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

New VAT sanctions within the reverse charge regime

(Italian Revenue Agency, circular no. 16 of May 11th, 2017)

While implementing the tax reform of 2014, the Italian Decree Law no. 158 dated September 24th, 2015 has significantly changed the tax administrative sanctions system.
It shall be pointed out that the changes made by the decree, in compliance with the provisions of the enabling law, were based on the will to make the sanctions more commensurate with the actual illegal act carried out by the taxpayer, distinguishing between the conducts characterized by *low seriousness* (sanctioned in a mild, often fixed way) compared to those considered as more *insidious and dangerous* (which most of the time are proportionally punished).

With the recent circular no. 16/E, the Italian Revenue Agency has analysed the changes concerning the sanctions related to the reverse charge principle contained in art. 6 of the Italian Decree Law no. 471/1997.
Please find below the main relevant hints.

New sanctions system

The current, new sanctions system related to reverse charge provides for 4 separate provisions of the Italian Decree Law no. 471/97:

- article 6, paragraph 9bis1, referring to the wrong application of VAT in an ordinary manner rather than by reverse charge;
- article 6, paragraph 9bis2, which regulates the opposite case (wrong VAT application by means of reverse charge rather than in an ordinary way);
- article 6, paragraph 9bis3, concerning the wrong application of the reverse charge in case of exempt, non-taxable or non-existent transactions;
- article 6, paragraph 9bis, a more general rule compared to the three ones above and aimed at ruling the omission of obligations related to the reverse charge system.

Wrong VAT application in an ordinary way rather than by reverse charge

Paragraph 9bis1 rules the case in which the transaction should be subject to the reverse charge mechanism but, by mistake, was subject to tax application in an ordinary manner.
In such a situation, *buyer*, taxpayer, has to pay a fixed sanction of at least Euro 250 up to a maximum of Euro 10,000: the *seller* is also liable, jointly, for the payment of this sanction.
The Italian Revenue Agency explains that the sanction is due based on *each* (monthly or quarterly) *liquidation* and with reference to *each supplier*.

Finally, the rule provides that where it is ascertained that the (wrong) application of VAT in an ordinary manner rather than by means of the reverse charge has been determined by an "evasion" or "fraud" purpose whose awareness by the buyer is proved, the fixed sanction is replaced with a proportional sanction (from 90% to 180% of the tax), and, of course, without prejudice to possible tax and criminal consequences.

Wrong VAT application by reverse charge rather than in an ordinary way

Paragraph 9bis2 rules the case where VAT should be paid in an ordinary way, but was irregularly paid through the reverse charge mechanism by the buyer.

In this case, the *buyer* maintains the right to deduct VAT unlawfully paid with the reverse charge, while the *seller* is punished with a fixed sanction set ranging from a minimum of Euro 250 to a maximum of Euro 10,000.

Contrary to the previous case, the *buyer* is also jointly responsible for the payment of such sanction.

This sanction is also due based on each (monthly or quarterly) liquidation and with reference to each buyer and also in this case the fixed sanction is replaced with the proportional one (from 90% to 180%) in the event of a clear intent of evasion or fraud.

Wrong application of the reverse charge system in case of exempt, non-taxable or non-existent transactions

Paragraph 9bis3 rules the hypothesis of an incorrect application of the reverse charge mechanism to exempt or non-taxable transactions.

In the example proposed by the circular, reference is made to a service provision received by a non-resident subject, where the buyer erroneously considers the transaction as relevant in Italy, subjecting it to the reverse charge (instead of not correctly subjecting it to VAT).

In such a case, the Tax Authorities are required to cancel both the debt calculated by the buyer in his periodic liquidation and the deduction made (without prejudice to the right to recover the tax not deducted based on a subjective or objective impossibility to be deducted).

Even in the case of non-existent transactions within the reverse charge, both the debt and the credit calculated in the VAT liquidations (neutralization of the transaction VAT effects) are erased, but a specific sanction is applied, ranging between 5% and 10% of the taxable amount (with a minimum amount of € 1,000) and without prejudice to any criminal-tax consequence.

Failure to carry out the obligations connected with the reverse charge system

Finally, paragraph 9bis contains the general provisions which include the cases that are not separately ruled by the paragraphs previously analysed.

The Italian Revenue Agency points out that this paragraph concerns, in particular, the hypothesis in which the transaction is subject to the reverse charge system, but the buyer (taxpayer) does not carry out, wholly or in part, the related obligations.

The case provided by the rule in question concerns the breaches committed by the buyer both in the case where it is necessary to issue a self-invoice (in the example proposed, for the purchase – by non-EU suppliers – of goods territorially relevant within the State) and when the integration of the invoice received by the seller (for example, for the purchase of scrap from a national supplier or EU supplier) is provided.

In such cases, the breach by the buyer is punishable by a sanction in a fixed amount, ranging from a minimum of Euro 500 up to a maximum of Euro 20,000, *provided that* the omission of the reverse charge fulfilments does not "conceal" the transaction, which must, however, emerge from the

accounting record kept for income tax purposes (e.g. from the journal or, for those who keep simplified accounting records, from the purchasing register).

If, on the contrary, the transaction does not result from the accounting records, the most severe *proportional* sanction between 5% and 10% of the non-documented taxable base, with a minimum of Euro 1,000 is provided.

Finally, it is underlined that where the omission of the obligations connected with the application of the reverse charge mechanism also involves an *untruthful return* or an *undue VAT deduction* by the taxpayer or by the buyer, ordinary sanctions for an unfaithful return and for unlawful VAT deduction shall also be applied.

Effective date of the provisions

The new sanctions entered into force on January 1st, 2016: according to the principle of "favor rei", they are also applied for breaches committed before such a date and for which no acts which have been made "final" before January 1st, 2016 have been issued.

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Tax reliefs for workers who (re)turn to Italy

Some years ago, the tax authorities have introduced a series of favourable tax regimes aimed at attracting "human capital" or "wealth" holders to Italy.
A common feature of the different tax reliefs is the recognition of significant reductions in IRPEF taxation in case certain people, by transferring to Italy, for different reasons, "enrich" and "enhance" with their work and skills the national economy or who based on their economic welfare can reasonably inject significant personal expenditure flows into the national system.

The knowledge of these regimes also interests the same Italian companies, which within the negotiations to attract non-resident employees may rely on the tax benefits granted to them in case they transfer to Italy.

On May 23rd, the Italian Revenue Agency issued a long explanatory circular (no. 17/E) which analyses the current regimes in force.
Please find below the main elements of the regimes (in their latest version, effective in 2017) aimed at attracting workers, researchers and teachers, excluding the regime under Law 238/2010 (which will expire this year) from the in-depth analysis: the explanations related to the favourable regime introduced in 2017 for foreign rich people (new article 24-bis of theTUIR – i.e. Italian Consolidated Law on Income Tax), which has already been analysed in the Tax News 2017/3, will be dealt with in the future.

The tax relief is applied to:

1. researchers and teachers;

2. workers who return to Italy (article 16, Decree Law no. 147/2015). The rule in question, renamed "tax regime for inpatriates" favours those workers who transfer their tax residence to Italy, subjecting the related income realized in Italy (from employment or self-employment) to IRPEF/IRAP taxation only on 50% of the taxable amount (70% with reference to 2016).
   The tax relief, which is also permanent, is effective for the year in which the Italian tax residence has been acquired and for the following 4 years and it concerns two different categories of subjects:

   - managers and workers with "high qualification";
   - graduates, nationals of a (EU or white-listed) country that has an agreement with Italy, who have worked/studied abroad for the last 24 months.

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DEADLINES – JUNE 2017

- 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

Friday 16th

IMU and TASI – payment of the first instalment 2017

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

It shall be reminded that said taxes are paid in 2 instalments (expiring on June 16th and December 16th), the first of which is 50% of the tax due and calculated on the basis of the rate and deductions planned for 2016, while the second instalment is due to pay the balance for the remaining amount.

By the end of June 30th, instead, IMU returns concerning real estate changes occurred in 2016 that have caused a variation in the tax debt should be sent to the relevant Municipalities. The changes occurred and "certified" by a notary deed (i.e. purchase and sale agreement) and those that result in an increase in taxation compared to the previous period are not subject to tax return.

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

Friday 30th

Payment of IREF-IRES-IRAP

By the above date, individuals, corporations and partnerships (whose year coincides with the calendar year) pay the balance 2016 and carry out the first payment on account 2017 (if due) of:

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

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

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

For those taxpayers who have decided to revaluate the tax value of building land and agricultural land or the tax value of participations not traded on regulated markets and held from January 1st 2017, both the term for the payment of the single or of the first instalment of the substitute tax (equal to 8%), and the term for the certification (by the professional in charge) of the relevant estimate expire.

For taxpayers who in 2015 or 2016 have revaluated the tax value of building land and agricultural land or the tax value of participations not traded on regulated markets, the deadline for the payment of the second and third instalment of the substitute tax expires, in the event of an original option for the payment by instalments.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

... there are quantitative limitations for the employment of workers under a fixed-term contract?

Unless otherwise established in the collective bargaining agreements, no more than 20% of employees out of the total number of open term employees can be hired under a fixed-term agreement effective from 1 June of the hiring year. Exceeding this quota leads to an administrative fine of: (i) 20% of the salary paid, for each month or fraction of the month exceeding 15 days of employment, if the number of workers hired in violation of the percentage limit does not exceed 1; ii) 50% of the salary paid for each month or fraction of the month exceeding 15 days of employment, if more than one worker is involved.

JUDGEMENT OF THE MONTH

Installation of video cameras requires the union authorization or an administrative permit

The Court of Cassation, criminal division, with judgement No. 22148/2017, ruled once again on the possibility for the employer to install video cameras without implementing the union directive as per art. 4 of Law No. 300/70. In the case in hand, the Sole Director of a company decided to install at a local subsidiary a video surveillance system that consisted of two video cameras connected through the Wi-Fi and ADSL network to a monitor with which it was possible to monitor the work of employees. The Sole Director did not enter into a specific union agreement for it (nor he requested an administrative permit) but informed the employees about it and they authorized the monitoring performed by the employer. After the proceedings filed against the Sole Director, the latter was sentenced to pay a fine of 600 euro pursuant to article 38 of the Workers' Charter. In particular, the Court of Cassation identified as unlawful the behaviour of the employer due to the fact that art. 4 of the Workers' Charter has the goal of protecting a collective asset and not an individual one. For this reason, an employee, not having contractual authority equal to that of the employer, cannot authorize the latter to perform specific actions without prior authorization of the union representatives where expressly established by the law. Therefore, the Court of Cassation confirmed once again that the need to install equipment – whenever such equipment is installed to perform remote monitoring of the work activity – be preceded by an agreement between the employer and union representatives of the workers or, lacking an agreement, by a permit issued by an administrative authority. Otherwise the installation in question is unlawful and will give rise to criminal sanctions.

REGULATIONS

Self-Employment Jobs Act: main developments

With the final approval of the so-called Self-employment Jobs Act – currently pending publication in the Official Gazette – a reform of the Italian laws has been introduced with the goal of providing financial-social protection to self-employed individuals that do not carry out their activity through a business. From a financial protection standpoint, the provision deems as illicit, with the consequent right of the self-employed individual to receive reimbursement for damages, the clauses (i) that assign to the client the right to withdraw from the agreement without adequate prior notice as well as to modify unilaterally the terms thereby specified and (ii) for which the parties agree to payment terms exceeding

60 days. Similarly, the behaviour of a client who refuses to sign a written agreement is deemed illicit. Also in such case, the self-employed worker shall have the right to receive reimbursement for damages. In addition, also in force are the application of the discipline governing the abuse of economic dependence and the recognition of the self-employed worker's rights related to the financial exploitation of original creations and inventions developed while performing the contract, except where the creative activity is the actual scope of the agreement and is compensated accordingly. These are only a few of the main developments introduced by the Self-employment Jobs Act, but they seem already sufficient to lead clients to carefully assess the possibility of entering into adequate agreements for the already existing relationships, as well as for any future ones, with self-employed workers.

Smart work: health and safety in the workplace

With the main goal of balancing private life and work, DDL 2233-B has been approved in its final version, which, in fact, governs the so-called smart work, that is the type of work performed outside of the employer's premises and without specific requirements in terms of working hours. The intrinsic characteristics of smart work clearly imply a lower level of monitoring by the employer; this also applies to those elements that may have an impact on the health and safety of the worker. As a result, and without prejudice to the fact that the employer remains responsible for the health and safety of the worker, the law-maker established that the employer shall provide the worker and to the Workers' representative, at least once a year, with a written information notice detailing the general and specific risks connected to performing a specific type of work while employed by the employer. On the other hand, the employer is made aware and becomes liable since he/she is expressly obligated to cooperate in implementing the preventive measures established by the employer to face the risks connected to the performance of the duties outside the workplace. However, the aforementioned requirements do not void the liability of the employer to guarantee the worker's health and safety. In fact, unless exceptions are applied, please note that the employer must also follow the regulations established in the Consolidated Law on Safety (Legislative Decree 81/2008) applicable to the specific matters that characterise smart work.

CASE LAW

On the matter of disciplinary dismissal, the provisions of the collective bargaining agreement are binding

The Court of Cassation, with judgement No. 11027 dated 5 May 2017, ruled once again on the subject matter of disciplinary dismissal. In the judgement under review, the Court, recalling previous cases, reconfirmed that the Judge cannot expand the list of just causes or justified reasons for dismissal beyond what is established by the independence of the parties. According to the Court, this means that behaviour that could abstractly and possibly lead to dismissal for cause or subjective justified reason pursuant to the law cannot fall within the related cases if the collective bargaining agreement has expressly excluded them, establishing for them only disciplinary actions short of termination. In essence, dismissal ordered for a behaviour (in the specific case a disagreement not followed by facts) that the sector's collective bargaining agreement does not punish with dismissal is unlawful.

Collective dismissal and end of activity: when the company closes down the notification must still be provided within seven days

The Court of Cassation, with judgement No. 11404 dated 10 May 2017, established that also in the case of collective dismissal due to termination of business, the term of 7 days for notifying the final

communication on the application of the selection criteria for workers (criteri di scelta dei lavoratori) as per art. 4, paragraph 9, of the law 223/1991 must be respected, since it has fundamental value. With this decision, the Court rejects the assumption according to which, in the case of such a situation, there would be no need to apply the selection criteria, given that all workers would be dismissed. In the opinion of the Court, in fact, the obligation to notify ex post the methods of application of the selection criteria must be respected, since this ensures that the function of guarantee and control also in the case of end of the business activity is fulfilled. Indeed, the notification is necessary to verify that the decision to dismiss the entire workforce does not conceal different intentions, among which the transfer of the business activity or its resumption under a different company name or location.

Maximum number of sickness absence days: the months are calculated as being of 30 days

The Court of appeal of Milan, with judgement No. 890 dated 6 April 2017, ruled once again on the maximum number of sickness absence days whenever it is expressed in months and the CCNL (Collective bargaining agreement) of the sector in question does not specifically govern the calculation procedure. In the specific case, a worker appealed the dismissal ordered to her on the assumption that pursuant to the Confapi CCNL the 18 months of sickness absence days had to be calculated on the basis of calendar days. The Judges, by referring to previous case law, clarified instead that "the calculation system must be only one and be consistent and uniform. To this end, the factor must always be 30, also if the absences occurred during months shorter or longer than 30 days". Therefore, in the case in hand, the 18 months of the sickness absence days established by the CCNL of the sector must always and in any case be equal to 540 days.

PRACTICE

The new rules governing merit-based indemnity

Effective 1 April 2017, the new method for the calculation of the merit-based indemnity for sales agents established by article 11 of the Collective bargaining agreement for the industrial sector (Aec Industria) signed by the social partners on 30 July 2014. The new rules, which follow closely the method adopted by the German Commercial Code, introduce a rather complex system based on the calculation of the "difference between the initial commissions and the final ones". Essentially, a comparison is made between the volume of commission income and any other remuneration received by the agent on the first and the last portion of the relationship. In addition, two new criteria have been introduced to define the calculation: (i) the "assessment period" (periodo di prognosi) subsequent to the termination of the relationship, that is the expected years for which the contracting company will benefit from the work of the agent and (ii) the expected "migration rate" of clients, that is the percentage of annual turnover reduction and/or loss of clients regardless of the activities of the agent. If the merit-based indemnity so calculated exceeds the amount established by art. 1751 of the Civil Code, it shall be equal to that amount. If, instead, it is lower than the statutory amount, only the portion exceeding the value of the Firr (Retirement Bonus Provision) and the provision for supplementary customer allowances (indennità suppletiva di clientela) shall be paid. As anticipated, this calculation system applies only effective from 1 April 2017: this means that for agency agreements already in place at the time of entry into force of the Aec, in order to calculate the merit-based indemnity it will be necessary to apply two different calculations, using respectively the old and the new calculation criteria.

The first operating guide on the application of the European Regulation on the protection of personal data has been published

The Personal Data Protection Authority has prepared and published the first operating guide on the application of European Regulation No. 2016/679, which is now available on its official website. The operating guide includes 6 sections: (i) Legal grounds for processing; (ii) Information notice; (iii) Rights of the Interested Parties; (iv) Data Controller, Data Processor and Person in charge of the Processing; (v) Approach based on the risk of data processing and accountability measures for Data Controllers and Data Processors; (vi) International Transfer of data. The operating guide has the goal of providing an overview of the main issues that businesses and public agencies must keep in mind when the European Regulation will enter in full force, on 25 May 2018. In addition, a few hints are provided for actions to be taken immediately, since they are based on specific rules established by the Regulation which do not leave room for national authority's interventions. Meanwhile, suggestions are provided on the main developments introduced by the Regulation in order to approach the upcoming changes and be ready for them on 25 May 2018.

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