RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

2018 – 02

RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

Shareholders' loans are presumed to bear interest irrespective of the material payment of interest

(Court of Cassation, Judgment no. 3819 of February 16th, 2018)

In the practice of SMEs, it often happens that shareholders provide funding to the company. When this funding is not punctually regulated/formalized, the issue regarding their profitability and the related tax consequences arises.

With regard to the profitability of the sums given as "loans", it should be noted that on the basis of art. 1815 of the Italian Civil Code, unless otherwise agreed by the parties, the borrower must pay interest to the lender, also observing the provisions of art. 1284 of the Italian Civil Code in matters of legal interest rate.

From a tax point of view, art. 46 of the TUIR provides that sums paid to companies and commercial entities by shareholders are considered as loans if from the financial statements or the statements of these parties it does not emerge that the payment has been carried out for another reason. Likewise, article 45 of the TUIR provides that, unless proven otherwise, with reference to loans, interest is presumed to be received at the due dates and to the extent agreed in writing, and in the absence of such agreements, interest is presumed to be received in the amount accrued during the tax period and at the legal rate.

In the tax litigation judged by the Court of Cassation, the Italian Tax Authorities recognized as taxable the amount of interest expenses not paid to shareholders of a Srl (i.e. limited liability company) and therefore not subject to the withholding tax, but accrued in the fiscal year assessed (pursuant to art. 26 of the Italian Presidential Decree no. 600/73).

The Tax Authorities justified the above by arguing that the loan paid to the company by the shareholders should be considered as onerous, unless proven otherwise, so that the Administration was entitled to recover the relevant withholding tax not carried out by the limited liability company.

The Supreme Court upheld the Tax Authorities' thesis, pointing out that:

- *The taxpayer is responsible* for proving evidence that interest receivable on the loan amounts is not received, both because of the normally onerous nature of the loan agreement (as provided for by article 1815 of the Italian Civil Code) and also because of the tax presumption established by the aforementioned article 45 of the TUIR;

- the corporation which has received sums of money as loan from its shareholders is obliged to apply the withholding tax on interest payments due to the lending shareholders as a result of the loan, *not only in the event that the payment of such interest has actually taken place, but also when it is only presumed by law*.

As far as evidence to the contrary is concerned, reference should be made to previous rulings of the Supreme Court, on the basis of which it is excluded that such evidence to the contrary may consist merely of generic and not proven *statements*, since it must be proved on the contrary that the financial statements attached to the company's tax returns provided for a payment made on a different basis from the loan.

Therefore, n the absence of an adequate evidence to the contrary:

- the amounts contributed by shareholders are presumed to bear interest,
- interest is presumed to be received in the amount accrued during the tax year,
- interest is charged at the legal rate.

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Public consultation on the internal discipline of Transfer Pricing

The Italian Ministry of Economy and Finance has started a *public consultation* on transfer pricing with regard to the implementation of the provisions of article 110, paragraph 7 of TUIR (i.e. Consolidated Law on Income Tax) and article 31-quater of the Italian Presidential Decree no. 600 of 1973.

The beginning of said consultation is based on the changes introduced by article 59 of the Decree- Law no. 50 of 2017, which reworded the aforementioned article 110 (7) of the TUIR, providing, among other things, for the possibility of issuing a ministerial decree containing, on the basis of international best practices, guidelines for the application of the regulation in question.
Art. 110, paragraph 7 of the TUIR in its current version states as follows:

Income components deriving from transactions with companies not resident within the territory of the State, which directly or indirectly control the business, are controlled by this latter or are controlled by the same company controlling the business, are determined with reference to conditions and prices that have allegedly been agreed between independent parties working under conditions of free competition and comparable circumstances if this leads to an increase in income.
The same provision shall also apply even if there is a resulting loss of income, according to terms and conditions referred to in article 31-quater of the Decree of the Italian President of the Republic dated September 29th, 1973, no. 600.
By means of decree of the Italian Minister of Economy and Finance, the guidelines for the application of the present paragraph can be determined on the basis of international best practices

The following are subject to public consultation:

- *the draft of the Italian Ministerial Decree* referred to in paragraph 7 of article 110, which identifies a series of "guidelines" to support the application of the provisions of said article and being consistent with the provisions of article 9 of the Convention against Double Taxation OECD Model and OECD Guidelines on Transfer Pricing.
  In the aforementioned Decree:
  - in particular, the scope of the legislation is defined and definitions of terms related to TP are provided;
  - the definition of comparability is given and transfer pricing methods are identified;
  - the *range of values* in line with the principle of free competition is also determined;

- *the draft of the provision* adopted by the Director of the Italian Revenue Agency to implement the new regulatory provisions contained in article 31-quater of the Italian Presidential Decree no. 600 of 1973 regarding "*corresponding adjustments*" following primary corrections made by other States while implementing their domestic legislation and aimed at avoiding double taxation arising from TP adjustments.
  On the basis of said measure, the taxpayer interested in making an adjustment in his own favor submits a specific *application* (motivated and documented) to the competent body "Accordi Preventivi e controversie internazionali" of the Italian Revenue Agency "(i.e. Advanced Agreements and International disputes Office).

After having verified the *admissibility* of the application, the Italian Tax Authorities starts a procedure, also within a cross-examination procedure with the taxpayer, which must normally be concluded within 180 days from the date of submission of the application.
The Tax Authorities, where necessary, may request the activation of the *instruments of international cooperation* between tax administrations; in such cases the deadline for the conclusion of the procedure is suspended for a period of time equal to the one necessary to obtain the information requested to the Tax Administration of the Country to which the collaboration was requested.
At the end of the investigation, the procedure ends with the issuance of a reasoned document of acceptance or rejection by the Office:

- in the event of acceptance, the Office shall notify the tax authority of the foreign State about the downward adjustment recognized. The procedure is therefore completed through the issue of a specific provision by the Director of the Agency, who provides for the *refund* of the tax calculated on the taxable amount corresponding to the final adjustment made in the other State, and notifies the competent office of the Italian Revenue Agency, which carries out all the formalities necessary to grant the refund;
- in the event of rejection, it is the taxpayer's right to request the activation of the *mutual agreement procedures* provided for by the International Conventions against double taxation of income or the Arbitration Convention, which has its effects in relation to TP disputes arising within the Community.

Besides the public consultation, a translation into Italian of the OECD Transfer Pricing Guidelines was published.

The deadline for the public consultation is March 21st, 2018, which is the deadline for all interested parties to provide clarifications.

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DEADLINES – MARCH 2018

- this list is not comprehensive of all tax deadlines; the most recurrent administrative deadlines have been omitted

- From January 1st, 2014, the compensation limit has increased from Euro 516.456 to Euro 700.000.
  Please remind the following limitations applicable to compensations:

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

Wednesday 7th

Electronic submission of Certificazione Unica

By the above date, the "Certificazione Unica" (i.e. Income Tax Statement) related to 2017 shall be electronically submitted to the Italian Tax Authorities: such Income Tax Statement has replaced and merged, from 2016, the previous forms of tax statement of income from employment and assimilated (i.e. CUD form) and the tax statements of the remuneration paid to self-employed, occasional workers, agents, etc.

For each Certificazione Unica not submitted/wrong/submitted late, a penalty of Euro 100 will be applied, up to a maximum of Euro 50,000.

The delivery of the Certificazione Unica to interested parties shall be made by March 31st (day falling on Saturday, therefore the actual deadline is April 3rd ,2018).

Friday 16th

Company's books tax

Deadline for the payment of the annual government concession tax for the statutory stamping and numbering of company's books.

Parties involved
Corporations.

Operating modalities
Payment by F24 form of:

- Euro 309.87, if the share capital as at January 1st 2018 does *not exceed* € 516,456.90;
- Euro 516.46, if the share capital as at January 1st 2018 *exceeds* the amount of € 516,456.90.

It shall be reminded that the amount of the tax does *not depend* on the number of books and related pages that the company has in place.

Duty Code
7085 "Annual tax on the authentication of company books"

Payment of VAT balance 2017

By the above date, taxpayers involved have to carry out the adjustment of the VAT due on the basis of the return for the year 2017.

It shall be reminded that:

- ❑ the payment may be divided into monthly instalments (time limit of the instalment: November);
- ❑ the payment may be extended to the expiry date of the payment of income taxes for 2017 (June 30th, 2018) .

Duty Code
6099 "Payment of VAT on the basis of the annual return"

Saturday 31st

(Deadline extended to Tuesday 3rd of April)

Payment of F.i.r.r. on 2017 agents commission

Deadline for payment to Enasarco, by the principal companies, of the provision for agents' termination indemnity (F.i.r.r.) for the previous year: payments must be made using the online system only.
The measure of the F.i.r.r. varies according to the type of agent and annual commission volume, as shown in the summary table below:

Type of Agent	Commissions Volume	Rate
Sole Agent	Up to € 12.400	4%
	Exceeding € 12.400 and within € 18.600	2%
	Exceeding € 18.600	1%
Multi-agent	Up to € 6.200	4%
	Exceeding € 6.200 and within € 9.300	2%
	Exceeding € 9.300	1%

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

THE GDPR has introduced the DPO?

The European General Data Protection Regulation ("GDPR"), that will have effect from next May 25, introduced the Data Protection Officer ("DPO") who shall have the task to monitor the compliance with the European regulation and with data protection provisions as well as with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits.

JUDGEMENT OF THE MONTH

The employer's unilateral withdrawal from a second-level agreement is legitimate

In Judgment no. 98 of 7 February 2018, the Court of Frosinone rejected the appeal filed by a worker, who had resigned, against his former employer. More specifically, the worker argued that the withdrawal of his employer from a supplementary agreement of 1998 establishing a 14th-month pay, unilaterally effected in 2014, was illegitimate due to violation of the principle of the inviolability of remuneration pursuant to Article 36, Italian Constitution, and Article 2103, Italian Civil Code. The worker maintained in essence that the 14th pay originates in the contract between the parties established at the time of hiring. The company properly filed an appearance before the court, arguing that its own actions were legitimate and requesting, as an effect thereof, rejection of the appeal with release from any demand laid down therein. The Court of first degree, accepting in full the arguments of the company, remarked that a collective agreement, without providing for an effective term (as in the case at hand) cannot bind the contracting parties indefinitely. This is so because it would stultify the cause and social function of collective bargaining, whose regulatory norms - which have always been based on not excessively long time limits - must relate to a constantly evolving socioeconomic context. Therefore – according to the Court – collective bargaining must be subject to the application of the rule – generally applied to private agreements – according to which a unilateral withdrawing constitutes an ordinary cause of termination of any contract with an indefinite duration. Not only that; the Court has stressed that in the case at hand it has never been agreed with the appellant on a personal level that the remuneration was to include a 14th monthly pay, because this had been recognized exclusively on the basis of a second-level agreement. Moreover, the Court pointed out that the appellant in claiming a violation of Article 36, Italian Constitution, on the basis only of the non-payment of the 14th monthly pay, failed to prove that the constitutionally guaranteed minimum pay had been violated, which, in its opinion, is however to be excluded based on the paychecks produced for the purpose of the proceedings.

CASE LAW

Dismissal due to the use of a company car for private purpose is out of proportion

In Judgment no. 1377 lodged on 19 January 2018, the Court of Cassation has stated – in regard to an employment contract stipulated before the entry into force of Legislative Decree no. 23/2015 (so-called Jobs Act) – that a dismissal for just cause imposed on a worker who systematically used the company car, assigned to him only for reasons of his office, to travel from home to work and to go to

lunch, is disproportionate. The Supreme Court relies on the assumption that in order to allow dismissal for just cause, a worker must have irremediably violated the fiduciary relationship that binds him to the employer, engaging in a conduct that is motivated by an abusive intent, in stark contrast to corporate rules. An essential element of this – according to the Court – is the proportionality of the behaviour at hand and the punishment imposed on the worker. Now, in the case at hand, in the court's opinion, the conduct of the worker, even if unlawful, is certainly to be considered less serious, given that the use of a company car did not produce any negative consequences for the employer company, nor has it violated the company rules and the "values of the workers' community". In considering the dismissal out of proportion, the Court, therefore, concluded that the worker must be reinstated in his original job.

Disciplinary dismissal and constitutive nature of relapse

In Judgment no. 1909 lodged on 25 January 2018, the Court of Cassation has ruled on the subject of disciplinary dismissal, stressing the need for the preliminary notification of the relapse having a constitutive nature. In the case at hand, a female worker had been dismissed for just cause because she had missed work one day without providing adequate justification. In the previous month, the employee had received a disciplinary letter in which she was reprimanded for having been unjustifiably absent from work for thirteen days. However, such occurrence had not been mentioned in the last letter of reprimand at the basis of the withdrawal. The Court of Cassation, in the light of its own customary rulings, maintained that "the preliminary notification of a worker's violation must necessarily also concern – under penalty of invalidity of the punishment or disciplinary dismissal – the relapse and the previous disciplinary measures that constitute it, only where the relapse is a constitutive element of the violation in question and not just a mere criterion, as a negative precedent of the conduct, for the determination of a proportionate punishment to be imposed in relation to the disciplinary violation committed." The Supreme Court also specified that "in order to determine the relapse's constitutive nature, reference must be made to the applicable collective agreements". As a consequence, the Court concluded that the dismissal at hand is illegitimate because it is based on reprimands that were not expressly cross-referenced in the letter at the basis of the withdrawal. Therefore, before notifying a violation, it is always necessary to verify if precedents exist, as these must necessarily be cross-referenced, under penalty of invalidity of the disciplinary measure.

No severancy indemnity pay in case of contiguous agency contracts

In Judgment no. 1672/2017, the Milan Court of Appeal has ruled again on the severance indemnity pay set out in Article 1751, Italian Civil Code. In particular, the Court has clarified that the expiration of an agency contract which is followed, without interruption, by a second agency contract with the same principal does not give rise to the right of the agent to receive the severance indemnity set out in Article 1751, Italian Civil Code, or the indemnities set out in collective bargaining agreements. Moreover, the Court further ruled, if the new contract no longer provides for non-competition obligations, the agent shall receive no non-competition indemnity. This judgment stresses in particular the undeniable element of the non-termination of the contract in the event of stipulation of a new contract without interruption, which is why the severance indemnity pay cannot be allowed. In the same way, unless otherwise agreed by the parties, if the new contract sets out nothing on the prohibition to engage in competitive activities once the contract is terminated, the agent shall be entitled to no indemnity, even though he was entitled thereto under the previous contract.

The unilateral verbal withdrawal from a collective agreement is legitimate

In Judgment no. 2600 of 2 February 2018, the Court of Cassation reiterated that if the signatory parties to a second-level collective agreement have not expressly provided for the need to serve written

notices for termination purposes, the employer's verbal withdrawal can be considered valid. The case at hand concerned a collective agreement – which set out certain provisions regarding the award of cash bonuses – on an annual basis, with tacit renewal, unless in case of cancellation served by 31 January. A few workers claimed that they had not received payment of a portion of the bonus, and applied for an order for payment of the amounts envisaged in the collective agreement. On the other hand, the employer argued that said agreement was inapplicable, as the company had verbally cancelled it, in the course of a meeting with the trade unions held before 31 January. The Court of Appeal had upheld the claim of the workers, maintaining that, for a withdrawal to be effective, this must be made in a written form. The Supreme Court had a different view, believing that the withdrawal, even if verbal, was effective, in observance of the principle of the freedom of form, since in the case at hand the collective agreement did not mandatorily require a written form in order for the withdrawal to be effective.

The burden of proving the achievement of the objectives to receive payment of the related bonus rests on the employee

In Judgment no. 1712/2017, the Milan Court of Appeal has dealt with the issue of the omission by the employer of the annual objectives linked to the payment of a bonus. In this case, in the Court's opinion, the employee claiming payment of the bonus is encumbered with the burden of "... producing and proving his achievement of the objectives that, according to the principles of fairness and good faith in performing a contract, should have been reasonably assigned with a view of continuity with previously set objectives and in relation to the company potential and contingent market conditions". This is so because the omission in question constitutes contract breach, since the employer is obliged to assign the annual objectives, and does not fall within the scope of application of Article 1359, Italian Civil Code (relied on in the case at hand by the worker) according to which "the condition (editor's note: achievement of the objectives linked to payment of the bonus) should be considered fulfilled if this was missing for reasons attributable to the party that had no interest in the fulfilment thereof." This provision – according to the Court – shall apply only in case of a future and uncertain event, on the occurrence of which the effectiveness of an agreement depends. This is so when an employer that has assigned the objectives has engaged in a conduct that prevents workers from achieving them; nevertheless, also in this case, the worker should prove not only the interest of the employer against fulfilment of the condition but also that the objective would have been achieved had the employer not thwarted it.

PRACTICE

Remote control of workers: additional operating provisions from the Labour Inspectorate

In Circular Letter no. 5 of 19 February 2018, the National Labour Inspectorate provided further operating provisions on the "new" Article 4, Workers' Statute. In particular, the Inspectorate specified that, due to actual reasons of control, a video surveillance system may also monitor the workers without any limitations as to the camera angle, the blacking out of the face of the operator or the specific indication of the position of the cameras and their exact number. This is so because oftentimes the conditions of places and the positions of merchandise or production plants is subject to continuous changes in the course of time. Only for systems that start operating when workers are present, observance of the principles of proportionality, fairness and not excess set out in the Privacy Code should also be verified. According to the Labour Inspectorate, the use of video surveillance systems based on IP technology can also be allowed; remote access to these in real time must be authorized only in exceptional cases, while access to recorded images shall be traced in order to allow storage of "log-ins" for a period of at least six months. Regarding the collection and processing of biometric data, the Labour Inspectorate has accepted the indications of the Italian Data Protection Authority, setting out that these devices are

legitimate only if they are considered indispensable tools to perform the work as they aim at limiting access to "sensitive" areas or allowing use of hazardous machinery only by qualified personnel. The new provisions of the Labour Inspectorate, even if they remove many doubts, basically further prove that the application of the matter at hand is uncertain and that it is necessary to make personalized inquiries into each specific case.

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