RSM PALEA LAURI GERLA

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

TAX NEWS

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RSM

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FOCUS ON TAX AND ACCOUNTING TOPICS

Tax news of the "EU Law" 2015-2016

On July 7th, the Law no. 122/2016, also called "EU Law 2015-2016" was approved".
Such law contains some provisions that amend our legislation and that are aimed at preventing the starting (or at encouraging the closure) of infringement proceedings against Italy by the European Union, in relation to the Italian provisions which conflict with the principles set at EU level.
Please find below the most significant developments contained in the above mentioned law.

Common tax regime applicable to parent companies and subsidiaries of different Member States

With the Directives 2014/86/EU of July 8th, 2014 and the Directive 2015/121/EU of January 27th, 2015, the European legislator has introduced within the framework of the parent-subsidiary directive (Directive 90/43 /EEC, amended by the Directive 2011/96/EU, hereinafter called the "Directive"), a series of provisions aimed at preventing the abuse of the favourable tax regime introduced by the above provision.

With the first amendment (Directive 2014/86/EU), article 4, paragraph 1, letter a) of the Directive was reviewed, providing, as a measure to avoid the "double non-taxation", the introduction of a *general clause* by which a Member State does not tax the profits earned by the parent company (or its permanent establishment) to the extent that such profits are not deductible for the subsidiary and by which it taxes the profits earned by the parent company (or by its permanent establishment) to the extent that the same ones are (equally) deductible for the subsidiary.

For this purpose, in order to fight tax evasion. with the subsequent amendment (Directive 2015/121/EU) the European legislator has adopted a more severe *general anti-abuse rule* (by amending article 1, paragraph 2 of the Directive), providing that the Member States do not apply the benefits of the Directive to an arrangement (or a series of arrangements) that - having the main purpose (or one of the main purposes) of obtaining a tax advantage contrary to the object and the purpose of the Directive itself - do not represent the facts and circumstances for which they have been put in place or do not comply with valid business reasons which reflect the economic reality.

First of all, the provisions contained in the directives are part of article 89 of the TUIR (i.e. Income Tax Act) which rules the taxation of profits distributed by resident companies and commercial entities subject to IRES (i.e. corporate income tax), and article 27-bis of Italian Presidential Decree 600/73 which rules the reimbursement of withholding tax on dividends distributed to non-residents subjects.

The EU Law contains three paragraphs of article 26. Paragraph 1 regulates the treatment of dividends and interest for IRES subjects, integrating the paragraphs *3-bis and 3-ter* of article 89-ter of the TUIR. In particular, the first point provides that the cases highlighted in articles 109, paragraph 9, a) and b) of the TUIR and 44, paragraph 2, letter a) of the TUIR, shall be subject - for the purposes of exemption of the income earned to the extent of 95% of their amount - to a prior check of non-deductibility while determining the income of the payer (the legislator provides the following: "limited to 95 percent of the portion of these latter that are not deductible pursuant to (...)".

It shall be pointed out that, based on the current law provision, the profits distributed by resident

companies and commercial entities to Ires subjects were excluded from the taxable income of the recipient for an amount equal to 95% of their amount and without additional conditions that would bind a possible use.

The new exemption regime, pursuant to the new paragraph *3- ter* of article 89 of the TUIR, also applies to profits from company participations and participating financial instruments of non-resident issuing subjects, if the (resident) parent company holds a direct participation in the capital of the (non-resident) subsidiary of at least 10%, together with a period of at least 12 months during which it holds such amount, and provided that the subsidiary is resident for tax purposes in an EU member State, without being considered, pursuant to a Double Tax Convention with any third State, resident in such third State for tax purposes, or it is subject to one of the income taxes listed in Annex I, part B of the Directive.

Article 27-*bis* of the Italian Presidential Decree 600/73 deals with the same provisions. Such an article rules the reimbursement of the withholding tax on dividends within the EU. In particular, paragraph 2, letter a) of article 26 of the EU Law replaces the existing paragraph 1-*bis*, integrating it with all income cases now provided by the "new" paragraph 3-bis of article 89 of the TUIR, meaning the amount excluded from the withholding tax on dividends corresponds to the portion not deductible in determining the income of the paying company "provided that the payment is carried out to a company with the requirements set out in paragraph 1 (of article 27-bis)".

Finally, the regulatory provision in paragraph 3 provides for the application of the rules in question to the payments made starting from January 1st, 2016.

Taxation of savings income in the form of interest payments

Another important new feature of the EU Law is represented by the provisions contained in article 28, with which Directive 2015/2060 of November 10th, 2015 is implemented. Such a Directive has repealed the Legislative Decree no. 84 of April 18th,2005 which implemented the Directive 2003/48 / EC concerning the *taxation of savings income in the form of interest payments.*
The new rules provide that, from January 1st, 2016, the new mechanisms of the Directive 2014/107/EC (with the amendment of the Directive 2011/16/EU with reference to the automatic exchange of information), compliant with the new global standard for automatic exchange of information developed by the OECD, are applicable.

Therefore, the Directive 2003/48/EC - which aimed at ensuring a level of effective taxation of savings income in the form of interest payments made in one Member State to a natural person resident in another Member State, through the exchange of information between the competent authorities of the single member states – is superseded.

With reference to payers obliged to disclose the relevant data on the beneficiaries of cross-border payments, it is specified that the rules of the Legislative Decree no. 84 shall apply to payments made up to April 30th, 2016. Moreover, for all the relevant data of the tax year 2015, the provisions obliging the payers to notify the Italian Revenue Agency of the following information (contained in article 5 of the aforementioned legislative Decree) will continue to be applied: identity and residence of the actual beneficiary of the payments, the name and address of the subject carrying out the notification, current account number of the actual beneficiary, elements of information relating to the payment of certain categories of payments (interest paid or accredited, amount for the transfer of the sums given as reimbursement or redemption, amount of distribution of profits, etc.).

What is more interesting is the method for managing the "transition" from the old to the new rules for

those countries which had been granted a derogation to the criterion of the automatic exchange of data provided for by Directive 2003/48/ EC (at that time, the list included Switzerland, Liechtenstein, Monaco, Austria and Luxembourg) and for which the "EU withholding tax" (an ordinary tax of 35% on interest payments arising from the States that had not adopted said Directive) was applied.

It shall be pointed out that Switzerland (where there is the highest concentration of financial flows for assets held by Italian taxpayers abroad), also based on the agreement signed with the European Union (and recently ratified by the Swiss Parliament) , will supersede the previous legislation of the EU withholding tax with the full adoption of the automatic exchange of information (based on the OECD model) from 2018 (on the data 2017).

Similarly, on the basis of the amended article 27 of the Double Tax Convention between Italy and Switzerland, the restriction of banking secrecy for the relevant data starting from February 23rd, 2015 (date on which the agreement between the two countries was signed) on request of the tax authorities will be superseded. On the contrary, for the automatic exchange of information, we will have to wait for, also in this case, 2018 (on the data of 2017).

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

Judgment of the month

Court of Appeal in Milan: messages in a mailing list protected like private correspondence

The Court of Appeal in Milan, in its ruling No. 439/2016, confirmed the principle that **e-mail messages** exchanged among employees **as part of a *mailing list***, constitute **private correspondence** and therefore fall into the category of protected communications of a personal nature. According to the Court, the personality of the communication "*lies in the **predetermination** of the recipients, which the sender wishes to send their e-mail message to – those persons and not others*". The case in question concerns an action brought by an airline pilot sacked for misconduct for instigating colleagues to engage in trade-union activity contrary to the employer's obligations. In support of the grounds for dismissal, the employers produced the emails exchanged between the person concerned and his colleagues, highlighting the damage caused by these actions. Nevertheless, the territorial Court, sticking to the position already taken in the past by the Italian Data Protection Authority stated that emails that circulate within mailing lists, just like paper-based correspondence, must be treated in the same way as ***correspondence that is closed and inviolable by third parties*** (Editor's Note: in this case, the employer)" and, thus, falling under the protection of Article 15 of the Italian Constitution. In this way, the judges deemed the grounds given for the dismissal as unfounded, because it lacked any evidence that could legitimise the employer's actions.

REGULATIONS

Contracts: Community Law in force from 23 July:

On **23 July 2016Community Law No. 122/2016** came into force containing new rules on **the management of personnel** in the event of **succession of procurement**. The legislation replaces Article 29, paragraph 3, of Legislative Decree No. 276/2003, which excludes the applicability of the rules of transfer of a company in cases of a contractor taking over from another in the management of the same service. According to EU rules, on the one hand, it is not possible to exclude the safeguarding of employees' rights in cases of this kind, such as the change of a contract, which are comparable to the transfer of a company; on the other hand, this safeguards the principle that the **succession of procurement** and the **transfer of a company** constitute separate situations and, as such, deserve **different rules**. In that regard, the legislative amendment has identified certain conditions where the above distinction applies. In particular, the acquisition of staff already employed in the contract does not involve the application of the rules of transfer of a company (i) when the **takeover** in the management of the service takes place in favour of an entity with its own organisational and operating structure, and (ii) where there are **elements of discontinuity** with the previous contractor which result in a specific identity as a company. The most arduous task will be the responsibility of case-law: identifying the aforesaid elements, on a case-by-case basis.

Legislative Decree No. 136/2016 as a panacea for the unlawful triangulations used in cross-border postings of workers

On **22 July 2016 Legislative Decree No. 136** that has redefined **cross-border postings** came into force. The Legislative Decree **implementing Directive 2014/67/EU**, addresses all cases of irregular

posting, encouraging cooperation between States in determining the authenticity of the same. The regulations apply to **companies within the EU** that **post one or more workers in Italy to another company, including employment agencies and internal mobility within the same company**. The powerful mechanism underlying the decree is structured on a set of initiative powers referred to the supervisory bodies. It refers to investigations geared, amongst other things, to verifying: the place where the company has its registered-administrative office and where it is registered; the place where the workers are hired and where they are posted to; the fact that the worker carries out his normal working activity in the State from where he was posted. If the **posting** is found **not to be authentic**, the **worker** will be considered as an **employee of** the **entity which has made use of his service**, also imposing considerable **financial penalties** on the company making the posting and on the one where the worker is posted to. It would seem, then, to be the end of the season where "*illicit personnel triangulations*" were a valuable mechanism for bypassing the onerous contributory schemes in Italy.

CASE LAW

Court of Cassation: prolonged absence from the new job location does not justify dismissal

The Court of Cassation with judgement No. 13455, filed on 30 June 2016, said the **dismissal** for **prolonged absence** imposed on a **working mother** for failing to comply with her employer's order to **resume service** at a **business unit** located **in a different municipality** from the one where the woman worked at the time of her pregnancy, is **illegitimate**. This is because, based on Art. 56 of Legislative Decree. No. 151/2001, the working mother, after her maternity leave, has the right to return to service in the same business unit of origin or another business unit within the same municipality, unless she expressly waives this right. **Legislative Decree No. 151/2001**, according to the Court, involves a complex set of guarantees and rights -aimed at ensuring the essential family function of the woman (now of parenting) as well as complying with the maternity safeguards – which "*has **effects in relation to the implementation of this relationship**, requiring and legitimizing, in the same way as the standards of fairness and good faith, all those behaviours that may contribute together in their implementation*". Basically in serving a notice of dismissal to a working mother, one cannot disregard the special guarantees laid down by Legislative No. Decree 151/2001 on the safeguards for motherhood.

Dismissal for misconduct is lawful if the out-of-work conduct violates the principles of fairness and good faith

The Court of Cassation judgement No. 13676 of 5 July 2016, confirmed the principle of law already expressed by judgement No. 2550 of 10 February 2015, whereby for the purposes of the lawfulness of dismissal for **just cause** it is not necessary for the worker to have established expressly-prohibited conduct, but rather, it is sufficient that he/she has "*behaved in any other way that, due to its nature and possible consequences, may be inconsistent with the obligations related to their inclusion in the structure and organisation of the enterprise, as Art. 2105 of the Civil Code must be integrated with Art.1175 and Art. 1375 of the Civil Code, which require compliance with the obligations of **fairness and** of **good faith** even in **out-of-work conduct**, so as to avoid damaging the employer*". In particular, in the case examined by the Supreme Court, the employee had been fired for misconduct, as during a period of sick leave, he had acted in a reckless manner as regards his health. The Court of Cassation had, therefore, correctly applied the general principles, in the actual case in question, relating to the performance of the contract and obligatory conduct of the parties to the relationship.

Court of Cassation: in the event of dismissal, compensation remains within the limits of what was applied for

The Court of Cassation, with its judgement No. 13876 of 7 July 2016, said that any judge who -in the face of a petition from a claimant, which seeks, as a result of an unlawful dismissal, the sentencing of the employer to pay 6 times the final month's actual global salary and, however, an amount not less than 2.5 monthly salaries - orders the **reinstatement** of the worker by forcing the employer to pay all the salaries not paid up to the date of the actual reinstatement to work, incurs the **defect of excess**. This is also true, even if the dismissal was not in written form. According to the Court, in fact, if the claimant in quantifying their claim for damages has placed a **definite limit** to the size of the **quantum** requested, the employer **cannot** be **sentenced** to pay an **amount in excess of that**. Moreover, the Court considers that this limit cannot be exceeded even with the reference "*to the sum that the judge will decide*" which may be included in the conclusions of the action, not only due to the purely formal content of the remark, that does not express an uncertainty about the amount of damage that should actually be liquidated, but mainly because deferring to the judge means relying on his discretion in determining the amount due between the minimum and maximum pursuant to Art. 8 of Law No. 604/1966.

PRACTICE

Conciliation: double control over filing of minutes in trade unions

The Ministry of Labour, with Memoranda Nos. 5199/2016 and 5755/2016, provided clarifications of interpretation on the filing process at the Territorial Directorate of Labour (DTL) of the **minutes of conciliation in trade unions**. The Ministry pointed out that in the event of conciliation reports filed in trade unions, the DTL must verify a) **the authenticity** of the deed, as expressly required by Art. 411, paragraph 3, of the Code of Civil Procedure and b) that the **conciliation** took place, pursuant to Article 412-ter of the Code of Civil Procedure "*at the **venues** and according to the **procedures** laid down by **collective agreements entered into by the most representative unions***". The trade union entity must be in possession of "***elements of specific representativeness***" and it is sufficient that this requirement, according to the Ministry, results from explicit certification signed by the Unions involved in the procedure. In this way, one moves "*the responsibility and compliance with legislative instructions to a level of **union self-regulation***".

Tertiary-sector Managers: renewal of the COLLECTIVE LABOUR AGREEMENT has been signed

On **21 July 2016**, the renewal of the COLLECTIVE LABOUR AGREEMENT for **managers of the Tertiary, Distribution and Service sector,** was finalised between Confcommercio and Manageritalia. One of the major novelties notably relates to the **reduction of the protected period** to 240 days in one year, during which full remuneration is paid to the manager, with a possibility of extension in the event of serious and continuous disease. Changes also affect dismissal. Unless on the grounds of just cause, any unfairly dismissed manager is entitled to **compensation in lieu of notice,** amounting to between a minimum of 6 monthly pays, for a period of service of less than 4 years, and a maximum of 12 monthly pays, for a period of service of more than 15 years. Then, **additional payment** parameters have been re-phased. Here too the manager's corporate seniority is taken into account, rescheduling the payment within a range of 4 to 18 monthly pays. A "**Centro di Formazione Management del Terziario**" (Tertiary-sector management training centre) was set up to offer training and refresher opportunities to companies and managers with the purpose of managing specific sector-related situations. Lastly, **pay increases** have been assigned to managers included in the scope of the agreement under review

with a gross monthly pay of (i) Euro 80 from 1 January 2017; (ii) Euro 100 from 1 January 2018, and (iii) Euro 170 from 1 December 2018.

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