Pirola
Pennuto
Zei
& Associati
studio di consulenza
tributaria e legale

TAX

NEWSLETTER / 1-15 MAY 2018

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

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

LEGISLATION

1.1 4
Interests for late payments of amounts listed under the tax roll pursuant to Art. 30 of Decree of the President of the Republic dated 29 September 1973, No. 602 – Measure dated 10 May 2018

GUIDANCE

2.1 5
VAT. Amendments to the split payment procedure - Art.3 of Law Decree dated 16 October 2017, No. 148, converted, with amendments, by Law dated 4 December 2017, No. 172. Ministerial Circular dated 7 May 2018, No. 9/E

2.2 8
Legal advice – Setting-off of a non-existing credit already object of assessment and subject to sanctions for unfaithful return and undue deduction – Sanction – Article 13, paragraph 5, of Legislative Decree dated 18 December 1997, No. 471. Ministerial Resolution dated 8 May 2018, No. 36/E

2.3 9
Ruling as per Art. 11, paragraph 1, lett. a), of Law dated 27 July 2000, No. 212 – Treatment of IRES (Italian Tax on Corporate Income) applicable to positive income items resulting from a right to build ("*diritto di superficie*") granted for a specific period. Ministerial Resolution dated 15 May 2018, No. 37/E

2.4 10
VAT regime of investment advice in light of the advice expressed by the Value Added Tax Committee in the *Working Paper* No. 849 dated 22 April 2015. Ministerial Resolution dated 15 May 2018, No. 38/E

CASE LAW

3.1 12
VAT. Intra-community transaction. Supreme Court, Ordinance dated 19 April 2018, No. 9717

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

3.2 12
Business income – doubtful accounts – deductibility – Supreme Court, Ordinance dated 4 May 2018, No. 10685

3.3 12
Assessment – unlawful notice – Supreme Court, Judgement dated 9 May 2018, No. 11043

3.4 13
Compliance. Supreme Court, Ordinance dated 11 May 2018, No. 11497

LEGISLATION

1.1
Interests for late payments of amounts listed under the tax roll pursuant to Art. 30 of Decree of the President of the Republic dated 29 September 1973, No. 602 – Measure dated 10 May 2018

Measure dated 10 May 2018 states that, as from 15 May 2018, interests for late payments of amounts listed under the tax roll are equal to 3,01% yearly (see also Note of the Bank of Italy dated 23 March 2018).

GUIDANCE

2.1

VAT. Amendments to the split payment procedure - Art.3 of Law Decree dated 16 October 2017, No. 148, converted, with amendments, by Law dated 4 December 2017, No. 172. Ministerial Circular dated 7 May 2018, No. 9/E

Circular No. 9/E intervenes in detail on rules concerning the split payment mechanism[1], with specific reference to subjects eligible to the procedure[2] - extension to new subjects and Public Administrations – pursuant to amendments by Law 172/2017.

These new measures shall be enforceable as 1 January 2018 and shall apply to transactions whose related invoice is issued as from such date. In addition to this, as in compliance with paragraph 1-*ter* Art. 17-*ter* of Decree of the President of the Republic No. 633/1972, these new rules shall apply until the deadline fixed for the special derogating measure issued by EU Council, as per Art. 395 of Council Directive 2006/112 (i.e. 30 June 2020).

Subjects subject to the new payment system

In light of amendments by Law No. 172/2017, the split payment mechanism will be applicable to:

- national, regional and local public bodies, including "*aziende speciali*" and public entities providing services to individuals;
- foundations in which Public Administrations subject to split payment hold at least a 70% total interest in the endowment fund or controlled by public bodies (see, for instance, foundations through which Professional Orders do realize interests unrelated to the professions they embody);
- companies directly or indirectly controlled by the abovementioned companies and by companies subject to the split payment mechanism;
- companies in which Public Administrations subject to split payment or bodies subject to split payment hold at least a 70% total interest in the share capital.

1 As per Art. 17-*ter* of VAT Decree.

2 Art 3, paragraph 1, of Law Decree dated 16 October 2017, No. 148, converted, with amendments, by Law dated 4 December 2017, No. 172 replaced paragraph 1-*bis* of Art. 17-*ter* of Decree of the President of the Republic No. 633/1972.

The above are an extension to the list of subjects already subject to the split payment mechanism such as Public Administrations and companies listed at FTSE MIB index of the Italian Stock Exchange. The following table summarizes all subjects which, as from 1 January 2018, will be subject to the split payment procedure[3].

3 The lists allowing taxable subjects to verify whether the transaction being executed shall be subject to the split payment procedure are available on the webpage of the Ministry of Economy and Finance (published on 19 December 2017 – in force as from 1 January 2018). The procedure shall apply only as from the day in which the subject is included in the list and the latter is published on the webpage of the Ministry of Finance. It is also possible to access online the index of all Public Administrations (IPA) via the link *http://indicepa.gov.it/documentale/ricerca.php*, in that suppliers can find all information necessary in order to issue the invoice pursuant to the split payment procedure.

Pubblic Administration *(Art. 17-ter, paragraph 1 of Decree of the President of the Republic No. 633/1972)*	• *subjects as per Art. 1 paragraph 2 Legislative Decree No. 165/2001;* • *subjects specified for statistical purposes by ISTAT (Italian National Institute of Statistics) as per Art. 1, paragraph 2, of Law No. 196/2009 and independent Authorities;* • *independent Authorities as listed under Art. 1, paragraph 209, of Law No. 244/2007.*
Bodies *(Art. 17-ter, paragraph 1-bis of Decree of the President of the Republic No. 633/1972, lett.0a)*	• *national, regional and local public bodies;* • *"aziende speciali";* • *public entities providing services to individuals.*
Foundations *(Art. 17-ter, paragraph 1-bis of Decree of the President of the Republic No. 633/1972, lett.0b)*	*foundations in which Public Administrations subject to split payment hold at least a 70% total interest in the endowment fund or controlled by public bodies.*
Companies *(Art. 17-ter, paragraph 1-bis of Decree of the President of the Republic No. 633/1972 lett. a), b), c), d)*	• *companies directly controlled (de facto and de jure) by the Presidency of the Council of Minsters;* • *companies directly or indirectly controlled (de jure) by Public Administrations and companies subject to the spit payment mechanism;* • *companies in which Public Administrations or bodies and companies subject to the split payment procedure hold at least a 70% total interest in the share capital;* • *companies listed at FTSE MIB index of the Italian Stock Exchange and with VAT number.*

Sanctions

The Circular specifies that – due to the uncertainty of the new rules on the split payment mechanism – incorrect behaviors adopted by taxpayers before the publication of the clarifications provided with the Circular at issue will not be subject to sanctions, provided that no damage was caused to the Treasury pursuant to the non-payment of the tax due.

Exceptions

The Circular provides clarifications also with reference to specific cases such as for example application of the split payment measure to fiduciary companies and the CTU fees (technical advisory fees) due by subjects subject to the split payment[4]. In presence of a fiduciary company, the split payment procedure shall apply only if the actual owner of the shares managed by the fiduciary company is subject to the measure, the nature of the fiduciary company having no relevance thereto.

2.2
Legal advice – Setting-off of a non-existing credit already object of assessment and subject to sanctions for unfaithful return and undue deduction – Sanction – Article 13, paragraph 5, of Legislative Decree dated 18 December 1997, No. 471. Ministerial Resolution dated 8 May 2018, No. 36/E

The Financial Administration, with Resolution No. 36/E, intervened on the setting-off of non-existing credits and sanctions applicable as in compliance with Art. 27, paragraphs from 16 to 20, of Law Decree No. 185/2008, converted with amendments by Law dated 28 January 2009, No. 2.

Legislative Decree No. 158 dated 24 September 2015 provided a new definition of non-existing credits and subjected the same to a specific penalty system[5]: a credit qualifies as non-existing "*if the underlying assumption of its existence is, wholly or in part, missing*".

According to the Financial Administration, the law aims at ensuring that the credit which is fraudulently

4 See Judgements of the Supreme Court (such as for example Cass. Civ, Sez. III, No. 1023/2013 and Cass. Civ., Sez, VI, Ord. No. 23522/2014).

5 Via the repeal of Art. 27, paragraph 18, of Law Decree No. 185/2008.

generated and used in compensations in the F24 Payment Forms is duly recovered and that such behavior is sanctioned. Hence, as the non-existence of the credit cannot be verified in the tax returns, the recovery modalities shall be those envisaged by Art. 1, paragraph 421, of Law No. 311/2004, i.e. notification of specific act of recovery[6].

It is specified that, in order to avoid sanctioning the same violation twice[7], if a non-existing credit is assessed and sanctioned as unfaithful return and undue deduction, the eventual use of the same in compensation cannot be sanctioned.

2.3
Ruling as per Art. 11, paragraph 1, lett. a), of Law dated 27 July 2000, No. 212 – Treatment of IRES (Italian Tax on Corporate Income) applicable to positive income items resulting from a right to build ("*diritto di superficie*") granted for a specific period. Ministerial Resolution dated 15 May 2018, No. 37/E

Resolution No. 37/E intervenes on the treatment of IRES applicable to positive income items resulting from a right to build ("*diritto di superficie*") granted for a specific period (for the case at hand, the fees related to the granting of a right to build are calculated yearly, prepaid on a quarterly basis). More in detail, the company issuing the request intends to qualify the periodic fees (invoiced and cashed in on a quarterly basis) related the right to build at issue as revenues (similarly to a provision of services). The Resolution makes direct reference to the accounting principle *OIC 12* (referred to as "*Schemes and contents of the financial statements*") which states that "*fees paid to thirds […] for the granting of the right to build*" must be listed under section "*B8) Use of goods property of third parties*" (at the same strength of "*real estate leases*" and "*real estate financial leases*" (Paragraph 65)). In practice, the accounting effects of the right to build are treated like those triggered by leases: hence, listing the same as revenues and not as capital gains is compliant with law[8]. This anticipated, according to the Revenue Agency, "*[…] the fees*

6 In case the non-existing credit (tax surplus) is reported within the return and later used in compensation, a corrective return must be filed and sanctions for unfaithful return applied.

7 First by sanctioning the accounting of non-existing invoices and the consequent deduction of the tax debt by reporting a higher credit, second by sanctioning the undue set-off of the subsequent years.

8 With specific reference to the case at hand, the accounting of revenues based on maturity dated was considered correct.

received by ALFA [issuing company] *for the granting of the right to build for a specific period do concur to the formation of the business income of the requesting company as revenues and not as capital gain as in compliance with the principle of derivation as per Art. 83 of the TUIR (Italian Income Tax Act)*"[9].

2.4
VAT regime of investment advice in light of the advice expressed by the Value Added Tax Committee in the *Working Paper* No. 849 dated 22 April 2015. Ministerial Resolution dated 15 May 2018, No. 38/E

Resolution No. 38/E analyzed the VAT regime of investment advice in light of what expressed by the Value Added Tax Committee in the Working Paper No. 849/2015.

With specific reference to the case at hand, the company issuing the request is a stock brokerage company carrying out services of *portfolio* management and advisory services concerning investment, with no ownership on clients' cash and financial instruments[10]. The company provides such services directly to its clients in a position of absolute independence and impartiality.

In general terms, the investment advisory services (as per Att. 1, paragraph 5, let. F) of the TUF – Italian Consolidated Financial Act) concern advises tailored on a potential investor – upon direct request of the latter or upon initiative of the broker – related to one or more financial instruments. The Revenue Agency made reference to Ministerial Resolution No. 343/E/2008 according to which investment advisory services rendered related to VAT qualify as VAT exempt mediation, intermediation and mandate services (as in compliance with numbers 4) and 9) of Art. 10, paragraph 1, of VAT Decree)[11].

On the issue, the VAT Committee expressed the following principle: "[…] "negotiation" is a service rendered by an intermediary as a distinct act of mediation whose purpose is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in

9 See Legislative Decree dated 18 August 2015, No. 139, related to the implementation of Directive 2013/34/EU, and Law Decree dated 30 December 2016, No. 244 (so called "*Milleproroghe 2017 Decree*"), converted by Law 27 February 2017, No. 19, envisaging the rules "*Coordination of IRES and IRAP rules with Legislative Decree No. 139/2015*".

10 The activities performed are: individual *portfolio* management, investment advisory, general advisory and distribution of insurance products.

11 See also Judgements pf EU Court of Justice *CSC Financial Services Ltd* and *Volker Ludwig,* to which Ministerial Resolution No. 343/E/2008 seems to make reference to.

the terms of the contract. The VAT Committee [unanimously] agrees that for the provision of investment service in securities to be considered as negotiation services it is fundamental that it constitutes a distinct act of mediation as established by CJEU".

In addition to the above, it is specified that "*the supply of an advisory service concerning investment in securities where the service provider is not involved in the negotiation and execution of the contract does not fall within the scope of application of Art. 135 (1) (f) of VAT Directive*". In practice, according to the interpretation provided the VAT Committee, which appears to be not fully in line with the position expressed by the EU Court of Justice, the supply of an advisory service concerning investment in securities with no involvement of the advisor/service provider in the execution of the contract between the client and the party who markets the securities cannot qualify as negotiation/mediation activity and therefore shall not be VAT exempt as per Art. 135 (1) (f) of VAT Directive2006 (112/EC. According to such interpretation, the Resolution specifies that, with reference to the case at hand[12], "*should there be no involvement, even indirect and/or economic, with the subjects who markets the recommended securities, the investment advisory cannot qualify as a VAT exempt intermediary service*" as in compliance with numbers 4) and 9) of Art. 10, paragraph 1, of Decree of the President of the Republic 633/1972. Hence, the services as above outlined shall be subject to VAT.

12 Where the company is either in an independent position compared to the deposit bank of each investors – or compared to financial subject which investments are connected to – and has no contractual deed/document that can be assimilated to the mediation/negotiation activity.

CASE LAW

3.1
VAT. Intra-community transaction. Supreme Court, Ordinance dated 19 April 2018, No. 9717

With Ordinance dated 19 April 2018, No. 9717, the Supreme Court intervened on intra community transactions (reference is herein made to Judgments No. 2233/2011; 21809/2012 and 20487/2017). More in specific, the case at hand refers to the non-recognition of a intra-community sale of goods due to the failure to provide adequate proof of the transfer of goods abroad. It is specified that the documentation of private origin of the goods as provided by the seller is irrelevant in order to ascertain the transaction. The so called *CMR Form*, duly signed by the seller, buyer and subject which delivered the goods at issue, or commercial agreements to this extent, are the sole documentation valid to such purpose.

3.2
Business income – doubtful accounts – deductibility – Supreme Court, Ordinance dated 4 May 2018, No. 10685

With Ordinance No. 10685, the Supreme Court intervened on the drafting of the Financial Statement in case of insolvency by costumers. It is specified that, in order to properly draft the Financial Statements and duly deduct items registered within the same, the difference existing between the item "*losses on receivables*" and the item "*doubtful accounts*" is as follow: a credit is definitely lost when there is no possibility whatsoever to recover the same; a credit is written-off, totally or partially, in case the loss is only potential and not yet certain or definitive.

3.3
Assessment – unlawful notice – Supreme Court, Judgement dated 9 May 2018, No. 11043

With Judgement dated 9 May 2018, No. 11043, the Supreme Court specified that, with reference to assessments related to taxes on income, in the event that the taxpayer fails to file the return, the Tax Administration can intervene also on mere presumptions which are not material, precise and consistent but shall nonetheless consider also negative items emerged during the assessment. In case costs cannot

be determined, these can be inductively assessed. The assessment must be coordinated according to "*the principle of financial statement continuity*" meaning that final surpluses of a financial year constitute initial assets of the following year and the reciprocal variations contribute to form the operating income (to this extent, see Judgement of the Supreme Court No. 3567/2017).

3.4
Compliance. Supreme Court, Ordinance dated 11 May 2018, No. 11497

With Ordinance dated 11 May 2018, No. 11497, the Supreme Court intervened on the issue of compliance which, should certain conditions be met, entitles to reduced sanctions.

The following principle is stated: when referring to tax matters "*compliance as per Art. 15 of Legislative Decree No. 218/1997, given the ratio of the measure aiming at avoiding tax litigation, can be exercised also with reference to single charges having relevance as a single unit notwithstanding the fact that they are part of a single assessment*". This method can therefore be considered as duly compliant with law as not in breach of tax rules and not in contrast with the ratio as above mentioned on which compliance is based.

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 | 1-15 MAY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 15 MAY 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