RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

2018 – 08

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

FOCUS ON TAX AND ACCOUNTING TOPICS

Bankruptcy proceedings – VAT can only be recovered when the proceedings are closed ***(Regional Tax Commission of Florence, judgment no. 1125/02/2018 of April 4th, 2018)***

As is known, on the basis of article 26, paragraph 2 of the Italian VAT Decree, a taxable person who has issued an invoice to a party, who has subsequently been subject to a bankruptcy procedure, is entitled to recover the tax when no assets emerge from the bankruptcy procedure.

The Italian Tax Authorities state that the note of variation can be issued (thus recovering the VAT charged and not received as payment) only at the end of the procedure, when the fruitlessness of the procedure becomes objective (no assets emerge).

With the Stability Law for 2016, art. 26 had been expressly changed on this point, establishing the possibility to recover the VAT when the bankruptcy proceedings start: the rule was repealed after a few months, never coming into force.

In this legislative and interpretative framework, it should be reminded that the Court of Justice of the European Union(Case C-246/16), having to settle an Italian dispute concerning art. 26, has recently ruled that, as a principle, a Member State may not subject a reduction in the VAT taxable amount to the outcome of a bankruptcy procedure if such procedure can last for more than 10 years: this is because the time required for its completion would put the burden of a liquidity disadvantage on the entrepreneurs subject to the Italian legislation compared to their competitors in other Member States.

The European Court has also pointed out that it is up to the national Authorities to determine, in compliance with the principle of proportionality and under the control of the judge, what is the evidence (against a bankruptcy procedure that is protracted over time) of a likely prolonged duration of non-payment, which the taxable person should provide to claim the right to a VAT "advance" recovery (i.e. before the closure of the procedure).
Briefly, the Court of Justice seems to identify a principle of protection for the taxpayer, but at the same time makes it ineffective due to a necessary intervention by the legislator.

On the basis of these considerations reached at European level, the Regional Tax Commission of Florence (i.e. CTR), before which a dispute – concerning the moment of issuing of the notes pursuant to article 26 of the Italian Presidential Decree 633/72 – between the Italian Tax Authorities and a company took place in recent months, upheld the rigorous and severe arguments of the Italian Tax Authorities, refusing to recover the VAT before the bankruptcy procedure had been definitively concluded.

For further information, please contact:

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

Tax features of "Decreto Dignità" (i.e."Dignity Decree")

The "Decreto Dignità", the "omnibus" measure of the new Government, was definitively converted into Law last August (Decree Law no. 87/2018, converted into Law no. 96 of August 9th, 2018).

The following is a summary of the main tax innovations contained in the law.

Hyper-depreciation Regulation - (de)location of investments (article 7)

It is established that the tax relief known as "Hyper depreciation" is granted on condition that the assets subject to tax benefits are allocated to production facilities located on national territory.

If, during the period hyper depreciation is adopted the assets subject to tax relief are *sold for consideration* or *destined* for production facilities located abroad, even if they belong to the same company, the hyper depreciation is recovered by means of specific changes in the income tax return. It is also provided that the hyper depreciation is not recovered if the assets subject to tax relief are by their very nature intended to be used in more than one production sites, and therefore, may be subject to temporary use outside Italy.

The provisions shall apply to investments made from July 14th, 2018.

Credit for Research and Development (art. 8)

Based on the tax credit rules for investments in research and development (article 3, paragraph 1 of the Decree-Law no. 145 of December 23rd, 2013, converted, with amendments, into Law no. 9 of February 21st, 2014), costs incurred for the purchase, including under license, of intangible assets identified in article 3, paragraph 6, letter (d) - *resulting from transactions with companies belonging to the same group - are not considered as eligible.*

These are, more in detail, industrial technical and privative competences (patents) relating to an industrial or biotechnological invention, to a topography of a semiconductor product or to a new vegetable variety, also acquired from external sources.

Companies controlled by the same subject, parent or associated companies, pursuant to article 2359 of the Italian Civil Code, including subjects other than corporations, are considered as belonging to the same group; for individuals participations, securities or rights held by the entrepreneur's family members, identified pursuant to article 5, paragraph 5 of the TUIR (i.e. Italian Consolidated Law on Income Tax) are also taken into account.

This provision shall apply from 2018, also in relation to the calculation of eligible costs attributable to the tax periods relevant for determining the average comparison. For purchases deriving from intragroup operations that took place during the tax periods prior to the one during which *Decreto Dignità* has entered into force, the portion of the purchase cost corresponding to the costs previously attributed to the Italian company as a result of its participation in research and development projects relating to the goods being purchased is excluded from the eligible costs.

Fuel purchases – electronic invoice from January 1st, 2019 (art. 11-bis)

The obligation to document the supply of fuels to VAT taxable persons by issuing the electronic invoice is postponed to January 1st, 2019.

However, the obligation to pay for fuel purchase by electronic payment instrument remains in force, otherwise VAT and the cost cannot be deducted.

Repeal of split payment for professionals (article 12)

Professionals are excluded from the application of the VAT split payment mechanism, based on which, in case of supplies of goods and services to administrations and public bodies, these latter pay the VAT directly to the Italian Tax Authorities. The exclusion applies to transactions for which the invoice was issued after July 14th, 2018.

For further information, please contact:

Dr. Alberto Baudo
RSM Studio Palea Lauri Gerla Milano
Foro Buonaparte, 67
20121 Milan
Tel: (+39) 02.89095151 Fax: (+39) 02.89095143 email: alberto.baudo@rsm.it
www.rsm.it

DEADLINES – SEPTEMBER 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

Sunday 30th

(term postponed to Monday 1st October)

Writing-off of tax payment notices - payment by instalments

By the above date, those who have opted for the writing-off of the tax payment notices shall pay the amount due: the amount of the payment depends on the installment plan chosen and from the time when the subject has opted for the writing-off procedure.

With specific reference to the writing-off of the tax payment notices 2000-2016, by the above date the Collection Agent informs those directly concerned of the amounts due as well as the payment plan.

VAT - Customer and supplier lists and periodic settlements – communications submission

By this date, the lists of invoices issued and received, as well as the results of VAT settlements, must be submitted electronically, with reference to the previous calendar quarter.

DID YOU KNOW THAT...

...... there is no traceability obligation for expense reimbursements?

Art. 1, paragraph 910 of Law No. 205/2017 (the so-called Budget Law 2018) established that, effective from July 1, 2018, employers and private clients must pay to employees their remuneration, as well as any advance, through a bank or post office using one of the following methods of payment: a) wire transfer on the current account identified through the IBAN code specified by the employee; b) electronic payment methods; c) cash payment through the bank or post office where the employer has opened a cash account with payment order; d) check handed out directly to the employee or, in the case of a proven impediment, to a proxy. On this matter, the National Labour Inspectorate (Inl), with memorandum No. 6201 dated 16 July 2018, specified that the aforementioned payment methods concern exclusively the remuneration. Thus, also in the opinion of Inl, their use is not mandatory for money paid for other reasons, such as cash advances for expenses that the employee must bear for the company and in the provision of services (e.g. lodging, meal and travel expense reimbursement).

JUDGEMENT OF THE MONTH

Dismissal for justified objective reasons: indemnification protection in the case of violation of the selection criteria

The Court of Cassation, with judgement No. 19732 dated 25 July 2018, confirmed that in the case of dismissal for justified objective reasons, the selection of the employee, or employees, to be dismissed is not fully at the discretion of the employer. In fact, it is limited, in addition by the prohibition to discriminate, by the rules on fairness and good faith to which, pursuant to articles 1175 and 1675 of the Civil Code, each conduct of the parties must comply as part of a mandatory relationship and thus, even in the case of termination of one of the parties. On the matter, the Court of Cassation remarked that the trial judges discussed the issue of how to identify in practical terms the objective criteria that allow deeming said choice compliant with the aforementioned principles, deeming that it is possible to refer to, even while taking into account the diversity of the respective regimes, the criteria established by the Law No. 223/1991 governing collective dismissals. Thus, consequently, in light of the criteria of family dependants and service seniority established in a similar fashion for said dismissal. Moreover, said criteria allow the employer to perform its unilateral power of selection consistently with the interests of the employee and of the company. Consequently, among multiple fully available employees and faced with the needs, originating from production reasons, to reduce by one or multiple units the work force, it is necessary to respect the aforementioned fairness and good faith principles. In terms of the penalties applicable whenever this legal principle is breached, the Court of Cassation has reminded of what is established by the Law No. 92/2012 (the so-called Fornero Law) which establishes typically payment of the indemnification ranging from a minimum of 12 and to a maximum of 24 monthly salaries, reserving the restoration of the employment relationship, with an indemnification up to a maximum of 12 monthly salaries in those residual cases that act as exceptions, where the non-existence of the fact on which the dismissal is based is supported by specific proof. Therefore, a breach in the principles of fairness and good faith when choosing among employees performing similar tasks, according to the Court of Cassation gives right to the indemnification protection established by paragraph 5 of article 18, given that the case of "open non-existence of the justified objective reason" does not apply as set out in article 18, paragraph 7, of the Law 300/70, as a prerequisite for granting the reintegration protection.

REGULATIONS

Dignity Decree 2.0

In the past few days, the so-called Dignity Decree (Law Decree 87/2018), which came into force on 14 July, was not approved by the Finance and Labour Committees which, during the review session, approved several amendments. With specific reference to the fixed term contract, the new regulations would be applicable to contracts entered into after the effective date of the Decree, as well as renewals and prorogations after 31 October 2018 (the so-called transition clause). Moreover, the Parliamentary Committees have approved, during the review session, the amendment according to which, except a different use of the collective agreement applied by the user, the number of employees hired with fixed term contract or staff leasing fixed term contracts cannot exceed overall 30% of the number of employees with open-ended contract working for the employer. In addition, the Committees have resolved on the introduction of the so-called fraudulent staff leasing that takes place whenever the use of staff leased has the purpose of avoiding mandatory laws or collective agreements. Finally, the Committees, with reference to the conciliation model established on art. 6 of the Law Decree 23/2015, has proposed to higher the parameters from a minimum of 3 to a maximum of 27 monthly salaries. Now it is to be seen if the Decree will undergo further amendments at the time of approval.

The new reform in transnational posting

The EU Directive No. 2018/957 amending the directive 96/71/EC regarding the posting of employees during the provision of services has been published on the EU Official Journal dated 9 July 2018. Specifically, the directive orders that the maximum term for transnational posting be 12 months, with the possibility of extending it for additional 6 months. At the end of the 12 months, based on the equal treatment principle, the posted employee shall be guaranteed with all the labour and employment conditions of the Country where he/she works. During the posting, the employees will be subjected to the regulations of the hosting country in terms of remuneration and they shall have the right to enjoy the lodging and indemnity conditions or reimbursement for travel expenses, meal and lodging, since he/she is away from home for business reasons. The member states shall apply also the regional or sector's collective agreements, if widely encompassing and representative. The period in which the posted employee will hold his/her contributory regime applicable in the origin country is reduced from 12 to 24 months and the regulations on the maximum work periods and minimum rest periods shall apply, including those governing the term of paid annual leaves. The regulation expands the application of the rules also to the staffing agencies that decide to post a worker at a user's company headquarters or centre of activity in the territory of a member state. The Member States now have two years of time to adjust to said regulation their own domestic laws and regulations meaning by 30 July 2020.

CASE LAW

Fixed term contract: the indemnification protection covers only periods not actually worked

The Court of Cassation, with judgement No. 17248 dated 2 July 2018, faced the matter of the protection of employees when in the presence of a series of fixed-term contracts. In particular, according to the Court of Cassation, the indemnity ranging from 2.5 to 12 monthly salaries from the last global remuneration as part art. 32, paragraph 5, of the Law 183/2000 (now revoked), to be paid to the employee after the conversion from an open-term contract must necessarily take into account the prejudices, in terms of remuneration and contributions, suffered in the same period ranging between the end of the contract and the judgement of restoration of the relationship. In the opinion of the Court, the indemnity in question, instead, cannot be applicable to periods of actual work during which the worker may not have suffered negative consequences either from a salary standpoint and contribution

standpoint. According to the Court of Cassation, with reference to these periods the all-inclusive principle of the indemnity pursuant to art. 32 of the Law 183/2000 does not apply and the employee has the right to their calculation for seniority purposes and accrual of the related seniority thresholds. In other words, said right cannot be affected and included in the lump-sum indemnification of damage not caused by the work.

Work activity while on sick leave: dismissal is legitimate only if work delays healing

The Court of Cassation, with judgement No. 17514 dated 4 July 2018, deemed justified the disciplinary dismissal ordered to a bus driver of a private rental company who, during a long period of absence from work for an ongoing injury, was found to be working for a car parking facility. On the same date, on 4 July 2018, the Court of Cassation has issued another order, No. 17424, where instead it ruled as unlawful a dismissal order to a disabled employee who could not work due to a gastroenteritis, who, during a period of absence, performed a self-employed activity offering outdoor painting services. The aforementioned conclusions, apparently contradictory, in truth find their common ground in the principle according to which carrying out a different work activity during leave from work due to illness cannot automatically lead to disciplinary consequences. This because it is necessary to check if such activity is incompatible with illness condition or such to impede or delay healing. Specifically, in light of the above, the Court, with judgement No. 17514, deemed that the actions performed by the employee "appeared ictu oculi incompatible with the declaration of illness or however certainly such to delay if not even compromise physical recovery". On the other hand, with order No. 17424, the Court verified that "the carrying out of the (extra) work activity during illness was not incompatible with the illness hindering the work activity, and it did not impair the normal psycho-physical health recovery".

Even for the Court of Milan food-riders are self-employed

The "battle" on the type of employment relationship of the so-called riders in the age of the gig economy continues. A few months after the judgement issued by the Court of Turin ruling that the six riders of Foodora could not be deemed employees of the company, the Court of Milan ruled on 4 July on a similar case, rejecting the appeal of a former rider who claimed an employment relationship with another company in the food distribution sector. The reasons of the judgement have not yet been filed, and thus it will be necessary to wait for them to find out if they are in line with what has already been ruled by the Court of Turin. In said case, the relationship was qualified as a self-employed relationship, since the Foodora riders were not obligated to provide the service and were not under the direction and organisational control of the employer. In fact, in order to exclude a position of employment, the actual methods used to implement that work relationship became relevant, managed through digital platform and a smartphone app. The matter in these past few days has become the topic of wide political and union debate to the point that on 18 July 2018 the first draft related to the financial and regulatory understanding governing riders has been signed. This took place with an understanding signed by Confetra, Fedit, Assologistica, Federspedi, Confartigianato trasporti, Fita – CNA, Filt CGIL, Fit CISL and Uiltrasporti within the logistics National Collective Bargaining Agreement (CCNL).

Dismissal for justified objective reasons: legal prerequisites and penalties

The Court of Cassation, with judgement dated 25 June 2018 No. 16702, issued a new ruling on the dismissal for justified objective reasons and related penalty consequences. In particular, the Court of Cassation noted that the negative trend of a company represents a factual requirement that the employer must necessarily prove and the judge accept. This is because it is sufficient that the reasons related to the production activity and the organisation of work, among which it is not possible to exclude

those aimed at greater management efficiency or to an increase in corporate profitability, lead to an effective downsizing of the organisational set up through the removal of a specifically identified job position. Instead, whenever the dismissal is justified with the need to face unfavourable financial conditions, or significant extraordinary expenses and in court it is verified that said reasons do not actually exist, the dismissal is deemed unjustified due to the confirmation of lack of truthfulness and on the pretence of the reasons brought forth by the employer. In this case, however, said situation would not automatically lead as a penalty consequence to the application of the actual protection of the job position. Essentially, verification of the requirement of "obvious non-existence of the fact supporting the dismissal", as per paragraph 7 of article 18 of the Workers' Statute, concerns both the legal prerequisites of the dismissal for justified objective reasons and thus the reasons related to the production activity, the organisation of work and its normal implementation as well as the impossibility to assign the employee to another position. Therefore, the "obvious non-existence" must be referred to a clear, obvious and easily verifiable (from an evidence standpoint) lack of the aforementioned prerequisites.

PRACTICE

National Collective Bargaining Agreement Signed with Chemical industry employees

On 20 July 2018, the parties reached an agreement for the renewal of the national collective bargaining agreement for employees of the chemical industry, chemical-pharmaceutical industry, chemical fibres and abrasive, lubricants and LPG industry (the so-called chemical industry contract). The main news from a financial standpoint concern the following: (i) recognition of an increase of EUR 97 gross (category D1) on the minimum economic remuneration during the term of the agreement, which was extended, temporarily, by six months, therefore up to June 2022. The increase is subdivided in 4 instalments: 1 January 2019 in the amount of EUR 30; 1 January 2020 in the amount of EUR 27; 1 July 2021 in the amount of EUR 24; 1 June 2022 in the amount of EUR 16; (ii) confirmation effective from the month of July 2018 of the Edr (distinct element of pay) in the amount EUR 22, to which additional EUR 9 will be added effective from January 2019 deriving from the verifications of the previous agreement. At the end of this new agreement, however, an overall review is planned to ensure alignment of the minimum collective remuneration to the actual inflation. From a regulatory standpoint, in addition to focusing on employment and productivity, the agreement pays specific attention to (i) the improvement in the quality of the industrial relations, (ii) the growing investment on safety, health and environment (even through digital means) and (iii) a major boost to the dissemination of training (promoting youth employment). This is the first National Collective Bargaining Agreement to apply the interconfederal agreement on the bargaining signed on the past 9 March (the so-called Factory Agreement). Now it will be the turn of the employees to speak in the meetings to provide their feedback on the agreement.

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 – Milan
Tel +39 02 89095151
Fax +39 02 89095143

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

www.rsm.it

VAT NO. AND FISCAL CODE: IT13174301005

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