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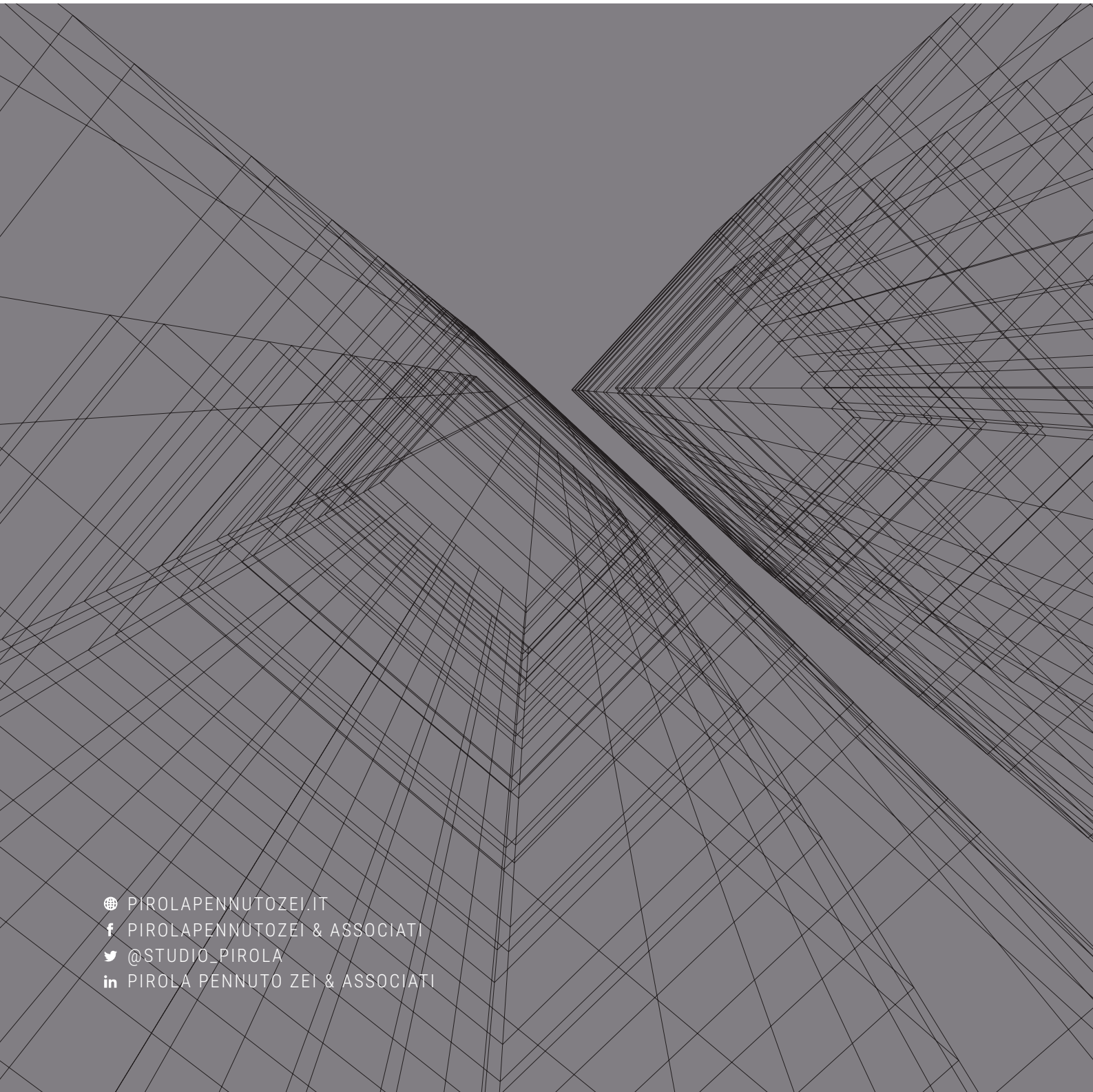
TAX

NEWSLETTER / 16-31 JANUARY 2019



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LEGISLATION

1.1

Acceptance of findings raised in Tax Audit Reports without payment of penalties and interest (*definizione agevolata*). Provisions implementing article 1 of Decree Law no. 119/2018. Enactment of the Director of the Revenue Agency of 23 January 2019, reg. no. 17776/2019

The above mentioned Enactment provided clarification on the procedures to implement *definizione agevolata* procedure, prescribed by article 1 of Decree Law no. 119/2018, converted with amendments by Law no. 136/2018.

On a preliminary basis, please note that:

- the violations regarding each single tax period to which a tax audit report on income taxes and related surcharges, social security contributions and withholding taxes, substitute taxes, *IRAP,* valued added tax on real property abroad, valued added tax on financial assets abroad and VAT served by 24 October 2018 refers may be fully settled without payment of penalties;
- the procedure may be adopted including by taxpayers which have failed to file the tax return for the tax period to which the tax audit report refers without prejudice to the fact that it is however considered a failure to file the tax return. The procedure may also be adopted in the event of violations regarding undue offsetting of tax benefits;
- the procedure may be adopted including by taxpayers which have undergone controls in respect of the violations challenged in the tax audit report after 24 October 2018 (e.g. service of a notice of deficiency, although subsequently a request for a negotiated settlement procedure or an appeal, a notice of hearing to controvert, request or questionnaire are filed in its respect, provided that such procedures have not yet been completed by way of other *definizione agevolata* procedures, or by way of a final judgement at the date of the definizione agevolata procedure regarding the tax audit report);
- the following cases do not imply disallowance: i) filing a request for starting a negotiated settlement procedure, or a brief, regarding the violations challenged in the tax audit report to which the *definizione agevolata* refers; ii) partial amendment completed pursuant to article 13(1) b-quarter of Legislative Decree no. 472/1997;
- *definizione agevolata* procedure cannot be adopted by taxpayers upon which, with reference to the

violations challenged in the tax audit report, a notice of deficiency, *atto di recupero* (notification of tax credits offsetting against tax liabilities), a notice of hearing to controvert, by 24 October 2018 have been served.

Definizione agevolata applies to the tax periods to which the tax audit report refers in respect of which at 31 December 2018 the period for tax assessment is still in progress, also taking into consideration that the number of years open to tax audit has doubled. Limitation period for the tax assessment of the tax periods and taxes to which the *definizione agevolata* refers, solely for tax periods until 31 December 2015, is extended to two years.

For the purposes of *definizione agevolata,* tax payers must file the related return – or returns if the filing is made autonomously – by 31 May 2019 according to the procedures set out for the tax period to which the *definizione agevolata* refers; in order to amend and supplement the information already reported, the new return must include solely the additional taxable bases, additional taxes, as well as the elements deriving from the violations challenged in the tax audit report.
Please note that the taxpayer cannot deduct the losses carried over further to those utilized in the original return from the additional taxable bases emerging after the filing of the return necessary for *definizione agevolata.*

Definizione agevolata is completed by filing the above mentioned return and paying by 31 May 2019 the taxes or reversing the credit unduly offset in one amount or paying the first instalment, without the application of the related interest and fines (see article 17(1) of Legislative Decree no. 472/1997). The payment of the sums may be made in one amount or with maximum twenty quarterly instalments of the same amount; offsetting is not allowed.

As specified in Par. 6 of the Enactment, the effects of a completed *definizione agevolata* procedure prevail over the tax assessment, if any, carried out after 24 October 2018, referring to the violations challenged in the tax audit report, including in the event of failure to appeal against and expiration of the deadline. On the contrary, they remain effective if the *definizione agevolata* has not been completed.

The Enactment has amended Par. 5 as well, which deals with the procedures and terms for *definizione agevolata* procedure for tax audit reports related to VAT violations. Definizione agevolata procedure may be adopted by taxpayers upon which the Customs office has served a notice regarding the violations

after 24 October 2018, provided that the proceedings have not yet been completed with other forms of *definizione agevolata* or with the issue of a final judgment at the date of the *definizione agevolata* of the tax audit report. *Definizione agevolata* is also allowed in the event of filing of a brief regarding the violations challenged in the tax audit report to which the said procedure refers.

Ministerial Resolution no. 8/E/2019 has established Tax codes for the payment, through F24 Form, of the taxes and social security contributions due and paid as a result of *definizione agevolata.*

GUIDANCE

2.1

Tax representative of a foreign intermediary. Ministerial Resolution no. 5/E of 16 January 2019

The Revenue Agency issued Resolution no. 5/E/2019 providing clarification on the tax representative of a non-resident intermediary having a permanent establishment in Italy (i.e. a bank authorized and supervised by the Bank of England).

The Resolution also commented on the following cases:

- investment income deriving from the shareholdings in collective investment undertakings governed by foreign laws – other than real estate investment trusts – subject to the withholding tax of 26%;
- application of the non-discretionary investment portfolio regime, prescribed by article 6 of Legislative Decree no. 461/1997 (see Ministerial Circular no. 165/E/1998), to foreign intermediaries;
- investment income deriving from the shareholding in real estate investment funds and real estate investment companies with fixed capital governed by Italian law;
- profits paid by real estate investment listed companies;
- permanent establishment and tax representative. The Resolution has clarified that for VAT purposes, in compliance with European provisions, when a company holds a permanent establishment, it is not allowed to hold a tax representative as well, since the non-resident entity is already represented from a tax perspective in Italy by the permanent establishment.

With reference to the case at issue in the Resolution, it has been specified that if the permanent establishment does not carry out the holding of securities (for which it plays the role of withholding agent), the non-resident intermediary may appoint a tax representative; the latter will file 770 Form by filling in the sections related to the foreign entity separately from those regarding withholding taxes and the substitute taxes paid with reference to its activity as an intermediary, by reporting the fiscal code attributed to the Italian permanent establishment.

2.2

Article 10-*bis* of Law No. 212/2000 and article 1 of Decree Law no. 201/2011. Anti-abuse evaluation of a re-investment in a merger leveraged buy-out. Article 11(1), a) and b), Law no. 212/2000, n. 212. *Principio di diritto* n. 1 of 29 January 2019

"*In a merger leveraged buy-out involving multi-tiered special-purpose vehicles, resident in Italy and abroad, aimed at acquiring the shares of a listed target company either by the previous majority shareholders and in the market, the re-investment of a portion of the liquid assets deriving from the above transfer by the previous majority shareholders to the acquiring special-purpose vehicle, through other special-purpose vehicles resident in Italy, with the purpose of providing it again with the liquid assets necessary for acquiring the remaining shares in the market, represents a case of abuse of law pursuant to article 1 of Decree Law no. 201/2011 and article 10-bis of Law no. 212/2000.*"

According to the Tax Authority, the re-investment by the shareholder entails an undue tax benefit due to the artificial creation of an amount relevant for the purposes of the aid-of-economic-growth in the hands of the special-purpose vehicle. Specifically, although the re-investment results in an increase of the net equity of the special-purpose vehicle, it does not causes the introduction of new financial resources, thus violating the purpose on which the regulations on the aid to economic growth are based. Moreover, as regards the requirement of economic substance, the re-investment is a circular flow of funds[1], not adequate to produce any significant effect other than the obtainment of an undue tax benefit (i.e. artificial creation of an amount relevant for the purposes of the aid to economic growth).

In the case at issue, more linear alternative procedures required the re-investing shareholder to offset the trade receivable deriving from the sale of the shares in the target company up to the amount to be re-invested in the special-purpose vehicle, without prejudice to all other transactions carried out and the pyramid organizational structure.

1 The flow of funds in a re-investment (from the special-purpose vehicle to the re-investing shareholder and from the re-investing shareholder to the special-purpose vehicle) may be subject to anti-abuse evaluation.

CASE LAW

3.1

Tax fines – Court of Cassation, Decision no. 2870 of 31 January 2019

By decision no. 2870 dated 31 January 2019, the Court of Cassation issued a decision regarding the reduction of fines for the collection of the sums due as a result of automated controls, as prescribed by article 2 of Legislative Decree no. 462/1997.

In particular, it specified that with regard to the violation of tax regulations, the pre-condition for the reduction of fines (pursuant to article 2 above) is that the sums due have been paid after automated controls, i.e. controls made by the Tax office, within 30 days from the notification of the outcome of the settlement or from the service of the tax demand, in the event of failure to file *avviso bonario* (notification of additional tax due following automated verification of the tax return), if such failure does not entail the nullity of the tax demand issued but is a mere irregularity.

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TAX NEWSLETTER | 16-31 JANUARY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JANUARY 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