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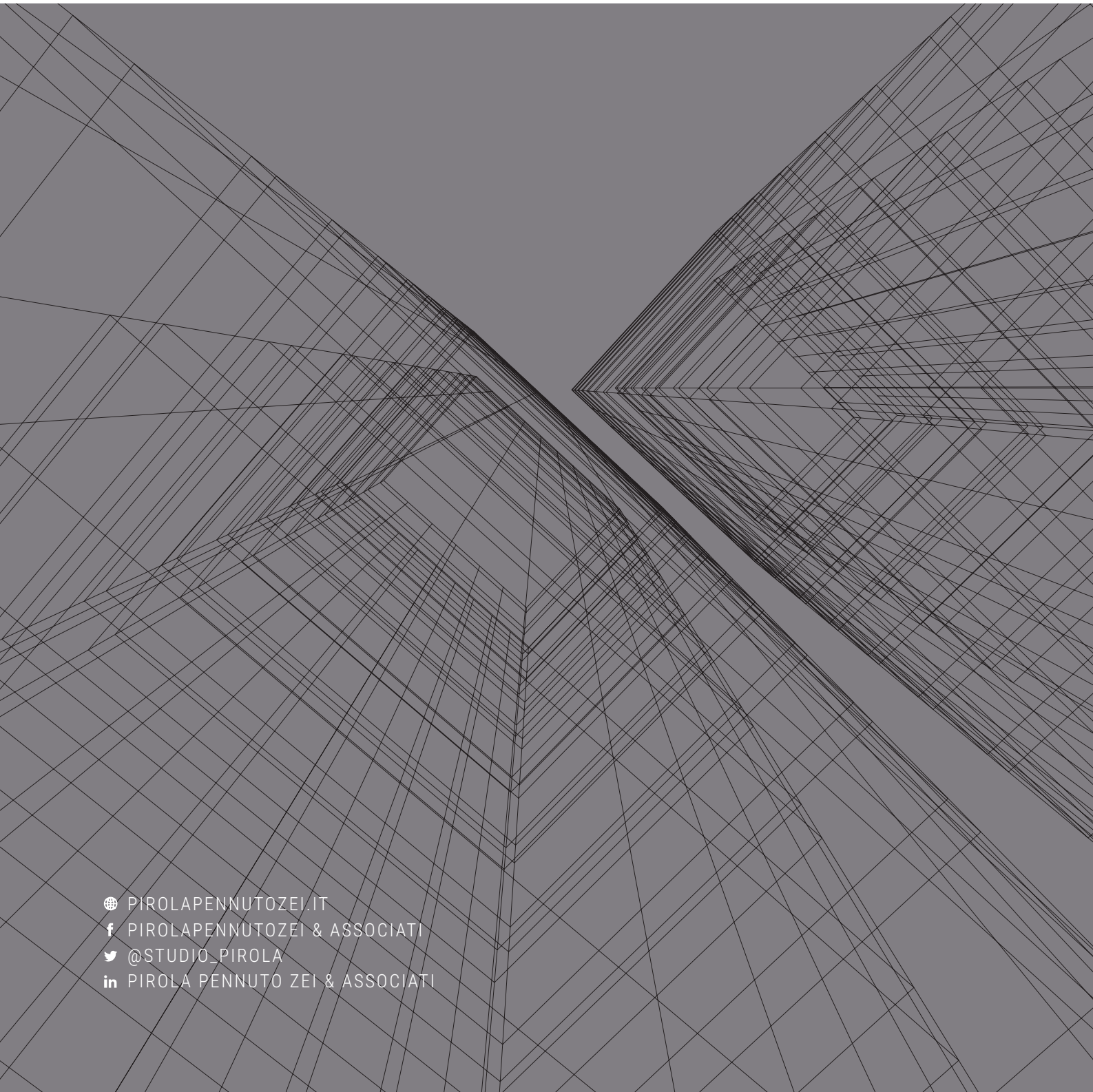
TAX

NEWSLETTER / 16-31 MAY 2019



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LEGISLATION

1.1

Law no 41 of 20 May 2019 converting, with amendments, Decree Law No 22 of 25 March 2019 containing urgent measures to assure the security, financial stability and integrity of markets as well as the health protection and right to stay of Italian and UK nationals in the event of Brexit (Italian Official Journal No 120 of 24 May 2019)

Law no 41 of 20 May 2019, published in Italian Official Journal No 120 of 24 May 2019, converted with amendments Decree Law No 22 of 25 March 2019 containing Urgent measures to assure the security, financial stability and integrity of markets as well as the health protection and right to stay of Italian and UK nationals in the event of Brexit.

Chapter 2, Section 1 contains the rules applicable in the event of no-deal Brexit.

From a tax perspective, article 13 provides that until the end of the transitional period (i.e., the period between the date of Brexit and the end of the eighteenth month thereafter), the domestic tax rules applicable to the UK as an EU Member State will continue to apply. The provisions deriving from the implementation of EU Directives and Regulations concerning VAT and excise tax will continue to apply insofar as compatible.
One or more Decrees by the Ministry of Economy and Finance shall establish the manner and the deadline for the implementation of these provisions, without further cost for the Italian treasury.

Provisions of interest include the following:

- *article 3 – Provisions of services and activities in Italy by UK nationals after the date of Brexit;*
- *article 4 – Termination of the services and activities by UK nationals working in Italy;*
- *article 5 - Provisions of services and activities in the UK by Italian nationals after the date of Brexit;*
- *article 6 – How will operators of Italian and UK trading venues do business after the date of Brexit?*
- *article 7 – Out-of-court settlement of dispute;*
- *article 8 – Protection of depositors and investors;*
- *article 9 - How will UK insurance companies do business in Italy after the date of Brexit?*
- *article 10 - How will UK insurance (including ancillary insurance) or reinsurance brokers do business in Italy after the date of Brexit?*

- *article 11 - How will Italian insurance or reinsurance companies do business in the UK after the date of Brexit?*
- *article 12 – Provisions concerning the investment limitations for pension funds*

To provide a complete picture, we inform you that the Bank of Italy issued a press release on 27 March 2019 ("*Two communications, specifically addressed to Italian intermediaries operating in the UK and to UK intermediaries operating in Italy, provide instructions regarding the requirements contained in Decree Law 22/2019"),* and two communications named *"Instructions to Italian intermediaries operating in the UK"* and *"Instructions to UK intermediaries operating in Italy*".

1.2

Enactment of 30 May 2019. Amendment to the Revenue Agency Director Enactment of 30 April 2018, as amended by Revenue Agency Director Enactments of 21 December 2018 and 29 April 2019. Ref. No 164664/2019

The Enactment provided that the functionality to apply for the consultation and upload of e-invoices or their duplicates, is available between 1 July 2019 and until 31 October 2019.
It has been specified that "*[…] also the deadline for deletion of the .xml files of electronic invoices, provided under point 8-bis of the 30 April 2018 enactment shall be amended if the consultation service is applied for. It is therefore established that cancellation shall be made within 60 days – instead of 30 days as initially provided – from the end of the consultation period, i.e. 31 December of the second year subsequent to that in which the e-invoice was received by Sistema di Interscambio (the interchange service – SdI)*".

1.3

Enactment No 167878/2019 of 31 May 2019. Application of the regime pursuant to article 24-*ter*(1) of Presidential Decree 22 December 1986, No 917 (Italian Income Tax Code)

The Enactment sets forth the practical steps for the application of the regime pursuant to article 24-*ter*(1) of the Italian Income Tax Code, introduced by article 1(273) of law No 145 of 30 December 2018 *(Italian Budget Act 2019*). This provision introduced, as an alternative to standard rules, an optional tax regime for individuals who transfer their tax residence to any Municipality in the following regions: Sicily, Calabria, Sardinia, Campania, Basilicata, Abruzzo, Molise and Apulia, with a population of no more than 20,000, provided that they were not resident in Italy in the five fiscal years prior to the effective year of the option.

The regime provides for the application of a substitute tax rate of 7% for each of the years in which the option is in place.

The Enactment dealt with the following points:

- *exercise of the option;*
- *cessation of the effects of the option, revocation of the option and forfeiture of the, regime;*
- *payment of the tax.*

GUIDANCE

2.1

Incorrect "*seal of approval*" (*visto di conformità*) - Article 39(1)(a) of Legislative Decree No 241 of 1997. Circular No 12 of 24 May 2019

The Circular provided clarification on the matter of the affixing of an incorrect "*seal of approval*" *(visto di conformità*) - Article 39(1)(a) of Legislative Decree No 241 of 1997, as amended by article 6 of Legislative Decree No 175 dated 21 November 2014 and, more recently, by article 7-*bis* of Decree Law No 4 dated 28 January 2019, converted with amendments into Law No 26 dated 28 March 2019 (which entered into force on 30 March 2019).

Pursuant to current legislation, if an incorrect "*seal of approval*" is affixed on a Form 730 (the income tax return for employees and retirees), the professional accountant, the *Responsabile dell'Assistenza Fiscale* (person in charge of providing assistance with the preparation of the return) and, jointly with him/her, the tax assistance center (*Centro di Assistenza Fiscale – CAF*) are liable to the payment of 30 per cent of the additional tax assessed, except in the event of the taxpayer's fraud or gross negligence.

Specifically, the Circular provided clarification on the following points:

- timeframe of application of the rule;
- filing of an amended return or of the amended information. It has been specified that if, following the filing of the return, the CAF or the professional accountant were to point out errors resulting in the seal of approval on the return being incorrect, it/he shall inform the taxpayer accordingly, in order that the an amended return may be prepared and filed with the Italian Revenue Agency.

2.2

Rulings (16 - 31 May 2019 summary)

During the above period, the Italian Revenue Agency filed several Rulings on the provisions concerning "*pacificazione fiscale*" (negotiated settlement procedure with the tax authorities pursuant to Decree Law No 119/2018 converted, with amendments, into Law No 136 dated 17 December 2018).

Ruling No 144 of 20 May deals with *definizione agevolata* (forgiveness of penalties and interest on

outstanding taxes due, subject to full payment of tax amount and to relinquishing the right to appeal) of tax audit reports (*Processi Verbali di Constatazione*) pursuant to article 1 of Decree Law No 119/2018. In that specific case it was considered that the violation punished pursuant to article 6(9-*bis*.1), third period, of Legislative Decree No 471/1997 could be settled by a negotiated settlement of the entire tax audit report. The mentioned paragraph 9-*bis*.1 regulates the irregular payment of VAT when reverse charge should have been applied but the ordinary procedure was applied instead.
Still on the matter of VAT, there is Ruling No 145 of 20 May (on the *definizione agevolata* of tax audit reports and the right to VAT deduction), concerning the case of a company which was charged with receiving sales invoices for transactions subject to the ordinary VAT regime instead of the reverse charge regime, as part of a VAT fraud scheme.

On the *definizione agevolata* of tax disputes (pursuant to article 6 of Decree Law No 119/2018) we point out the following Rulings:

- No 156 of 24 May;
- No 157 of 24 May;
- No 58 of 27 May (on the *definizione agevolata* of ongoing tax disputes and the refund of substitute tax paid in order for a merger loss allocated to know-how to become tax relevant);
- No 165 and No 166 of 28 May (*definizione agevolata* of tax disputes within the scope of a tax group);
- No 174 of 31 May;
- No 175 of 31 May;
- No 177 of 31 May (on the *definizione agevolata* of ongoing tax disputes and the "*Tremonti ambiente*" environmental incentive).

Ruling No 148 of 20 May provided clarification on the anti-abuse assessment of a reorganization implemented through and exchange of shareholdings by way by contribution, a total demerger and a further exchange of shareholdings by way of contribution. The transaction consisted of the following steps:

- an exchange of shareholdings by way of contribution between two individuals who jointly transfer their respective right of usufruct and bare ownership of the shareholding in company *ALFA* to company *BETA* (subject to the special tax regime "*a realizzo controllato*" referred to in article 177(2) of the Italian Income Tax Code);
- a total demerger of company ALFA, neutral for tax purposes pursuant to article 173 of the Italian Income Tax Code;

- a further exchange of shareholdings by way of contribution made by the same two individuals who jointly transfer their respective right of usufruct and bare ownership of the shareholding in company GAMMA to company BETA (again, subject to the special tax regime "*a realizzo controllato*" referred to in article 177(2) of the Italian Income Tax Code).

The intended goal of the reorganization being the shortening of the chain of ownership, in the Italian Revenue Agency's opinion all three legal arrangements set out above – tax neutral for different reasons – were consistent from a tax perspective.

Ruling No 168 of 29 May analyzed a corporate reorganization, with a particular focus on the VAT treatment of regional contributions. In line with EC provisions, it has been specified that a contribution is relevant for VAT if made in exchange for an obligation to give, to do, not to do or to allow (i.e., arrangements with bilateral obligations) (as per Ministerial Circular No 34/E of 21 November 2013, Ministerial Resolutions No 21/E of 16 February 2005 and No 16/E of 27 January 2006).

With regard to VAT, we point out the following rulings:

- Ruling No 176 of 31 May, on the matter of the recovery of VAT as a result of a tax audit, pursuant to article 60(7) of the VAT decree (Ruling No 84 published on 26 November 2018, and Ministerial Circular No 35/E/2013 provided clarification on the right to recover VAT - *diritto di rivalsa* – and the tax audit and assessment process);
- Ruling No 172 of 30 May on the VAT credit notes and the obligation to issue e-invoices through the SdI;
- Ruling No 164 of 28 May, providing clarification on whether deferred payment of VAT in transactions made and invoiced before the execution of an agreement with creditors but paid for after the procedure was implemented, should be regarded as accounts receivable arisen at the time or in relation with insolvency proceedings, or as an account receivable arisen before the declaration of bankruptcy. The Italian Revenue Agency specified that, on the basis that the transactions in questions are considered carried out at the time of issuing the invoice, pursuant to the ordinary criteria established by article 6 of the Italian VAT Code, the Italian Treasury's VAT receivable cannot be deemed to have arisen "a*t the time or in relation with insolvency proceedings*", although payment for the service or sale was made after the start of the insolvency proceeding. Therefore, being an account receivable arisen before the declaration of bankruptcy, it will be paid for at the time of the final distribution plan, in the order

of priority determined according to the principles regulating the equal treatment of creditors (*par condicio creditorum*);
- Ruling No 155 of 22 May, regarding the special VAT regime for the publishing sector, with particular regard to the change of the tax rate / *variazione dell'imposta* due to non-payment in connection with insolvency proceedings.

Ruling No 160 of 27 May provided clarification on the tax treatment of the extraordinary income from the reduction of accounts payable as part of a certified restructuring plan / piano attestato. Article 88(4-*ter*) of the Italian Income Tax Code provides that if a certified restructuring plan pursuant to article 67(3) (d) of Royal Decree No 267/1942 is implemented, the reduction of the company's liabilities does not constitute taxable extraordinary income as to the amount exceeding the sum of specific items. It has been specified that the non-taxable portion of the extraordinary income is determined by deducting from the extraordinary income (i) the losses for the period and accumulated losses, pursuant to article 84, without considering the 80 per cent limit, (ii) the losses transferred to the domestic tax group pursuant to article 117 and not yet utilized, (iii) the losses deducted in the period and (iv) the excess - for the purposes of the aid to economic growth, ACE benefit - interest expense and similar financial costs referred to in article 96(4) of the Italian Income Tax Code.

To provide a complete picture, we bring to your attention also Rulings Nos 152 and 153 of 22 May on the tax credit provided by article 20 of Legislative Decree No 60 of 26 February 1999 in respect of movie theaters.

2.3

Specific Italian Revenue Agency guidance (*Principi di diritto*) (16 - 31 May 2019 summary)

We list below guidance issued by the Italian Revenue Agency on specific issues (*Principi di diritto*):

- No 16 of 29 May (*Clarification on the criteria for the identification of low-tax jurisdictions pursuant to article 167(4) of the Italian Income Tax Code - version in force until 11 January 2019*);
- No 17 of 29 May 2019 (*Correct application of article 89(3) of Presidential Decree No 917 of 22 December 1986, in the light of the changes to the legislation on the taxation of foreign-source income*);

- No 18 of 29 May (*Treatment of profits from the permanent establishment of a non-resident subsidiary*).

Principio di diritto No 16 pointed out that "*for the purposes of article 167(4) of the Italian Income Tax Code (version in force until 11 January 2019), Circular No 35/E of 4 August 2016 clarified that special regimes are regimes constantly affording a beneficial treatment resulting in taxation less than half the Italian taxation. Pursuant to the same Circular, in the event that the special regime is only "partially" used, i.e., it concerns particular aspects of the business activity carried out by the foreign entity as a whole, it is necessary to adopt a "prevalence test to identify the activity with the higher amount of ordinary revenue". In this respect, if the non-resident subsidiary carries on business in a Country which provides for a territorial regime exempting all foreign-source income from taxation, the prevalence test will consider all foreign-source income, it being immaterial whether such income is generated through a permanent establishment or otherwise*".

Principio di diritto No 17 dealt with the correct application of article 89(3) of the Italian Income Tax Code, in light of the legislative changes on the taxation of foreign-source profits. It commented paragraph 1007 of the Italian Budget Act 2018 (Law No 205 of 27 December 2017) pursuant to which profits received as of the fiscal year subsequent to that in progress at 31 December 2014 are not considered to be sourcing in low-tax jurisdictions if:

- They accrued in fiscal years prior to that in progress at 31 December 2014, when the paying subsidiaries were resident in countries not included in the "*Black List*" enclosed with Decree 21 November 2001 (the only basis for identification of low-tax jurisdictions at that time);
- They accrued in fiscal years subsequent to that in progress at 31 December 2014 in low-tax jurisdictions and were subsequently received in fiscal years in which the conditions laid down in article 167(4) of the Italian Income Tax Code[1] were met.

As specified, the new rule only applies in those cases where profits of prior years are distributed and the subsidiary's state of residence has changed its status to low-tax jurisdiction.

As concerns the tax treatment of the profits paid by the permanent establishment of a non-resident subsidiary (*Principio di diritto No 18*), it has been clarified that in order to determine the tax regime of profits distributed by a subsidiary resident in non-low-tax jurisdiction with a permanent establishment in a low-

1 Non-resident subsidiaries must be liable to effective taxation lower than half that they would have been liable to had they been resident in Italy, and more than one third of the income generated by them must be accounted for by passive income (these conditions are to be met concurrently).

tax jurisdiction, it is necessary to separate the profits generated by the subsidiary and those generated by the permanent establishment. The clarification provided in Ministerial Resolution No 144/E/2017 applies.

Principio di diritto No 15 of 29 May provided clarification on the determination of the foreign tax credit pursuant to the provisions of article 23, paragraph 3, of the Italy/US double tax treaty.
An opinion was requested on the determination of the foreign tax credit pursuant to the provisions of international Double Tax Treaties, in connection with royalties on which the licensee's home country (i.e., United States) levies an exit WHT, whereas Italy, as the licensor's home country, levies reduced taxation by operation of the beneficial patent box regime.
In the Italian Revenue Agency's opinion, as a result of the non-inclusion of the foreign-source income (royalties) in the Italian taxable income, no tax credit can be determined. For consistency reasons, this principle applies also to foreign-source income only partially included in the Italian aggregate taxable income, and to the reduced taxation of a portion of foreign-source income in connection with the patent box regime, since it is believed that in the circumstances the portion of income which is not included in the Italian taxable base does not meet the conditions for the creditability of foreign taxes in Italy.

Ruling No 167 of 28 May also dealt with the matter of article 165 of the Italian Income Tax Code.

CASE LAW

3.1

***Esterovestizione* (establishment of fictitious residence abroad by a company that carries on business and pursues its corporate objects in Italy) – Tax residence - Italian Supreme Court, Tax section, decision No 14527 of 28 May 2019**

In its decision No 14527 of 28 May 2019, the Italian Supreme Court ruled on the matter of the *esterovestizione* of companies, referred to in article 73 (5-*bis*) of the Italian Income Tax Code.

According to the Italian supreme court judges, the fact that the directors are resident in Italy or in the UK does not per se indicate that the foreign company's effective place of management is in Italy or in the UK; the conduct of a shareholding management activity only is inherent in the company's character as holding company (the matter was also dealt with in decision No 2869 of 7 February 2013).

3.2

Liability to tax - Italian Supreme Court, Decree No 10706 of 17 April 2019

In Decree No 10706 of 17 April 2019, the Italian Supreme Court clarified that the expression used in the Italy/Switzerland double tax treaty for the taxation of a resident individual according to the OECD Model Tax Convention - person "*assoggettata ad imposta nello stesso Stato*" - should be intended as a person "*fully liable to tax*", regardless of the actual tax charge suffered by the individual in question (the matter was also dealt with in Italian Supreme Court decision No 26377/2018).

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TAX NEWSLETTER | 16-31 MAY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 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