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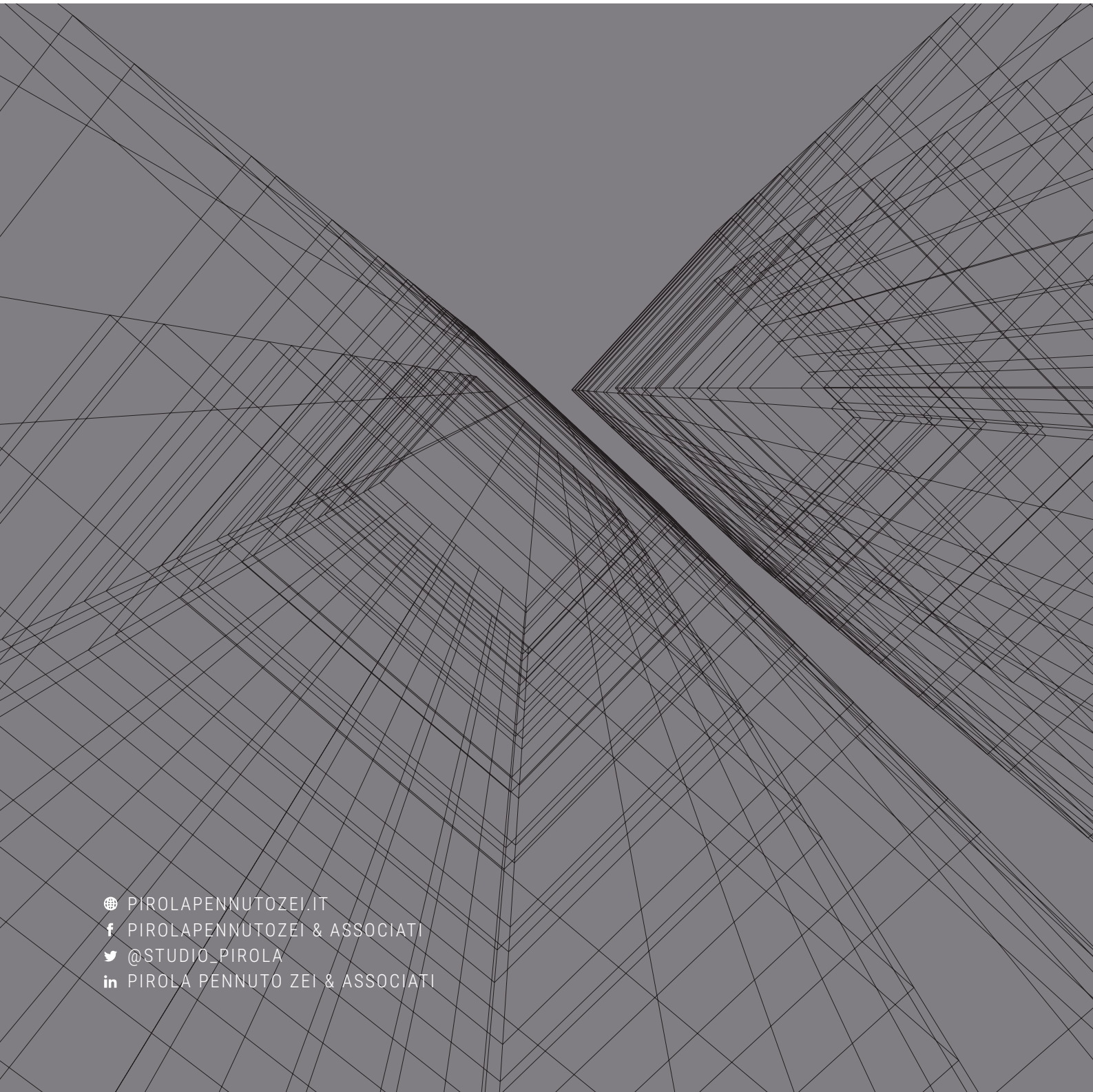
TAX

NEWSLETTER / 16-31 OCTOBER 2019



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LEGISLATION

1.1

Amendments to the enactment of the Revenue Agency's director of 30 April 2018, amended by the enactments dated 21 December 2018, 20 April 2019 and 30 May 2019. Reg. no. 738239 of 30 October 2019

By its Enactment dated 21 December 2018 the Revenue Agency has amended the procedures by which it stores and makes the invoices issued and received available to VAT taxable entities (or the intermediaries appointed by them) and the invoices received to final consumers.
Specifically, on the website of the Revenue Agency a specific function has been made available in order to enable the VAT or the final consumers to use the service for viewing and receiving the e-invoices or a copy of them ("*Consultazione e acquisizione delle fatture elettroniche o dei loro duplicati informatici*").
The above mentioned service is available until 20 December 2019.

1.2

Decree law no. 124 of 26 October 2019, containing urgent tax measures, Official Journal no. 252 of 26 October 2019 ("*Disposizioni urgenti in materia fiscale e per esigenze indifferibili*")

We provide below the main tax changes.

Assumption of another entity's tax liability and prohibition to offset (art. 1)

Article 1 of the Decree law prescribes that, in the event of assumption of another entity's tax liability (as set out in article 8(2) of Law no. 212/2000), the latter cannot be offset against the tax assets of the company which has assumed it. As specified in the Explanatory report, tax liabilities may be assumed and paid off according to the procedures specified in the regulations […] and, with the purpose of preventing fraudulent behaviours, the assumed tax liabilities cannot be offset against the other entity's tax assets […].

Payments made in violation of the above provision shall be considered not carried out and imply fines in the hands of the entities involved.
The related notices regarding fines, unpaid taxes and the related interest can be served by 31 December of the eighth year subsequent to that in which the tax return has been filed; the company assuming the debt (new debtor) is jointly liable with the original debtor for the taxes and interest due.

Termination of a VAT number and prohibition to offset (art. 2)

The new provision is aimed at tackling the undue offsetting against tax credits made by entities holding a VAT number which are subject to the termination of the VAT number or the exclusion from the database prescribed by article 17 of European Council regulation no. 904/2010 of 7 October 2010. Specifically, the new provision prescribes that taxpayers which have been served with the notification of termination of the VAT number cannot carry out the offsetting with tax credits (starting from the date of notification), regardless of the type and amount of the tax credits, including in the case when they have not been accrued in relation to the business conducted under the VAT number terminated and the prohibition remains in force until the VAT number is cancelled.

Moreover, the taxpayers which have been served with the notification of exclusion of the VAT number from the database of taxable entities carrying out intra-community transactions (see article 35(15-*bis*) of the VAT Decree) cannot carry out the offsetting with VAT credits, starting from the date of the notification; this prohibition will remain in force until the irregularities which have caused the notification of exclusion have been removed. In the event of violation of the above provision (an entity carries out the offsetting against tax credits), the F24 Form is considered invalid and a notification is electronically sent to the entity which has filed the F24 Form.

Fighting undue offsetting (art. 3)

The offsetting of the annual VAT credit or the VAT credit related to periods shorter than one year, of tax credits related to income taxes and related surcharges, withholding taxes of income taxes and *IRAP* as to an amount higher than Euro 5,000 per year is allowed starting from the tenth day subsequent to that in which the tax return has been filed or of the request showing the tax credit.

As stated in the Explanatory report, the provision at issue has introduced the following requirements necessary in order for the taxpayers to offset the tax credits related to income taxes and withholding taxes by way of the F24 Form; they must:

- previously file the tax return showing the tax credit, as to an amount higher than Euro 5,000 per year;
- file the F24 Form solely *via* the Revenue Agency's electronic means (this obligation also applies to the entities not holding a VAT number).

The latter requirement also applies to the offsetting of tax credits made by the withholding agents to recover the excess of withholding taxes and refunds/bonuses paid to employees.

In the first year of application of the provisions at issue (i.e. 2020), the above mentioned tax credits (related to the FY closed at 31 December of the previous year), not including the tax credits accrued by the withholding agent, may be offset after the filing of the related tax return (i.e. starting from May).

The Revenue Agency, *INPS* (Italian Social Security Institute) and *INAIL* (Italian authority for compulsory insurance against accidents at work) will establish statutory compliance procedures, with the purpose of facilitating and making the recovery of tax credits unduly offset by way of the F24 Form more effective and immediate.

In the event of failure to file the tax returns, a fine of Euro 1,000 is inflicted for each single tax return not filed. This applies to all tax returns filed starting from March 2020.

Withholding taxes and offsetting in contracts and subcontracts and extension of the reverse charge system in order to tackle unlawful staff leasing (art. 4)

The new provision has introduced article 17-*bis* of Legislative Decree no. n. 241/1997 in order to avoid the failure to pay withholding taxes by contractors and subcontractors or entities anyway dealing with the execution of works and provision of services.
The scope of application of article 17-*bis* is wider than that of article 29 of Legislative Decree no. 276/2003, since it includes contracts and sub-supply, logistic, shipping and transport agreements, where the subject is the assumption of the obligation to do by the contractor.

In particular, it prescribes that in all cases where a principal contracts out a work or a service, the payment of withholding taxes must be made by the principal (a withholding agent resident in Italy).
This obligation only refers to the withholding taxes applied by the employer on the salaries paid to the employee directly involved in the performance of the work.

As prescribed by par. 3 of article 17-*bis* above the amount of the aggregate payment due is paid by the

contracting company and by the sub-contracting entities to the principal at least 5 working days prior to the deadline of the payment to the bank or post office account notified by the principal to the contracting company and by the latter to the sub-contracting companies. The principal must carry out the related payment and cannot carry out any offsetting against its tax credits.

The contracting company in respect of which the consideration which has not yet been paid by the principal has already accrued may request to the latter to carry out the payment of withholding taxes by utilizing such consideration.

Article 17-*bis*(12) has established the sizes of the companies which can opt to adopt the normal procedures of payment of the withholding taxes applied to their employees.

The contracting or subcontracting companies cannot adopt the offsetting in order to pay off the related social security contributions and statutory insurance premiums, accrued in respect of employees or the workers directly involved in the performance of the work. This applies to all social security contributions and insurance premiums accrued during the agreement term in respect of the salaries paid to the staff directly involved in the performance of the work or the provision of the services.

Article 17-*bis*(17) prescribes that, if certain conditions are met, the entities which have received or retained the sums necessary to pay the withholding taxes do not fully or partly comply with the above obligation may be criminally prosecuted.

The provisions at issue shall apply starting from 1 January 2020.

Article 17(6) has also been supplemented, as specified in the Explanatory report of the Decree at issue, in order to fight undue tax saving resulting from the deduction of the VAT debt by the contracting company in respect of the VAT deduction made by the principal and/or consortium. It has introduced the reverse charge system which will guarantee the correct payment of VAT. The reverse charge system must be applied to labour intensive contracts regarding the core business of the principal. This provision will be effective with prior authorization by the European Council of special measures for derogation pursuant to article 395 of Council Directive no. 2006/112/CE of 28 November 2006.

Trust (article 13)

Article 13 has amended articles 44 and 45 of Italian Income Tax Code and resolved certain issues related to interpretation and operation of the taxation of Italian entities receiving income from foreign fiscally opaque trusts located in low-tax jurisdictions.

Specifically, if it is impossible to make a distinction between the portion attributable to the trust's assets and the portion attributable to income, the portion earned from foreign fiscally opaque trusts which might be included in the taxable income (pursuant to article 44, g-*sexies* of Italian Income Tax Code) shall be considered income as to their entire amount.

Amendments to article 96 of Italian Income Tax Code (article 35)

As stated in the Decree's Explanatory report, this article is aimed at defining the exclusion of special purpose vehicles from the deductibility prescribed by article 96 of Italian Income Tax code of the interest payable related to the loans financing long-term public infrastructure projects, which must be understood as those subject to the provisions of Part V of Legislative Decree no. 50/2016.

In the event of incorporation of a special purpose vehicle instrumental to the segregation between assets and liabilities not related to the infrastructural project, the interest payable and the financial costs related to the loans taken out by the project company, including those covered by guarantees, and used to finance public infrastructural projects, as prescribed by Parts III, IV and V of Legislative Decree no. 50/2016, are fully deductible.

Tax incentives on electricity (art. 36)

This article is aimed at resolving the application issues deriving from the prohibition to accumulate the tax incentives related to the electricity produced by photovoltaic plants with tax relief prescribed by article 6(from 13 to 19) of Law no. 388/2000. In particular, the right to continue to benefit from the tax incentives is subject to the payment of an amount determined by applying the tax rate currently in force to the decreasing adjustment made in the tax return in relation to the environment investment tax relief. The entities qualifying for this tax incentive must send a specific notification to the Revenue Agency. The

procedures to send such notification and its contents will be established by an enactment of the Director of the Revenue Agency to be issued within 60 days from the date of entry into force of the Law converting the Decree at issue.

Property tax on offshore oil platforms (art. 38)

Starting from 2020 a property tax will be introduced on the Intelligent Platform Management Interface (IPMI), replacing any other local property tax on such assets. Offshore oil platforms must be understood as platforms for the production of hydrocarbons and located within a certain distance in the territorial sea, as specified in article 2 of the Navigation code.

As specified in the Explanatory report, article 38 prescribes a specific criterion for determining the tax on these assets and for the determination of the taxable base reference must be made to article 5(3) of Legislative Decree no. 504/1992, as referred to in article 13(3) of Decree law no. 201/2011, which prescribes the utilization of book values. This solution entails the simplification of the determination of the taxable base.

The tax is calculated at a rate of 10.6 per thousand.

With regard to 2020 only, the payment of the tax will be made in one amount by 16 December.

Amendments to Legislative Decree no. 74/2000 and to the regulation on the administrative liability of entities (art. 39)

With regard to the tax offences prescribed by Legislative Decree no. 74/2000, the following articles have been amended:

- art. 2 – **Fraudulent tax return by utilizing invoices or other documents of inexistent transactions**;

Imprisonment from four to eight years is inflicted to anyone who reports fictitious liabilities in the tax return with the purpose of evading income taxes or value added tax by using invoices or other documents related to inexistent transactions.

If the amount of the fictitious liabilities is lower than Euro 100,000, imprisonment from one year and six months to six years is inflicted.

- art. 3 – **Fraudulent tax return with the adoption of other deceptions;**

Outside the scope of the cases prescribed by article 2, imprisonment from three to eight years is inflicted to anyone who, in order to evade income taxes or value added tax, carries out simulated transactions or utilizes false documents or other misstaments preventing tax assessment and misleading the Tax authority and reports in the related tax returns assets as to an amount lower than the actual amount or fictitious liabilities or fictitious assets and withholding taxes.

- art. 4 – **False tax return;**

Outside the scope of the cases under articles 2 and 3, imprisonment from two to five years is inflicted to anyone who, with the aim of evading income taxes or value added tax, reports in the return related to such taxes assets as to an amount lower than the actual amount or inexistent liabilities, if the following conditions are jointly met:

a) tax evaded is higher than Euro 100,000, with reference to certain individual taxes;
b) the aggregate amount of the assets subtracted from taxation, including by reporting inexistent liabilities, is higher than 10% of the total amount of the assets reported in the tax return or anyway higher than Euro 2 million.

[…]

- art. 5 – **Failure to file a tax return;**

Imprisonment from two to six years is inflicted to anyone who, in order to evade income taxes or value added tax, does not file one of the tax returns required for such taxes, if the evaded tax is higher than Euro 50,000 with reference to certain individual taxes;
Imprisonment from two to six years is inflicted to anyone who does not file the required tax return of withholding agent, if the amount of the withholding taxes not paid is higher than Euro 50,000.

[…]

- art. 8 - **Issue of invoices or other documents for inexistent transactions;**

Imprisonment from four to eight years is inflicted to anyone who, with the aim of enabling third parties to evade income taxes or value added tax, issues invoices or other documents in respect of inexistent transactions.

[…]

If the untrue amount reported in the invoices or documents, for each single tax period, is lower than Euro 100,000, imprisonment from one year and six months to six years is inflicted.

- art. 10 – **Concealment or destruction of accounting documents;**

Unless the fact represents a more serious offence, imprisonment will be inflicted to anyone who, in order to evade income taxes or value added tax or to enable third parties to evade taxes, fully or partly conceals or destructs the statutory accounting records or documents, thus preventing the reconstruction of income and sales.

- art. 10-*bis* – **Failure to pay withholding taxes due or certified;**

Imprisonment from six months to two years is inflicted to anyone who does not pay by the deadline prescribed for the withholding agent's annual tax return the withholding taxes due based on that tax return or shown in the certification issued to the withholding agents as to an amount higher than Euro 100,000 per tax period.

- art. 10-*ter* – **Failure to pay VAT.**

Imprisonment from six months to two years is inflicted to anyone who does not pay by the deadline for the payment on account related to the subsequent tax period, the value added tax due based on the annual report, as to an amount of more than Euro 150,000 per tax period.

New article 12-*ter* has been introduced into Legislative Decree no. 74/2000 and refers to specific cases of seizure to fight more serious tax offences.

It prescribes that in the event of conviction or application of a sentence pursuant to article 444 of the code of criminal procedure for certain offences prescribed by the decree at issue, other than those prescribed by article 10-*bis* and 10-*ter*, article 240-*bis* of the criminal code applies if:
a) the amount of the fictitious liabilities is higher than Euro 100,000 in the case of the offence prescribed by article 2;
b) the evaded tax is higher than Euro 100,000 in the case of the offences prescribed by articles 3 and 5(1);
c) the amount of the withholding taxes not paid is higher than Euro 100,000 in the case of the offence prescribed by article 5(1bis);
d) the untrue amount reported in the invoices or documents is higher than Euro 100,000 in the case of the offence prescribed by article 8;
e) the undue offsetting refers to credits not due or inexistent higher than Euro 100,000 in the case of the offence prescribed by article 10-quater;
f) the amount of taxes, fines and interest is higher than Euro 100,000 in the case of the offence prescribed by article 11(1);
g) the amount of assets lower than the actual assets or of the fictitious liabilities is higher than Euro 100,000 in the case of the offence prescribed by article 11(2);
h) sentence or application of for the offences prescribed by articles 4 and 10".

As regards the administrative liability of entities, a fine of up to 500 quotas is inflicted to those which file a fraudulent return by using invoices and documents of inexistent transactions, as prescribed by article 2 of Legislative Decree no. 74/2000.

The above provisions will be effective starting from the date of publication in the Official Journal of the Law converting the Decree at issue.

For the sake of completeness, please note that Decree no. 124/2019 included changes to the following issues:

- fighting frauds regarding excise tax (art. 5);

- preventing frauds in the fuel sector (art. 6);
- fighting frauds in the sector of hydrocarbons and other products (art. 7);
- frauds in the purchase of vehicles fiscally used (art. 9).

Reference should also be made to article 17 on the stamp duty on electronic invoices.

GUIDANCE

2.1

Tax ruling request pursuant to article 11(1)(a) of law No 212 dated 27 July 2000. Request for clarification on the deductibility for IRAP of costs in connection with financial instruments relevant for capital adequacy purposes. Ministerial Resolution No 91/E of 29 October 2019

The Revenue Agency issued guidance on the tax treatment for IRAP of the income from Additional Tier 1 financial instruments relevant for capital adequacy purposes.

First of all, article 6(1) of the IRAP decree identifies the P&L account items relevant for the determination of the net revenue of banks and other financial intermediaries, as follows:

a) Brokerage income reduced by 50% of dividends;
b) 90% of the depreciation/amortization of tangible and intangible assets used in the conduct of business;
c) 90% of other administrative costs;
c-*bis*) net value adjustments due to deterioration of accounts receivable from clients.

The Tax Authorities referred to Ministerial Circular No 27/E/2009, according to which the IRAP taxable base of financial entities is determined as the algebraic sum of the P&L account items referred to in article 6 mentioned above; instead, shareholders' equity items are not relevant for this purpose (reference should be made also to Bank of Italy Circular No 262 of 22 December 2005 is).

Furthermore, under IAS 32, the difference between a financial liability and an equity instrument is that (inter alia) a financial liability is a contractual obligation to deliver cash. Specifically, paragraph 35 of IAS 32 provides that "*distributions to holders of equity instruments are recognised directly in equity*". This means that since financial instruments are characterized as capital, the relevant income is regarded as a profit distribution (i.e., dividend).

Thus, income from Additional Tier 1 financial instruments are not relevant for the determination of the net revenue liable for IRAP. In the Revenue Agency's opinion, "*the same conclusions are reached, pursuant to the provisions of article 2(2) of Ministerial Decree 8 June 2011, also in the wording prior to the changes*

introduced by article 1(1)(a)(2) of Ministerial Decree 3 August 2018 since, on the basis of the above considerations, IAS 32 treats the income under analysis as dividends which, as such, are not relevant for IRAP".

2.2

Exemption from withholding tax on interest pursuant to article 26-*quater* of Presidential Decree No 600 of 29 September 1973 – ultimate beneficial owner – pledging of an account receivable. Ministerial Resolution No 88/E of 18 October 2019

The Authorities provided clarification on the withholding tax exemption pursuant to article 26-*quater* of Presidential Decree No 600/1973 for interest payable by the surviving company in a merger leveraged buy-out to the controlling company of the Newco (hereinafter also "*Alfa*") on an intercompany loan granted to partially fund the acquisition of the Target company.

Specifically, clarification had been requested with regard to the notion of ultimate beneficial owner of the interest accruing on a "*shareholding loan*" granted by the non-resident parent to the Italian Newco to fund the leveraged buy-out of the Italian Target company. In the case dealt with by the authorities, Alfa's loan receivable from the subsidiary was pledged to the bondholders who subscribed another bond issue of the Newco to raise further funds for the MLBO.

After commenting upon the conditions for the application of article 26-*quater* of Presidential Decree No 600/1973, the Revenue Agency pointed out that a company was regarded as the beneficial owner when it had title to the income received and derived an economic advantage from the loan. Furthermore, beneficial owners had to genuinely carry out a business (i.e., have strong ties with their country of establishment and not be a mere conduit for the transaction).

For the definition of beneficial owners, reference should be made also to the ECJ decisions dated 26 February 2016 in the joint cases *N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS (C-299/16).*

On this basis, having regard to the particular nature of the transactions, it was specified that Alfa had no title to and availability of the receivables under the loan agreement and as a result could not be regarded

as the ultimate beneficial owner pursuant to article 26-*quarter*(4)(c)(1) of Presidential Decree No 600 of 1973.

2.3

Tax rulings (summary 16-31 October)

We provide below a list of some tax rulings published during the relevant period:

- Article 166-*bis* of the Italian Income Tax Code. Transfer of the residence to Italy (*Ruling No 460 of 31 October*). The Revenue Agency also dealt with the valuation of shareholdings recorded in the financial statements;
- Tax ruling pursuant to article 11(1)(a) law 27 July 2000, No 212 – *Insolvency proceedings. (Operazioni ad esigibilità differita effettuate dall'imprenditore in bonis) – Recovery of the VAT paid by the receiver in insolvency proceedings (Ruling No 455 of 31 October*);
- Tax ruling pursuant to article 11(1)(a) law 27 July 2000, No 212 – Group VAT settlement – effects on the annual credit VAT (*Ruling No 449 of 30 October*). It has been specified that, in the event of payment by instalments of unpaid periodical VAT, the credit VAT in connection with the unpaid amounts shall arise at the time and insofar as payments are made, including after years;
- Tax ruling pursuant to article 11(1)(a) law 27 July 2000, No 212 – clarification on the date of deferred electronic invoices (*Ruling No 437 of 28 October 2019 and Ruling No 436* providing clarification on invoices issued to the public authorities - *Pubblica Amministrazione*);
- Tax ruling pursuant to article 11(1)(a) law 27 July 2000, No 212 – Investments by foreign funds in Italian alternative real estate funds. Article 7(3) of decree law No 351 of 25 September 2001 (*Ruling No 430 of 25 October*);
- Non-application of the withholding tax on interest charged on a loan to Italian companies. Article 26(5-*bis*) of Presidential Decree No 600 of 29 September 1973 (*Ruling No 423 of 24 October 2019*).

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TAX NEWSLETTER | 16-31 OCTOBER 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 OCTOBER 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