RSM STUDIO PALEA LAURI GERLA

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

TAX NEWS

2018 – 09

RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

Countdown to electronic invoicing

(Italian Revenue Agency, guide of October 4th)

Unless the deadline is extended, January 1st, 2019 marks the start of the "revolution" of electronic invoicing: as is well known, in fact, from such date all invoices issued between residents or subjects established in Italy must be processed and transmitted in an electronic manner.

The activity of understanding the new and imminent mechanism and the consequent adaptation of the information and organizational systems is therefore in full swing.

To such an extent, it should be noted that the Italian Tax Authorities have set up a "portal" on their institutional website (www.agenziaentrate.it), where it is possible, among other things, to:

- access a specially dedicated thematic area;
- download an operational guide;
- read several FAQs;
- access the portal "Invoices and fees";
- consult all the legislation and practice on the subject;
- view special tutorials and presentations.

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The Italian Tax Authorities can always challenge the "uneconomic" behavior of the company

(Supreme Court, judgment no. 21859 of September 9th, 2018)

In the disputes between companies and the tax authorities there is frequently a challenge about the uneconomical nature of certain transactions, whereas the supposed "unreasonableness" of the conduct of the entrepreneur leads to the non-deductibility of the costs incurred.

Although there is no law provision ruling such cases, this trend has been endorsed over time by the jurisprudence, which has found that the uneconomical feature is a principle being "inherent" in the tax system, a kind of "lack of pertinence" of the costs to the activity of the company; on other occasions, the Supreme Court has held that the uneconomical feature justified the assessment as it is a presumption endowed with the requirements of seriousness, accuracy and concordance.

In the case in question, the Italian Tax Authorities had challenged the undue deduction of costs and deduction of VAT, in relation to an invoicing for accounting services provided by a company to other associated companies, at an amount deemed to be much higher than the one charged for similar services.

At the first two levels of judgement, the company emerged in a successful way from the comparison, thanks also to an expert's report on the congruity of the amounts invoiced, both according to the economic criterion used by the company and according to the one of the professional tariff of the chartered accountants.

In the Supreme Court's judgment, however, the results were different, since the first judges had not dwelt and expressed their opinion on other specific evidences/justifications put forward by the Italian Tax Authorities in support of the uneconomical nature, such as:

- the fact that the taxpayer company belongs to the same family-based corporate group;
- the provision of only two employees by the invoicing company;
- the fiscal advantage of over-invoicing both for the taxpayer company and for the "M. group".

Therefore, the Supreme Court has "referred" the analysis of the case in question to a new judge, in order to take into due account such evidence which had previously been disregarded.

Regardless of the peculiarities of the case, the Supreme Court has *reasserted*, in the judgment 21859, that in the tax case, once challenged by the Tax Authorities the uneconomic nature of a transaction carried out by the taxpayer who is a commercial entrepreneur, as it is based on an accounting wholly *unreliable* (because contrary to the criteria of "reasonableness"), it becomes the *taxpayer's responsibility* to prove the tax lawfulness of the said transaction, and the tax judge cannot, in this regard, limit himself to checking the regularity of the paper documentation.

In other words, the Tax Authorities are allowed to doubt the truthfulness of the transactions declared and to infer lower costs, using simple presumptions and objective reference parameters, with the consequent shifting of the burden of proof to the taxpayer, who must demonstrate the regularity of the transactions carried out in relation to the disputed uneconomic nature.

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Green light to the "VAT Group"

With the Provision of September 19th, with which the Italian Tax Authorities have issued the forms (form AGI/1) and related instructions, it is now possible to opt for the establishment of the so-called "VAT group".

Article 1, paragraph 24 of the Italian Law no. 232 of December 11th, 2016 (Stability Law 2017) inserted in the Italian Presidential Decree no. 633/72, after article 70, a specific regulatory *corpus* (Title V-bis) that regulates the aforementioned setting-up of the VAT group, on the basis of which taxable persons established in the territory of the State, exercising business, art or professional activities, for which certain requirements are met, may exercise the option to become a *sole taxable person* for VAT purposes. The subsequent Italian Ministerial Decree of April 6th, 2018 defined the rules for implementing the regulations.

Provided that the "*VAT group*" is different from the already existing "*group VAT settlement*" (pursuant to art. 73 of the Italian Presidential Decree no. 633/72), the main features of the legislation are summarized below.

Subjective field

Taxable persons established in the territory of the State and carrying out business, art or professional activities, for which the "financial, economic and organizational" constraints regulated by article 70-ter of the VAT Presidential Decree jointly apply, may opt for the VAT group, thus becoming a sole taxable person.
By express provision of law, the following subjects are not allowed to participate in a VAT group:

- headquarters and permanent establishments located abroad;
- subjects whose company is subject to judicial seizure;
- subjects subject to bankruptcy proceedings,
- subjects put into ordinary liquidation.

Links between participants in the VAT group

The participation the VAT group requires the existence of the following constraints:

- financial constraints,
- economic constraints,
- organizational constraints,

between the participating subjects.

A financial constraint is considered to exist when, pursuant to article 2359, first paragraph, number 1), of the Italian Civil Code, and at least from July 1st of the previous calendar year:

- there is, directly or indirectly, a "control" relationship between the participating parties;

- these subjects are controlled, directly or indirectly, by the same subject, provided that it is resident in the territory of the State or in a State with which Italy has entered into an agreement that ensures an actual exchange of information.

There is *an economic bond* between taxable persons established in the territory of the State on the basis of the existence of at least one of the following forms of economic cooperation:

- carrying out a principal activity of the same kind;
- carrying out of complementary or interdependent activities;
- carrying out of activities which fully or substantially benefit one or more of them.

Finally, an *organizational bond* between taxable persons established in the territory of the State is considered to exist when between such persons "there is coordination, by law, pursuant to the provisions as per Fifth Book, Title V, Chapter IX, of the Italian Civil Code, or between the decision-making bodies of these latter, even if such coordination is carried out by another subject.

It should be considered that:

- the existence of the financial constraint requires the simultaneous existence of economic and organizational constraints;
- in any case, the economic constraint is considered to be non-existent for those subjects for whom the financial constraint occurs as a result of shareholdings acquired within the framework of activities aimed at recovering the credits or of activities deriving from the conversion into newly issued credits towards companies in temporary financial difficulty (as per article 113, paragraph 1, TUIR – i.e. Italian consolidated law on income tax): in order to show the existence of the economic constraint, a specific request for ruling may be submitted to the Italian Tax Authorities;
- the existence of legal constraints may be the subject of a specific request for ruling to the Italian Tax Authorities.

Effects of participation in the VAT group

By opting for this scheme, the companies are provided with a single VAT number (the group number) instead of the individual numbers previously held.
This has the following effects depending on the parties involved in the transactions:

- Supplies of goods and provision of services by an entity participating in a VAT group towards another entity participating in the same VAT group are not considered to be supplies of goods and provision services for the purposes of articles 2 and 3 of the VAT law. The obligation to record "intra-VAT group" transactions with reference to the accounts remains unchanged.
- The supply of goods and provision of services by a subject participating in a VAT group towards a subject who is not included in the group shall be regarded as being made by the VAT group.
- Supplies of goods and provision of services towards a company participating in a VAT group by an entity who is not a member of such group shall be deemed to have been made towards the VAT group.
- VAT group is subject to the obligations and rights arising from the application of the value added tax rules.

- The supply of goods and provision of services by a company or a permanent establishment participating in a VAT group towards a permanent establishment of the company itself or its seat located abroad shall be deemed to have been carried out by the VAT group towards an entity which is not a member of such VAT group.

- The supply of goods and provision of services towards a company or permanent establishment participating in a VAT group by a permanent establishment of such company or by its seat located abroad shall be deemed to have been made towards the VAT group by an entity which is not a member of it.

- The supply of goods and provision of services carried out towards a company or a permanent establishment participating in a VAT group set up in another Member State of the European Union, by a permanent establishment of such company or by its seat located in the territory of the State, shall be deemed to have been carried out towards a VAT group set up in the other Member State by an entity which is not a member of the group.

- The supply of goods and provision of services by a company or a permanent establishment participating in a VAT group set up in another Member State of the European Union towards a permanent establishment of such company or its seat located in the territory of the State shall be deemed to have been carried out by the VAT group established in the other Member State towards an entity which is not a member of that gro.

The VAT Group therefore assumes the obligations and rights deriving from the application of the VAT provisions with reference to transactions for which the tax becomes chargeable or the right to deduct can be exercised starting from the date on which the option to set up the Group enters into force: conversely, the individual participants assume the obligations and rights deriving from the application of the VAT provisions with reference to transactions for which the tax becomes chargeable or the right to deduct can be exercised before the date of entry into the VAT Group or after its termination.
When the VAT group is effective:

- The right to purchase goods and services without paying the value added tax, pursuant to article 8, paragraph 2 of the Italian Decree no. 633 of 1972 (subject to a *letter of intent*), is exercised:
    - by the VAT Group, even if accrued by individual participants in the year prior to the entry;
    - by the individual participants following the termination of the VAT Group, in proportion to the transactions, referable to each of them, which formed the basis for it.

- The VAT Group, as a result of its establishment, applies the provisions relating to the *adjustment of the deduction* (pursuant to art. 19-bis2 of the Italian Decree no. 633/72) with reference to the date on which the goods and services were purchased by the participants.

- The tax credit accrued and not used by the VAT Group before its termination is requested for refund pursuant to article 30 of the Italia decree no. 633 of 1972, or calculated as a deduction by the Group's representative in its settlements or in its annual return.

Registrations – settlements and payments – communications and returns

The representative of the VAT Group or the participants shall carry out the registrations referred to in articles 23, 24 and 25 of the VAT law, including through the adoption of appropriate sectional registers.

The representative of the VAT Group carries out the periodic settlements.
It should be considered that:

- for the purposes of paying the tax payable, offsetting with credits relating to other taxes or contributions accrued by the participants in the Group is not permitted;

- the annual or interim tax credit accrued by the VAT Group cannot be used to offset the payables relating to other taxes and contributions of the participants.

The group representative shall also centralize the communication requirements, and for this purpose:

- communicates the data of the invoices issued, received and recorded, as well as the related variation notes and submits the Spesometro (i.e. Register of income and expenses) and the communication of the periodic VAT settlements;

- submits the VAT return.

Opting for the regime

The form to opt for the regime is presented by the Group's "representative", meaning the person who exercises the control referred to in article 70-ter, paragraph 1 of the VAT Law. If the aforesaid person cannot exercise the option, the representative of the Group shall be the participating party with the highest turnover or revenue amount in the period prior to the setting-up of the Group.

The option is *binding* for a three-year period starting from the year in which it enters into force. After the first three years, the option is *automatically* renewed for each subsequent year, until revocation is exercised.

The form may be submitted:

- from January 1st to September 30th. In this case, the option or revocation shall be effective from the 1st of January of the following year;

- from October 1st to December 31st. In this case, the option or revocation shall be effective from the 1st of January of the second year thereafter.

Upon first application, if the form is submitted by November 15th, 2018, the Group shall be effective from January 1st, 2019.

Once the request has been submitted, the group is given a unique VAT number.

The VAT number must accompany, in the invoicing (of both accounts receivable and payable), the indication of the tax code of the subject participating in the transaction.

VAT Refunds

VAT refunds due to the Group are carried out upon request of the representative, applying the general rules on the subject (art. 38-bis, Italian Presidential Decree no. 633/72), with the exception of some specific rules specifically provided, such as, for example, the regularity of payments of social security and insurance contributions, which must be checked for *all* members of the Group.

Differences with the rules on group VAT settlement

The regulations on the VAT group presuppose that, for the purposes of such tax, the all companies of the group are provided with a single VAT number.

The so-called "group VAT settlement", regulated by art. 73 of the Italian Presidential Decree no. 633/72 and Ministerial Decree dated February 13th, 2017, is different. According to the "group VAT settlement" the periodic payments and the year-end adjustment (as well as the related obligations) are – upon option – made by the group parent company, which determines the VAT due, or the credit, of the group through a system of *internal offsetting* of receivables and payables emerging from the periodic settlements and annual returns of the group companies. Under this regime, therefore, each participant maintains its own distinct VAT subjectivity.

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DEADLINES – OCTOBER 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

Thursday 25th

730 Supplementary form

The above date marks the deadline for the submission of the 730/2018 supplementary form" in *favor"* of the taxpayer.

The recipient of the supplementary form must be a CAF (i.e. an Italian Tax Advice Center) or an authorized professional.

Wednesday 31st

Tax return –770 form – submission terms

(Extended) deadline for the electronic submission of the Tax Return 2018 and 770 form of joint-stock companies and partnerships (if the tax year coincides with the calendar year), as well as of natural persons.

Refund request submission /Offsetting of VAT receivable for the third quarter of 2018

By the above date, companies that meet the requirements provided by the current legislation can apply for a refund or the possibility of offsetting the VAT receivable for the third quarter of 2018.
The VAT form "TR" must be used for the (electronic) request.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

..... the Dignity Decree has modified the rules on fixed term contracts and staff-leasing?

Official Gazette No. 186 dated 11 August 2018 has published the conversion law (Law No. 96) of Law Decree 87 (the so called Dignity Decree), entered into force on 14 July. Major changes have been applied to the fixed term contract. In particular, a fixed term contract can be entered into without reason for 12 months, after which it requires a specific reason. In any case, the total term of a fixed term contract cannot exceed 24 months, or it will be automatically converted into an open term contract. The maximum number of extensions is reduced to 4; if there is a fifth extension, the contract is automatically deemed an open term contract. For renewals a reason must be provided at all times. The exception to the mandatory inclusion of the reason is represented by extensions and renewals for seasonal work. The term to appeal a fixed term contract is extended from 120 to 180 days. In addition, a 0.5% increase in contributions by the employer becomes due at time of every renewal. The new rules apply to fixed term contract signed after 14 July 2018 and the extensions and renewals effective from 1 November 2018. Staff leasing is governed by the same rules of fixed term contract, except in the case of the provisions regarding the total number of fixed term contracts, right to take precedence and the so called stop-and-go. Fixed term staff leasing can be used up to a maximum of 30% of the overall staff hired with open term contracts; this limitation applies also to fixed term direct cooperation contracts. The offence of fraudulent staff leasing has been reintroduced.

JUDGEMENT OF THE MONTH

Withdrawal during the trial period: standard protection if the agreement is void

The Court of Cassation, with ruling No. 17358 dated 3 July 2018 has issued another ruling on the dismissal ordered for failure to successfully pass the trial period and on the protections applicable when the employer's withdrawal is unlawful if ordered on the incorrect assumption of the validity of the related agreement. In the case in question, the Court of Appeals having local jurisdiction confirmed the ruling of the Judge of first instance who had verified that the probation period agreement attached to the employment agreement was void thus declaring unlawful the withdrawal of the employer and applying the reintegration and indemnification protection as per article 18 of the Law No. 300/1970. In this respect, the local Court argued that the probation period had to be deemed void because only during the appeal, and thus late, the company had attached suitable justification to demonstrate the need for a longer period respect to the one established by the National Collective Bargaining Agreement applicable to the sector. Moreover, the local Court confirmed the ruling of the Court of first instance regarding the applicability of the actual protection, refusing the exception established by the aliunde perceptum and percepiendum principle, due to the fact that it was brought forth late, at the time of the appeal. The company filed an appeal at the Court of Cassation against said ruling. On the lawfulness of the matter, the Court restated its opinion (inter alia see Cassation ruling No. 17921/2016) according to which dismissal ordered on the erroneous assumption of the validity of the probation period agreement, in fact void since the probation between the parties had already occurred successfully, does not represent an exception of the application of the limitations on dismissals. This because freedom of decision as part of the probation period requires that said probation period is validly set-up. Therefore, since the requirements of substance and form called for by the law did not apply, the clause was void – given that the clause was partial and did not extend to the overall contract – leading to a

"conversion" into a standard contract, with applicability of the related protection regime for unlawful individual dismissals, thus leading to the legal verification of whether or not the just cause or justified reasons principles applied. Therefore, the Court of Cassation has deemed the dismissal in question as occurred when the employment relationship had already become an open term relationship and having verified the lack of reason, applying the established case law principles of lawfulness regarding the responsibility of proof to be borne by the employer, also regarding the dimensional requirement.

REGULATIONS

A draft of the Law Decree for the standardisation of the Privacy Code with the GDPR has been approved

On 8 August, a final version of the draft related to the Law Decree "standardising" the Privacy Code (Legislative Decree 196/03) with the European Regulation 679/2016 on the matter of personal data protection (GDPR) has been approved. More specifically, the Decree establishes that the rights of the interested party may be limited or excluded whenever they are in contrast with the needs established by the laws of the State, as in the case of anti-money laundering or whistleblowing. The Decree establishes some specific offences that would not fall under the ne bis in idem principle and would thus be established and penalised according to our regulations. Among others, these are: (i) unlawful processing of the data; (ii) the unlawful disclosure and dissemination of the data undergoing large scale processing; (iii) the fraudulent acquisition of personal data undergoing large scale processing; (iv) the breach of provisions governing remote supervision and employee's opinion surveys. The draft includes, in addition, that the pending proceedings before the Data Protection Authority not closed at 25 May 2018, may be closed with the payment of two fifths of the minimum penalty within 60 days from the date in which the Decree enters into effect. Instead, concerning future disputes, the offender and the obligated party together may settle the dispute by accepting the ruling of the Data Protection Authority (if issued) and by paying an amount equal to half of the penalty ordered. In addition, the new draft lowers to 14 years old the age when a minor can provide his/her direct consent for activities on social networks or similar platforms (including for marketing and profiling purposes). Last but not least, is the fact that in the first eight months the Data Protection Authority shall keep into account, in order to apply the administrative fines and within the limitations compatible with the GDPR, the application difficulties that will occur in the first months. In the next few weeks the publication is expected on the Official Gazette: the entry into force of the Decree is expected to match the day of the publication.

CASE LAW

Full matching between the disputed charge and the reasons for the disciplinary dismissal is required

The Court of Cassation with ruling No. 15523/2018 had the opportunity to clarify, once again, a few important cases concerning a dismissal ordered upon conclusion of disciplinary proceedings pursuant to art. 7 of the Law No. 300/1970. The judges of the Court of Cassation, in fact, returned to explore the heavy and controversial matter of linking the disputed fact with the letter starting the disciplinary proceeding to a different disciplinary assumption. On the matter, the Court reminded how said possibility is not excluded since it would exclusively be related to a different take on the same fact subject matter of the dispute, relating to which the employee had the opportunity to exercise his right of defence. On the contrary, it was also restated how the employer does not have the possibility to bring forth new and/or additional factual circumstances respect to those subject matter of the dispute, since this conduct would irremediably damage the right of the defence of the worker who would not have, in this manner, the possibility to present his own reasons related to said circumstances. In this manner, the Court of Cassation confirms its opinion according to which it is necessary full matching

between the disputed facts and the ones at the root of the dismissal tied to the disciplinary proceedings.

A dismissal for justified objective reasons is lawful even if the employer makes use of external resources and overtime work

The Court of Cassation, with ruling No. 19731 dated 25 July 2018 has recently expressed its opinion on the repêchage obligation. In the case in question, an employee had filed a law suite against the dismissal ordered by the company due to closing down of the department where he worked, stating that the dismissal was unlawful for breach of the repêchage obligation. This since in his opinion (i) the employer company after the dismissal had continued hiring on a regular basis and with repeated staff leasing contracts and (ii) the staff leasing contracts reported reasons that did not match the true tasks then carried out by the leased staff, tasks that the employee had made himself available to carry out. In fact, confirming what the Judges having jurisdiction had ruled, the Court of Cassation rejected the appeal of the employee and pointed out that the employer, subjected to a long lasting period of difficulties in getting results and financial difficulties, had the right to reduce its staff. And according to the Court of Cassation, it can do so by redistributing to the residual personnel the tasks previously assigned to the dismissed employee or making use, for strictly limited time periods, to external resources hired with fixed term contracts or staff leasing contracts. In addition, according to the Court of Cassation, the use of overtime work by the employer after the employee's dismissal, also pointed out by the employee in support of his own claim, is explained according to said principle. This since the greater amount spent for the overtime remunerations of employees asked to work overtime are without a doubt lower than the costs associated to maintain a person hired under an open term contract.

Reclassification of apprenticeships? Possible if there is a breach of training obligations

The Court of Cassation, with ruling No. 16571/2018 has once again returned – confirming an already consolidated trend in legal literature and case law concerning lawfulness – on the topic of reclassification of the apprenticeship relationship in an employment relation under an open term contract, if the employer's obligations to provide training was breached. In particular, the Court has pointed out that in the matter filed for review, the necessary professional training was lacking, that is the professional training provided to the employee in-training required to allow him to become qualified. On the matter, the Court states once again that in an apprenticeship contract the fundamental matter is specifically represented by the obligation of the employer to provide effective professional training with the goal of providing to the trainee a professional qualification. And since this breach, being of no little importance, leads in the opinion of the Court of Cassation to the transformation right from its inception of the apprenticeship contract into an open term contract, with consequent payment to the employee of all the contributions and salary differences. This means that the priority role that the training undertakes respect to the work activity excludes that this specific contractual form be deemed suitable a relationship having as its objective the performance of elementary or routine tasks, not integrated by an effective training both theoretical and in practice, under penalty of reclassifying the relationship into an open term contract since the very beginning.

A demerger to avoid the regulations on collective dismissal is against the law

With two "twin" rulings (No. 19863 and No. 20620, the latter filed on 7 August), the Court of Cassation had the opportunity to express its opinion on the rules governing collective dismissals linked to corporate demergers. In the case in question, a company had performed a partial demerger – by assigning to two newly incorporate companies as many corporate branches – redistributing the overall work force among the three legal entities emerged from said transaction. Such a transaction, in the opinion of the Court of Cassation as well as in the opinion of the judges in charge, represents a

fraudulent act when, in the period of the following 120 days, multiple dismissals for justified objective reasons take place. In fact, in the case in question a fraudulent attempt was identified – inter alia, concerning the requirements established in articles 4 and 24 of the Law No. 223/1991, thus in the procedure of informing and consulting the unions to safeguard and ensure the choice of employees in excess according to the law criteria – specifically due to the contractual link between the corporate action and the dismissals ordered. In fact, in the opinion of the Court, the corporate demerger allowed triggering individual dismissals subdivided among the newly formed companies (12 the employees dismissed, 4 for each), where the reduced size did not make it necessary to trigger the collective dismissal procedure of personnel. Therefore, even if the method used was lawful in itself, the result achieved was deemed unlawful. The deciding factor, in the opinion of the Court of Cassation, was the fact that upon a work organization that was essentially unchanged – where workers continued to carry out in the same corporate spaces the same tasks – the new corporate setup was solely formal, thus leading solely to a fragmentation of the work force.

PRACTICE

Failure to hire disabled people or individuals falling under protected categories is an immediate breach of the law with permanent effects

The National Labour Inspectorate (INL), with its Note No. 6316 dated 18 July 2018 provided its opinion regarding the legal nature of the offence related to failure to hire disabled individuals or individuals belonging to the protected categories as per art. 15, paragraph 4, of the law No. 68/1999. According to INL the aforementioned offence shall be deemed immediate and with permanent effects. Immediate due to the fact that the omission occurs when the term established by law expires and the party bearing the legal responsibility to perform the hiring by the 60th day from the date in which the obligation occurs fails to do so. Permanent due to the extended effect of the offence over time until the breach is corrected. Qualifying an offence as immediate triggers a number of repercussions in terms of applicable regulation, in the case of sequence of laws over time. Regarding the offences occurred when the old regulation was in force – whose effects continue to apply even after the new penalty provision established by article 5, paragraph 1, letter b) of Law Decree No. 185/2016entered into force on 8 October 2016 – the applicable penalty will be the one in force at the time in which the offence occurred, according to the "tempus regit actum" principle. Even with reference to the terms of the statute of limitations it will be necessary to refer to the time when the offence actually occurred.

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VAT NO. AND FISCAL CODE: IT13174301005

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