RSM STUDIO 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

The treatment of tax and social security receivables in bankruptcy proceedings

(Italian Revenue Agency, circular no. 16 of July 23rd, 2018)

With the publication of Circular no. 16 of July 23rd, 2018, the Italian Tax Authorities comments on the new regulations governing tax settlements – provided by art. 182-ter of the Italian Bankruptcy Law, introduced by the Italian Law no. 232/2016 (Budget Law 2017) and in force from January 1st, 2017 – and retraces the history of the sentences of the Court of Cassation and the European Court of Justice, going beyond the position adopted in Circular 40/E of April 18th, 2008 and Circular 19/E of May 6th, 2015, with reference to the *cut* of the tax debt for VAT and withholding taxes.

A first new element introduced by the Italian Law 236/2016 is represented by the mandatory nature of the Claim for Tax Settlement pursuant to art. 182 ter of the Italian Budget Law, in all the cases of arrangement with creditors and restructuring of the debt provided for by the Italian Bankruptcy Law. In this perspective, unlike in the past, when there was an optional regime based on the jurisprudence of legitimacy, the tax and social security debt cannot be invalidated, or deferred, in the context of the mentioned procedures, if the debtor does not formalize a Tax Settlement Claim pursuant to art. 182-ter of the Italian Budget Law.

However, the most important new development related to Tax Settlement is the *elimination of the prohibition on VAT cut*, a tax previously considered "intangible" as it represents an own resource of the European Union. With this amendment, the internal regulations are in line with the ruling of the European Court of Justice dated April 7th, 2016, Case C-546/14, which establishes the possibility of cutting the VAT credit claimed by the tax authorities, where the revenue from bankruptcy proceedings, considering the market value of the goods/rights on which the privilege exists, satisfies tax and social security receivables to an extent no lower than that achievable through bankruptcy.
This circumstance must be attested in a special report certified by an independent professional, equipped with the requirements of art. 67, paragraph 3, letter d, of the Italian Bankruptcy Law. A further necessary condition for the VAT debt cut is the respect of the legitimate causes of pre-emption for the creditors in order not to alter the like terms among creditors.

Through the publication of Circular 16/E, the Italian Revenue Agency, going beyond the obsolete lines of interpretation provided by the previous Circulars 19/E of 2015 and 40/E of 2008, finally recognizes as legitimate the proposal for VAT debt cut contained both in the applications for the arrangement with creditors not accompanied by a tax settlement and not yet voted on April 7th, 2016 (date of the sentence issued in relation to Case C-546/14), and in the Tax Settlement Claim formulated within the framework of an arrangement with creditors not yet voted on January 1, 2017.

The same Circular 16/E, inspired by the principles set forth by the European Courts and by sentence no. 1337 of January 19th, 2017 of the Court of Cassation, also declared admissible, within the framework of

the procedures of arrangement with creditors and restructuring of the debt, the cut of the debt for withholding taxes applied to self-employed workers and employees.

Another significant change made to the regulations governing Tax Settlement is the elimination of the part of paragraph 5 of article 182 ter, which provided for the termination of the procedural dispute concerning the agreed taxes. This circumstance, as confirmed by the Italian Tax Authorities, extends the scope of article 176 of the Italian Budget Law, bringing the treatment of tax receivables back into line with the ones of other creditors in bankruptcy, in respect of whom the pending disputes remain in place until the final decision on the merits is made. The debtor may therefore submit a proposal for an arrangement with creditors also covering taxes which are the subject of tax litigation.

In the absence of provisions regarding the entry into force of the new art. 182 ter of the Italian Budget Law, as clarified by Circular 16/E, the new Tax Settlement must be considered applicable to all proceedings commenced from January 1st, 2017 and to those proceedings whose proposal, as of January 1st, 2017, has not been voted and signed for acceptance yet. Therefore, the claim for settlement put forward by the debtor can be amended also providing for the debt cutting for VAT and withholding taxes if the proposed arrangement as of January 1st, 2017 has not already been voted on and the restructuring proposal has not already been signed for acceptance by the competent Italian Tax Authorities.

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Tax credit for advertising investments – implementation of favorable legislation

Art. 57-bis of the Italian Decree Law no. 50/2017 introduced a facilitation measure aimed at encouraging and supporting advertising investments by companies and professionals.

The regulation, which was originally analyzed in Tax News 2017/9, required the issue of a specific Implementing Decree: the Measure (Decree of the Italian President of the Council of Ministers of May 16th, 2018) was finally published in the Official Gazette of July 24th, thus making the bonus operational.

The essential elements of the tax relief are summarized below.

Subject of the tax relief

On the basis of art. 57-bis of the aforementioned Decree Law no. 50/2017, investments in *advertising campaigns* in the daily press and periodicals, including online, and in local television and radio stations, whether analogue or digital, are facilitated through the granting of a special *tax credit*.

The implementing decree specifies, in this regard, that the investments eligible for tax credit are those relating to the purchase of *advertising space and commercial advertisements*, made exclusively in daily newspapers and periodicals (published in paper editions or published in digital format) or in the programming of local television and radio stations, analogue or digital.

The advertising investments eligible for the tax credit can therefore be carried out on:

- local radio and television broadcasters registered with the Register of Communication Operators (art. 1, paragraph 6, letter a), number 5), Italian Law no. 249/1997);

- newspapers registered with the competent Court (art. 5 of Law no. 47/1948) or with the aforementioned Register of communication operators and in any case having an editor in charge.

The following expenses are *excluded* from the tax credit: expenses incurred for the purchase of space within the programming or editorial programming to advertise or promote teleshopping of goods and services of any type, as well as expenses incurred for the transmission or purchase of radio and television commercials, of advertisements or promotional spaces related to betting, gaming or betting services with cash winnings, voice mail or chat-line services at extra cost.

Investments subject to tax relief are those carried out from January 1st, 2018; however, advertising investments in the daily press and periodicals, including on-line, carried out from June 24th, 2017 to December 31st, 2017 are also subject to tax relief.

Beneficiaries

The following subject can obtain the tax credit:

- enterprises,
- self-employed workers,

regardless of their legal status, size and accounting system.

Non-commercial bodies may also be subject to tax relief.

Quantification of the bonus

The quantification of the credit follows the so-called "incremental approach": this means that the investments (as described above), whose value is at least 1% higher than the similar investments made in the same media in the previous year, are subject to tax relief.

Also for investments made in the period June 24th, 2017 – December 31st, 2017, the tax relief is granted provided their value exceeds the amount of similar investments by at least 1%, in this case made by the same parties in the same media in the corresponding period of 2016.

Once the size of the advertising investments has been defined, the tax credit is normally equal to 75% of the incremental value of the investments carried out,
The credit is increased to 90% if the beneficiaries are:

- micro-businesses,
- small and medium-sized enterprises,
- innovative start-ups.

The granting of the 90% bonus is subject to the successful completion of the notification procedure to the European Commission. However, before the notification procedure is completed, the ordinary 75% bonus is granted.

For the sole purpose of allocating the tax credit, expenditure on the purchase of advertising is allowed net of incidental costs, intermediation costs and any other expenditure other than the purchase of advertising space, even if it is functional or linked to it.

The tax credit is recognized considering the overall maximum limit of the annual budgetary resources allocated for this purpose, which represents an expenditure ceiling.

If the resources available are insufficient in relation to the admitted applications, they will be distributed among the beneficiaries proportionally to the tax credit abstractly due, with an individual limit per person equal to 5% of the total annual resources allocated to investment in newspapers and equal to 2% of the annual resources allocated to investment in local radio and television broadcasters.

For the purposes of quantifying costs relevant to the bonus,

- expenses are considered to have been incurred in accordance with the rules on tax competence set out in art. 109 of the TUIR (i.e. Italian Consolidated Law on Income Tax),

- expenditure must be carried out on the basis of a *specific certification* issued by the parties authorized to issue the so-called "stamp of approval" of the data shown in the tax returns or by the parties carrying out the statutory audit pursuant to article 2409-bis of the Italian Civil Code.

Modalities of use of the credit

The tax credit is alternative and not cumulative, in relation to the same items of expenditure, with any other tax relief provided for by state, regional or European legislation, unless subsequent provisions of the same regulatory source do not expressly provide for the cumulation of the same tax relief.

The tax credit can only be used for *offsetting* purposes.

Applying for and granting of a bonus

Bonuses are applied for in the period between March 1st and March 31sr of each year, by means of a specific *electronic communication* (in accordance with the procedures to be defined in an administrative provision issued by the Italian Department for Information and Publishing of the Italian Presidency of the Council of Ministers).

The communication shall contain the following data:

a) the identification details of the company, the non-commercial entity or the self-employed person, including the tax code;
b) the total cost of the advertising investments made or to be made;
c) the percentage measure and the total amount of the increase in advertising investment made or to be made in comparison with the previous year;
d) the amount of tax credit claimed.

By April 30th of each year, the Department for Information and Publishing of the Presidency of the Council of Ministers draws up a list of subjects applying for the tax credit with the indication of any *provisional percentage of allocation* in the event of insufficient resources and the amount theoretically available to each subject after the realization of the incremental investment.

The amount of credit *actually* available after the assessment of the investments carried out is determined by a provision of the Italian Department for Information and Publishing of the Presidency of the Council of Ministers published on the institutional website of the Department.

The tax credit shall be disclosed in the *tax return* relating to the tax periods in which the credit is *accrued* as a result of the investments made and in the tax returns relating to subsequent tax periods up to the period in which the use thereof ends.
Subjects with a tax period that does not coincide with the calendar year shall indicate the tax credit in their tax return for the tax period in progress as at December 31st, of the year in which the credit is accrued with reference to the investments made during the calendar year.

For the year 2018, the electronic communication must be submitted starting from the 60th day and no later than the 90th day following the date of publication of the decree in the Official Gazette (i.e. from July 24th, 2018).

Checks and possible revocation of bonuses

The Italian Presidency of the Council of Ministers carries out checks on compliance with the requirements and on compliance with the conditions laid down by law for benefiting from the tax relief.

The tax credit is *revoked* if it is ascertained that one of the requirements laid down is not met or if the documentation submitted contains untrue elements or if the returns made are found to be false. The *partial revocation* of the tax credit is granted only in the event that the assessments carried out show elements that exclusively influence the extent of the benefit granted.

The special measure to counter international and national tax and financial fraud provided for in article 1, paragraph 6, of the Italian Decree-Law no. 40 of March 25th, 2010 shall apply to the recovery of any amounts unduly received.

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DEADLINES – AUGUST 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

Wednesday 1st

Tax disputes – suspension of procedural time-limits

From the above date until August 31st, pursuant to the Italian Law no. 742/1969, the procedural deadlines for tax jurisdictions will be suspended.

This means that the calculation of the time limits related to the tax dispute (e.g. time limit for appealing against an assessment notice, for filing documents, for appealing against a sentence, etc.) is interrupted for the entire month of August and resumed as from September 1st.

Monday 20th

Payment of IREF-IRES-IRAP (taxpayers benefitting from the postponement)

Payment (with a 0.4% increase) of the 2017 balance and first payment on account for 2018 of IRPEF-IRES-IRAP and of taxes with due dates coinciding with the date of payment of income taxes.

FOCUS ON EMPLOYMENT

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

DID YOU KNOW THAT...

..... from 1st July 2018, the ban on cash payment – of the salary/compensation – comes into force?

From 1st July 2018, employers and principals are obliged to pay remuneration, compensation and any related advance payment, through traceable means of payment, i.e. bank transfer with IBAN code indicated by the worker, electronic payment instruments, payment in cash at banks or post offices where the employer/principal has opened a treasury account with a mandate to pay and issue a check to be delivered to the person concerned or to a delegate.
This is a novelty introduced by Law No. 205/2017 (so-called Budget Law 2018), in order to avoid both any possible "recycling/money laundering activity" and any possible abuse against workers.
In fact, the signature affixed by the worker on the paycheck no longer constitutes proof of the payment of the due remuneration/compensation.
Employers and principals who contravene the prohibition of payment in cash incur administrative pecuniary sanctions from a minimum of 1,000 to a maximum of 5,000 Euros.
With this regard, the National Labor Inspectorate – with its note No. 4538 of 22 May 2018 – clarified that the violation is accomplished both when no traceable means of payment are used and when these are used in an elusive manner.

JUDGEMENT OF THE MONTH

The control aimed at protecting the company's assets and image does not breach article 4 of the Workers' Statute

With its judgment No. 13266 of 28 May 2018, the Court of Cassation has declared the lawfulness of a disciplinary dismissal served on an employee for having used the company computer during working time for non-working purposes. In the case at issue, the employer had commenced a retrospective investigation – following the reporting of the technical director, who had caught the employee using the computer for leisure activities –, from which it emerged that the employee often played "with the company computer" (Free Cell game). The employee challenged the served dismissal in court, by stating that the employee had carried out controls using a universal password that requested prior trade union agreement, failing which, the Labour Inspectorate's authorization (article 4 of Law No. 300/70). By upholding the conclusions of the Court of Appeal having territorial jurisdiction, the judges of the Court of Cassation have stated that the application of the procedural guarantees under article 4 of the Workers' Statute is admitted in the event that the remote controls are aimed at the precise compliance with the employment and not also when they (as in the case at issue) are aimed at ascertaining the carrying out of unlawful behaviors of employees harming the company's assets and image. In this respect, the Court of Cassation has laid stress on the fact that the application of such procedural guarantees derives from a balancing, which is not always easy to carry out, between the needs for the protection of the company's interests and assets, related to the freedom of economic initiative, and the protection that cannot be renounced of the employee's dignity and confidentiality, with a mitigation that cannot disregard the circumstances of the specific case. And, within this scope, as also stated by the European Court of Human Rights, the fair balance between the opposing interests must be made in compliance with the principles of reasonableness, proportionality and of the protection

of the employee's right to the respect of private life, through the employer's prior disclosure of the possible control of his/her communications, also through the Internet. In short, the case in which the employer has carried out checks aimed at ascertaining unlawful behaviors harming assets unrelated to the employment falls beyond the scope of application of the Workers' Statute rule, moreover, in case of controls carried out ex post. The above since said controls are carried out after the implementation of the behavior charged to the employee, such as to disregard the pure and mere supervision over the performance of his/her employment.

CASE LAW

The ethical minimum rule as insurmountable limit of trade union freedom

With its judgment No. 14527 of 6 June 2018, the Court of Cassation has quashed the decision of the Court of Appeal having territorial jurisdiction which, by reversing the decision of the first instance judge, had declared the unlawfulness of the dismissal for cause served on five employees who had staged the suicide and the funeral of the Managing Director of the employer, in addition to having charged the latter Managing Director with the suicide of other employees. In particular, in the Court of Appeal's opinion there was no cause for dismissal whatsoever, since the employees had not caused any serious moral or material damage whatsoever to the employer with their own behavior, much less going beyond the limits of substantial and formal moderation in exercising the lawful right of criticism. Instead, the Court of Cassation has laid stress on the fact that, in the case at issue, the employees' behavior had gone beyond the limit of formal moderation, thus infringing the so-called ethical minimum, namely, those duties safeguarding ordinary, democratic civil life in common. Furthermore, the Court of Cassation has stressed that the aforesaid employees, with their behavior, even if within the lawful harshness of constitutionally protected trade union dialectics, had caused damage to the honor, to the reputation and to the dignity of the Managing Director, by actually finally harming the fiduciary bond underlying the relevant employment. Well then, the Court of Cassation has laid stress on a clear lack of balance between the two conflicting interests at stake: on one side, that of the individual having been criticized in the protection of the human being and, on the other side, that opposed of the author of the criticism (even as a satire) in the free expression of thought.

Unlawful data processing: automatic non-patrimonial damage

With its order No. 14242/2018, the Court of Cassation was requested to rule on the existence of non-patrimonial damage in case of unlawful data processing. In particular, the dispute under the close examination of Court of Cassation concerned the order to transfer a Customs Agency employee after commencement of an investigation by the Public Prosecutor's Office concerning such employee. The Order included in its own grounds the legal disputes in which the employee was involved and was issued by the Administration by using an ordinary protocol, fit for making the information on the employee's litigation involvement available to all the Agency's employees. Upon the outcome of the legal proceedings, the Court held that non-patrimonial damage had automatically arisen caused by the employer that processes the employee's personal data, in breach of the data protection rules, unless the employer itself has adopted all appropriate measures to avoid it, or is capable of proving the respective absence or, at least, the substantial irrelevance.

Lawful investigation activity of the employer, but with limits

With its judgment No. 15094 of 11 June 2018, the Court of Cassation has stated that the controls carried

out through an investigation agency (or security guards) may in no way concern the fulfilment or the breach of the contractual obligation, but must only limit themselves at ascertaining the carrying out of unlawful acts carried out by the employee, even when the employment is carried out outside the company's premises. In said context, the Court mentions some examples of lawful investigation control, that is when the employee (i) carries out a paid activity in favor of third parties during working time; (ii) carries out specific offences (sells a product or steals the collected amount), or (iii) carries out outside work related activities, thus infringing the competition prohibition (causing damage to the employer). In other words, in order to act lawfully, the investigator "cannot go beyond the limits of the supervision of employment" since such control is directly reserved, pursuant to article 3 of the Workers' Statute, to the employer or to its own collaborators, whose names and whose duties must be communicated to the employee. Otherwise, the investigation controls ordered are to be deemed unlawful with the corresponding unlawfulness of the resulting dismissal.

PRACTICE

Greenlight for the replacement Agreement

The Ministry of Labour and Social Policies and ANPAL (that is the National Agency for Active Employment Policies) issued, on 7 June 2018, a joint signature circular establishing the criteria and the ways of accessing the replacement Agreement by the employees falling within company and professional profile scopes at risk of excess of staff, by way of implementation of the measure included in article 24-bis of Law No. 148/2015. The 'replacement Agreement' format will be drafted consistently with the model attached to the above-mentioned circular. The circular also stresses that the employer that, pursuant to paragraph 6 of the above-mentioned article 24-bis, hires the employee in the period in which he/she benefits from the replacement allowance, will be entitled to exemption from the payment of 50% of the social security contributions due as a whole, with the exclusion of the premiums and contributions due to INAIL (that is the Italian Industrial Injury Compensation Board), within the maximum limit of an amount equal to Euro 4,030.00 on an annual basis. INPS (that is the Italian National Social Security Institute) will readjust such amount on an annual basis based on the variation of the ISTAT consumer price index for the families of blue-collar and white-collar workers. The benefit will arise provided that the company does not have proprietary assets essentially coinciding with those of the existing employer. The exemption is granted for a duration not in excess of: a) 18 months, in case of indefinite term employment; b) 12 months, in case of fixed-term employment and if, throughout its performance, the aforesaid contract is transformed into an indefinite term contract, there will be entitlement to the contributory benefit for a further six-month term. For the purposes of benefitting from the allowance, ANPAL will disclose to INPS the data related to the employers having hired employees throughout the period of enjoyment of the replacement allowance.

Lawfulness of the personal data processing through GPS, but with limitations

With its Decision No. 441 of 29 May 2018, the Data Protection Authority has admitted the possibility of personal data processing through a geographic positioning system installed on tablets and smartphones given to the employees of a company that renders private security guard and money & valuables transport services. The above provided that the company adopts a series of necessary measures, amongst which one may find: (a) the system configuration in such a way that (i) an icon is placed on the device showing that the localization features is active, (ii) the deactivation of the localization feature is allowed during the breaks granted from the respective jobs, and (iii) it is possible to black out the visibility of the geographic position, after a certain period of inactivity of the operator on the screen at the operations center; (b) the identification of the time during which the data actually processed will be kept, by taking into account the pursued aims; (c) the appointment of the software

supplier as outside data processor. Furthermore, the security guards will not have to be directly identified by the system and the access in real time to the localization data made by the authorized staff from the operations center will only be foreseen in case of need and emergency. In short, in order for geographic positioning systems to be lawful, the latter must not entail the tracking of staff and, therefore, the employer must not use them to observe the movements of employees.

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