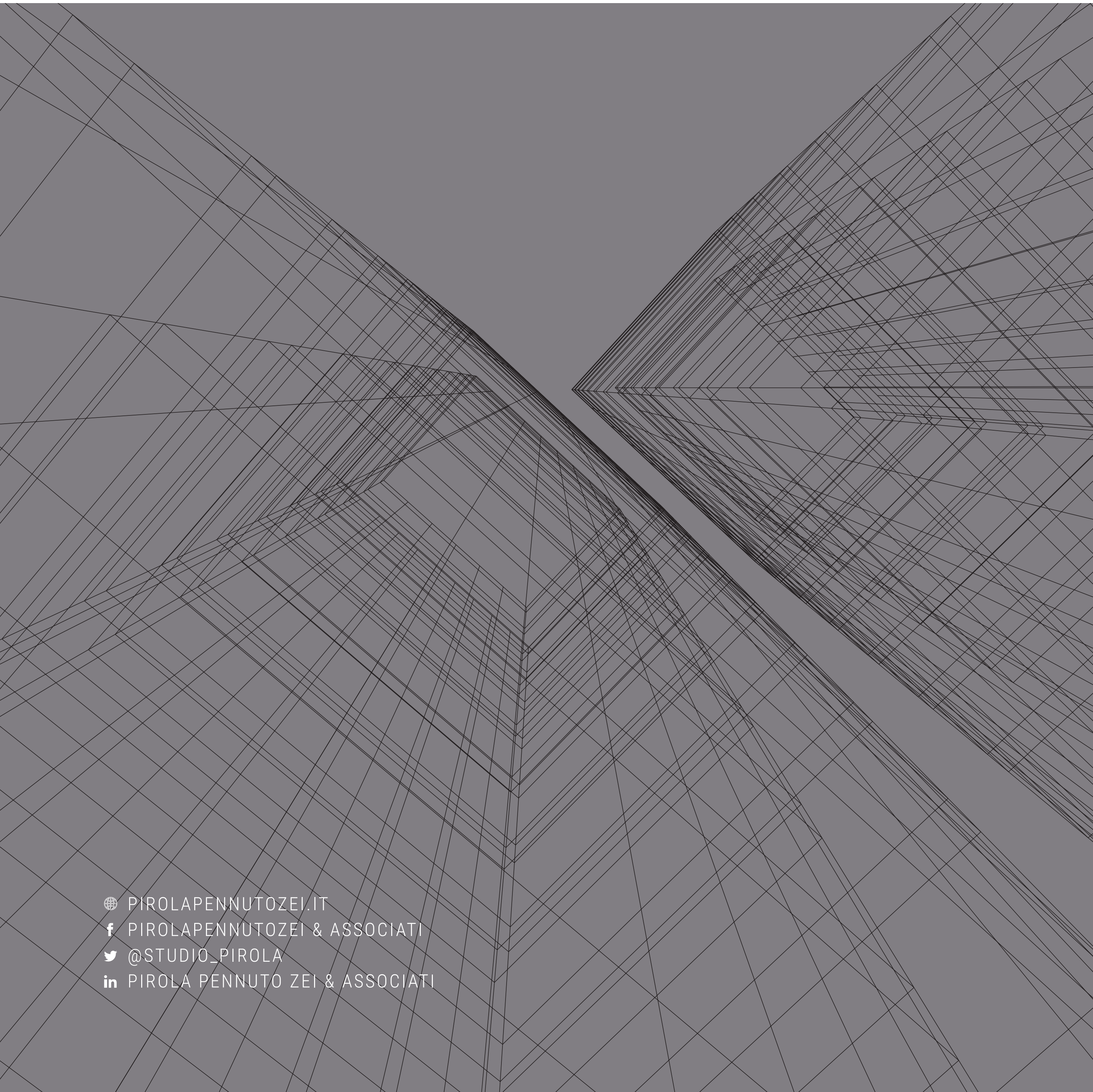
Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

TAX

NEWSLETTER / 16-28 FEBRUARY 2018



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GUIDANCE

1.1
Law dated 11 December 2016, No. 232 (2017 Budget Law), Article 1, paragraphs from 100 to 114. Implementation of Individual Investment Plan (*PIR* in Italian) measures. Ministerial Circular dated 26 February 2018, No. 3

The Revenue Agency, with Circular No. 3/E, provided clarifications with reference to Individual Investment Plans (*PIR*) as per Article 1, paragraphs from 100 to 114, of 2017 Budget Law, as amended by Law Decree dated 24 April 2017 No. 50 and by 2018 Budget Law. The Law[1] envisages that certain capital gains and profits resulting from investments part of individual investments plans having specific features (in terms of obligations and bans) shall be tax exempt. The same shall not be subject to succession fees[2].

The regime applies if the investment *portfolio* consists of financial investments[3] issued by Italian or foreign companies having an Italian branch which met certain criteria.

On 4 October 2017, the Ministry of Economy and Finance published the specific guidelines in which it is stated that the PIR is dynamic, customizable, and flexible, i.e. "*it can adapt to the investment needs and not rigid as the dis-investment is allowed: i.e. it is possible to transfer certain instruments of the PIR without implying the closure of the same PIR (should certain limit be met) and also it is possible for new instruments to be re-invested in the same PIR*".

A summary of provisions of the new law can be found below:

- The tax treatment applies to individuals fiscally resident in Italy which earn capital gains different from the business activity. The residency requirement must be met at the moment of creation or transfer of the plan;

1 The goal is to channel family savings towards financial instruments of Italian based businesses by recognizing tax advantages for long-term investments.

2 The transfer of financial instruments part of the plan in case of death is not subject to succession fee. For the transfer due to *mortis causa*, there is no obligation to include the same in the Succession Declaration. The specific reference to the *mortis causa* clearly implies exclusion of the facilitated regime in case of transfer *inter vivos*, such as in case of donations.

3 Life insurance agreements or capitalization agreements can at the same strength feed the *PIR* (so called "*Insurance PIR*").

- from an objective perspective, the regime includes capital gains (Art. 44 of the Italian Income Tax Act - TUIR)[4] and other financial incomes (Art. 67, paragraph 1, of the TUIR);
- each investor may only invest in one individual investment plan and must not invest more than €30,000 per year or €150,000 on the whole;
- the special tax treatment is conditioned on a minimum 5-year period[5];
- tax fulfillments must be made solely by the intermediary which created/transferred the plan.

The Circular analyses two main issues on the possibility to use the overall weighted average cost criterion in case of disinvestment in stead of the year weighted average cost criterion and of derivative financial instruments.

With specific reference to the last point, it is specified that, if the investments are made through *PIR* complaint UCIs[6], derivative instruments could be included within the 30%[7] free quota, but solely to reduce the risk proper of qualifying investments (so called hedging derivatives) as in compliance with the Measure of the Bank of Italy dated 19 January 2015. According to the Revenue Agency "*even in case of instruments whose general features resemble those of hedging derivatives, if the incomes by the latter generated are higher than the amount needed to cover the losses of qualifying investments within the PIR, the taxation regime (exemption) at issue cannot apply to the surplus*".

The Circular intervened also on certain operative aspects such as:

- undue tax withholdings: the investor is entitled to receive an amount equal to withholdings at source and substitutive taxes eventually applied and not due on incomes from investments part of the *PIR*;

4 Reference is made to Ministerial Circular No. 52/E/2004.

5 An individual taxpayer disinvesting prior to the 5-year "*vesting*" period loses the tax exemption and the substitute tax (plus interests) would be levied with retroactive effect but without penalty. In addition, if the activity is sold or reimbursed, the tax regime at issue remains valid if a new instrument in financial instruments is made no later than after 90 days. On the contrary, taxes plus interests must be paid no later than the day 16 of the month subsequent to the one in which the terms for the reinvestments are due. In order to verify the minimum detention period, if all instruments belong to the same category, the first sold are the one which were first purchased (so called *FIFO* Method) and the year weighted average cost as the relevant cost.

6 See, to such extent, paragraph 7.1 of the Circular. In order for the same to be *PIR* complaint, the UCIs must not include investments in non-cooperative countries.

7 As clarified within the Circular, the amount of financial instruments issued or executed with the same subject or with subjects belonging to the same group cannot exceed the 10% of the amount which feed the *PIR* (so called concentration limit). Such 10% limit refers both to qualifying and non-qualifying investments which must not exceed the 30% free quota of the overall plan. For the sake of example, in presence of a plan where the total investments amounts to 10.000 Euro, 70% of which is from qualifying investments, the concentration limit to be met is equal to a 1.000 Euro (i.e. the 10% of 10.000 Euro).

- capital losses regime: capital losses, losses and negative margins resulting from the sale or refund of financial instruments can be deducted from capital increases, positive margins or incomes generated in the following operations carried out within the scope of the same plan and subject to taxation in the same fiscal period and in the following ones (but not from the fourth). This apply to all capital losses generated within the *PIR*.

1.2
Press Release of the Revenue Agency dated 27 February 2018

With Press Release dated 27 February 2018, the Revenue Agency informed that, due to the extraordinarily severe weather conditions that hit Italy in the past days, penalties for delays in the filing of tax fulfillments might be evaluated. Ad-hoc measures might be issued.

CASE LAW

2.1

Shell Company - Supreme Court, Judgement dated 21 February 2018, No. 4156

Judgement No. 4156 clarified that the Fiscal Administration has the authority to challenge a higher income and the applicability of the shell company regime in case the so called "*profitability test*" is not passed, notwithstanding the fact the business had been leased.

With specific reference to the case at hand, it is stated that the company "*was supposed to have increased the lease so as to try and reach a more proper income threshold*". It is reassessed the concept that Article 30, paragraph 4-*bis*, of Law No. 724/1994 aims at avoiding shell companies by determining minimum incomes, related to certain business assets, which, if not realized, are clear expression of the non-profitability of the company, this "*triggering*" the presumption of a given minimum income (on this, see also Judgement of the Supreme Court No. 21358/2015 and Ordinance No. 26728/2017).

2.2

Tax evasion (i.e. Abuse of Law) – Supreme Court, Ordinance dated 21 February 2018, No. 4148

The Supreme Court, with Ordinance No. 4148, specified that, on the issue of tax evasion and more in specific abuse of law, the transfer of a business at a price which is lower compared to the fees previously recognized for its lease does qualify as abuse of law. Moreover, the Revenue Agency would not be required to provide proof of the illegal incomes received by the transferor, as the tax saving would suffice to that end. The Ordinance establishes that "*with reference to tax issues, the economic transaction whose scope is primarily tax elusion, this shall qualify as abuse of law. Hence, similar transactions do not fall under the classification of abuse of law should there be an explanation differing from tax savings, the financial administrations being under the obligation to prove the existence of abusive intent and how the former is realized through the alteration of classical schemes*" (to this extent, see Judgements of the No. 9610/2017 and No. 4603/2014).

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TAX NEWSLETTER | 16-28 FEBRUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 2018.
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