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LEGISLATION

1.1

“*Definizione agevolata degli atti del procedimento di accertamento*” (Acceptance of amounts claimed in notices of deficiency and similar instruments, of amounts stated in summons to meetings with the tax authorities and in settlement agreements, without payment of penalties and interest) – implementing rules of article 2 of decree law No 119 of 23 October 2018 – Joint Revenue Agency Director and Customs Authority Director Enactment No 298724 of 9 November 2018

By this Enactment, the Revenue Agency and the Customs Authority established the manner and deadline for tax payments to be made pursuant to notices of deficiencies, tax payment demands, negotiated settlement agreements and similar arrangements, served or entered into until 24 October 2018 (date of entry into force of Decree-Law 119/2018 discussed in the 16-31 October 2018 Tax Newsletter, to which we refer).

Article 2 of the decree covers all amounts claimed by the Revenue Agency and the Customs Authority; under the beneficial regime only taxes (and any contributions) are payable, without any administrative penalties, interest and ancillary expenses. Any notices of deficiency and similar instruments in respect of which a settlement has otherwise been reached or which have been appealed against by or after 24 October 2018, do not qualify for the beneficial treatment.

The deadlines for payment vary depending on the instrument claiming payment, and in particular:

- as regards amounts payable pursuant to notices of deficiencies, tax payment demands and similar instruments, the deadline for payment (of the entire amount or the first instalment) is 23 November 2018 or the due date for filing an appeal, if later;
- as regards *inviti al contraddittorio* (summons to negotiations with the authorities), the deadline for payment (of the entire amount or the first instalment) is 23 November 2018;
- as regards negotiated settlement agreements, the deadline for payment of taxes and contributions is 13 November 2018.

Article 2 of the Enactment provides the relevant payment instructions.

1.2

“*Definizione agevolata degli atti del procedimento di accertamento*” (Acceptance of amounts claimed in notices of deficiency and similar instruments, of amounts stated in summons to meetings with the tax authorities and in settlement agreements, without payment of penalties and interest) – rules implementing article 2 of decree law No 119 of 23 October 2018 –Revenue Agency Director Enactment No 301338 of 13 November 2018

Enactment No 301338/2018 establishes the manner of implementation of article 2 of Decree Law 119/2018, with particular regard to *amateur* sports clubs and associations. Specifically, it states that the provisions of Enactment 298724/2018 (described in the previous paragraph) apply to the *definizione agevolata* procedure implemented by such entities.
Pursuant to the (combined) provisions of articles 2 and 7 of Decree No 119/2018, *amateur* sports clubs and associations registered with CONI (the Italian National Olympic Committee) may qualify for: the *definizione agevolata* in respect of notices of deficiency and similar instruments (*atti del procedimento di accertamento*) served or signed by 24 October 2018 by paying 50% of the additional taxes assessed, except VAT (which is due in full), and 5% of the penalties and interest claimed, not including any ancillary charges.

The limit to qualify for *definizione agevolata* is Euro 30,000 for all taxes due for each fiscal year.

GUIDANCE

2.1
VAT – Clarification on the VAT group rules contained in Title V-*bis* of Presidential Decree No 633 of 26 October 1972 (Italian VAT Code) and Ministry of Economy and Finance Decree dated 6 April 2018. Ministerial Circular No 19/E of 31 October 2018

In Circular No 19/E of 31 October 2018, the Italian tax authorities provided clarification on the (optional) VAT group[1] rules , with particular regard to the provisions of Title V-*bis* (cf. arts. 70-*bis* to 70-*duodecies*) of the VAT Decree and Decree of 6 April 2018.

The VAT Group regime applies to all areas of business, including activities carried out by setting aside segregated assets. Therefore, also Italian asset management companies (SGR) and companies incorporated as part of a securitization transaction can become members of a VAT Group.

Article 70-*quater*(4) of the VAT decree sets the regime's minimum initial term of three years. For the first year[2] of application of the regime, if the option was elected by 15 November 2018, the VAT Group would be effective as of 1 January 2019; subsequently, the relevant application may be submitted until 30 September in order to create a VAT Group as of 1st January of the next year.

We outline below some of the most significant points of the VAT Group rules.

Eligible entities

As prescribed by article 70-*bis* of the VAT Decree the taxable entities located in the territory of the State conducting a business, art or profession, for which the financial and organizational conditions explained below are jointly met may become members of a VAT Group. Each single VAT Group's member must be located in the territory of the State and offices and permanent establishments abroad cannot join a VAT group.

1 The Circular describes the VAT Group as a separate taxable person, with the same rights and obligations as any other VAT registered person, with its own VAT number and V.I.E.S. (VAT Information Exchange System) registration number. Under Italian legislation, groups of companies may voluntarily choose whether or not to implement the VAT group regime – albeit on an *"all in, all out"* basis.

2 After such period, the election is automatically extended for successive one-year periods until revoked.

In particular, the following entities cannot join a VAT Group:

- foreign offices and permanent establishments;
- entities of which firm is under court-ordered seizure (see article 670 of the Code of Criminal Procedure); in the event of several firms, the provision applies even if the seizure involves only one of them;
- entities involved in an insolvency procedure and those in liquidation.

Moreover, the following entities cannot become members of a VAT Group; i) non-commercial entities since performing institutional activities; ii) *consortia* with a mere internal relevance; iii) pure holding companies and non-operating holding companies (i.e. companies which only hold and manage shares without interfering in the management of the entities in which the shares are held).

On the contrary, holding companies which interfere in the management of the entities in which the shares are held and offering the latter services of mutual interest and from which all of them can benefit are allowed to become members of a VAT Group. See the ECJ judgements referring to the cases *Floridienne SA and Berginvest SA.*

Financial, economic and organisational conditions

With regard to the financial condition (see article 70-*ter*(1) of the VAT Decree), reference must basically be made to the principle of control established by article 2359(1)(i) of the Civil Code, which prescribes that a controlled company is a company in which another company holds the majority of votes which can be exercised in a general meeting; this control can be exercised either directly or indirectly; a mixed (direct and indirect) control is also allowed.

The VAT Group can be controlled by an entity not located in Italy, but in a country with which an agreement for the effective exchange of information has been signed (i.e. a white-listed country as prescribed by the Decree dated 4.9.1996 and subsequent amendments, or with which it is possible to have an adequate exchange of information by way of the Convention against double taxation, or a specific international agreement, in relation to which the European community provisions on administrative assistance apply).

The financial condition between the taxable entities required in order to join a VAT Group must exist at the time of the election of the option and anyway, as at 1 July of the FY prior to that in which the option is in force; in particular:

- the entities setting up a VAT Group by 30 September must demonstrate that the financial condition is satisfied starting from 1 July of the previous year;
- on the contrary, the entities setting up a VAT Group from 1 October to 31 December must demonstrate that the financial condition is satisfied from the time when the option is elected.

The economic condition is satisfied (see article 70-*ter*(2) of the VAT Decree and article 4(4) of the Sixth VAT Directive) if at least one of the following cases occurs:

- the entities conduct a similar[3] core business[4];
- the entities conduct a complementary[5] or interdependent business;
- the entities conduct a business which fully or basically benefits one or more taxable entities which are members of the VAT Group.

Basically, the connections between the taxable entities required to set up a VAT Group must be such as to enable the pursuit of a common goal in the conduct of their individual business.

As prescribed by article 70-*ter*, (3), of the VAT Decree, the organizational condition is met when among the entities located in the territory of the State there is a coordination relationship from a legal perspective – pursuant to the provisions of the Civil Code on direction and coordination – and from a factual perspective among their governing bodies, even if such coordination is performed by another entity. The Circular prescribes that on a general basis the coordination consists of defining the economic policy, the strategies and the main aspects of the business conducted by independent taxable entities, by establishing operational guidelines for the several and formally separate entities in order to manage the Group as if it were a single entity.

According to the law, the financial condition is prominent, since if the latter is met, it is presumed that the economic and organizational conditions are also met.

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3 I.e. the same commercial or professional activities.

4 Relevance is given to the core business of the economic operator (as reported in the memorandum of association in the description of the corporate object) and not simply to the business generating the highest turnover.

5 E.g.: the manufacturing of motor vehicle parts made by a taxable entity for the benefit of another taxable entity which manufactures finished products.

In order to demonstrate that the economic or organisational conditions are not met or in order to demonstrate that the economic condition is met, it is necessary to file a ruling request (article 11(1)(b)) of Law no. 212/2000) for confirmation that the entity can or cannot become a member of the VAT Group. This ruling request may be filed prior to the election of the option for the setting up of a VAT Group, if the entity wants to demonstrate that the economic and organizational conditions are not met or that the economic condition is met starting from the time when the VAT Group is set up. The reply to the ruling request is provided within 120 days from its filing (see Ministerial Resolution no. 54/E/2018).

Notice of setting up of a VAT Group

In order to elect the option for the VAT Group, the Group's representative must electronically file a specific notice (the form and its filing procedure have been approved by the Enactment of the Revenue Agency's Director no. 215450/2018). The notice also includes the options regarding the segregation of activities (article 36 of the VAT Decree) and exemption from VAT obligations required for exempt transactions which the VAT Group wants to apply (36*bis* of the VAT Decree;) the notice can be supplemented with such additional regimes' options until 31 December prior to the actual operation of the VAT Group.
The revocation of the VAT Group regime must be requested by filing a notice as explained in Enactment no. 215450/2018.

Rights and obligations

The setting up of a VAT Group implies the setting up of a new taxable entity with its own VAT number and V.I.E.S. registration number. The procedures to register with the V.I.E.S. are prescribed by the Enactment of the Revenue Agency's director no. 159941/2014 and the registration can be done by way of the online services of the Revenue Agency, either directly or through intermediaries. At the date on which the VAT Group is effective each single member – if registered with the V.I.E.S. – will be automatically excluded from the V.I.E.S.; if the VAT Group ceases to exist or is revoked, the members must register (again) with the V.I.E.S. if they carry out intra-community transactions.

The VAT numbers of the VAT Group members will be associated with the Group's VAT number. Moreover, the reporting, settlement[6] and payment obligations regarding VAT and all other recording obligations

6 As regards the tax deduction, reference is made to the clarification provided in the Ministerial Circular no. 1/E/2018.

must be complied with by the VAT Group (the code related to the legal status of the VAT Group to be reported in the notifications to the Tax authority is 61)[7].

Transactions within the VAT Group

As prescribed by article 70-*quinquies*(1) of the VAT Decree, the sales of goods and the provisions of services made by a VAT Group member *vis-à-vis* another member are not considered sales of goods and provisions of services. In other words, the sales of goods and provisions of services occurring among the members of the same VAT Group are not relevant for VAT purposes; as specified in the Circular, this implies that with regard to the intercompany transactions, the determination of the taxable base of such transactions has no relevance for VAT purpose and in respect of such transactions there is no invoicing obligation and the recording in the VAT ledgers and the reporting in the VAT annual return are not required. However, in the Revenue Agency's opinion, although the sales of goods and the provisions of services are not relevant for VAT purposes, if the VAT is separately charged within the VAT Group, internal transfers of goods and services are relevant for VAT purposes.

Amounts exchanged between the VAT group members based on internal agreements in exchange for VAT credits and debts deriving from being members of the VAT Group are not relevant for VAT purposes.

VAT credits prior to the application of the VAT Group regime

Reference must be made to article 70-*sexies* (first sentence) of the VAT Decree, according to which once a VAT Group is set up, it is not allowed to transfer the VAT credits arising from the Tax return of each single VAT Group member of the year prior to that of the regime's application. Such tax credits will remain entirely in the hands of the VAT Group member, which can choose if either:

- requesting for the VAT credit refund, in the annual tax return, or
- utilising such credit for offset, pursuant to article 17 of Legislative decree no. 241/1997.

According to the Circular, such principle is however overcome by the provision included in article 70-*sexies* (second sentence), which prescribes that the portion of prior deductible tax credits as to an amount

7 The goods and services sold and purchased by one of the members of the VAT Group are considered sold or purchased by the Group itself; this principle also applies to imports and exports and intracommunity purchases and sales made by and to the Group.

equal to the VAT payments made in the year prior to the first year of application of the regime must be transferred to the VAT Group (see the instance explained at page 4 of the Circular).

The document under examination also deals with the following aspects:

1. relationships between the parent company and the branches which are members of a VAT Group (see article 70-*quinquies* from (4*bis*) to 4-*sexies* of VAT Decree). After becoming members of a VAT Group, the sales of goods and/or the provision of services occurred between a parent company and a permanent establishment are relevant for VAT purposes. Basically, starting from 1 January 2018 Italian legislation has incorporated the principles set out by the European Court of Justice in *Skandia* judgement , according to which "*[...] supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group*".
2. utilization of the threshold by the members for the purposes of the classification as usual exporter of the VAT Group (Declaration of intent): the VAT Group – starting from the first year of election of the related option – can benefit from the classification of exporter making frequent shipments based on the threshold accrued by each single member of the VAT Group;
3. regulations on the split payment: if the VAT Group includes one or more members which fall within the scope of such regulations, the regime does not apply to the transactions made vis-à-vis the Group;
4. adjustments to the deduction made at the time of the VAT Group's setting up, or of the cessation of the VA Group; it has been clarified that as regards the regulations on the adjustment to the deduction, the setting up of a VAT Group implies effects similar to those generated by a merger between companies;
5. representative of the VAT Group: all VAT Group obligations are fulfilled by the group representative, which according to the law is the entity exercising the control over the other members of the VAT Group as prescribed by article 70-*ter* (1) of the VAT Decree (financial condition);
6. allocation of goods and services when switching from single-member option to the VAT Group option and procedures to separate the different business activities performed by the members of the VAT Group;
7. internal switches from one activity to another for which the tax is applied separately within the VAT Group;
8. allocation criteria of depreciable assets, as well as of services commonly utilized within the scope of the separated business activities (see Ministerial Circular no. 18/1981 and Ministerial Resolutions no.

450565/1990 and 445015/1991);

9. responsibility within the scope of the VAT Group;
10. asset management companies (SGR) are admitted to the regulations on VAT Group (see article 70-*duodecies,* (4), of VAT Decree); for the sales of goods and provisions of services related to the transactions of real estate investment funds set up by asset management companies the taxable entity for VAT purposes is the VAT Group and not the asset management company. Moreover, the VAT is determined and paid separately from the tax due for the business conducted as an asset management company and is applied separately to each single fund.

2.2
Legal consultancy – Supplementing the VAT TR Form. Ministerial Resolution no. 82/E/2018

The Resolution deals with the term for the filing of the VAT TR Form, by which it is possible to supplement or amend solely the data shown in the TD field of that Form (see Ministerial Resolution no. 99/E/2014 and Ministerial Circular no. 35/E/2015). It has been specified that there are no obstacles to allow the supplement or amendment of VAT TR form by 30 April of every year (or by another deadline prescribed for filing the annual VAT return) in respect of the elements (e.g. affixing the seal of approval, certifying the contribution and financial requirements) which do not affect the purpose and/or the amount of the sub-annual credit, provided that the VAT credit has not yet been reimbursed or offset.

In this case:

- it is not necessary to file a substitute annual VAT return by the deadline, since the amended elements do not affect the contents of the annual return;
- the supplement or amendment of the elements listed above is not liable to penalties, unless the sub-annual credit has been offset and the TR VAT Form has no seal of approval.

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TAX NEWSLETTTER 1-15 NOVEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 15 NOVEMBER 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