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TAX

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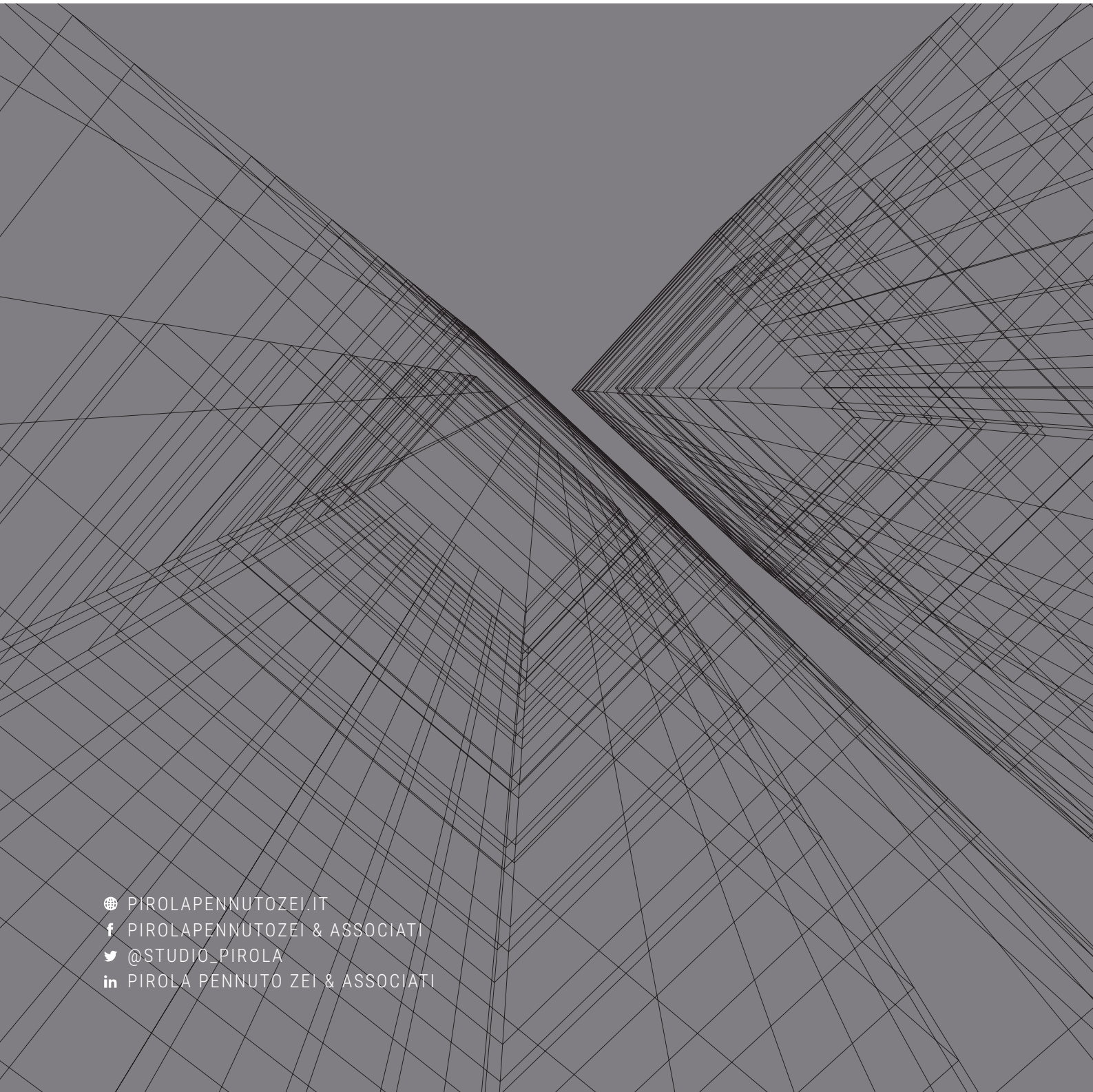

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GUIDANCE

1.1

Ministerial Resolution No 56 dated 6 June 2019. Application of the transitional regime to profit distributions resolved by 31 December 2017 - Article 1(1006) of law No 205 of 27 December 2017

The Resolution deals with the tax treatment of profits from qualifying shareholdings, owned by private individuals other than sole proprietors, pursuant to the changes introduced by the 2018 Budget Act. Specifically, the income from capital deriving from such shareholdings is subject to the same rate (26%) and to the same taxation (withholding tax as final liability or substitute tax) as income from capital deriving from non-qualifying shareholdings.

As stated in article 1(1005) of the 2018 Budget Act, this provision applies to income from capital received as of 1 January 2018; however, in paragraph 1006, the law introduced a derogation from the general principle, i.e. a transitional regime aimed at not penalizing shareholders who own qualifying shareholdings in companies with earnings reserves allocated up to 31 December 2017. In more detail, profit distributions in respect of qualifying shareholdings in companies and entities subject to corporate income tax (IRES), made out of profits earned until the fiscal year in progress at 31 December 2017 and resolved between 1 January 2018 and 31 December 2022, will continue to be subject to the regime provided Ministerial Decree dated 26 May 2017.

It has been specified that although the rule refers to profit distributions between 1 January 2018 and 31 December 2022, pursuant to a logical interpretation of the provision the transitional regime applies also in respect of profits distributed pursuant to resolutions adopted until 31 December. Therefore, it ensues that also profit distributions resolved by 31 December 2017 are subject to the prior tax regime, according to which taxation varies depending on the year in which the earnings arose (40%, 49.72% and 58.14%).

In practical terms, the paying company shall separately report (in the schedule of capital and reserves - *Prospetto del capitale e delle riserve* – of Section RS of the income tax return of corporations) the earnings reserves formed out of profits generated:

- until the year in progress at 31 December 2007;
- in the period between the year subsequent to that in progress at 31 December 2007 and the year in progress at 31 December 2016;

- in the period between the year subsequent to that in progress at 31 December 2016 and the year in progress at 31 December 2017;
- after the year in progress at 31 December 2017.

The statement of profits, and similar income, resolved to be paid until 31 December 2022 shall separately report the profits generated in different periods.

1.2

Resolution No 57 of 7 June 2019. Tax treatment of transactions in foreign currency

The Resolution has provided clarification (mainly) in connection with article 110 of the Italian Income Tax Code, with particular regard to the following cases:

Opening of a current account in foreign currency with a concurrent withdrawal from a euro liquidity account

Pursuant to articles 9 and 110 of the Italian Income Tax Code, the translation value for tax purposes of an item in foreign currency is the one obtained using the exchange rate on the date a purchase is made (or that ruling on the closest earlier date or, if not available, at the exchange rate ruling on the month of the transaction). If the bank uses an exchange rate other than the official rate, an alternative exchange rate may be applied provided that this is provided by independent international players, as provided by article 110 (9) of the Italian Income Tax Code.

Purchase of shares in foreign currency (recorded either among financial fixed assets or current assets) using funds out of the current account in foreign currency

A withdrawal of funds from a current account in foreign currency for the purchase of shares results in the realization of any accrued exchange gains or losses and their inclusion in taxable income. Accordingly, the tax basis in foreign currency of the shares will correspond to the purchase cost.

Collection of dividends in foreign currency

Translation will be made at the official exchange rate ruling at the time the dividend is received.

Divestment of securities on portfolio

The sale consideration must be determined at the exchange rate ruling on the date of the sale and any translation differences shall constitute exchange gains or losses.

Year-end valuation

Any difference (gain or loss) between the tax basis and the translation value at the year-end is included in taxable income.

The Resolution also provides clarification on the valuation of securities on *portfolio* at the year-end, whether shares or similar securities, or bond-like securities.

1.3

Resolution No 58 of 11 June 2019. Article 4-*bis* of decree law No 193 dated 22 October 2016 – Clarification on the correct issue of credit notes

The Resolution provided clarification on the issue of credit notes and on the *OTELLO 2.0* system regarding the issue of e-invoices for "*tax free shopping*", specifying that credit notes (whether affecting both the taxable amount and the tax of a tax free shopping transaction or the tax alone) must be issued using the *OTELLO 2.0.* system (*Determinazione interdirettoriale* - interagency resolution - No 54088 of 22 May 2018).

The Resolution also provides clarification on the possibility to issue an aggregate credit note. The matter is also dealt with in Ministerial Resolutions Nos 1882/1994 and 445849/1992, and in the Italian Customs Authority note No *54505/RU* of 22 May 2018, concerning "*Article 4-bis of Decree Law No 193 dated 22 October 2016, on the obligation to issue tax-free invoices in electronic form starting from 1 September 2018 – Operating instructions for the use of OTELLO 2.0 and for the procedure in place during the transitional period (tax free invoices issued until 31 August in hard copy)*".

1.4

Tax rulings (1- 15 June 2019 Summary)

Several rulings on VAT matters have been published in the period.

Ruling No 178 of 3 June concerns VAT credit notes following the execution of a settlement agreement (pursuant to article 1965 of the Italian Civil Code). In light of the case law and guidance on the matter, the Revenue Agency stated the following: since the settlement between the parties is an unplanned arrangement, the time limit stipulated in Article 26(3) of Presidential Decree No 633/1972 applies, according to which the adjustment cannot be made beyond one year from the original sale transactions (in that specific case, sales of cars). Furthermore, in the event of bankruptcy proceedings, the issue of credit notes – where all or part of the payment is not received because of the failure of the proceedings – is conditional on the fact that the creditor (seller/service provider) is a party to the proceedings, i.e., it submitted proof of debt in case of the debtor's filing a petition for bankruptcy.

Clarification was also provided in respect of the application of registration tax to the settlement agreement.

On a similar matter, we bring to your attention Ruling No 190 of 13 June concerning the recovery of VAT paid (under the flat-tax regime, *regime forfetario*), in case of unsuccessful insolvency proceedings (special receivership - *procedura di amministrazione straordinaria* – under "*Legge Marzano*"). The Ruling specified that the flat-tax regime does not give the right to the deduction of VAT (to implement the principle of neutrality according to which the taxpayer is expected to pay over only the VAT actually received - cf. ECJ decision dated 26 January 2012 on Case C-588/10, point 27). A VAT refund claim may be filed.

In Ruling No 188 of 12 June, the Revenue Agency dealt with the VAT, IRES and IRAP treatment of the transfer to consortium members of the costs incurred and revenue realized by a Consortium (in this case a cooperative company with limited liability), for the performance of works and services. On the basis of the information contained in the ruling request, the relationship between the Consortium and its members was considered to be equivalent to an "*agency agreement with undisclosed principal*" (*mandato senza rappresentanza*), resulting in the application of article 3(3) last period of the VAT Decree, according to which a transaction carried out by an agent with undisclosed principal who renders services to or receives services from its principal, is regarded as a service having the same character.

For VAT purposes, reference to Ministerial Resolutions No 355/E/2002, No 229/E/2007 and No 202/E/2008 has been made.

Given this legal characterization (i.e., agency agreement with undisclosed principal), for IRES and IRAP the transactions carried out generate their legal effects in the hands of the consortium company.

Finally, Ruling No 192 of 13 June provided clarification on the deduction of the additional assessed VAT on imports pursuant to article 60(7) of the VAT Decree. As specified in Ruling No 176 published on 31 May 2019, the additional assessed VAT may be recovered provided that the seller/service provider has definitively paid any amounts due to the Italian Treasury (Ministerial Circular No 35/E/2013 also specified that, although the mentioned rule was issued having regard to the ordinary cases of application of the tax – where the right to deduction by the purchaser or principal arises as a result of the charge to VAT made in the invoice by the seller or service provider – it applies also in the cases where input VAT is not charged to the purchaser/principal according to the rules on VAT liability shifting but is directly paid by the latter, as is the case in imports). In these cases, the right to the deduction must be exercised at the latest in the Return for the second year subsequent to that in which the importer (liable to tax) paid the tax, the additional tax assessed, the penalties and the interest, i.e. any amounts due pursuant to a tax assessment process that has become final.

The two-year term to exercise the right to deduct the additional assessed tax starts from the moment the final judgment definitively concluding the tax assessment process is passed; for amounts paid after such court decision, the term runs as of the date of payment of the individual sums due pursuant to the instalment payment plan.

We bring the following additional rulings to your attention:

- No 180 of 4 June concerning the step-up of business assets (in this specific case, assets established on public land);
- No 182 of 6 June, providing clarification on the tax credit for R&D activities. In that specific case, due to the absence of employees and other workers, R&D activities were exclusively carried out by the sole shareholder and sole director of the company. The relevant R&D costs, with particular regard to the portion of the sole director's fee corresponding to the remuneration for his actual R&D activities, qualified for the tax credit;

- No 185 of 11 June ("*Article 87(1)(a) and (b), of the Italian Income Tax Code, Presidential Decree No 917 of 22 December 1986. Effects of company transformation on subjective conditions for the eligibility to the "participation exemption" regime*), containing considerations on the tax implications and the tax abuse issues of specific corporate transformations;
- No 191 of 13 June, regarding the assignment of tax credits (in the movie and audiovisual industry).

CASE LAW

2.1

VAT – Italian Supreme Court, Section V, Decree No 16010 of 14 June 2019

By Decree No 16070 dated14 June 2019, the Italian Supreme Court specified that for VAT purposes the relevance of a cost cannot be excluded pursuant to a fair value assessment, unless the tax authorities are able to prove that it is blatantly non-cost-effective and such non-cost-effectiveness constitutes evidence of the lack of a connection between the cost and the business activity (decision No 18904/2018).

Furthermore, still on the matter of VAT, the fair value assessment has a different incidence, which per se does not rule out the right to deduction, unless the transaction's blatant non-cost-effectiveness is such that it may constitute evidence of the invoice's untruthfulness or irrelevance of the use of a product or service in respect of VATable transactions (cf. ECJ decisions, *Hotel Scandic Gåsabäck, Balkan, Lajvér*).

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TAX NEWSLETTER | 1-15 JUNE 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 15 JUNE 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