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Italian tax news

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ESTABLISHING THE JURISDICTION OF VAT LIABILITY ON ATM WITHDRAWALS

To determine where VAT liabilities arise (under Art. 7-*septies* of Presidential Decree 633/72) in the case of services related connected to withdrawals from ATMs it is necessary to identify the State of residence of the card holder. To this end, the BIN (Bank Identification Number) code associated with the card itself is not deemed to be relevant.

Indeed, with the ruling no. 207 of the 8 February 2023, the **Italian Tax Authorities** maintained that the BIN makes it possible to identify the entity – credit or financial institution – that issued the debit or credit card and, therefore, the State in which it is established; that State, however, does not necessarily coincide with the State in which the card user is resident and domiciled.

GROUP VAT SETTLEMENT INVOLVING NON-RESIDENT COMPANIES

With the statement of practice no. 22/2005, Italian Tax Authorities clarified that the rules for group VAT settlement also apply to companies' resident in other EU countries where they meet the requirements of Ministerial Decree of 13 December 1979 and are identified for VAT purposes in Italy (through a permanent establishment, or through the appointment of a tax representative).

Ruling no. 209 of the 8 February 2023 recalled the clarifications made with the above-mentioned statement of practice and held that even companies resident in other EU member States without a permanent establishment in Italy may apply for the group VAT scheme. In addition, in the case of a nonresident company that is directly identified for VAT purposes in Italy, it is necessary that the latter entity is identified from the 1st of January of the year in which the group VAT scheme is to be applied.

VAT REFUND REQUEST BY RESIDENTS OF NON-EU COUNTRIES DEPENDS ON THE CONDITION OF RECIPROCITY

With the decision no. 3908 of the 9 February 2023 the **Italian Supreme Court** examined a claim raised by a Canadian company that had requested a refund of VAT paid in Italy in connection with cars rented by Italian companies. Such cars were put at the disposal of clients of such Canadian company while they were in Italy.

The Supreme Court held that the condition of reciprocity is a prerequisite for a non-resident established in non-EU states to request a VAT refund on VAT paid in Italy. In the absence of this condition, the foreign company cannot benefit from the ordinary refund procedure under Art. 38-*bis* of Presidential Decree 633/72.

30% WHT ON SELF-EMPLOYMENT SERVICES RENDERED BY NON-RESIDENT COMPANIES

Pursuant to Art. 25(2) of Presidential Decree 600/73 a 30% withholding tax applies on remunerations for self-employment services paid to nonresidents, "*including for services rendered in the course of business*". The above-mentioned article excludes the 30% levy for remuneration related to services rendered abroad (for which there is no Italian taxation) and for remuneration paid to Italian permanent establishments of non-residents.

The Supreme Court with the decision no. 2619 of 27 January 2023 confirms that in interpreting Art. 25 it is necessary to verify whether the service is objectively of a self-employment nature, even if the relevant compensation is paid to a company. It must, therefore, be determined whether the personal nature prevails in the services rendered as opposed to the economic activity of the company through an objective assessment of the profile of the services rendered.

INVOLVEMENT OF A PERMANENT ESTABLISHMENT IN ITALY IN INTRACOMMUNITY PURCHASES

With ruling no. 57 of 17 January 2023, the Italian Tax Authorities speculated on how to identify the person who is liable to pay VAT in an intra-community transaction involving an Italian taxable person and a non-resident entity which has a **permanent establishment** in Italy.

The VAT liability depends on whether the permanent establishment is involved in the transaction or not. Should the permanent establishment be involved in the transaction which took place between the non-resident parent company and the Italian buyer, then the Italian Tax Authorities considers that the permanent establishment had made a transaction which might be assimilated to an intra-Community acquisition pursuant to Art. 38(3) of DL 331/93 vis-à-vis the **head-office**. Subsequently, the Italian permanent establishment carries out a domestic supply to the Italian buyer that is subject to VAT.

NON-RESIDENT PERSONS AND EXEMPTION ON PROVIDING VAT GUARANTEES

With tax ruling no. 211 of the 13 February 2023, the Italian Tax Authorities clarified that in case of a VAT refund request submitted by the tax representative of a non-resident person:

- when the creditor is resident in the EU the **affidavit** relating to the assets of the creditor who requests refund must be submitted by the tax representative according to the ordinary rules. If the creditor is resident in a non-EU country, the affidavit must be in line with the international conventions between Italy and the Country of establishment of the non-resident;
- in all the other cases, on the other hand, the financial soundness of the credit holder may be certified by the procedure set out in Art. 3(4) of Presidential Decree 445/2000 which guarantees public certainty and enables the tax authorities to carry out similar controls as those that are applicable on tax returns carried out by Italian taxpayers.

CLARIFICATION OF THE ITALIAN TAX AUTHORITIES ON THE NEW DEDUCTION REGIME ON R&D COSTS

With Law Decree no. 146 of 21 October 2021 the previous Italian patent box regime has been repealed and a new optional regime has been enacted instead.

The new regime allows for persons engaged in business activities and holding certain kind of intangible assets to deduct costs suffered for research and development activities.

The intangible assets which allow for the deduction are the following:

- software;
- certain kind of patents;

- drawings or models which are liable to be protected under IP law;
- two or more of the intangible assets listed above which are deeply intertwined and the realisation of a product(s), process depends upon the use of such assets.

For tax purposes, the deduction is allowed for an amount equal to 110% of the R&D costs actually borne. However, the deduction is not allowed where the costs suffered qualify as intra-group costs.

VAT RATE ON COVID-19 VACCINES

As per circular letter no. 5 of 14 February 2023, the **Customs and Monopolies Agency** has clarified the amount of the updated VAT rates for the supplies and imports of "anti-COVID-19" goods, considering that the VAT exemption on such goods came to an end on the 31 December 2022. In particular, the following rates will apply:

- a 5% VAT rate for in-vitro COVID-19 diagnostic instruments, identified by CN codes 3822 1900 10, ex 3821 0000, ex 9018 90, ex 9027 89, 3822 1900 10, ex 9027 8990, pursuant to no. 1-ter.1 of Table A, part II-bis, annexed to Presidential Decree 633/72
- a 10% VAT rate for COVID-19 vaccines, identified by CN code 3002 4110, as provided for in no. 114) of Table A, Part III, annexed to Presidential Decree 633/72.

The clarifications that had been issued by the Customs and Monopolies Agency in their circular letter no. 9 of 3 March 2021 for imports of goods necessary to contain and manage the COVID-19 virus (e.g. computer tomographs, surgical masks, Ffp2 and Ffp3, thermometers; disinfectant hand cleaners, etc.) remain valid.

INCOME DISTRIBUTED BY A FOUNDATION IS ASSIMILATED TO INCOME DISTRIBUTED BY TRUST

With the ruling no. 221 of 22 February 2023, the Italian Tax Authorities assimilates the Liechtenstein family foundation to a foreign trust black-listed trust.

Art. 45(4-*quarter*) of the **TUIR** has introduced a **rebuttable presumption** according to which where, in relation to distributions made by foreign trusts - as well as the ones made by similar institutions - to beneficiaries resident in Italy, it is not possible to distinguish between income and assets, the entire amount received is deemed to qualify as income.

The Italian Tax Authorities states that the provision requires a distinction to be made between;

- the "assets", consisting of the initial endowment and any subsequent transfer made by the settlor or third parties in favour of the trust; and
- the "income", consisting of any income earned by the trust, including any income reinvested or capitalized in the trust itself.

To apply this rule, the income must be re-determined according to Italian tax law and, in the absence of accounting and non-accounting documentation allowing for the identification of the above-mentioned portions, the entire amount distributed must be considered as 'income'.

GERMAN INHERITANCE TAX LAW INFRINGES THE PRINCIPLE OF FREE MOVEMENT OF CAPITAL

The Advocate General's Opinion issued on 9 February 2023 with respect to the Case C-670/21 analyses the compatibility with the principle of free movement of capital (Art. 63-65 TFEU) of a provision of German inheritance tax law.

Such provision allows for the reduction (to 90%) of the taxable amount for immovable properties leased for residential purposes if located in Germany, in a Member State of the European Union or in a State of the European Economic Area, while such reduction does not apply where the immovable properties are located in a third Country.

According to the Advocate General, the principle of free movement of capital prevents a domestic rule from reducing the taxable amount of inheritance tax only in respect of immovable property situated in that State, in the EU and the EEA, while there is full taxation for the same property situated elsewhere. The justification related to ensuring effective tax controls may not apply where there is a legal framework for the exchange of relevant information between the competent tax authorities.

However the **principle of free movement of capital** does not prohibit a national rule that intends to promote the availability of affordable rented housing and ergo reduces the inheritance taxable base for leased properties located in that State, in the EU and the EEA, while requiring full taxation on leased properties located elsewhere, provided that the national legislation is appropriate to achieve the objective pursued and that there aren't less restrictive yet equally effective measures available to attain the same goal (i.e., proportionality).

REVISION OF THE EU BLACKLIST

On the 14 February 2023 the European Council carried out the periodic review of the list of non-cooperative jurisdictions for tax purposes. The updated list includes four new states: British Virgin Islands, Costa Rica, Marshall Islands and Russia.

These join American Samoa, Anguilla, Bahamas, Fiji Islands, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos, US Virgin Islands and Vanuatu.

The list also affects the application of the newly (re)enacted rule related to the deduction of costs suffered vis-à-vis "blacklist" counterparty (Art. 110 (9-bis) and (9-quinquies) of the TUIR).

There is no specific information indicating the date from when one is to verify whether the counterparty is resident or located in one of the above-mentioned non-cooperative States.

However, should the same approach suggested by the circular letter no. 39/2016 be adopted, the limits to deductibility would affect those costs that were incurred from 14 February 2023 with counterparty parties located in the British Virgin Islands, Costa Rica, the Marshall Islands and Russia (in addition, of course, to costs arising from transactions carried out since the beginning of the year with the 12 States that were already on the list).

The next review of the list is scheduled for October 2023.

APPROVAL BY COUNCIL OF MINISTERS OF THE EU DIRECTIVE 2021/514/EU (SO-CALLED DAC 7)

The Council of Ministers approved the Legislative Decree implementing Directive 2021/514/EU, the so-called "DAC 7", amending Directive 2011/16/EU on administrative cooperation in the field of

taxation. This Legislative Decree concerns the procedures for the automatic exchange of data held by operators of digital platforms.

Currently the EU Commission has launched an infringement procedure against several Member State (Italy included) related to the late implementation of the Directive at stake.

CLASSIFICATION FOR TAX PURPOSES OF FEES PAID TO USE, REPRODUCE AND DISTRIBUTE A SOFTWARE PROGRAM

With **statement of practice** no. 5 of 20 February 2023, the Italian Tax Authorities addressed the tax classification of the fees paid for the right to use, reproduce and distribute a software program, where, in the absence of such concession, a copyright infringement would arise.

Paragraph 12.2 of the Commentary to Article 12 of the OECD Model clarifies that "the character of payments in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. The rights in computer programs are a form of intellectual property".

It also specifies (in paragraph 13.1) that "payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright".

According to the Italian Tax Authorities, among this type of agreements are those aimed at granting a license to reproduce and distribute to the public any software that incorporates the program protected by the copyright or to modify and distribute the program to the public.

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We remain at your disposal for any clarification and we take this opportunity to extendour best regards.

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