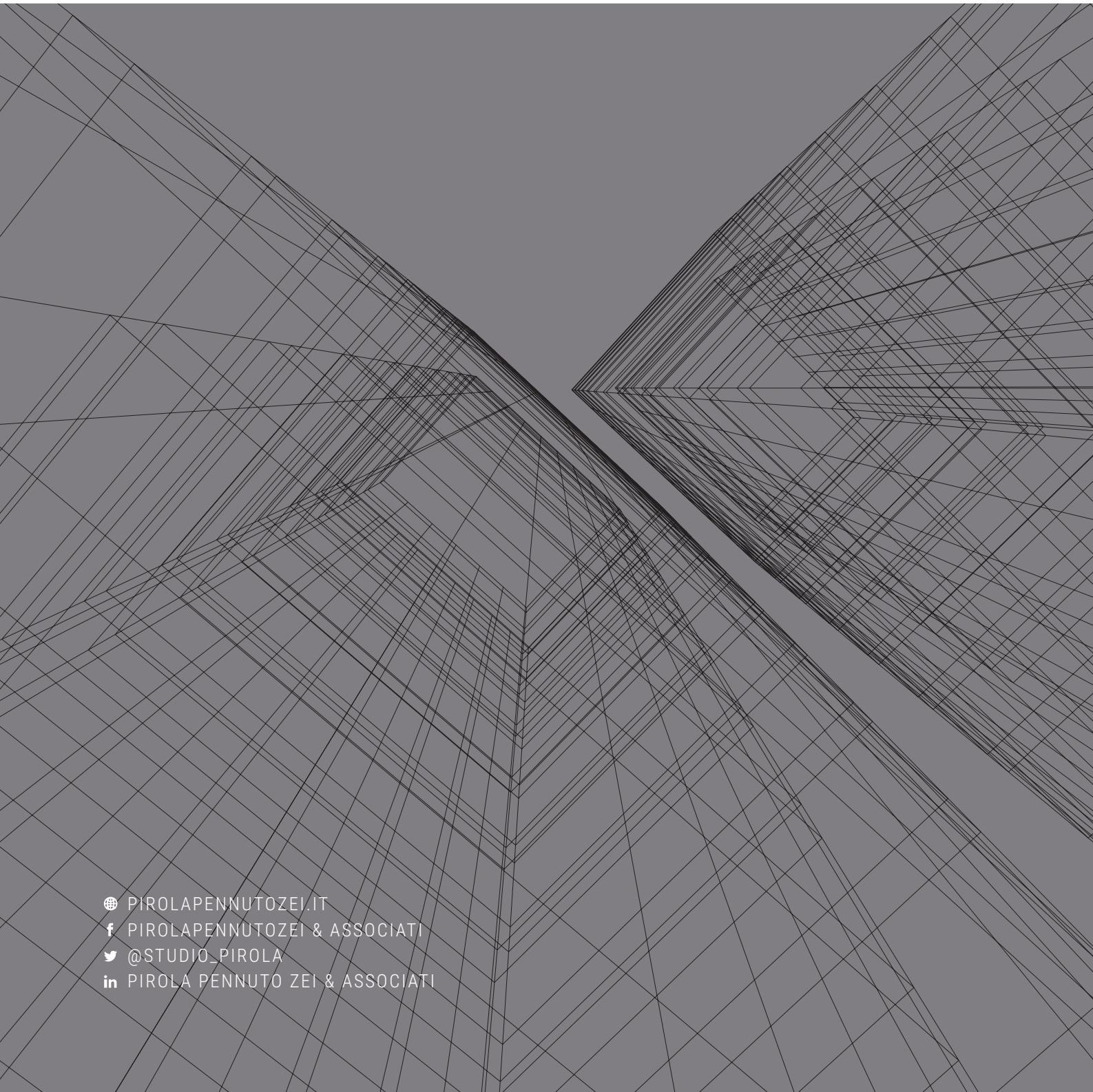
Pirola
Pennuto
Zei
& Associati

studio di consulenza
tributaria e legale

TAX

NEWSLETTER / 16-31 JANUARY 2018



PIROLAPENNUTOZEI.IT
PIROLAPENNUTOZEI & ASSOCIATI
@STUDIO_PIROLA
PIROLA PENNUTO ZEI & ASSOCIATI

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

GUIDANCE

1.1 4
Ordinary ruling (Article 11, paragraph 1, lett. a), Law dated 27 July 2000, No. 212). Art. 50-*bis* of Law Decree No. 331/1993, VAT Warehouses. Ministerial Resolution dated 16 January 2018, No. 5/E

1.2 5
Non-Taxable VAT Regime for vessels used for navigation on the high seas as per article 8-*bis* of Decree of the President of the Republic No. 633/1972. Further clarifications. Ministerial Resolution dated 16 January 2018, No. 6/E

1.3 6
VAT deduction – amendments introduced by Law Decree dated 24 April 2017, No. 50, converted with amendments by Law No. 96 dated 21 June 2017. Ministerial Circular dated 17 January 2018, No. 1/E

1.4 9
Light "*spesometro*", 28 February term postponed. Ruffini Measure, simplified draft available online. Revenue Agency Press Release dated 19 January 2018

1.5 9
Domestic tax consolidation regime and use of losses – Specific cases. Ministerial Circular dated 26 January 2018, No. 2/E

1.6 11
Ruling - Art. 11, Law dated 27 July 2000, No. 212. Electronic storage of tax returns. Ministerial Resolution dated 29 January 2018, No. 9/E

1.7 12
Ruling as per Art. 11, paragraph 1, letter a) Law dated 27 July 2000, No. 212. IRES (tax on income) referring to the valuation of debt securities with the amortized cost method. Ministerial Resolution dated 29 January 2018, No. 10/E

BACK TO TABLE OF CONTENTS

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

CASE LAW

2.1 14
Business income – Supreme Court, Ordinance dated 11 January 2018, No. 450

2.2 14
Tax Credit - Supreme Court, Ordinance dated 18 January 2018, No. 1146

2.3 14
Stamp Duty - Supreme Court, Ordinance dated 26 January 2018, No. 2007

GUIDANCE

1.1
Ordinary ruling (Article 11, paragraph 1, lett. a), Law dated 27 July 2000, No. 212). Art. 50-*bis* of Law Decree No. 331/1993, VAT Warehouses. Ministerial Resolution dated 16 January 2018, No. 5/E

The Revenue Agency, with Resolution at issue, provided clarifications on the theme of VAT warehouses as per Art. 50-*bis* of Law Decree No. 331/1993, as amended by Law Decree No. 193/2016[1] with specific reference to the introduction/withdrawal of goods into/from[2].

When referring to the withdrawal of goods (moment in which taxes become due), paragraph 6 of Article 50-*bis* states that – with exception to Intra-EU purchases or imports from non-EU countries – taxes are due by the subject who proceeds with the withdrawal and must be paid by the warehouse keeper in the name and on behalf of said subject. In the case of import of goods with introduction into the VAT warehouse, in order to pay the tax, as in compliance with Article 17 of the VAT Decree – i.e. through the reverse change mechanism – the subject who proceeds with the withdrawal must submit specific guarantee (see to this extent Decree dated 23 February 2017).

Guarantees related to the introduction of goods into the warehouse are different and independent[3], as they are made by two different subjects (one by the subject who introduces the goods and one by the subject who withdraws such goods) and related to different periods (6 months for the withdrawal, until the communication of data related to the payment of the tax - to be performed by the subjects performing the withdrawal - for the introduction)[4].

1 See to this extent Article 4, paragraph 7, of Law Decree dated 22 October 2016, No. 193, converted with amendments by Law No. 225 dated 1 December 2016. The amendments are enforceable, as in accordance with paragraph 8 of above mentioned Article 4, from 1 April 2017. Ministerial Resolution No. 54 specified that the amendments at issue imply that any kind of goods (regardless their origin) can now be introduced in the VAT warehouse and that goods, based on their origin, have different withdrawal modalities.

2 Decree dated 23 February 2017 determined the contents, modalities as well as those cases for which a financial guarantee must be submitted by the subject who proceeds with the withdrawal of goods introduced in the VAT warehouse as in compliance with Article 50-*bis*, paragraph 6, of Decree 331/1993.

3 The Resolution states that: "*[…] The guarantee for the introduction into the VAT warehouse in the case of import of goods is different from the one related to withdrawal. The two guarantees are independent*".

4 In case the introduction into the VAT warehouse with import of goods is performed by subjects who meet the reliability requirements as according to custom's law, the guarantee for the "*introduction*" is not mandatory.

As the Resolution specifies, "*in case of introduction into the VAT warehouse with import of goods, the subject who proceeds with the withdrawal can apply the reverse charge mechanism without guarantee as in compliance with Article 50-bis, paragraph 6, of Law decree No. 331/1993*" provided that the subject who proceeds with the withdrawal:

- meet the reliability requirements;
- be one of the subjects as per Article 4, paragraph 1, letter a) and b) of Decree dated 23 February 2017 (for instance, subjects authorized as per Articles 38 and subsequent of EU Regulation No. 952/2013 of the European Parliament and of the Council of 9 October 2013, subjects exempted as per Art. 90 of the Customs Law Code).

1.2

Non-Taxable VAT Regime for vessels used for navigation on the high seas as per article 8-*bis* of Decree of the President of the Republic No. 633/1972. Further clarifications. Ministerial Resolution dated 16 January 2018, No. 6/E

The Financial Administration intervened on the non-taxable VAT regime for vessels used for navigation on the high seas as per article 8-*bis* of the VAT Decree, pursuant to Ministerial Resolution No. 2/E/2017. It is therein specified that a vessel can qualify as used for the navigation on the high seas if the vessel, in the year prior to the one in which the application of the non-taxable regime is requested, was used for navigation on the high seas for more than 70% of the time or in the sea area beyond the 12 nautical miles. The condition must be verified for each fiscal year.

Main clarifications on the issue are provided below.

Voyage on the high seas

Voyage shall mean any cruise carried out between two ports – Italian, EU or Extra EU – that the vessel performs in carrying passengers for reward or used for the purpose of commercial activities, where embarkation/disembarkation of goods and/or people take place.

Voyage on the high seas is "*the cruise carried out between two ports (or from and to the same port) beyond 12 miles no matter the bearing. This being the case, the voyage is to be considered as made*

on high seas hence the condition for the non-taxable VAT regime as per Article 8-bis of Decree of the President of the Republic No. 633/1972 is verified". A voyage which is fully operated in the internal waters of a State different from Italy must be considered, for VAT purposes, as fully made on high seas.

Official documentation in support of the fact that the navigation is mainly performed on high seas

The navigation on high sea condition must be verified based on official documentation [5], i.e. documentation from the ship owner or by the subject in charge of the vessel, able to provide detailed information on the navigation. It is specified that, "*should the buyer fail to provide such documentation, due to reasons supported by documentary evidence, a declaration of the ship owner, captain or the person in charge may as well suffice so as to prove that the vessel is mainly used for the navigation on high seas*".

The Resolution intervenes also on vessels under constructions, (see to this extent, EU Court of Justice dated 21 March 2013, C-197/12), on the failure to reach the above-mentioned threshold of 70%, or on vessels not used for one or more years. On this last point, it is specified that, should the vessel be not used for one or more years, reference must be made to the percentage of navigation on the high seas in the last year of use. If, during the year, the discontinuity of use of the vessel is evident, the condition that the vessels must be used for navigation on the high seas must be verified "*ex ante or ex post, according to the criteria chosen by the taxpayer, with reference to the period of competence of the new ship-owner, owner or user*".

1.3
VAT deduction – amendments introduced by Law Decree dated 24 April 2017, No. 50, converted with amendments by Law No. 96 dated 21 June 2017. Ministerial Circular dated 17 January 2018, No. 1/E

Circular No. 1/E provided clarifications with specific reference to the VAT deduction laws as amended by Law Decree dated 24 April 2017, No. 50 – which came into force on 24 April 2017 - converted with amendments by Law No. 96/2017. More in specific, Decree No. 50:

- (Article 2, paragraph 1) intervened on Art. 19, paragraph 1, of the VAT Decree by reducing the terms to deduct VAT related to goods/services purchased or imported;

5 For instance, *inter alia*: the logbook, the cartographies, the GPS reports or similar (data exchanged through the *A.I.S.*, "*Automatic Identification System*" where present), means of payments, contracts and the relevant invoices.

- (Article 2, paragraph 2) amended the process of invoice registration and more in specific intervened on Art. 25, paragraph 1, of the VAT Decree on the term for registration of invoices related to goods/ services purchased or imported by the taxable subjects.

The above applies to invoices and custom bills issued as from 1 January 2017 (see to this extent paragraph 2-*bis*, Art. 2 of Decree No. 50) provided that the same are related to transactions (i.e. purchase of assets/ services and imports of goods) actually performed and whose related VAT has become due as from said date.

With reference to decreases as per Art. 26 of the VAT Decree, the above applies with reference to credit notes issued as from 1 January 2017 provided that the related events which triggered the variation took place as from such data.

The Fiscal Administration specified that, in light of the fact that such clarifications were provided later than the 16 January 2018 – term fixed for the payment of the periodic VAT related to the month of December – behaviours to the contrary are hereby exempt and shall not be subject to sanctions.

Right of VAT deduction

EU Directive 2006/112/EC intervenes on the right of VAT deduction under Art. 167 and subsequent and Art. 178 and subsequent. Art. 167 states that a right of deduction shall arise at the time the deductible tax becomes chargeable. Art. 168 envisages that the right of deduction is subject to the inherence of the purchase to the VAT taxable operations performed by the taxable subject.

At a domestic level, the amendments to Decree No. 50 affected Art. 19, paragraph 1, of the VAT Decree in that the term within which the right of deduction can be exercised is modified: such right arises at the time the deductible tax becomes chargeable and can be exercised within the Return related to the year in which the right arose at the latest and at conditions existing at the moment such right arose.

As specified within the Circular, "*the amendments did not have any impact of the rules governing the right, which is still connected to the moment in which the deductible tax becomes chargeable (i.e. moment in which the operation is performed) whereas the term envisaged for the exercise of the right of deduction*

has been reduced. It is now envisaged that the right can be exercised with the filing of the VAT Return related to the year in which the right arose at the latest". With specific reference to the registration of purchase invoices, the new version of Art. 25, paragraph 1, of the VAT Decree (in light of amendments introduced by Art. 2, paragraph 2, of Law Decree No. 50) envisages that the invoice must be registered within the specific ledger prior to the periodic payment (moment in which the right arise) and however no later than filing of the yearly return related to the year in which the invoice is received and referring to the same year.

According to the Financial Administration, the two measures (Articles 19 and 25) must be coordinated by applying EU jurisprudence and more in specific Judgement dated 29 April 2004, C-152/02 (*Terra Baubedarf-Handel GmbH*)[6], which specifies that the exercise of the right to deduct is subject to the fact that the goods must be actually delivered or the services actually performed and the taxable person must be in possession of the related invoice.

This implies that, for the purposes of domestic coordination (Art. 19, paragraph 1 and Art. 25, paragraph 1, Law Decree No. 50), the term within which the right to deduct must be exercised starts when the following requisites are met:

- Tax becoming chargeable;
- Possess of valid invoice compliant with Art. 21 of the VAT Decree.

From this moment on, the right of deduction can be exercised no later than the date of filing of the Return related to the year in which both the requisites are realized and with reference to the same year. As specified within the Circular, "*[…] the right to deduct can be exercised in the year in which the taxable subject, having gained possess of the accounting documents, registers the same […] in the accounting books, introducing the same in the periodic liquidation related to the month/quarter of competence*".

The tax deduction must be complaint to the conditions existing in the FY in which the tax became chargeable[7].

6 The Judgment clarified that the right to deduction must be exercised with reference to the fiscal period in which two requisites are valid, i.e. that the sale of goods/provision of services have actually been performed and that the taxable subject is in possess of the invoice or of the equivalent document according to criteria fixed by the Member State involved.

7 An example is provided within the Circular: a subject which purchased a service in year 2017 (year with 75% pro-rata of deductibility), even if the deduction is performed in year 2018 (year in which the invoice is received) must perform the deduction with the pro-rata as in force in year 2017.

The Circular intervened also on the following issues:

- Variation of the taxable amount or of the tax, as in compliance with Art. 26 of the VAT Decree;
- Deduction as per Art. 60, paragraph 7, of the VAT Decree (exercise of the right to deduct VAT charged pursuant to a final assessment);
- Specific hypothesis of postponement of chargeability (exercise of the right to deduct for those operations subject to the split payment procedure and to the cash accounting VAT regime);
- exercise of the right to deduct through the filing of the corrective tax return "*in favor of the taxpayer*": it is specified that the taxable subject which did not exercise the right to deduct VAT paid related to purchases duly documented in the invoices is allowed to recover the tax by filing the corrective Return "*in favor*" (see art. 8, paragraph 6-*bis*, of the Decree of the President of the Republic No. 322/1998) no later than the 31 December of the fifth year following the one in which the Return is filed.

1.4

Light "*spesometro*", 28 February term postponed. Ruffini Measure, simplified draft available online. Revenue Agency Press Release dated 19 January 2018

With Press Release dated 19 January 2018, the Revenue Agency specified that, in order for all users to have an adequate period to study the new rules and so as to comply with the rules of the Taxpayer's Chart, the term for transmitting the data of invoices related to the second semester of 2017 originally fixed on 28 February 2018 has been postponed to the sixtieth day after the publication of a Measure of the Revenue Agency.

1.5

Domestic tax consolidation regime and use of losses – Specific cases. Ministerial Circular dated 26 January 2018, No. 2/E

The Revenue Agency, with Circular No. 2/E, intervened on the domestic tax consolidation regime and more in specific on the use of losses referring to financial years preceding the commencement of the group taxation to deduct higher taxes resulting from an assessment. The Agency intervened also on how losses must be attributed in the event the consolidation is interrupted, or revoked.

Use of losses referring to financial years preceding the commencement of the group taxation to deduct higher taxes resulting from an assessment

The Circular, after making reference to the existing law (see Art. 118, paragraph 2, of the Italian Income Tax act – TUIR – and Circulars No. 53/E/2004 and No. 15/2017), deals with a case where a consolidated company – or the consolidating company with reference to its own profits – receives a deed of tax assessment related to one of the FYs in which the consolidation regime is in force and has losses accrued prior to the year in which the option is exercised[8]. The company is willing to use such losses to reduce the higher amount assessed. In the event that the consolidated company transferred losses of the period to the consolidation, it is possible for the same to use losses referring to financial years preceding the commencement of the group taxation to reduce the amount assessed "*for the part of the higher amount assessed which may exceed the loss of the period transferred to the fiscal unit.*"

On the contrary, if the higher taxable amount assessed does not exceed the losses of the period transferred to the consolidation, losses referring to financial years preceding the commencement of the group taxation cannot be used in deduction of the higher taxes assessed (through the filing of the IPEA Form) since "*such losses could have not been transferred to the Consolidation though the return but only carried forward to the following year, as in compliance with Art. 118, paragraph 2 of the TUIR […]*".

Two numerical examples are provided as a practical explanation to the principles above mentioned.

Attribution of losses in case of interruption or revocation

As in compliance with Art. 124, paragraph 4, of the TUIR, in case of interruption of the group taxation before the end of the three-year period, tax losses as shown in the return of the consolidation remain available only to the controlling company. On the other hand, it is possible to provide appropriate criteria for attributing said tax losses to the companies that produced them, net of those drawn down, and with respect to which the requirement of control has ceased to be met. The above applies also in case of revocation (see to this extent Art. 125 of the TUIR which makes direct reference to Art. 124, paragraph 4, of the TUIR).

8 Available in the year under assessment and not yet used at the moment in which the IPEA Form is filed.

In case of interruption or revocation, the criteria of attribution of residual losses must be communicated to the Revenue Agency at the moment in which the option is exercised (see Art. 5 of Ministerial Decree dated 9 June 2004), by specifying one of the following codes:

- 1, attribution to the consolidating company/body;
- 2, proportional attribution to the companies which produced said losses;
- 3, attribution to the companies which produced said losses according to criteria differing to the above specified ones.

The Circular specifies that in case of interruption or revocation, the criteria to be used for the attribution of losses is the one communicated in case of option exercise/renewal "*and refers to all losses to be attributed at the moment of interruption/revocation, no matter the year in which such losses were accrued or with no stratification, even if the attribution criteria has changed medio tempore*". On a practical basis, the criteria in force at the moment in which the interruption/revocation is performed must be valid for all losses which, "*without distinction to the year in which they were produced*", are part of the Consolidation and need attribution.

1.6

Ruling - Art. 11, Law dated 27 July 2000, No. 212. Electronic storage of tax returns. Ministerial Resolution dated 29 January 2018, No. 9/E

Resolution No. 9/E provided clarifications on how long tax returns must be electronically stored. The Revenue Agency made direct reference to Resolution No. 46/E/2017 where it is stated that all electronic documents must be stored for as long as the Yearly Income Return is stored (same period applies to VAT relevant document).
This anticipated, according to the Agency, documents falling under the classification of declaration, transmission and payment returns must be stored for a period which begins with the year in which such documentation is produced and filed. For instance, the 2017 Income Return must be stored until three months after the term for filing the 2017 yearly tax return (above mentioned Resolution No. 4/E specifies that, as in compliance with Art. 3, paragraph 3, of Decree dated 17 June 2014 – in which reference is made to Art. 7, paragraph 4-*ter,* of Law Decree No. 357/1994 – the storage of electronic documents, in order for the same to be fiscally relevant, must be performed no later than three months after the term for filing the yearly Returns has come due).

1.7

Ruling as per Art. 11, paragraph 1, letter a) Law dated 27 July 2000, No. 212. IRES (tax on income) referring to the valuation of debt securities with the amortized cost method. Ministerial Resolution dated 29 January 2018, No. 10/E

The Resolution intervenes on the issue of IRES (corporate tax) related to the valuation of debt securities with the amortized cost method. With specific reference to the case at issue, a company operating in the largescale commercial distribution (the company is born after a merger of equals whose legal and fiscal effects are valid as from 1 January 2016) enquired to know:

1. whether it is correct to apply IRES transitory measures as per Art. 13-*bis*, paragraph 5, II period, of Decree No. 244/2016, to debt securities already owned as at 1 January 2016 (the company is of the opinion that retroactively applying the amortized cost method in order to valuate debt securities requires that the transitory measures be used, this implying a distinct treatment of the securities at issue);
2. which method must be used in order to allocate or transfer such debt securities for tax purposes.

The Revenue Agency, after commenting the amortized cost method (whose fiscal effects are valid from FY 2016 in force of the "*reinforced derivation principle*") specified that the retroactive application of such method requires that the pre-existing tax measures be applied. In other words, using the amortized cost method for debt securities pre 2016 would imply "*an improper taxation of income items referring to the same securities which have already been tax-relevant in tax periods pre 2016 due to the different accounting methods*".

Hence, in presence of a warehouse fully evaluated with the amortized cost method, from a tax perspective, the following must be applied:

- the pre-existing tax measures to bond securities pre 1 January 2016 which the company continues to be in possess of even in the following FYs;
- the amortized cost method (implementation of the criteria of the amortized cost method) for bond securities as from 1 January 2016.

With specific reference to which tax warehouse (securities pre 2016, or as from 2016) the eventual transfer of securities performed from 2016 must be allocated to, having such securities the same features, the

Resolution specifies that a proportional criteria must be applied. For a deeper understanding, reference can be made also to Resolutions No. 55/E/2004 and 127/E/2006, Circular No. 33/E/2009 – related to subjects *IAS/IFRS* – and Resolution No. 232/E/2003.

CASE LAW

2.1

Business income – Supreme Court, Ordinance dated 11 January 2018, No. 450

The Supreme Court, with Ordinance No. 450, intervened on the issue of inherence of costs when referring to tax related matters. The Ordinance specifies that the inherence of the costs must be interpreted in qualitative terms, and not by quantitative approach. Judges herein underlined that a cost does qualify as deductible even if the requisite of utility is not met.

2.2

Tax Credit - Supreme Court, Ordinance dated 18 January 2018, No. 1146

Ordinance No. 1146 specifies that once a tax credit (for the case at issue, a VAT credit) is duly reported within the Income Tax Return, the taxpayer is not burdened with any additional administrative filings in order to receive the refund. Indeed, he shall wait for the Tax Administrations to perform all controls they have power/are under the obligation to carry out and proceed with payment of taxes or, being all requirements met, by amending the Tax Return (on the issue, see also judgements No. 19115/2016, section VI, No. 14981/2014). Consequence of the above is that the credit is therefore invalidated by ordinary prescription after a period of 10 years whilst the 2 years term envisaged by Legislative Decree No. 546/1992, (Art. 21, paragraph 2) is not applicable. This is why the request of refund "*is merely the assumption based on which the credit qualifies as demandable, the element that triggers the refund process itself*" (reference can also be made to judgements No. 10180/2016, 76841/2012, 8813/2013 and 20255/2015).

2.3

Stamp Duty - Supreme Court, Ordinance dated 26 January 2018, No. 2007

With the Judgement at issue, the Supreme Court intervened on the amendments made by Article 1, paragraph 87, lett. a) of Law dated 29 December 2017, No. 205 (2018 Budget Law) to Art. 20 of Decree of the President of the Republic No. 131/86 (TUR) on Stamp Duty. More in specific, it is specified that

paragraph 87 as above mentioned (having innovative and not interpretative nature) has no retroactive effects. Hence, deeds executed prior to 1 January 2018 (coming into force of the new measure) "*continue to be subject to stamp duty in accordance with pre-existing rules (Art. 20 of Decree of the President of the Republic No. 131/86)*". On the issue, reference is made to Tax Newsletter 16-31 December 2017.

The anti-avoidance nature of Art. 20 of the TUR is excluded. (see judgments No. 21676 and 6758 year 2017, No. 1955, 24594, 24594 and 1955 year 2015; contra No. 2054 year 2017, No. 6835 year 2013, No. 24452 year 2007, No. 2713 year 2002).

Pirola
Pennuto
Zei
& Associati
studio di consulenza
tributaria e legale

Via Vittor Pisani, 20
20124 Milano

T. +39.02.669951
F. +39.02.6691800

info@studiopirola.com
www.pirolapennutozei.it

TAX NEWSLETTER | 16-31 JANUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 JANUARY 2018.
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