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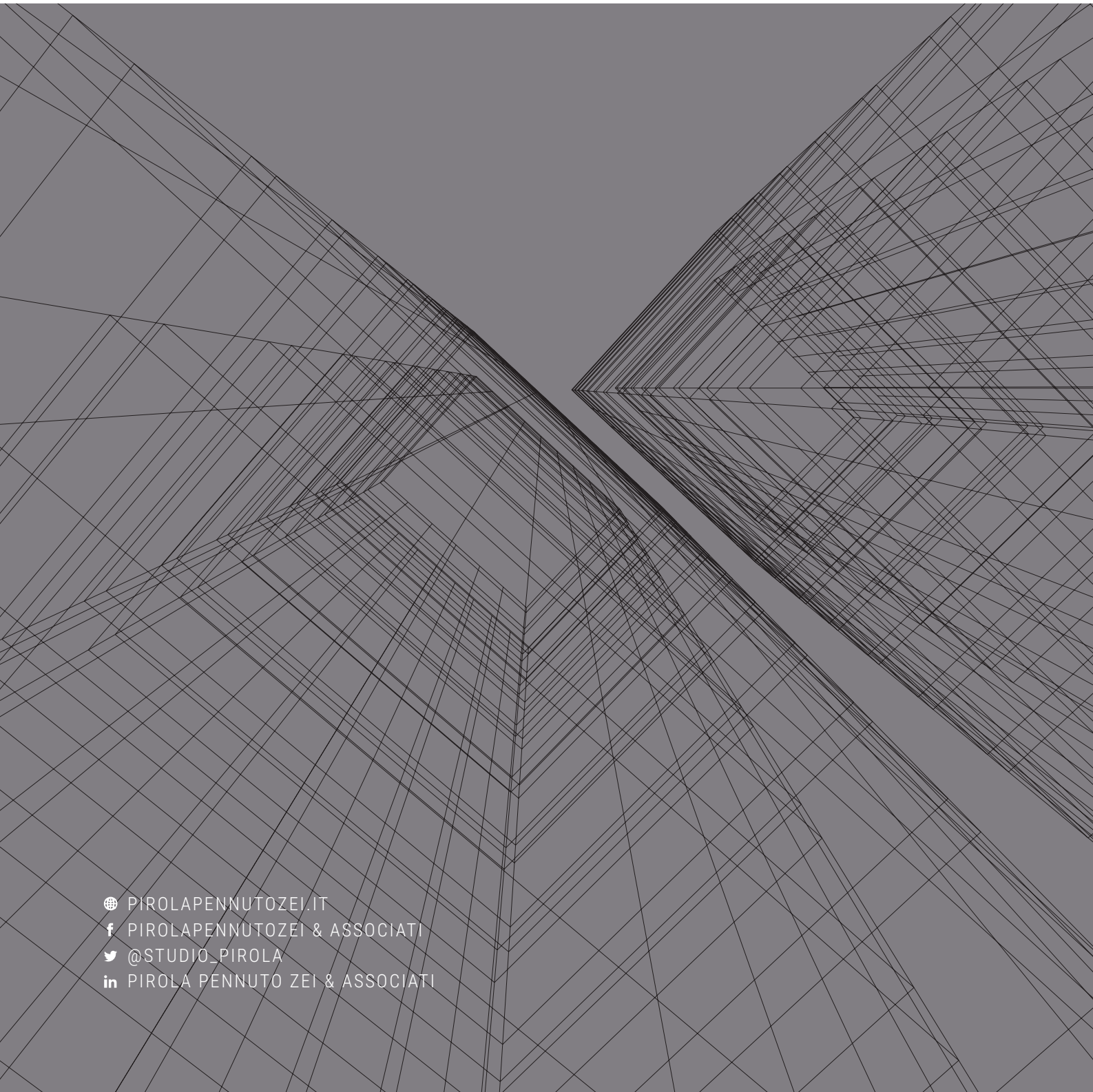
NEWSLETTER / 1-15 MAY 2019



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LEGISLATION

1.1

Provisions for compliance with the obligations deriving from Italy's membership in the EU – European Law 2018. Law No 37 of 3 May 2019

Law No 37 of 3 May 2019 ("*Provisions for compliance with the obligations deriving from Italy's membership in the EU – European Law 2018*") was published in Italian Official Journal No 109 of 11 May 2019.

We bring the following provisions to your attention:

- art. 5 - provisions concerning payments in commercial transactions – Infringement procedure No 2017/2090;
- art. 11 - provisions concerning the VAT on transportation and shipping services for goods free of customs duties - Infringement procedure No 2018/4000;
- art. 12 - provisions concerning the limitation period for customs obligations;
- art. 13 – provisions concerning the auctioning of greenhouse gas emission allowances.

GUIDANCE

2.1

Article 2(1) of legislative decree No 127 of 5 August 2015 – Electronic storage and online transmission of details of cash receipts. Turnover exceeding 400,000 euro. Ministerial Resolution No 47/E of 8 May 2019

The Resolution provided clarification on the correct interpretation of article 2(1) of legislative decree No 127/2015, with particular regard to the manner of determining the "*Turnover exceeding 400,000 euro*" which triggers the obligation for electronic storage and online transmission of details of cash receipts as of 1 July 2019.

Specifically, satisfaction of this obligation (effective as of 1 January 2020):

- will have to be met in advance (i.e., by 1 July 2019) by persons with a turnover exceeding 400,000 Euro p.a.;
- will replace the recording of cash receipts pursuant to article 24(1) of the VAT decree (which, however, may still be done on a voluntary basis);
- replaces the obligation to issue a tax-relevant document (tax receipt - *ricevuta fiscale* - or cash register receipt for tax purposes - *scontrino fiscale* - "*without prejudice to the obligation to issue an invoice at the customer's request*").

For the purposes of the obligation, the taxable person's aggregate turnover for 2018 will be taken into account. Any activities started during 2019 are not considered for the purposes of the 2019 obligation.

However, the Resolution specifies that the obligations (electronic storage and online transmission of details of cash receipts) may also be satisfied on a voluntary basis.

The Italian Revenue provided clarification on the matter in ruling No 139 of 14 May 2019. For your information, we point out that the Italian Revenue Agency provided clarification on the matter also in Ruling No 139 of 14 May 2019 named "*Ruling pursuant to article 11(1)(a) of law No 212 of 27 July 2000 – Article 2(1) of legislative decree 5 August 2015, No 127*" (and ruling No 13 published on 20 March 2019).

2.2

Definizione agevolata of tax disputes (forgiveness of penalties and interest on outstanding taxes due, subject to full payment of tax amount and to relinquishing the right to appeal) - Article 6 and article 7(2)(b) and article 7(3) of decree-law No 119 of 23 October 2018, converted, with amendments, into law No 136 of 17 December 2018 – Answers to queries. Ministerial Circular No 10 of 15 May 2019

In Circular No 10 of 15 May 2019, the Italian Revenue provided clarification on the *Definizione agevolata* of tax disputes (articles 6 and 7(2)(b) and (3) of Decree Law No 119 of 23 October 2018, converted with amendments into Law No 1360 of 17 December 2018).

We set out below the Revenue Agency's replies to specific queries.

Disputes against notices of deficiency (avvisi di liquidazione) for the registration of judicial documents

Is it possible to settle disputes concerning notices of deficiency (avvisi di liquidazione) concerning the liability to registration tax of civil judgements or court orders?

Disputes concerning the liability to registration tax of judicial documents cannot be settled, as their purpose is to collect the tax due on the registration of such documents.

Litigation concerning tax payment demands (cartelle di pagamento)

Is it possible to settle a dispute with the Revenue Agency concerning a tax payment demand for the failure to pay taxes if the taxpayer claims that the limitation period has expired? In this case, can it be argued that the litigation concerns a taxing instrument, questioning the an debeatur of the claim?

Disputes on tax payment demands can be settled by *definizione agevolata* only if they constitute taxing instruments as well.

Disputes in respect of a tax payment demand issued as a result of non-payment do not qualify for *definizione agevolata,* even if the taxpayer claimed that the limitation period has expired. The matter is dealt with also in paragraph 2.3.4 of Ministerial Circular No 6/E/2019.

Ninety per cent of the value of the dispute

If, after 24 October 2018, but before the taxpayer files an application for definizione agevolata of outstanding disputes, a provincial tax court decision against the taxpayer is filed following a hearing held in March 2019, will the taxpayer have to pay 100 per cent of the value of the dispute in order to take advantage of definizione agevolata or may it pay 90 per cent?

Since article 6 deems the status of the proceedings at 24 October 2018 to be relevant, the provincial tax court decision issued after such date is immaterial. There ensues that if the appellant entered appearance by 24 October 2018, the dispute may be settled by paying 90% of its value.

Suspension of tax proceeding

Can a dispute suspended by the provincial tax court pursuant to article 295 of the code of civil procedure in December 2015 be settled by paying 90% of the value of the litigation?

It has been specified that if the conditions required by article 6 are met, a dispute suspended by the Provincial Tax Court (pursuant to article 295 of the code of civil procedure) can be settled by paying 90% of the value of the litigation.

The settlement of the dispute by paying 5% of the value of the litigation applies also with regard to the tax disputes outstanding before the Italian Supreme Court where the Revenue Agency was the losing party at all previous levels of jurisdiction. It is considered that the Revenue Agency entirely lost the case when the taxpayer's demands were wholly acceded to (as stated in paragraph 5.1.5 of Circular No 6/E/2019).

The Revenue Agency loses the case sent back to the lower court for reconsideration

If during proceedings, both the provincial tax court and the regional tax court ruled in favor of the taxpayer, the supreme tax court reversed the lower court decision and sent the case back to the lower (regional tax) court for reconsideration acceding to a procedural matter raised by the Revenue Agency and the regional tax court ruled in favor of the taxpayer by a decision filed before 24 October 2018 and appealed against before the Supreme Court by an appeal served before 19 December 2018, can the outstanding dispute be settled by paying 5 per cent of the value of the dispute pursuant to article 6(2-ter)?

The dispute may be settled by paying 15% of the relevant value, pursuant to article 6(2)(b). This rule applies even though the last judgement filed at 24 October 2018 in favor of the taxpayer was issued by the Regional tax court to which the case had been remitted by the Supreme Court for reconsideration.

Article 6(2-*ter*) – according to which disputes outstanding before the Italian Supreme Court at 19 December 2019 where the Revenue Agency lost the case at all prior levels of jurisdiction may be settled by paying 5% of the value of the litigation – does not apply.

The Revenue Agency loses the case on appeal

In the event that:

- *the provincial tax court ruled in favor of the taxpayer and the regional tax court ruled in favor of the Revenue agency;*
- *the taxpayer appealed against the regional tax court's decision for quashing or to request a new trial, and the regional tax court acceded to the request for a new trial (giudizio di revocazione);*
- *the revenue agency appealed to the Italian Supreme Court against the decision issued by the regional tax court in the new trial, by an appeal served before 19 December 2018,*

can the latter dispute, still outstanding before the Supreme Court, be settled by paying 5 per cent of the value of the dispute pursuant to article 6(2-ter)?

In the affirmative, will there be a statement to the effect that the case (appeal to the Supreme Court against the regional tax court's ruling in favor of the revenue agency) has ceased to exist?

The dispute outstanding before the Italian supreme court initiated by the Revenue Agency against the Regional tax court's decision in the new trial can be settled by paying an amount corresponding to 15% per cent of the value of the litigation.

Disputes exclusively concerning penalties

In the event of a dispute concerning a "deed of recovery of a tax credit" where the provincial tax court decision acceding to the appeal solely with respect to the penalties, was appealed against by the Tax Office and in the meantime the taxpayer paid the tax, can the dispute be settled without payment of any

further amount? Can this solution apply also with respect to a regional tax court decision in favor of the tax office filed before 24 October 2018?

The dispute can fall within the scope of article 6(3) second period since, as a result of the *giudicato interno* arisen in connection with the tax and the interest, the appeal solely concerns the imposition on the penalties on the tax which has been fully paid.

The *definizione agevolata* procedure may be implemented without payment of any amount including when the definizione of the tax results from the Court acceding to the Tax Office's appeal in their latest decision filed at 24 October 2018.

Italian Supreme Court decision remitting the case to the lower court judge solely with regard to the redetermination of the penalties

During proceedings concerning a notice of deficiency charging tax and the related penalties, the Italian supreme court accedes to the tax office's claims, declaring that the taxi s due, and sending the case back to the regional tax court for reassessment of the penalties. Can the dispute on the tax be considered as settled – and therefore not eligible for definizione agevolata – with the consequence that a negotiated settlement may cover only the penalties?

The Italian Supreme Court's ruling to the effect that the tax is due, constitutes a final pronouncement; in the case at issue, therefore, the litigation is outstanding solely with respect to the penalties and may be settled without paying any other amount, since the tax has been finally settled.

Infliction of a fine for failure to regularize invoices

For the purposes of definizione agevolta, is a fine inflicted for failure to regularize invoices, as per article 6(8) of Legislative decree no. 471/1997, classified as not related to the tax?

With regard to the correct classification of the fine prescribed by article 6(8) of Legislative Decree no. 471/1997, Ministerial Circular no. 12/E/2003 (par. 10.3.3) specified that it is not related to the tax, even if it is calculated in proportion to the additional tax assessed by the Tax office, since it is an independent fine which is inflicted due to the conduct of the seller or purchaser which have not regularized invoices.

Any dispute solely referring to the fine inflicted for failure to regularize the invoices may be settled – pursuant to article 6(3) – by paying 15% of the value of the dispute if the Revenue Agency loses the case in the latest decision filed at 24 October 2018 and by paying 40% in all other cases.

Please see the clarification provided in par. 5.1.6 of Ministerial Circular no. 6/E/2019.

Value of the litigation – Group taxation

The Tax Office issued a first-level notice of deficiency for IRES purposes vis-à-vis the subsidiary and a second-level notice of deficiency vis-à-vis the parent company, pursuant to the assessment procedures of companies which adopt group taxation in force prior to 1 January 2011, date of entry into force of new article 40-bis of Presidential Decree no. 600/1973. Either companies have filed an appeal but the case regarding the assessment of the parent company has been suspended by the provincial tax court waiting for the final decision on the litigation regarding the first-level notice of deficiency. May the definizione agevolata be implemented solely by the parent company by making reference to the additional IRES assessed in the second-level notice of deficiency or may it be implemented also in respect of the litigation on which the court's decisions partly uphold the appeal regarding the first-level assessment referred to the theoretical additional IRES?

In the Revenue Agency's opinion, in the case at issue, the *definizione agevolata* procedure may be implemented by the subsidiary in respect of the litigation pending before the Court of Cassation and related to the first-level assessment of the theoretical tax.

As a consequence of the completion of *definizione agevolata,* the declaration that the case ceased to exist may be requested including in respect of the litigation on the second-level assessment vis-à-vis the parent company.

Deductible amounts

Is it possible to deduct the amounts due to the taxpayer as a result of the decision in favour but not yet reimbursed at the time of the filing of the request for *definizione agevolata* from the sums due for the purposes of the calculation of definizione agevolata? If so, would the amounts due and exceeding those due for the calculation of definizione agevolata be no longer reimbursable?

The amounts paid pending judgement and not yet reimbursed by the Tax office (as a result of a decision in favour of the taxpayer) may be deducted from the sums due for the *definizione agevola*ta procedure; however, the additional sums paid pending judgment may not be reimbursed.

Refusal of a previous definizione agevolata of the litigation and completion of the definizione agevolata of the registration of taxes in the permanent list of taxes due pending judgment

A taxpayer has implemented definizione agevolata of the pending litigations pursuant to article 11 of Decree law no. 50/2017, converted with amendments by Law no. 96/2017, but the Revenue Agency has refused such procedure due to failure to pay the amounts due. The amounts have not been paid since the taxpayer deemed that the fines inflicted did not require the payment of any amount, according to the above mentioned article 11; the taxpayer filed an appeal against such refusal. Is it possible to implement a definizione agevolata procedure pursuant to article 6 for the original dispute in compliance with the theory that the fines were not related to the tax and by discontinuing the proceedings against the refusal? Taking into consideration that the forgiveness of the taxes due prescribed by article 1(4) of Decree law no. 148/2017, converted with amendments by Law no. 172/2017, initiated with regard to the temporary registration of two thirds of the fines, made pending judgement, is it correct to deem that the litigation now solely refers to the remaining portion of one third of the fines originally inflicted?

The taxpayer may adopt *definizione agevolata* for the original litigation (regarding the infliction of fines not related to the tax) pursuant to par. 3 of article 6, by discontinuing the proceedings against the refusal issued by the Tax office.
With regard to the above mentioned forgiveness of two thirds of the fines, the completion of *definizione agevolata* results in the settlement of the dispute in respect of the portion registered in the permanent list of taxes due (see Ministerial Circular no. 2/E/ 2017 and 23/E/2017).
If the taxpayer wants to implement *definizione agevolata* for the dispute regarding the portion of taxes not forgiven, the determination of the value of the litigation must be made taking into consideration the sums still at dispute only.

How to identify the competent Tax Court

If on 19 July 2018 the Provincial Tax court issued a decision in favour of the taxpayer, against which the

Tax office filed an appeal, in order for the taxpayer to settle the dispute, by paying 40 per cent of the value of the litigation, should it file a request for suspension either with the secretary of the Provincial tax court or the secretary of the Regional tax court?

As already said in par. 8 of Circular no. 6/2019, par. 10 of article 6 prescribes that the disputes subject to settlement are not suspended, unless the taxpayer makes a specific request to the judge; in this case, the proceedings are suspended until 10 June 2019.

The request for suspension of the proceedings may also be made by a taxpayer which has not yet adopted *definizione agevolata;* in order to obtain the suspension of the proceedings until 31 December 2020, the taxpayer adopting *definizione agevolata* must file a copy of the related request and payment by 10 June 2019.

In the case at issue, the request for suspension must be filed with the secretary of the Regional Tax Court, before which the appeal filed by the Tax office is pending.

Definizione agevolata of pending litigations pursuant to article 7 of Decree Law no. 119/2018 – Calculation of interest

For the purposes of calculating the interest due by amateur sports firms and associations, is the deadline for adopting definizione agevolata pursuant to article 7 either the date on which the notice of deficiency has been served, the deadline for paying the sums due or the date of payment made for the purposes of definizione agevolata?

As specified in par. 12.3 of Circular no. 6/E/2019, for litigations which can be settled pursuant to article 7, the payments due must be made at the following rates:

- 40% of the value of the litigation and 5% of fines and interest assessed if at 24 October 2018 it is still pending before the provincial tax court;
- 10% of the value of the litigation and 5% of fines and interest assessed, if the Tax administration is the losing party in the last and only decision filed and not yet become final at 24 October 2018;
- 50% of the value of the litigation and 10% of fines and interest, if the amateur sports firm or association is the losing party in the last and only decision filed and not yet become final at 24 October 2018.

For the sake of simplification, reference must be made to the amount of interest shown in the notice of deficiency. Moreover, as specified in Circular no. 6/E/2019, the determination of the amounts due for definizione agevolata must always be made taking into consideration the sums actually disputed.

2.3
Definizione agevolata of formal irregularities - Article 9 of decree law No 119 of 23 October 2018 – Clarification provided by Ministerial Circular No 11 of 15 May 2019

Ministerial Circular No 11/E provided clarification on the *definizione agevolata* of formal irregularities (article 9 of Decree Law No 119/2018). The Revenue Agency Director Enactment, ref. No 62274/2019 of 15 March 2019 (the Enactment) has regulated the relevant implementation rules and Ministerial Resolution No 37/E/2019 provided the tax code to be used for payment.

The procedure concerns any formal irregularities, infringements or cases of non-compliance committed by and not later than 24 October 2018, which have no impact on the determination and payment of VAT, IRAP, direct taxes, direct tax surcharges, substitute tax, withholding taxes and tax credits.

Qualifying violations

The following violations may qualify for the *definizione agevolata* pursuant to article 9 (without limitation):

- Filing of annual returns completed on forms other than the approved forms or containing errors in or incomplete taxpayer's details;
- Non-filing or irregular filing of notifications of particulars of invoices issued or received or of periodical VAT settlements (referred to in articles 21 and 21-*bis* of Decree Law No 78 dated 31 May 2010, converted by article 1(1) of law No 122 of 30 July 2010), provided that the relevant tax has been paid and that the violation did not have an impact on its determination and payment;
- Non-filing or irregular filing or filing of incomplete Intrastat listings;
- Failure to return the questionnaires sent by the Revenue Agency or by other authorized persons, or returning questionnaires with incomplete or untruthful answers;
- Violations of the accrual principle, provided that they did not affect the aggregate tax due during the relevant year;
- Late filing of tax returns by intermediaries;

- Irregularities or omissions committed by financial players;
- Failure to notify the extension or termination of a lease agreement subject to the flat-tax regime (*cedolare secca*);
- Violation of the documentary and recording obligations for VAT taxable transactions, provided that the violation did not affect the determination of the tax;
- Violation of the documentary and recording obligations for non-taxable or exempt transactions or transactions not subject to VAT, when the violation is not relevant for the purpose of determining income;
- The erroneous deduction of VAT at a rate higher than due without fraud (for violations committed as of 1 January 2018);
- The irregular application of reverse charge provisions without fraud; this violation may be settled only if the tax was paid – although with an irregularity – and not when the violation resulted in non-payment;
- The failure to report or the incorrect reporting in the tax return of costs from transactions with companies resident in black-listed countries;
- The failure to elect the option in the annual tax return, provided that the company adopted a conclusive behavior with regard to the accounting or tax regime chosen.

Taxpayers' compliance

To complete the regularization procedure, taxpayers must pay Euro 200 per year, in two equal annual instalments (on 31 May 2019 and 2 March 2020) or in one instalment by 31 May 2019 (cf. Ministerial Resolution No 37/E/2019), without the possibility to make offsets.

If an error was committed when filing the 2017 income tax return (for FY 2016), FY 2016 must be specified in the bank payment form F24; when the irregularity or omission does not refer to a specific fiscal year, reference must be made to the calendar year in which it was committed.

If the payment concerns a violation committed by a company merged into or with another company, the F24 form must specify the identification particulars of the merged company but the taxpayer code and VAT number of the surviving or merging company.

How to remedy irregularities or omissions

Article 9(3) provides that the position is regularized with the payment of the amounts due and the "*elimination of the irregularities or omissions*", by and not later than 2 March 2020. The following example has been made, having regard to the clarification contained in the Enactment: "*[…] for example, if the taxpayer receives a "compliance letter" on 5 July 2019 pointing out a formal violation for FY 2017, the violation may be remedied by 2 March 2020, provided that by 31 May 2019 the taxpayer paid the first or single instalment for the fiscal year. If, instead, the compliance letter is received on 28 February 2020, the taxpayer has 30 days to remedy the violation provided that the 200 euro payment for 2017 was wholly or partly made by the deadline stated above*".

The failure to remedy all irregularities (either spontaneously or upon request), does not impair the successful conclusion of the *definizione* in respect of other violations regularized during the same fiscal year; the Enactment has provided the cases in which there is no need to remedy the irregularities or omissions (listed on pages 16 ff of the Circular).

Regularization of formal violations if tax audit reports have been issued and there are outstanding tax litigation proceedings

Pursuant to article 9, any formal irregularities, infringements or violations may be settled even if they are the subject of outstanding litigation proceedings and therefore could be settled pursuant to article 6 of decree law No 119/2018.
If a taxpayer decides to apply for *definizione agevolata* hereunder while proceedings are in progress, it shall notify waiver of such proceedings upon conclusion of the *definizione agevolata.*

Extension of the limitation period

The limitation period for the service of a tax payment demand for violations committed until 31 December 2015 in respect of which a tax audit report has been issued, has been extended by two years. As specified in the Circular "*this means that the basis for the extension is merely the existence of formal violations ascertained in a tax audit report falling within the scope of article 9, regardless of whether the taxpayer under audit applied for definizione agevolata of the tax audit report and of whether or not the definizione agevolata procedure was successfully concluded*".

Cases of exclusion

The procedure does not apply to substantive violations, which affect the determination of the taxable base or the tax or the payment of the tax, such as for instance (but without limitation):

- the failure to file tax returns, whether or not a tax liability arises;
- the reporting of non-deductible costs or invoices for non-existing transactions;
- the failure to issue invoices, receipts or tax register receipts affecting the determination and payment of the tax;
- the failure to exercise an option (e.g., the option for Domestic Group Taxation) to be notified in the income tax return for the first year of application of the option, which may be remedied by *remissione in bonis* (a form of voluntary adjustment – *ravvedimento operoso*);
- the failure to submit or the submission of irregular periodical VAT settlement forms, when this had an impact on the determination of the tax liability;
- a withholding agent's failure to transmit the statement of wages (*certificazioni uniche*);
- the failure by authorized intermediaries to transmit the income tax return;
- errors in connection with a *visto di conformità* (seal of approval) ("f*ailure to affix seal of approval, or affixing of an irregular seal of approval, or seal of approval affixed by a person other than that which filed the annual income tax return*");
- the failure to submit a zero-balance Tax payment form F24;
- the late filing of a guarantee as part of a VAT group settlement.

2.4

Ruling requests (Summary 1 - 15 May 2019)

Rulings No 136 of 9 May 2019 and No 141 of 14 May 2019 concerned payments under the *definizione agevolata* procedure for tax disputes pursuant to article 6 of Decree Law No 119 of 23 October 2018 (dealt with in Ministerial Circular No 6/E of 1 April 2019).

Ruling No 136 pointed out that any amounts paid in the course of the proceedings are deducted from the amounts due under a negotiated settlement (*definizione*). In this specific case, the amount paid in connection with the prior *definizione agevolata* (referred to in article 11 of Decree Law No 50/2017) – subsequently not brought to conclusion – can be deductible from the gross amount payable under the

current *definizione agevolata*. The amounts previously paid are not refundable, even if they are in excess of those due for the current settlement.
Following conclusion of the negotiated settlement agreement (pursuant to article 6 of Decree Law No 119/2018), the taxpayer may abandon the appeal by rejecting the earlier definizione, or the tax office may declare that the case has ceased to exist as the interest in the litigation has lapsed.

Also any amounts paid under the voluntary amendment procedure - *ravvedimento operoso* (Ruling No 141) are deductible from the gross payment due under *definizione agevolata.*

Ruling No 142 of 14 May 2019 provided clarification on the invoicing (especially e-invoicing) of goods removed from a VAT warehouse. The Revenue Agency specified that reverse-charge invoices issued upon removal of goods from a VAT warehouse, may - at the parties' discretion – be hard-copy or non-SdI electronic invoices and that the obligation to issue an e-invoice through the SdI applies only if the goods removed by an Italian entity from the VAT warehouse underwent processing, relevant for VAT in Italy under the place-of-supply rules, which changed the value of the goods (the matter has been dealt with in Ministerial Circular No 12/E/2015 and in Ministerial Resolutions No 55/E/2017 and No 5/E/2018).

CASE LAW

3.1

Registration of mortgage – voidness – Italian Supreme Court decision No 12237 of 9 May 2019

In its decision No 12237, the Italian Supreme Court clarified that the registration of mortgage on a taxpayer's assets without prior notification (and setting of the 30-day term for compliance or for filing observations) is void.

Article 50(2) of Presidential Decree 602/1973 requires the Italian Revenue to inform taxpayers of its intention to carry out a forced sale of a taxpayer's assets, whereas articles 41, 47 and 48 of the EU Charter of Fundamental Rights require the tax authorities to inform a taxpayer of their intention to register a mortgage, under penalty of nullity.

Voidness may also be automatically acknowledged.

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TAX NEWSLETTER | 1-15 MAY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 15 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