of the tax relief on "Hyper-amortization", effective for the *<u>investments made in 2017</u>*, must have a specific technical report drawn up by the subjects identified by the regulations.

More specifically, it should be reminded that for the application of this provision, the company is required to produce a *sworn* technical report issued by an engineer or an industrial expert registered with the respective professional registers or a certificate of compliance issued by an accredited certification body, certifying that the asset has such technical characteristics that enables it to be included in the lists as per Annex A or Annex B annexed to the law and is connected with the company's production management and supply network system.

In the case of assets with an acquisition cost *not exceeding Euro 500,000,* it is possible to fulfil the documental requirement also through a return made by the legal representative pursuant to the consolidated text of the laws and regulations on administrative documentation, as per Italian Presidential Decree no. 445 of December 28th 2000.

- ***With regard to the content of the report, reference should be made to Circular no. 547750 of the Ministry of Economic Development dated December 15th 2017, which can be downloaded from the following Internet address***

http://www.sviluppoeconomico.gov.it/images/stories/documenti/allegati/industria40/Circolare_perizia.pdf

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

... whistleblowing has been regulated by law?

The House Assembly, on 15 November 2017, approved a bill that includes rules for the protection of employees or contractors who disclose illegal actions of which they become aware during the work relationship (the so-called whistleblowing). In the specific case, the whistleblowing employee cannot be punished, dismissed, demoted or subjected to any other retaliatory or discriminatory measure.

JUDGEMENT OF THE MONTH

When dismissal ordered due to failure to successfully overcome a probation period is lawful

The Court of Brescia, with its judgement dated 3 November 2017, has declared lawful a dismissal ordered to a female employee due to her failure to successfully overcome the probation period. In particular, the employee claimed that probation period agreement attached to the job contract was void due to the undefined tasks assigned, since she was hired as "Commodity Manager" and registered in the 6th Category of the National Collective Labour Agreement (CCNL) for the Private Metalworking and Mechanical Engineering Sector. On the contrary, the Court deemed the descriptions more than adequate, recalling the opinion of the Court of Cassation according to which "especially when the work is of an intellectual nature and not merely manual, the tasks do not have to be necessarily listed in details, being sufficient that, on the basis of the wording used in the contractual document, they can be determined". Moreover, the Court highlighted that the meaning of the term "Commodity Manager" was well known to the employee, since she had, among others, provided to the company a curriculum vitae in which she stated to have held the same role when working for another company. And not only that. The employee also stated that there was lack of correspondence between the tasks assigned and those established in the contract. This was another claim that the Court rejected given that, based on the documentation provided on file, the employee, right from the beginning of her employment as an employee of the Defendant, had been assigned to tasks perfectly in line with the ones agreed. The employee also claimed that the probation period was impossible to successfully overcome due to its short term, since she had been absent first for vacation reasons, then due to illness and finally for early pregnancy leave. The Court, in rejecting also this claim, pointed out that the employee – even if excluding from the calculation of the days actually worked the aforementioned periods - had worked for 2/3 of the probation period originally anticipated and, thus, for sufficient time to allow the employer to assess her suitability to hold the requested role. Finally, in reference to the reasons of the company brought forth as justification for the dismissal and contested by the employee, the Court, after having pointed out that typically a termination due to failure to overcome the probation period does not require the employer to provide any specific justification, made reference to a judgement of the Constitutional Court according to which, "the employer who terminates a work relationship based on a probation period with a female employee that the employer knows to be pregnant at the time of dismissal, must justify the reasons that led to a negative outcome of the probation period so that the other party can understand the matters that led to the failure and the Judge has the information necessary to carry out a reasoned and fair assessment on the real reasons for the termination, in order to exclude with reasonable certainty that it was due to the fact that the woman was pregnant". According to the Court, the Defendant had met its obligation by specifying in the related notification all the reasons that led it to

decide to terminate the work relationship while the plaintiff could not prove the alleged discrimination. At the end of the ruling, the Court, therefore, rejected the action of the employee who was sentenced to pay all legal fees, quantified in the amount of EUR 2,500, in addition to all ancillary charges by law.

CASE LAW

Travel allowance, 50% taxability rate if fixed

The Court of Cassation, with judgement No. 27093 dated 15 November 2017 issued during a Plenary Sitting, intervened on the matter of travel allowance and related taxability and contributory regime. The Supreme Court, overruling its previous stance, consolidated as from judgement No. 396/2012, stated that "habitual travel allowances, payable to operators who, by contract, must carry out their work activities in always different and variable locations, can be subjected to fiscal incentives as per article 51, paragraph 6, of the TUIR and a related taxable amount also for contributory purposes of 50% of their amount, if paid in a fixed amount, independently from the continuity of the payments". This is valid if, as established by article 7 quinquies of the Law Decree 193/2016 (rule for the authentic interpretation of paragraph 6 of article 51 of the TUIR - Consolidated Tax Act) the following three elements apply: (i) formal element: the workplace is not listed in the contract; (ii) substantial element: the implementation of a work activity that requires the continuous mobility of the worker; (iii) remuneration element: the payment of a "fixed" allowance, paid whether the employee travels or not. If the three conditions are not satisfied simultaneously, then the taxability and contributory regime applicable to travel allowance is the one established in paragraph No. 5 of article 51 of the TUIR, even if the travel allowance is paid on a regular basis.

Validity of a dismissal deriving solely from the reading and justifiability of the employer's dismissal

The Court of Cassation, with judgement No. 23503 dated 9 October 2017, has ruled valid a dismissal that took place "through reading of the written notification before the recipient (ed. in this specific case a manager) who made himself unavailable to receive a copy". On the matter, the Court, recalling a few previous applicable cases, specified that "refusal by the recipient through a unilateral act of refusing to receive the deed does not exclude its notification from having been regularly performed", also because "refusal to receive the dismissal cannot take place to the damage of the obligated party". However, in this specific case, the Court of Cassation, leveraging from its consolidated opinion of distinction between "justifiability" and "justified reason" for dismissal, deemed the dismissal – even if validly notified – unjustified, since it was untrue that it was impossible to assign the manager to a different task. In fact, the Court states that, if it is true that the dismissal of the manager was supported by the employer's full freedom of decision, it cannot be the result of arbitrary entrepreneurial choices. Consequently, similarly to what had already been ruled, the Court stated that "once the employer has made known the reason for the termination of the work relationship and in court it is verified, instead, that the stated reason does not apply, the dismissal may be declared unlawful by the Trial Judge not for reviewing the discretionary entrepreneurial options, but for a practical assessment on their truthfulness or lack of good faith on the reason formally stated".

No repêchage obligation of collective dismissals

The Court of Appeals of Milan, with judgement No. 131/2017, in confirming the first-degree ruling, stated that in collective dismissals the employer does not have any repêchage obligations. This because the latter is an element that applies to dismissals for justified objective reasons for which the employer has the obligation to prove of having assessed the possibility to re-assign the worker, even to lower level

tasks, in order to avoid the termination of the work relationship. Therefore, in the opinion of the Court of Appeals, said element does not apply in the case of possible commitment undertaken by the employer at the time of Trade Union agreement signed as part of a collective dismissal procedure (as in the specific case), with the intent of supporting the relocation of the employees involved. This employer's commitment, according to the Court of Appeals, has a «merely contractual nature» and breaching it does not represent a violation of the criteria of choice or of the procedure itself. It only represents a contractual obligation, whose breach, if occurring, cannot be subjected to the protections established by article 18, Law 300/1970, which at the most could lead to a claim for damages (not submitted in the case under review).

Dismissal is unlawful if subcontracting takes place after two years

The Court of Cassation, with judgement No. 25649 dated 27 October 2017, ruled as unlawful, persecutory and abusive, the dismissal ordered to an employee "for organizational reasons", due to the decision to subcontract out the IT system that the employee was in charge of handling. The employee, in bringing to court the dismissal, proved that the IT system in truth had been used within the company up to almost two years after his dismissal. Thus, proving that the urgently needed reorganization of the service brought forth as the reason for his dismissal was null and void. In fact, on the matter, the Court of Cassation reconfirmed the following law principle: "the justified objective reason as per article 3 of the Law No. 604 dated 1966 must be assessed on the basis of factual and truly existing elements at the time of notification of the dismissal, and not on future and potential circumstances". Moreover, in the specific case, it emerged that the manger of the IT system had, a month before the dismissal, a meeting with the CEO of the Company during which he had been told that he would be dismissed since "no one could stand him anymore at the company". Therefore, the employer had been ordered to reintegrate the employee in his job position, in addition to pay a general damage reimbursement for the unlawful, persecutory and abusive dismissal.

An employer can monitor its employee's corporate email account

The Court of Cassation, with judgement 26682/2017, ruled as lawful the disciplinary dismissal ordered to an employee who accused of ineptitude and incompetence employees and top management of the company using offending words in several messages sent through his corporate email account. In the specific case, the employee, in bringing to Court the employer's dismissal, claimed among others failure to adopt the corporate regulations on the use of IT systems. In this respect, the Supreme Court pointed out that the failing relationship of trust was not due to the use of the corporate email account for purposes other than for work, but due to the offensive content of the emails regarding employees and top management of the Company. Moreover, the Court highlighted that the monitoring performed by the employer on the corporate email account of the employee, despite the exceptions of the latter, had to be deemed lawful, since it took place due to an anomaly notified by the system administrator and carried out ex post because of reasonable doubt regarding the existence of damaging conducts outside the performance of the work obligations (that is, damaging the image of the company and the dignity of other employees). Essentially, an employer can perform focused inspections to verify the correct use of the work tools, including corporate PCs, as long as, in order to maintain a balance of interests, this is done in respect of the freedom and dignity of the employee and the principles of fairness, pertinence and non-excess dictated by the privacy regulation.

Imposing the use of vacation leave may be lawful

The Court of Cassation, with judgement No. 27206/2017, has declared lawful the decision of a local health unit (ASL) to impose to one of its managers, close to retirement due to reaching the pensionable

age, the use of vacation leave and non-used paid leaves, as established by the contractual obligations, also in order to prevent any possible, subsequent, request of related indemnities. This, in addition, took place through the adoption of a provision of precautionary suspension, having seen the reluctance of the manager, without starting the protection procedure established in article 7 of the Law No. 300/170. In this respect, the Court has also pointed out that the precautionary suspension, having "ontologically" different nature compared to a disciplinary suspension, is free from the formalities established for the disciplinary procedures, including the obligation to guarantee to the employee the right of defense. In deciding in this sense, on the matter of precautionary suspension, the Court has mentioned its previous rulings: 15353/2012 and 25136/2010).

PRACTICE

Smart Work, Companies to comply

Effective from 15 November 2017 employers that signed individual smart working agreements must comply with the mandatory notifications. In fact, art. 23 of the Law 81/2017 expressly establishes that the agreement on smart work be subjected to the "notifications detailed in article 9-bis of the Law Decree No. 510 dated 1 October 1996, converted, with amendments, by the Law No. 605 dated 28 November 1996", which governs the mandatory notification procedure applicable to all those cases in which an employment or self-employment relationship is established. To notify about the agreement, it is necessary to connect to the telematic platform made available on the Services Portal of the Ministry of Labour and Social Policies (cliclavoro.gov.it), which can be accessed only by the holders of the special Public Digital Identity System (the so-called SPID). In addition, in order to submit the notification, the employer must specify (i) its identification data, (ii) the identification data of the worker (iii) the type of smart work used (whether open-term or fixed term) as well as the term of the agreement. Moreover, it will be possible to edit data already entered in the system or cancel the submission. The companies that enter into a high number of individual agreements, can make use of the mass-notification feature.

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 STUDIO 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

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