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TAX

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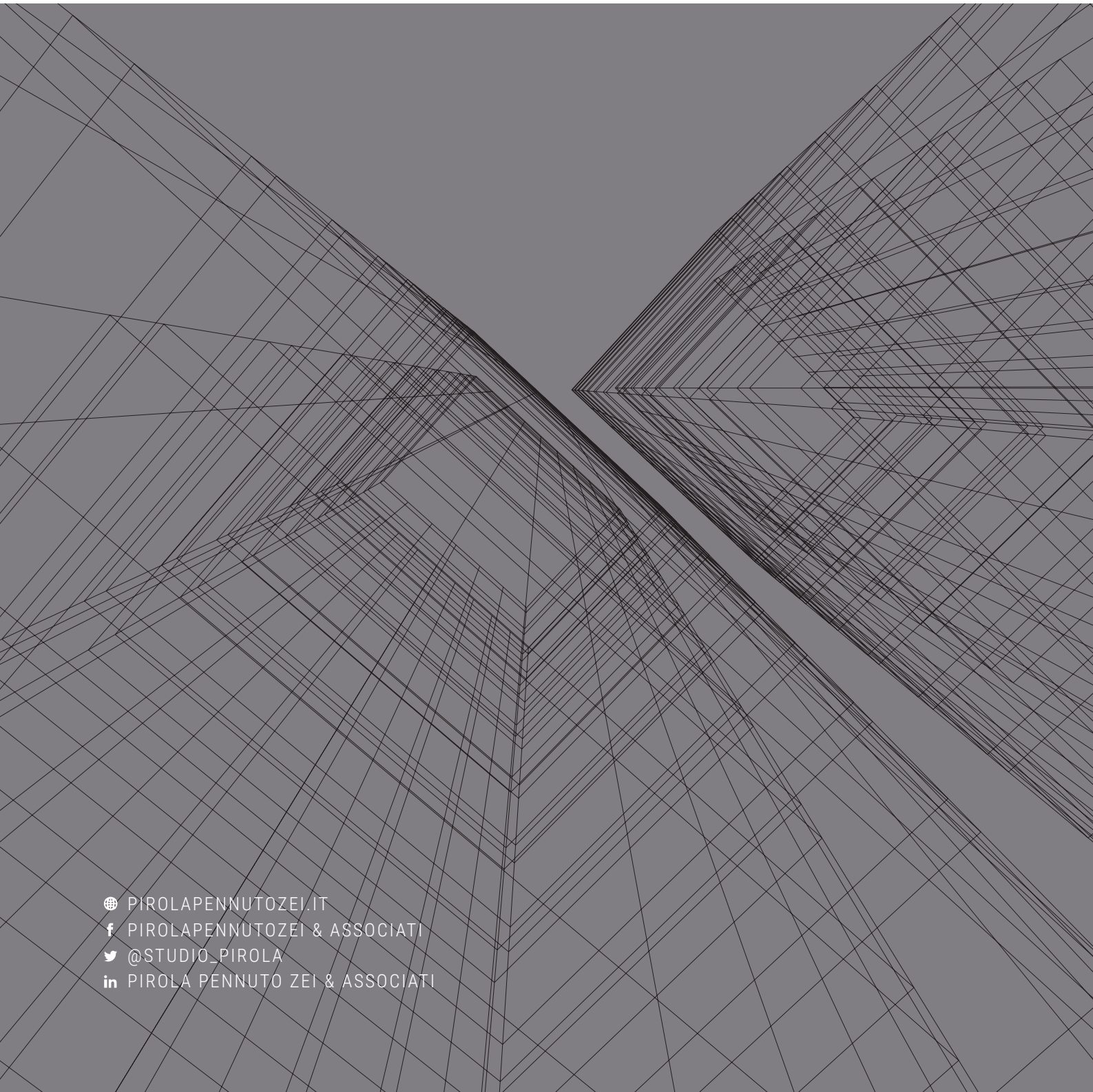

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LEGISLATION

1.1

Law dated 27 December 2017, No. 205 - 2018 Budget Law

Law dated 27 December 2017, No. 205 – 2018 Budget Law – referred to as "*Bilancio di previsione dello Stato per l'anno finanziario 2018 e bilancio pluriennale per il triennio 2018-2020*" was published in the Official Gazette No. 302 on 29 December 2017, Ordinary Supplement No. 62.

The most relevant tax measures contained in the Law are introduced below.

Super and hyper depreciation allowance

Allowances have been extended, i.e. the terms within which eligible investments can be performed have been prolonged.

More in specific, for the purposes of taxes on income, for entities investing in new instrumental assets - being herein excluded certain motor vehicles as listed under Article 164, paragraph 1 of the Italian Income Tax Act , TUIR - in the period between 1 January 2018 and 31 December 2018 (or 30 June 2019, provided that the purchase orders are accepted by the seller by 31 December 2018 and at least 20% of the price is paid by the same date) a 30% purchase cost increase is recognized limited to depreciation quotas and financial leases fees (super depreciation).

The 150% hyper-depreciation allowance related to the purchase cost of new high-tech tangible assets which are allowed to benefit from specific digital and technological transformation processes under the model promoted by the Italian Government plan for industrial growth named Industry 4.0 Plan has been extended. Investments performed in the period by 31 December 2018 (or 31 December 2019, provided that the purchase orders are accepted by the seller by 31 December 2018 and at least 20% of the price is paid by the same date) are eligible.

In addition, the list of assets eligible to such benefit has been extended (for the sake of example, drop shipping supply chain management methods in e-commerce activities, immersive, interactive experiences rendered through digital services, 3D reconstructions have been added as eligible).

A major change, referring solely to hyper-depreciation allowance, is that the replacement of an asset does not directly imply that the allowance is revoked, as it has to be demonstrated that:

1. the new asset has similar or more advanced technological features to those envisaged under Annex A of Law No. 232/2016;
2. the investment referring to the replacement is certified, the new features of the asset are demonstrated and so is the interconnection element.

Training expenses related to the Industry 4.0 development plan

The Law provides a tax credit of 40% on personnel expenses incurred for training activities related to the "*Industry 4.0*" technology development program. The tax credit is recognized to all enterprises, no matter their legal status, area of business or accounting regime in place.

The maximum granted tax credit for the beneficial enterprise equals to €300,000 on an annual basis and is subordinated to the condition that the training activities shall be agreed on through corporate or territorial collective agreements.

Only training activities related to the "*Industry 4.0*" technology development program (i.e., big data application, data analysis, cloud and fog computing, cyber security, cyber-physical systems, advanced and collaborative robotics) are eligible to the benefit.

Such tax credit must be indicated in the Tax Return of the FY in which the eligible expenses are borne and in all Returns of the FYs in which such credit is used. The credit does not concur to the formation of the income taxable base, nor of the IRAP base and is it possible to use it in the years following the one in which the expenses are borne solely in compensation as in compliance with Art. 17 of legislative Decree dated 9 July 1997, No. 241.

Web Tax

As from year 2019, a new tax on digital transactions related to the performance of services carried out through electronic means rendered to Italian businesses is fixed. Services carried out through electronic means shall be those supplied through the Internet or an electronic network, the nature of which makes the performance completely automatic, with minimum human intervention and for which the information technology component is essential. The Web Tax would apply at a 3% rate on the amount of the consideration paid in exchange for the performance of the above services, by subjects requesting the provision of services above outlined, with obligation to charge the supplier.

A specific Decree to be issued shall identify modalities of implementation, it being allowed for the Revenue Agency, through specific measures, to intervene further on the issue.

Permanent Establishment

2018 Budget Law reformulated the wording of agency and material permanent establishment as per Art. 162 of the Italian Income Tax Act (TUIR) by introducing the amendments as envisaged by OECD within the scope of the BEPS Project (Base erosion and profit shifting) and, more in specific, of Action 7 – referred to as "Preventing the Artificial Avoidance of Permanent Establishment Status[1]". Amendments relate to negative hypothesis of PE, material PE and agency PE. With reference to the latter, it is noted that, should any party acting in a Contracting State for a non-resident enterprise and habitually conclude contracts, or habitually play the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise and should said contracts be in the name of the non-resident company (or for the transfer of property or for the granting of rights to use assets of such company or that the company has rights to use or related to the provision of services by said company) said company is considered to have a PE with reference to each activity carried out by the agent on behalf of the company, provided that such activity are ancillary, or preparatory.

Reference is made also to the wording of closely related party: a subject shall be considered as closely related to a company, being all circumstances evaluated, if one has control over the other, or if they are both controlled by the same subject.

1 The fundamental issues dealt with by the ODEC under Action 7 are as follow: *artificial avoidance of PE status through commissionnaire arrangements and similar strategies; artificial avoidance of PE status through the specific activity exemptions (i.e. fragmentation of activities between closely related parties); profit attribution to PEs and interaction with action points on Transfer Pricing.*

With reference to the material PE, it is specified that a material permanent establishment is assessed even in case of relevant and prolonged economic presence within the territory according to a structure designed so as that its physical presence is not to be found in that territory. A fixed business location is, however, not considered a material permanent establishment if: i) a facility is used for the sole purpose of storage, display or delivery of goods or merchandise belonging to the company; ii) the goods or merchandise belonging to the company are warehoused for the sole purposes of storage, display or delivery; iii) the goods or merchandise belonging to the company are warehoused for the sole purpose of the transformation by another business; iv) a fixed business location is used for the sole purposes of purchasing goods or merchandise or to collect information for the company; v) it is used solely to perform any other preparatory or auxiliary activity for the company; vi) it is used for the sole purposes of the combined exercise of the activities mentioned in letters above.

The above mentioned activities must be of preparatory or ancillary nature only.

As in compliance with paragraph 5 of Art. 162 of the Italian Income Tax Act (TUIR), a fixed business location is considered a permanent establishment if it carries out activities strictly correlated or if the combined exercise of the activities is not of preparatory or ancillary nature only, as long as the activities performed are complementary to a complex of business operations.

Incomes recognized to resident individuals

2018 Budget Law amended Art. 27 of the Decree of the President of the Republic No. 600/1973. More in specific, any resident company or entity shall apply a 26% source withholding tax, with obligation to charge the recipient, to any income recognized to resident individuals with regard to the ownership of corporate participations, thus making irrelevant whether the shareholding is of qualified or non-qualified nature, to incomes from financial instruments as set forth under Art. 44, paragraph 2, letter a), and to incomes from joint venture agreements as set forth under Art. 109, paragraph 9, letter b), of the Income Tax Consolidation Act ("*TUIR*") which are not business related.

Black List dividends

Dividends matured during the previous fiscal years when the subsidiary was resident in countries not

included in the (black) list and distributed starting from FY 2015 are not considered as black list. The same provision also applies to dividends matured in fiscal years following FY 2015 where the subsidiary was resident in a country not included in the list and received in fiscal years during which the CFC condition was satisfied. In the event that the participations are transferred, the preexisting stratification of reserves is transferred to the transferee.

Incomes from black list countries do not concur to the formation of the income of the year in which they are received since excluded from the income of the receiving company for 50% of their amount but is allowed an underlying tax credit for any taxes paid abroad by the subsidiary, if the taxpayer can document that the foreign entity carried out as its main activity an actual industrial or commercial activity in the market of the state or territory according to Article 167 paragraph 5 letter a) of the Italian Income Tax Code (TUIR).

Interests payable

Art. 96 of the Italian Income Tax Act on the deductibility of interests payable has been amended. More in specific, dividends from foreign controlled companies are now excluded from the computation of the gross operating earnings. This is effective from the FY following the one as at 31 December 2016.

Filing of Income Tax Return

In order to avoid filing issues, the term to file IRAP and Taxes on Income Returns has been postponed to the 31st of October of each year.

Tax debts falling within creditors of Public Administrations

PAs and their subsidiaries are under the obligation to verify, should they be on the verge of performing any form of payment exceeding Euro 5.000, even electronically, whether the beneficiary has not performed all payments of his own competence pursuant to one or more notices of payments whose amount is at least equal to the former amount. Should there be a payment still pending, PAs and their subsidiary shall not perform the payment and communicate such information to the Revenue Agency.

Real estate intermediaries – IRES (corporate tax) rate and interests payable deductibility

A 3.5% surcharge for corporate tax is envisaged for banks and financial entities as per Legislative Decree dated 27 January 1992, No. 897 being herein excluded mutual funds of investments and real estate intermediaries.

Interests payable borne by insurance companies and holdings of insurance groups, as well as by mutual fund management companies and real estate intermediary companies are deductible for 96% of their value. Interests payable of real estate intermediary companies do concur to the formation of the production value valid for IRAP (regional tax) purposes for 96% of their amount. This is effective from the FY following the one as at 31 December 2016.

SMEs listing

The Law recognizes a tax credit equal to 50% of the advisory expenses and up to €500,000 maximum, incurred until 31 December 2020 in order to obtain, as from 1 January 2018, the listing of SME companies (thus qualified by EU Commission Recommendation 2003/361/EC dated 6 May 2003) in a regulated market of a European Union / European Economic Area Member State[2].

Step-up of land and participations

2018 Budget Law has extended to possibility to step-up the purchase value of participations (not traded in regulated markets) and of building and agricultural lands by paying a substitute tax of 8%.

The new value shall appear in a ad-hoc expert's appraisal to be sworn no later than 30 June 2018.

Registration Tax Regime

Under Article 20 of the TUR (referred to as "*Interpretazione degli atti*"), amended in light of new measures envisaged by 2018 Budget Law, the Registration Tax is applied based on the "*intrinsic nature*" and

2 The advisory expenses can be credited up to €20 million for FY 2019 and €30 million for FY 2020 and 2021, starting from the fiscal year following the one in which the listing was obtained and can only be used in compensation.

"*juridical effects*" of the deeds presented for registration, regardless of their legal title or apparent form, any external interpretative elements or the contents included in other legal transactions which might be "*linked*" to the one to be registered being excluded. Article 53-bis, paragraph 1, has been amended as well, which states that "*notwithstanding what envisaged by Art. 10-bis of Law dated 27 July 2000, No. 212 powers and assignments as per Articles 31 and subsequent of Decree of the President of the Republic dated 29 September 1973, No. 600, and subsequent amendments, can be exercised also for the purposes of registration tax regime, as well as mortgage taxes and cadastral taxes as envisaged by Legislative Decree dated 31 October 1990, No. 347*".

E-invoicing

As from 1 January 2017, it is possible to issue e-invoices through the '*Sistema di Interscambio*' system ('*SdI*'), which is the current platform used to transmit e-invoices to public bodies and which will allow the Italian Revenue Agency to automatically collect the details of e-invoices, or eventual corrections related to operations intercurring between subjects resident or located within the territory according to the format as per Annex A of Decree dated 3 April 2013, No. 55.

In order to rationalize the process, all transactions intercurring between subjects resident or located within the territory shall be invoiced, and eventually corrected, through the '*Sistema di Interscambio*' system ('*SdI*').

E-transmission of consideration data are as well dealt with by the 2018 Budget Law.

VAT Group

In implementing principles expressed with Skandia Judgement issued by the EU Court of Justice dated 17 September 2014, VAT Group rules have been amended. More in specific:

1. sales of goods/provisions of services performed by a subsidiary or permanent establishment part of a VAT Group to its permanent establishment or to its own subsidiary located abroad are considered as made by the VAT Group to a subject which is not part of such Group;
2. sales of goods/provisions of services performed to a subsidiary or permanent establishment part of

a VAT Group by its permanent establishment or by its own subsidiary located abroad are considered as made to the VAT Group by a subject which is not part of such Group;

3. sales of goods/provisions of services performed to a subsidiary or permanent establishment part of a VAT Group, located in a different EU Member State, by its permanent establishment or its own subsidiary located within the state territory are considered as made to the VAT Group located in the other EU member state by a subject which is not part of such Group;
4. sales of goods/provisions of services performed by a subsidiary or permanent establishment part of a VAT Group, located in a different EU Member State, to its permanent establishment or to its own subsidiary located within the state territory are considered as made by the VAT Group located in the other EU member state to a subject which is not part of such Group.

VAT sanctions

Should an higher tax be applied compared to the actual one, erroneously paid by the transferor – this not excluding the right of deduction within the transferee – the latter is under the obligation to pay an administrative sanction from 250 to 10000 Euro. A penalty of €2 per invoice (capped at €1,000 per quarter) may apply for failing to submit a report or submitting an incorrect one.

VAT rates

2018 Budget Law postpones the gradual increase in the VAT rates to 1 January 2019 – being confirmed the rate as of 22% for year 2018. The standard 22% VAT rate will increase of 2.2 points as from 1 January 2019, of additional 0.7 points as from 1 January 2020 and of additional 0.1 points as from 1 January 2021.

A new rule has been introduced with specific reference to VAT rates applicable to services provided within the scope of recovery of building heritage. It is specified that the assets which are a significant part of the value of the overall supply (supply which is performed within the scope of recovery of building heritage and of removed parts) must be identified by considering the functional autonomy of such elements compared to the main structure. The value of such assets is to be found in the contractual terms signed

by the parties involved, which must include all costs borne for the production of such assets alone (raw material and labor).

It is pointed out that also the provision of services, through intermediaries, related to agreements executed within the scope of exhibitions are now subject to a 10% VAT rate.

GUIDANCE

2.1

Single payment court fees (so called "*contributo unificato*") for extraordinary appeals to the President of the Republic. Ministerial Circular dated 22 December 2017, No. 29/E

With Ministerial Circular No. 29/E, the Fiscal Administration provided clarifications on the payment of court fees (so called "*contributo unificato*") for extraordinary appeals to the President of the Republic notified as from 7 July 2011 (to this extent, see Art. 37, paragraph 6, letter s), of Law Decree dated 6 July 2011, No. 981 which amended the Decree of the President of the Republic dated 30 May 2002, No. 115 – (referred to as "*Testo Unico delle disposizioni legislative e regolamentari in materia di spese di giustizia*", hereinafter the *TUSG*).

The Circular intervenes on the following issues:

a)*entity of the fees*: according to Article 9 of the TUSG, a standard fee has to be paid for bringing an action to the courts, at each judicial level, in civil proceedings, including collective creditor action procedures and non-contentious proceedings, and in administrative and tax proceedings;

b)*impossibility to bring an extraordinary action on tax related matters*. Extraordinary appeals are allowed limitedly to administrative proceedings and cannot be used with reference to tax related matters (see for example, Opinions of the Council of State dated 21 September 2017, No. 2038, 9 February 2017, No. 317 and dated 5 August 2015, No. 2302);

c)*collection procedure:* as envisaged by the TUSG and by Decree of the President of the Republic No. 1199/1971, all activities referring to the collection, recovery and supervision of such fee are performed by the body issuing the deed, or by the competent Ministry. In addition to the above, with Decree dated 27 June 2017, such activities have been entrusted to the Secretary offices of the Council of State sections, as well as to the Secretary of the Council of administrative Justice for Sicily Region. The Circular at issue specified that, in absence of a specific law, the collection of the fee becomes time barred according to the 10 years ordinary term as in compliance with Article 2946 of the Italian Civil Code.

2.2

Tax mediation/tax complaints – Amendments to Article 10 of Law Decree dated 24 April 2017, No. 50 – Clarifications and instructions. Ministerial Circular dated 22 December 2017, No. 30/E

Circular No. 30/E provides clarifications and operational instructions with specific reference to tax mediation and tax complaints pursuant to Article 10 of Legislative Decree No. 50/2017, as converted with amendments by Law dated 21 June 2017, No. 96.

The Article did amend the rules as per Article 17-*bis* of Legislative Decree dated 31 December 1992, No. 546 on tax mediation and tax complaints by increasing from 20.000 Euro to 50.000 Euro the threshold of the limit under which it is obligatory to make an attempt at mediation and complaint before resorting to the tax courts.

Moreover, litigations on taxes considered as EU traditional own resources[3] (see to this extent Ministerial Circular No. 9/E/2012) have been excluded.

Tax mediation/tax complaint for litigation not exceeding Euro 50.000 value

It is specified that the value of the litigation has to be assessed based on the challenged amount, and not on the assessed one, with reference to each deed for which an appeal has been made. More in specific, the value of the litigation has to be determined with reference to each deed challenged and it is equal to the amount of the tax challenged net of interests and eventual sanctions. If the deed is solely on sanctions, or sanctions are the only element of the notice being challenged, the value of the litigation equals to the sum of sanctions alone. Moreover, according to the Financial Administration, tax mediation/complaint can be applied even in the event that, should a partial self-defense action have been triggered, the "*Tax Administration reduced the taxes assessed to an amount lower than the 50.000 Euro limit, provided that the term for filing an appeal before the tax court are still pending (see Circular No. 33/E dated 3 August 2012, paragraph 5.1); this is not possible if the appeal has already been notified*

3 Above mentioned Article 10 added paragraph 1-*bis* to Art. 17-*bis* of Legislative Decree No. 546/1966. Said paragraph envisages that EU traditional own resources as per Article 2, paragraph 1, letter a) of the Council Decision 2014/335/EU *Euratom* dated 26 May 2014 are excluded from tax mediation procedures. Hence, tax mediation/tax complaints cannot be applied to litigations on EU traditional own resources "*consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as contributions and other duties provided for within the framework of the common organization of the markets in sugar*".

(see above mentioned Circular No. 33/E year 2012, paragraph 5.2)". Paragraph 2 of Article 10 clarified that the increase of the threshold to 50.000 Euro applies to deeds notified as from 1 January 2018[4]. Tax mediation/tax complaints can be applied also to litigations whose value does not exceed 50.000 Euro which have been notified as from 1 January 2018 as well as to tacit refusal (refund of taxes, sanctions, interests or ancillary) for which the 90 days term for the filing the request of refund has not been elapsed as at 1 January 2018 (see Art. 21, paragraph 2, of Legislative Decree No. 546/1992).

4 In order to identify the dies a quo of the new law, reference is herein made to the above-mentioned Circular No. 9/E/2012, paragraph 1.5.

CASE LAW

3.1

Assessment – Supreme Court, Judgement dated 18 December 2017, No. 30372

The Supreme Court specified that the assessment based on the inspection performed by a Regional Tax Office Directions (DREs) – given the inspection powers on taxpayers of which non central offices are legally endowed with – does qualify as valid (to this extent, see also Judgement of the Supreme Court No. 15984/2017, as well as Ordinance dated 7 October 2016, No. 20307). More in specific, it is specified that, with reference to assessments on tax matters, "*Regional Tax Office Directions, as established by the Revenue Agency, […] have full powers in terms of access, inspections and verification as stated also by Art. 27, paragraph 13 of Law Decree No. 185/2008 […], the latter placing on such Offices the powers as above outlined to be exercised on tax payers having relevant business volumes*" (See Supreme Court, Ordinance dated 14 October 2016, No. 20856).

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TAX NEWSLETTER | 16-31 DECEMBER 2017

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 DECEMBER 2017.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY TAX DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM