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TAX

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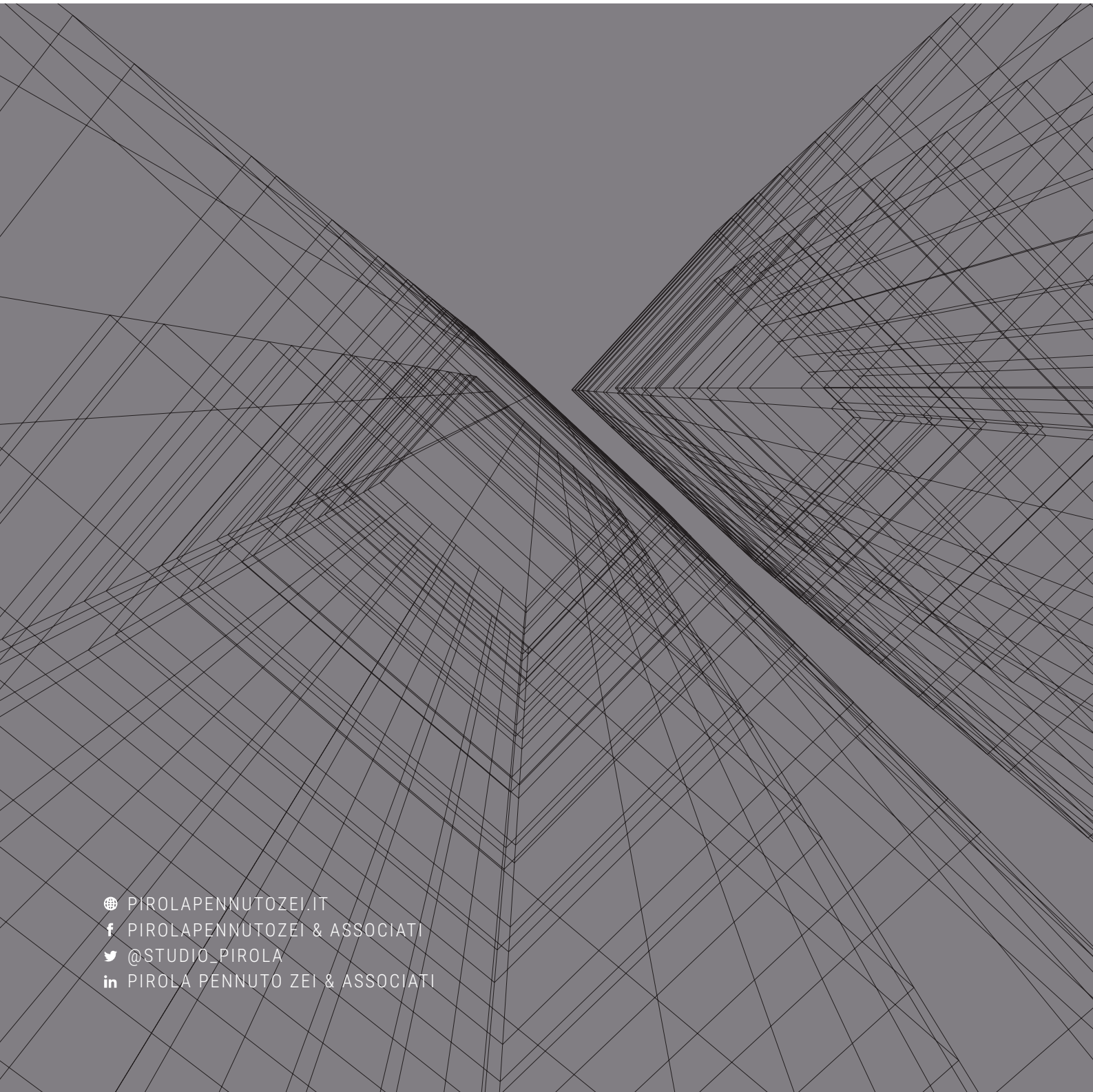

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LEGISLATION

1.1

Procedure to apply articles 6 and 7(2)b) and (3) of Decree Law no. 119, converted with amendments by Law no. 136/2018, relating to *definizione agevolata* procedure of tax litigations in which the Revenue Agency is a party and related to tax payment demands. Enactment of the Director of the Revenue Agency no. 39209/2019

By the above mentioned Enactment, the Revenue Agency approved the form for the application for *definizione agevolata* procedure of tax litigations in which the Revenue Agency is a party and related to tax payment demands, pending before any court, including the Court of Cassation, and sent back to lower courts for reconsideration, according to par. 15 of article 6 of Decree Law no. 119/2018, converted with amendments by Law no. 136/2018. In accordance with such provision, it is allowed to determine the amounts related to the value and the status of the dispute (net of fines and interest) in the event of disputes in which the application originating proceedings before the Local Tax Court has been served on the counterparty by 24 October 2018 and for which at the date on which the application has been filed the proceedings have not been closed with a final decision.

As prescribed by par. 4., by 31 May 2019, for each tax dispute relating to one single deed appealed against a separate application for *definizione agevolata* – exempted from registration tax – must be filed with the Revenue Agency solely via electronic means. Moreover, the sums due may be paid in one amount or in maximum twenty quarterly instalments, according to the deadline prescribed by Decree Law no. 119/2018.
For each single separate dispute, a separate payment must be made.

The Enactment's paragraphs are entitled as follows:

- *approval of the form for the application for definizione agevolata of tax disputes in which the Revenue Agency is a party, related to tax payment demands;*
- *description and contents of the form;*
- *how to obtain the form and print it;*
- *procedure and deadline for filing the application;*
- *procedure and deadline for payment;*
- *completing the definizione agevolata.*

1.2

Procedure to implement the tax credit for the purchase or adjustment of instruments by which electronic storage and transmission to the Revenue Agency of data regarding daily consideration are made – article 2(6)*quinquies* of Legislative Decree no. 127/2015. Enactment of the Director of the Revenue Agency no. 49842/2019

Enactment no. 49842/2019 set out the procedures to implement the tax credit for the purchase or adjustment of instruments by which the electronic storage and transmission to the Revenue Agency of data related to daily consideration are made (see article 2(6)*quinquies* of Legislative Decree no. 127/2015).

This tax credit is due in relation to the expenses incurred in 2019 and 2020 for the purchase or adjustment of the above mentioned instruments and is available for offset only; it is 50% (for each single instrument) of the expense incurred, up to the maximum amount of Euro 250 for purchase and Euro 50 for adjustment. The tax credit must be adopted starting from the first VAT settlement subsequent to the month in which the invoice related to the purchase or adjustment of instruments has been recorded and the related consideration has been paid in a traceable way.

GUIDANCE

2.1

Tax ruling request pursuant to article 11(1), b), Law no. 212/2000, - Non-application of article 10(4) of Ministerial Decree dated 3 August 2017. Reply no. 58 of 18 February 2019

The Tax ruling request refers to the interpretation of the regulations on the Aid to Economic Growth (see article 10 of Ministerial Decree dated 3 August 2017, New decree on Aid to Economic Growth), with specific reference to the adoption of the tax attribute related to 2016. In the case at issue, the appellant requested to anticipate the application of the regulations on the Aid to Economic Growth, based on the interpretation provided by the Ministerial Circular no. 26/E/2017 as well, in which it is specified that with regard to FYs 2016 and 2017 a taxpayer may anticipate the application of the provisions under article 10 of the above mentioned Decree, provided that all provisions are applied.

Specifically, article 10 prescribes the reduction of the basis on which the Aid to Economic Growth is calculated in the hands of the receiving company as to an amount equal to the cash payments made by entities other than those located in the States enabling an adequate exchange of information, even if not belonging to the group. As specified in the tax ruling request: "*[…] in the above mentioned provision the look-through investigation is carried out in the event of investment funds with certain characteristics. In particular, the investigation carried out by the taxpayer in respect of the origin of the contributions, in the event of a regulated investment fund located in States or territories enabling an adequate exchange of information, is not made in respect of the entities which have signed that fund*".

2.2

Tax ruling request pursuant to article 11(1), a), Law no. 212/2000 – Article 15(10), Decree law no. 185/2008. Reply no. 59 of 18 February 2019

The Revenue Agency provided several clarification on the provisions included in article 15(10) of Decree Law no. 185/2008, which prescribe that the taxpayer, by way of derogation from article 176(2-*ter*) of Italian Income Tax Code, may apply taxes wholly or partly to the additional book values of goodwill, business trademarks and other intangible assets subject to substitute tax.

On a general basis, the regimes prescribed by article 176(2-ter) of Italian Income Tax Code and by article 15 of Decree Law no. 185/2008 allow, including in the event of mergers, to make the differences between the additional book values of the assets received by the absorbing company (or surviving company) and the last fiscally relevant value of such assets in the hands of the absorbed (or merged) company fiscally relevant for the purposes of the application of the substitute tax.

As regards the amount of the differences shown (in the case at issue) in the post-merger financial statements of the applicant company and to the audit activity, please refer to the clarification provided in Ministerial Circular no. 9/E/2016, par. 1.1.

For the sake of completeness, please also refer to Reply no. 60 of 18 February 2019 regarding article 15(10) of Decree Law no. 185[1].

2.3

Tax ruling request pursuant to article 11(1), a), Law no. 212/2000 – Territorial relevance for VAT purposes of the services rendered to a foreign real estate investment fund with properties located in Italy – article 7ter of Presidential Decree no. 633/1972. Reply no. 65/2019

The Revenue Agency provided clarification with regard to the legal and tax characterization (for the purposes of article 7*ter*(1) of VAT Decree) of the following services rendered within the scope of *portfolio* management of real estate investments[2]:

1. provide consultancy to management companies with reference to the purchase and sale of real estate;
2. provide consultancy for preparing and implementing the business plan;
3. provide consultancy for the management of litigations and pre-litigation procedures;
4. coordinate the periodical valuation of the *Portfolio;*
5. provide consultancy regarding the *Portfolio* current management.

It was specified that the services under 1 (consultancy for the purchase and sale of real estate) are referable to the real estate investment *portfolio* management, as prescribed by article 31*bis* of the Council Implementing Regulation (EU) no. 282/2011. In the case at issue, such services – they being rendered by the Applicant company to the Fund managed by the asset management company located in another Member State – are not territorially relevant in Italy, pursuant to article 7-*ter*(1)a) of Decree no. 633/1972.

1 The Revenue Agency also provided clarification in respect of the Clients' list in a merger.

2 See article 47 of the VAT Directive and article 31-*bis* of the Council Implementing Regulation (EU) no. 282/2011.

According to the Revenue Agency, in the case at issue, this conclusion cannot be drawn in respect of the services listed under 2 and 5 above.

On this regard, please see the European Court of Justice decisions C-169/04 of 4 May 2006 and C-595/13 of 9 December 2015.

2.4

Tax ruling request pursuant to article 11(1), a) of Law no. 212/2000 - clarification on the e-invoicing obligations. Reply no. 67 of 26 February 2019

Clarification was provided in respect of e-invoicing, with specific reference to the following aspects:

- *scope of application of the regulations on e-invoicing*: as already clarified in the document FAQ no. 30 (published on the Revenue Agency website *www.agenziaentrate.gov.it*), for transactions carried out with non-resident entities identified for VAT purposes (directly or by way of a tax representative), starting from 1 January 2019 VAT taxable entities resident and located in Italy must issue electronic invoices through the interexchange system (*Sistema di Interscambio*) or make the notification of the invoices' information, pursuant to article 1(3bis) of Legislative Decree no. 127/2015;

- *non-resident entities' obligation to register with the interexchange system in order to receive the invoices to be paid:* a non-resident entity has not the obligation to register with the interexchange system since the new rules on e-invoicing do not apply to the purchaser/principal not located in the territory of the State but identified for VAT purposes;

- *non-resident purchasers/principals identified for VAT purposes in Italy may exercise the right to deduct VAT (see article 19 of VAT Decree) solely based on the hard copy of the invoices, regardless of the procedure adopted by the seller/service provider to issue an invoice.*

Moreover, the entities subject to the obligation to file the notification of cross-border transactions are those resident or located in the territory of the State.

2.5

Tax treatment of hybrid capital instruments. Ministerial Resolution no. 30/E of 26 February 2019

Clarification was provided on the tax treatment of financial instruments with either debt and equity characteristics (in the case at issue, hybrid capital instruments, such as Additional Tier 1 - AT1).

The Revenue Agency referred to article 44(2) of Italian Income Tax Code to clarify that the classification and distinction between equity and debt are based on the following conditions:

1. the related remuneration fully consists in a share in the profits of the issuer or any other group company. If this condition is met, the financial instrument can be classified as a share or a share-like instrument;
2. there is an unconditional obligation to pay on maturity date an amount not lower than that stated on the instrument and the holder has no right to share in the company's profits. If these conditions are met, the financial instrument will be similar to a bond.

It has been specified that the classification rules are also valid with reference to the tax position of the subscriber of the financial instrument which applies to the returns earned the tax regime of interest income or of dividends, depending on the fact that the instrument is classified as a bond or a share-like instrument.

In the case at issue, with reference to "*Additional Tier 1*" (AT1) instruments, they are fiscally similar to bonds, since the return is not completely anchored to the profit of the issuer.

Specifically, the remuneration paid by issuers of the AT1 instruments are:

1. deductible, they being interest payable, according to the rules included in article 96 of Italian Income Tax code;
2. non-deductible, as to the portion of interest which either directly or indirectly entails to share in the profits of the issuer or of other group companies or the business in respect of which the financial instruments have been issued (see article 109(9) of Italian Income Tax Code).

On the Revenue Agency's opinion, hybrid instruments with characteristics similar to those of AT1 instruments, if issued by companies of a sector other than financial sector, receive the same tax treatment.

CASE LAW

3.1

VAT – Court of Cassation, Order dated 28 February 2019, n. 5938

By Enactment no. 5938 of 28 February 2019, on VAT refunds, the Court of Cassation clarified that the filling in of Section RX of *Unico* Form, regarding the credit for which the refund is requested, is lawfully considered similar to an agreement declaration to obtain the refund. In particular, such agreement declaration corresponds to the request for refund made in the Tax Return and, even if the VR form necessary to determine the amount of the refund requested in the VAT return is not included therein, entails that the two-year term of forfeiture of the refund does not apply to the case at issue.

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TAX NEWSLETTER | 16-28 FEBRUARY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 2019.
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