RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

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RSM

TABLE OF CONTENTS

FOCUS ON TAX AND ACCOUNTING TOPICS

Transfer Pricing – enactment of the decree "pro- taxpayer" relating to adjustments by the Italian Tax Authorities

In the last issue of Tax News the important changes recently introduced in the field of Transfer Pricing were analyzed: the subject of the analysis was, in particular, the Measure of the MEF (i.e. Italian Ministry of Economy and Finance) with which the guidelines for the application of the provisions on Transfer Pricing were formalized at a "regulatory level". It should be reminded that the issuing of the aforementioned Measure stemmed from the amendments made to article 110 of the TUIR (i.e. Italian consolidated law on income tax) by Law Decree no. 50 of April 24th 2017: on the basis of this provision, it was established that, by means of a specific ministerial decree, the guidelines for the application of the TP could be determined on the basis of the international best practices.

On May 30th, the Italian Tax Authorities issued a further measure regulating the way in which the so-called "downward changes" deriving from adjustments to TP in foreign countries are managed.

Basically, in order to avoid *double group taxation*, if in a foreign jurisdiction higher taxable amounts deriving from intragroup transactions that have had an Italian company as their counterparty are definitively assessed, it is necessary to allow – in principle – a specular *downward* change in the taxation of the Italian company itself.

The measure therefore implements article 31-quater of the Italian Presidential Decree no. 600/73, on the basis of which:

"the downward adjustment of income referred to in article 110, paragraph 7, second sentence, of the TUIR approved with the Italian Presidential Decree no. 917 of December 22nd, 1986 may be recognized:

a) in execution of the agreements entered into with the competent authorities of foreign Countries following the mutual agreement procedures provided for by the international conventions on the avoidance of double taxation on income or by the Convention on the elimination of double taxation in case of adjustment of profits of associated companies, with final act and declarations made in Brussels on July 23rd, 1990, implemented by Law no. 99 of March 22nd, 1993;
b) when concluding the checks carried out in the framework of the international cooperation activities whose results are shared by the participating Countries;
c) *upon application by the taxpayer to be submitted in accordance with the arrangements and time limits laid down with the measure issued by the Director of the Italian Revenue Agency, following an upward change being final and compliant with the principle of free competition carried out by a Country with which a convention for the avoidance of double taxation on income is in force allowing an adequate exchange of information. In any case, the taxpayer remains entitled to request the activation of the mutual agreement procedures referred to under letter a), if the necessary conditions are met*."

A brief summary of the measure is provided below.

Access to the adjustment procedure

A company that wishes to assert its right to a downward adjustment of its taxable income, in relation

to the above-mentioned tax recoveries assessed in the foreign country where the other group company "counterpart" of the offending transactions resides, must submit an application to the Office for Preventive Agreements and International Disputes of the Italian Inland Revenue, located in Rome.
The application may alternatively be:

- sent by certified e-mail;
- written on plain paper and sent by registered letter with return receipt;
- written on plain paper and handed over directly to the Office which shall issue a receipt upon presentation.

Contents of the application

The application, must first of all indicate the "legal instrument" for the settlement of international disputes for which the related activation is requested, which may alternatively be:

- the "mutual agreement procedure" provided for by the Conventions for the avoidance of double taxation on income,
- the procedure provided for by the so-called "Arbitration Convention" on TP, in force between the countries of the European Community (convention of July 23rd, 1990);
- other legal instruments governing the settlement of international disputes as transposed into national law.

The application shall also:

- indicate the subject, meaning the request for the elimination of the double taxation generated by an upward amendment being *final and compliant with the principle of free competition*, made by the tax authority of the foreign country with which a convention for the avoidance of double taxation on income is in force. If on the date of submission of the application the upward adjustment made by the foreign country is not final yet, the application must indicate the stage of the upward adjustment and the possible circumstances under which the upward increase will become final;

- include in the Annex:

    - a courtesy translation into Italian or, alternatively, into English of the tax documents issued by the foreign tax authority from which the upward adjustment emerges. The Office reserves the right to request a sworn translation into Italian of such documents, if it is deemed as appropriate;

    - all the legal and factual elements that make it possible to assess that the upward adjustment made in the foreign country complies with the principle of free competition.

The application must be undersigned by the legal representative of the company or by another person with powers of representation.

Procedure management

Once the application has been received, the Office starts an "investigation" activity, at the end of which it can declare the related *eligibility* or notify the *impossibility to proceed* (due to the lack of the necessary documents: in this case, an additional term is granted to the company in order to provide the

missing elements/documents) or the *inadmissibility* (due to the lack of essential documents that has not been remedied by the taxpayer).

Once the preliminary investigation phase has been completed, the Italian Tax Authorities examine the application and the related documentation and may also invite the company to appear through its legal representative or a proxy in order to provide the details necessary for the successful outcome of the procedure. Minutes of this cross-examination shall be drawn up, a copy of which shall be given to the applicant.

The proceedings shall end within 180 days from receipt of the application.

At the end of the preliminary investigation, the procedure ends with the *issuing of a reasoned acknowledgement or failure to recognize* the downward change in income against an upward adjustment made by the foreign country.

In the event of positive outcome of the procedure, the Tax Office first informs the Tax Authority of the foreign country about the related downward adjustment: subsequently, after obtaining the certification issued by the foreign tax authority or the suitable equivalent documentation certifying the final character of the upward adjustment made, a specific measure is issued by the Director of the Italian Revenue Agency which provides for the downward adjustment in income corresponding to the final adjustment carried out in the other country and notifies the competent office of the Italian Revenue Agency, which carries out all the necessary formalities.

Causes of "procedure termination"

The Measure of May 30th specifies that a cause for termination of the proceedings is the lack of production, without justified reason, within the time term communicated at the time the request is made or within any different time limit agreed with the Tax Office, of the documentation and/or clarifications necessary for the continuation of the investigation. The procedure may also be terminated if the Tax Office becomes aware of facts or circumstances in which it is established definitively that the taxpayer is liable to "serious penalties" in connection with the subject of the proceedings.

Relationship between the "internal" correction procedure and international procedures

The submission of the application started on the basis of the Measure dated May 30th triggers the activation of the procedure for the settlement of international disputes provided for by the legal instrument chosen at the initial stage.

If the procedure ends with the non-recognition of the decrease in income, the same one may be obtained through the *implementation of the agreements entered into with the competent authorities of foreign countries within the related (and different) procedure for the settlement of international disputes*, as established by art. 31-quarter, paragraph 1, letter a) of the Italian Presidential Decree no. 600/73 mentioned above.

If the taxpayer does not intend to request, with the application, the unilateral downward adjustment referred to in article 31-quater, he has the right in any case to activate directly the procedure for the settlement of international disputes provided for by the international conventions against double taxation on income or by the Arbitration Convention.

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DEADLINES – JUNE 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

Saturday 16th

(term extended to Monday 18th)

IMU and TASI – payment of the first installment 2018

Deadline for the first instalment payment of IMU (i.e. Italian tax on real estate properties) and TASI (i.e. Italian Municipal Tax for Indivisible Services) taxes.

It shall be reminded that said taxes are paid in 2 instalments (expiring on June 18th and December 17th), the first of which is 50% of the tax due and calculated on the basis of the rate and deductions planned for 2017, while the second instalment is due to pay the balance for the remaining amount.

By the end of June 30th, instead, IMU returns concerning real estate changes occurred in 2017 that have caused a variation in the tax debt should be sent to the relevant Municipalities. The changes occurred and "certified" by a notary deed (i.e. purchase and sale agreement) and those that result in an increase in taxation compared to the previous period are not subject to tax return.

The return must be sent to the Municipality by registered letter.

Allocation of corporate assets – transformation into partnerships – facilitated dissolution – instalment payment

For those who have availed themselves of the favorable legislation (art. 1, paragraphs from 115 to 120, Law no. 208 of December 28th, 2015 – as extended by art. 1, paragraph 565, Law no. 232 of December 11th, 2016) that allowed, by September 30th, 2017, to proceed alternatively with:

- the allocation of corporate assets to the shareholders,
- the transformation of trading companies into partnerships,
- the allocation of assets of the sole proprietorship,

by the above date, the residual amount of the substitute tax due must be paid.

Saturday 30th

(term extended to July 2nd)

IREF–IRES–IRAP Payments

By the above date, individuals, corporations and partnerships (whose year coincides with the calendar year) shall pay the balance 2017 and carry out the first payment on account 2018 (if due) of:

- ☐ IRPEF and additional taxes;
- ☐ IVIE (tax on property value located abroad) and IVAFE (value added tax on financial assets overseas);
- ☐ substitute taxes (i.e. flat tax);
- ☐ INPS contributions – separate management;
- ☐ IRES;
- ☐ IRAP;
- ☐ Chamber of Commerce contributions.

It is possible to carry out the above payments by July 30th with an increase of 0.4% and the amounts can be paid, at the discretion of the taxpayer, by instalments.

Revaluation of participations and land – deadline for the substitute tax payment

For those taxpayers who have decided to revaluate the tax value of building land and agricultural land or the tax value of participations not traded on regulated markets and held from January 1st 2018, both the term for the payment of the single or of the first instalment of the substitute tax (equal to 8%), and the term for the certification (by the professional in charge) of the relevant estimate expire.

For taxpayers who in 2016 or 2017 have revaluated the tax value of building land and agricultural land or the tax value of participations not traded on regulated markets, the deadline for the payment of the second and third instalment of the substitute tax expires, in the event of an original option for the payment by instalments.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

..... effective from 25 May, the European Regulation on the protection of personal data has entered in full force

On 25 May 2018, the European Regulation on the protection of personal data has entered into full force in each member state of the European Union (including Italy). Among the major changes there are: focus on the accountability of the data controllers and data processors, the introduction of the Data Protection Officer (so-called DPO) as well as the obligation to (i) perform, at the occurrence of specific circumstances, an impact assessment; (ii) notify the Data Protection Authority and notify the data subject in the case of "data breach" and (iii) keep a Data Processing Record. The penalties for those failing to comply with the Regulation can reach up to 4% of the overall annual turnover related to the previous fiscal year.

JUDGEMENT OF THE MONTH

Riders are self-employed professionals

The Court of Turin, with judgement No. 778 dated 11 April 2018, rejected the appeal lodged by 6 riders against a well-known German food delivery company. In this case, the riders had opposed the company's termination of the coordinated and continuous cooperation with them following their protests, dating back to 2016, to have a fairer remuneration and regulatory treatment, claiming the existence of a subordinate employment relationship. The riders claimed, in fact, that the company (i) gave them detailed "directives" concerning, among others, the time and the location of work, the verification of their presence at the starting locations, the obligation to deliver on time, and (ii) exercised power of control and supervision by monitoring their productivity. At the end of the proceedings, the Court found instead that they were not employees since "they were not obligated to perform the work and the employer was not obligated to receive their work". According to the Court, this characteristic in the employment relationship is "in itself decisive for the purpose of excluding the applicants' claim as to the managerial and organizational power of the employer because it is clear that, if the employer cannot demand from the worker the performance of the work, the employer cannot consequently exercise managerial and organizational power over them". Among other things, from a practical review of the procedures governing the relationship, it emerged, in the opinion of the Court, that the riders, after confirming their availability, could revoke it, that is not show up to perform the work. And in such cases, no disciplinary penalties were imposed on them, which also excluded their submission to the disciplinary power of the alleged employer. Consequently, according to the Court of Turin, even the claims related to the voiding, ineffectiveness, and unlawfulness of the termination (rectius dismissal) and the other requests so related could not be accepted, with the consequent rejection of the appeal.

CASE LAW

Resigning Agent and lack of just cause

The Court of Appeals of Turin, with judgement dated 22 December 2017 reviewed a case of resignation for just cause presented by an agent of a company in the consumer credit sector. In particular, the resigning agent had appealed to the court to obtain the payment of the indemnity pursuant to art. 1751 of the Civil Code (and, alternatively, in any case the payment of compensation in lieu of notice), complaining about both the worsening of the contractual conditions applicable to the customers in his circles and the unlawfulness of the employer's choice to reserve better contractual conditions to its branches operating in the area assigned to him. In confirming the opinion expressed by the court of first instance, the Court of Appeals stated that, on the one hand, the worsening of the contractual conditions had been expressly accepted by the agent and that, however, by virtue of a contractual clause, the employer could have also proceeded unilaterally. Furthermore, the Court of Appeals noted that the choice of the employer to favor, by reserving better conditions, its branch offices could not in any way be considered unlawful since the agent was not contractually tied by an exclusivity restriction. In light of these considerations, the judges of the Court of Appeals rejected the appeal of the resigning agent.

Lawful dismissal for justified objective reasons not based on an economic crisis

The Court of Cassation, with judgement No. 9127 dated 12 April 2018 reviewed the case of dismissal for justified objective reasons not supported by a negative economic trend. In this case, the judges reviewing the case had deemed the employer's dismissal unlawful because "the unfavorable situations were not such as to have a decisive influence on the normal productive activity of the sector". The judges, on the other hand, pointed out that – although it was not possible to acknowledge the presence of a negative economic trend within the company and sector of the employer – it was unquestionable that the latter had indeed led to a corporate reorganization, aimed at improving production efficiency and organization, and therefore the suppression of the position of the dismissed employee. In light of this fact, the Supreme Court decided to transfer the case for judgement to the Court of Appeals having jurisdiction. Basically, in a dismissal for justified objective reasons a negative economic trend of the company does not represent a factual condition that the employer must prove, being sufficient the existence of reasons tied to productivity and business organization such as to determine the effective removal of a specific job position. Moreover, from the reasoning of the Court it emerges that these reasons may include reasons aimed at a better managerial or productive efficiency or an increase in the profitability of the company. This is because, pursuant to art. 41 of the Constitution, the choice of the employer cannot be judged in terms of adequacy and appropriateness.

Lawful dismissal of those who offend their company on Facebook

The Court of Cassation, with judgement No. 10280 published on 27 April 2018 reviewed the case of a dismissal ordered to an employee who had published disparaging statements and negative comments against her employer and its representatives on her Facebook page. In particular, the Supreme Court, in confirming the decision of the judges in charge of the case, noted first of all that the conduct of the worker – although not intending to relate it to the volitional act of malice – may certainly fall within a case of serious negligence and, therefore, such as to cause damage to the bond of trust between the parties. Similarly, regarding the objective element, the Supreme Court has pointed out that "spreading a slanderous message through Facebook leads to a potential situation of defamation, for its potential ability to reach an indefinite number of people", thus proving to be capable, also in this respect, of breaking the bond of trust at the basis of any standard employment relationship. In essence, this ruling

confirms the case law trend that deems lawful those disciplinary dismissals ordered for the improper use of social networks.

The relative nature of the requirement of immediacy in disciplinary proceedings

The Court of Cassation, with judgement No. 7424 dated 26 March 2018 has once again dealt with the matter of immediacy of disciplinary dispute and the timeliness of the penalty then adopted. In this specific case, the employer had initiated against the employee disciplinary proceedings – which ended with a dismissal for just cause – only months after the occurrence of the alleged facts. The Court of Cassation, in reviewing the case, reiterated that the principle of immediacy must be understood in a relative sense, since in practical terms it must be compatible with a longer or shorter period of time, "when the verification and assessment of the facts calls for more time or when the complexity of the organizational structure of the company may delay the termination decision". In addition, the Supreme Court reminded how the time frame between the facts and the dispute, for the purposes of assessing the immediacy of the dismissal, must start from the moment in which the employer has become aware of the disputed situation and not from the abstract perception or knowledge of the facts. Essentially, the concept of immediacy must be assessed in relation to the complexity of the employer's corporate organization

PRACTICE

Statement of Agreement Signed for the Rubber Plastic Sector

On 2 May 2018, the Plastic Rubber Federation signed a statement of agreement with Filctem CGIL, Femca CISL and Uiltec UIL which, in line with the Interconfederal Agreement of 9 March, has the purpose of creating a contractual model capable of responding appropriately to the needs of employees and companies operating in the sector. This with particular reference "by way of example" to the following: (i) the role of the National Collective Bargaining Agreement; (ii) industrial relations and (iii) a new remuneration by determining the fundamental elements of the Overall Remuneration and Minimum Remuneration. Moreover, key element of the statement of agreement, in order to make the next renewal of the National Collective Bargaining Agreement consistent with the principles of the interconfederal agreement, is the drafting by 30 September 2019 of a joint document containing the guidelines for the renewal of the agreement. Therefore, the parties have agreed to postpone the expiry of the current National Collective Bargaining Agreement (scheduled for 31 December 2018) to 30 June 2019, guaranteeing, as it was established at time of renewal (10 December 2015), an average gross increase of EUR 76 for level F but with the introduction of two new tranches: EUR 21.00 on 1 May 2018 and EUR 14.00 on 1 January 2019 .

The clarifications of the Italian National Labor Inspectorate ("INL") relating to the filing of the conciliation minutes signed before the trade unions

The Confederdia Union has requested clarifications to the National Labour Inspectorate ("INL") regarding the rejection issued by the territorial office of the Inspectorate to the filing of the minutes of conciliation signed pursuant to art. 411 of the Civil Code, justified with the alleged lack of powers by the union. In this respect, INL, with note dated 17 May 2018 number 163, has above all highlighted that the fundamental requirement of conciliation talks with a trade union is the fact that the agreement has to be reached with the effective support of the employee by his/her trade union. Furthermore, the note has recalled – after having referred back to the rules governing conciliation talks with trade unions as well as the requirements of actual mandate and representation powers called for by the case law of the supreme courts – what had already been established by the Ministry of Labour and Social Policies

(protocol 5199 dated 16/03/2016 and protocol 5755 dated 22/03/2016). In particular, INL stated once again that, in order to file the minutes at the territorial office and in light of what is established in art. 412 ter of the Civil Code, the union "must be in possession of specific representation powers". According to INL, given that not all the collective agreements establish specific conciliation procedures, the solution of a self-declaration of the union regarding possession of the requirement of greater representation (to be adopted only in those cases in which trade union conciliation is performed according to specific contractual provisions) allows the inspectors to avoid technically complex audits and at the same time ensures union self-regulation in application of the regulations establishing it.

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