RSM 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

From May 1st green light to the Reverse Charge on tablet PCs and laptops

(Italian Law Decree no. 24/2016)

Please note that from May 2nd, 2016 (and up to December 31st, 2018) the sales of:

- ☐ "tablet PCs"
- ☐ "laptops",
- ☐ integrated circuit devices (prior to their installation in the products for the final consumer)
- ☐ game consoles,

are subject to the reverse charge mechanism: therefore, the buyers of such goods, (provided that they are VAT taxable subjects), will have to receive an invoice without VAT pursuant to art. 17, paragraph 6 of the Italian Presidential Decree no. 633/72, so that the Vat payment is transferred to the seller.
The application of the reverse charge has been also extended to the above categories of goods, in order to counter fraudulent phenomena of VAT evasion.

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The Italian Revenue Agency issues the Guidelines on 2016 tax audits

On April 28th, the Italian Revenue Agency has issued the resolution no. 16/E, with which it has released its guidelines related to the countering of tax evasion for the year 2016. The complex document of the Italian Tax Authorities, primarily addressed to local offices, contains many hints, which will be analyzed and summarized below.

General principles for the carrying out of tax audit activities

The resolution contains an "openness attitude" on the need to *improve* the relationship between the Italian Tax Authorities and the taxpayers: the need to be focused on the countering of the *real and substantial evasion rather* than the need to pursue "formal" and insignificant mistakes is pointed out; the need to avoid promoting audits based on unnecessarily aggressive approaches, being sometimes based on assumptions disconnected from reality is also stressed. This approach is effectively summarized in the following extract contained in the resolution no. 16/E:

"a precise strategy to counter fraud and the most serious forms of evasion ***must*** *be accompanied by the awareness that in the relationships between tax authorities and taxpayers an* ***improvement is necessary****"*

The need for the actual participation of the taxpayer in the assessment procedure is also highlighted. Therefore, the *preliminary cross-examination* "assumes a crucial and strategic importance", making the tax claim more credible and sustainable and avoiding the carrying out of tax claims not properly supported and grounded because they are not preceded by a real exchange of opinions.

Through an extensive and targeted use of the several information now available to the Italian Revenue Agency, the audits related to the following are promoted:

Redditometro (i.e. system for working out whether the Italian taxpayer is paying his fair share of tax)

In this field, from the analysis of the costs incurred stated by the taxpayer, it is also possible to get a representation related to the social and family context and to the concrete economic availability of the taxpayer, which is highlighted by the information about the "reconstructed" total income and the tax return trend of the last three years and by the total investments/disinvestments made in five years.

Studi di settore (i.e. Statistics-based tax assessment)

The anomalies resulting from the statistics-based tax assessment should be evaluated in the presence of *further* risk factors which may lead to think that there is a false tax return. In the example suggested by the Italian Revenue Agency, through the use of data from the "spesometro" (i.e. register of income and expenses) it is possible to know the data provided by the different suppliers of the subject and compare them with what is mentioned by the same latter in the tax return and in the statistics-based tax assessment form, as well as to identify those taxpayers that show likely anomalies with reference to the principle of pertinence, to be assessed more thoroughly during the next (and necessary) phase of exchange of opinions with the taxpayer.

Assessments towards professionals

Particular attention will be given to self-employed who, despite declaring a high amount of income, deducts a substantial amount of costs that significantly reduce the taxable income.

False invoicing

Within the countering of this type of fraud, the following is pointed out: it is necessary to evaluate whether there are "repeated conducts" among those subjects who use the same tax advisor and, in particular, whether there are elements that make such advisor be regarded as the "promoter" of the evasive behavior. In such cases it is necessary to proceed against those subjects that have adopted the improper conduct, including the advisor.

Non-profit sector

"Hard fight", even with the use of specific databases, towards subjects that consider themselves as "non-profit", but they actually carry out profitable activities in typically commercial areas, such as the provision of food and beverages, the organization of travel, entertainment and show.

Audits on middle- and large-sized taxpayers

Given that with a special guideline of October 2015 the Regional Directorates were given an important role in coordinating the analysis of the tax avoidance and evasion risk with reference to the middle- and large-sized taxpayers (turnover exceeding Euro 5.16 million), the identification of the subjects to be checked is primarily based on the detection of phenomena of *national and international tax planning* involving the erosion of the taxable base by the State territory as well as based on typically elusive phenomena.

In relation to the *transfer pricing* audits, the focus will be on those cases where the "alteration" of the intercompany prices leads to a taxable base shift towards countries *with a lower taxation* : in the other cases the attention of the offices is focused on the consequence in terms of *double taxation* arising from these audits, which may lead to the activation of mutual procedures with foreign Countries or in the management of the "arbitration agreement" provided for within the EU..

"Caution" and "judgment" are also required in the use of the "*anti-abuse*" legislation: the offices are invited to carry out a careful and respectful evaluation of the spirit of the rule, avoiding disputes that are not in line with the provisions of the taxpayers' bill of rights.

The offices are then invited to work in a "balanced" manner also with reference to the *financial investigations* ("whose appeal should only be submitted only after a careful risk analysis from which significant anomalies related to the tax return can emerge and when an official investigation activity is already under way") and while using any *assessment based on "assumptions*" ("the use of assumptions should be carefully evaluated and lead to realistic results being consistent with the actual ability to pay of the subject under investigation ").

Among the different types of "statistical" assessments, a lot of attention is paid to the management of the disputes related to *real estate.* Less importance is given to the assessment based **only** on the value calculated by using public databases (such as OMI). These latter shall only represent the initial datum for the identification of the market value of the property and further elements shall be used by the office as preliminary investigation activity.

Management of the requests for Voluntary Disclosure procedures

In 2016 the offices of the Italian Revenue Agency have been managing the finalization of the complex Voluntay Disclosure procedure, which started in 2015. With reference to this procedure of regularization of the capital held abroad, the offices are required to finalize the documents by September 30th, 2016, in order to proceed with the notification of the relevant acts of assessment and of penalties issuing by December 31st, 2016 as provided by the law.

Together with the VD requests management, the officials in charge were asked to digitally collect (through the use of a specially developed software) the key data and information contained in the requests submitted to have access to the procedure, to be used in the following analyzes and calculations for future activities aimed at fighting international tax evasion.

Coordination with other bodies

The need to maintain and develop in a coordinated manner the relationships with the other institutional bodies involved in the fight against tax evasion (**Tax Inspectors, Customs and Monopoly Agency, INPS** – i.e. national institute of social insurance, **INAIL** – i.e. the National Institute for Insurance against Accidents at Work–, **SIAE** – i.e. an Italian copyright collecting agency., **municipalities**) is pointed out once again, as well as the need to strengthen the relationships with the Public Prosecutors in relation to acts bearing a criminal nature.

"Strategic" as well is the combination between the Italian Revenue Agency and Equitalia (i.e. a state-owned tax collection agency) : in this context the need to strengthen the synergies between the two agencies is pointed out, in order to ensure the quality of the amounts assessed and managed by the collection agency, as well as to guarantee the rapid activation of precautionary and enforcement measures.

Countering of fraud and international tax offenses

In the field of fraud and international tax offenses there is the recent change made to the anti-fraud structures and resulting in the unification of the activities into a special structure of the Central Assessment Office, which is divided into 7 territorial sections and one central section of analysis and strategies. Among the most specific and relevant activities to counter fraud the following are mentioned and they are related to:

- ☐ false letters of intent;
- ☐ the carrying out intra-Community purchases;
- ☐ the use of F24 forms containing untrue data.

The need to monitor over the time the conducts of the subjects already involved in fraudulent phenomena is pointed out, as it happens very often that these illegal conducts are repeated.

Implementation of the spontaneous fulfillment

A precise will of the Italian Revenue Agency, stated in the resolution, consists in continuing the philosophy of the spontaneous fulfillment: this expression is used to stress the tendency to "warn in advance" the taxpayer against the anomalies found in his personal position in order to promote his spontaneous fulfillment, avoiding the activation of the control and assessment instruments by the Italian Revenue Agency.

To such an extent, it shall be reminded that during 2015 a phase to test such spontaneous fulfillment process has started though the sending over 275 thousand communications resulting from different types of anomalies that have emerged from the elaborations of tax return data within the system.

Among the similar activities that will affect 2016 the activation and management of the following communications shall be pointed:

- to VAT taxable subjects,
    - that from the comparison with the amounts certified by their own withholding agents in the 770 simplified form it emerges that they have allegedly failed, wholly or in part, to declare the amounts received for the tax year 2012;
    - that show anomalies coming from the crossing of the data declared in 2013 and of those acquired through the "Spesometro";
    - that show particular anomalies in the three years 2012, 2013 and 2014 on the basis of the data relevant for the application of statistics-based tax assessment;
    - for whom, from the comparison of the data relating to the submission of Vat data annual communication for the tax year 2015 with those related to the submission of the tax return for Vat purposes referred to the same tax period, it allegedly emerges either the failure to submit the tax return for VAT purposes or the submission of the same latter with the filling-in of the only VAT section;
- to individuals and individual enterprises,
    - for whom in the year 2012 one or more tax anomalies concerning multiple criteria were found in the following income: income from real estate rent, from employment, from divorce cheques, undeclared capital gains related to the sales of company assets, income from dividends and share trade.

Further, significant insights contained in the resolution refer to the implementation of the *cooperative compliance program* (activity of preventive tax partnership with very large-sized companies, whose turnover exceeds one billion euro) and to the management of the *precautionary rulings*, including the procedure provided for within the "*patent box*" legislation": in this latter case the imminent issuing of a specific provision which will rule the operational aspects of the expected ruling is announced.

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

Judgment of the month

Court of Cassation: right of access to personal records

By judgment no. 6775 of 7 April 2016, the Court of Cassation has asserted the **right** of workers **to access** their **personal records**, containing the documents and acts relative to the **professional pathway** and **career advancement** whilst in employment. In this case, a woman had repeatedly asked her employer to access, pursuant to Article 13 of Law no. 675/1996 (in the case at hand, applicable *ratione temporis*, currently Legislative Decree no. 196/2003), her personal records following several negative evaluations of her professional performance, without receiving a reply. The woman therefore decided to turn to the Italian Data Protection Authority, which – after a first invitation to the employer to spontaneously comply with the request – issued two orders in favour of the woman, which were also ignored. The woman applied to the judicial authority seeking protection of her rights. The court of first instance and the court of appeal rejected her petitions. The woman then resorted to the Court of Cassation, which accepted her claims. In particular the Court of Cassation remarked that **the obligation of the employer to allow the employees the full exercise of the right to access their records**, derives, even before the Data Protection Law, from **the observance** of the principles of **good faith and fairness** referred to in Articles 1175 and 1375 of the Italian Civil Code. With regard to the principle of alternative application to the judicial authority instead of the Data Protection Authority, the Court, upholding a previous stance, has remarked that if, in a court of law, "*the non-compliance of the data controller (ed.'s note, in the case at hand, the employer) with the measures issued by the Data Protection Authority is contested and/or payment of pecuniary or non-pecuniary damage is claimed – a matter reserved to an ordinary court and that in any case has specific* ***causa petendi*** *and* ***petitum*** *entirely different from the issues brought to the Data Protection Authority – the* ***application*** *of the aforementioned* ***principle of alternative applications for the protection of rights*** *can certainly* ***not be assumed*** *(see Court of Cassation no. 19534, 17 September 2014*).

REGULATIONS

EU Parliament: new data protection package

On 14 April 2016, the EU Parliament has approved the texts of the Regulation and Directive on personal data protection. The **new "data protection package"** has the objective of updating the European regulations, which date back to 1995 – that is, to a time when many of the new technologies did not even exist – and affording to the citizens, in the Internet and social networks era, a greater control on their personal information. Main **innovations** of the **Regulation** are (i) the "***right to be forgotten***", that is the right of the interested parties to delist a web page or information on the web; (ii) the "***right to data portability***", that is, the right to obtain return of one's own data transmitted to an on line service and to transfer them to others (e.g., social networks); and (ii) the "***consent***", which must be **effective** and **unequivocal**. On the other hand, the **Directive** provides, for the first time, for **common rules** for all member states regarding the **processing of data** by the police and judicial authorities for investigation purposes. In the next few months, the texts will be published in the EU Official Journal. The **Regulation**, which **will enter into force** 20 days from publication, **will be directly applicable within two years** to all member States, which shall have two years to transpose the provisions of the Directive. Therefore, in two years the new "*data protection package*" will override the Italian Data Protection Code and the confidentiality laws in force in other EU member states.

PRACTICE

National Collective Labour Agreement for the Credit Sector: the coordinated text has been approved

On 14 April 2016, the Trade Unions of the Credit Sector and the Italian Banking Association (ABI) have approved the **final coordinated text** of the **National Collective Labour Agreement for the Credit Sector**. The agreement is the result of long negotiations, which went on for more than one year, following underwriting of the agreement between the parties on 31 March 2015 and valid until 31 December 2018. The confirmation of the solidarity and employment fund and of the bilateral organisations (the private agencies established by the trade unions and employers of the sector) are two of the most important pillars of the new agreement, revolving around the issues of **solidarity** and **protection of sound employment**. With the approval of the agreement, as explained in a note released by ABI, «*the* ***importance*** *of* ***national bargaining*** *is confirmed, and, with cutting-edge solutions,* ***the industrial relations at a company and group level are enhanced*** *in a decisive phase of the overall reorganization of the banking sector*». For the banks, the agreement « provides *adequate* ***responses*** *to the professional and occupational* ***interests*** *of workers, and, at the same time, the* ***need for stability and balance*** *of lending and financial businesses*».

Performance bonuses and amounts paid as profit sharing: definition of the criteria for the application of a 10% substitute tax

On 25 March 2016, the Minister of Labour and Social Policies, in agreement with the Minister of the Economy and Finance, has signed the **decree** provided for by the 2016 Stability Law, for the purpose of the determination of the **criteria** (*i*) to measure increases in productivity, profitability, quality, efficiency and innovation based upon which the corporate or territorial contracts shall correlate the payment of **performance bonuses** in variable amounts, as well as, (*ii*) to identify the **amounts paid as profit sharing**. Only observance of the above **criteria** will allow application of a substitute tax of 10%. The **decree** also sets forth the methods for the employers to achieve equal involvement of workers in the work organisation and arranges for the provision, via vouchers, of goods, services and company welfare. The decree is currently being examined by the Court of Auditors and will become effective following registration and publication in the Official Gazette. In consideration of the new provisions introduced on the matter by the 2016 Stability Law and the detailed implementing regulations provided by the decree, the labour agreements should be re-modulated accordingly for the purpose of the application of the reduced tax.

Active aging: signature of the implementing decree

On 13 April 2016, the Minister of Labour and Social Policies, in agreement with the Minister of the Economy and Finance, has signed the **implementing decree** sanctioning "*subsidized*" part-time work as introduced by the 2016 Stability Law, to promote the so-called "**active aging**". The **decree** in question clarifies the methods for employers to notify to the Local Labour Directorate and INPS the finalisation of contracts with the workers, the scope of which is the reduction of working hours by 40% to 60%, as well as subsequent termination of the employment agreement. The law-maker, in fact, has specified that the reduction in working hours shall be authorized by the Local Labour Directorate and that this benefit will be granted by INPS within the limits of the allocated resources. The **decree** is currently being examined by the Court of Auditors and will become effective following registration and publication in the Official Gazette. Following the publication of the **decree**, this experimental measure will become effective.

CASE LAW

Court of Cassation: the employer is responsible for any risks, including contingencies

The Court of Cassation, IV Criminal Section, by judgment no. 12683 of 29 March 2016, has ruled that an **employer is responsible for any injury caused by inexperience, negligence or imprudence of workers**, except in case of **absolute irrationality** of the behaviour of the latter. In the case at hand, a worker fell disastrously on the ground from a slippery ladder leaning on the wall that he was using to work at a height of more than 2 meters above the floor. Even though the worker had used the ladder on his own initiative, the employer was found criminally responsible for the accident occurred to the worker because the employer **had assigned him in any case to work** at such a height "**without adequate support and protection from fall**". In essence, in complying with anti-accident rules, employers should also keep into account, and therefore avert, any contingencies that may possibly occur at the workplace, as they shall be held responsible for the physical safety of their workforce.

Court of Cassation: an employee refusing to transfer may be considered resigning from employment

By judgment no. 6265, published on 31 March 2016, the Court of Cassation has sanctioned the principle whereby an employee refusing to transfer may be considered as resigning from employment. In the case in question, the worker had contested the **legitimacy** of the employer's order to **transfer** to another production unit, and **refused** to comply. On such refusal, **the employer**, in a notice sent to the same employee, **acknowledged his intention to resign from employment**. Against such dismissing measure, **the worker filed suit**, deeming the measure illegitimate as it had been **given verbally**. The court of Cassation partly modified the decision of the **trial judge** remarking that, where the methods of termination of employment are at issue (oral dismissal or resignation), the **trial judge** is obliged to make an **accurate assessment** that takes into proper account **all the investigation results**. Therefore, the **refusal** of the worker to be assigned to another place, **in the presence of a legitimate transfer**, appears **indicative** of his will **to no longer work**, a circumstance that excludes any instance of verbal dismissal.

Court of Cassation: behavioural standards to be considered when determining the existence of an accident on the way to and from work in case of use of a bicycle

By judgment no. 7313 published on 13 April 2016, the Court of Cassation has ruled that, in order to assess the existence of **an accident on the way to and from work in case of use of a bicycle**, it is necessary to keep into account **not only the distance** between **home and workplace but also of the behavioural standards** in place in civil society. Therefore, according to the Court of Cassation the use of a bicycle should be evaluated in relation to **social customs**, **normal family needs**, availability of public transportation means, methods of organization of the same at the places where the use of bicycles is more widespread, the type of road taken (riding a bike along urban roads is different from riding one along non-urban roads), the configuration of the places, and the existing climatic conditions (and not so much seasonal conditions) and the propensity of laws to **encourage the use of bikes**. From the judgment of the court, it emerges therefore that the tendency to foster the use of bicycles, as a means able to abate economic, social and environmental costs, has become more pressing in our legal system. By now, many municipalities offer to citizens free bicycles for urban transportation to and from work, in order to achieve not only environmental benefits but also benefits for the health of citizens and, in the future, reduced health care costs for the national health system.

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