

Tax Key News - Real Estate

Real Estate Taxation Review No. 1/2023

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Highlights

- *Merger between real estate funds and tax neutrality (Ruling No. 208 of 8 February 2023)*
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- *Sale and lease back: VAT regime (Resolution No. 3 of 3 February 2023)*
- *New provisions on the transfer of tax credits related to real estate tax incentives (Law Decree No. 11 of 16 February 2023)*

I **Legislation**

New provisions on the transfer of tax credits related to real estate tax incentives

Law Decree No. 11 of 16 February 2023

Law Decree No. 11 of 16 February 2023 amended the rules regarding the transfer of tax credits related to real estate tax incentives, pursuant to Article 121 of Law Decree No. 34 of 19 May 2020. Such amendments:

- repealed the option for the invoice discount and the transfer of the tax credit¹;
- prohibit the purchase of the tax credits by the Public Administrations;
- limit the joint liability of the transferee of the tax credits with the beneficiary of the tax incentives.

II **Case-law**

Withholding tax exemption on interest paid to EU companies

(Supreme Court, Decision No. 6050 of 28 February 2023)

The Supreme Court stated that the exemption from withholding tax on interest paid to EU companies (pursuant to Article 26-*quater* of Presidential Decree No. 600/1973 that implemented the EU Interest-Royalties Directive) applies if the foreign company demonstrates the beneficial ownership with respect to such interest on the basis of the following tests:

- *substantive business activity test*
- *dominion test*
- *business purpose test.*

The *business activity test* verifies that the recipient company carries out an actual economic activity.

The *dominion test* verifies whether the recipient company is fully entitled to receive the interest or whether it is obliged to pay it back to a third party.

The *business purpose test* verifies whether the recipient company is a *conduit company* or not.

¹ The prohibition does not apply in relation to expenses incurred before 17 February if the following conditions are met: (i) the communication of option of the commencement of works (CILA) has been submitted for interventions other than those carried out by condominiums; (ii) the works have been approved by the condominiums and the CILA has been submitted, for interventions carried out by condominiums; (iii) the authorization title has been submitted for interventions of demolition and reconstruction of buildings.



III

Italian Tax Authority's Rulings**Tax neutrality of the merger between real estate funds****(Ruling No. 208 of 8 February 2023)**

The Italian Tax Authority provided clarifications, for the first time, on the tax regime applicable to the merger of real estate alternative investment funds established in Italy and managed by the same management company (SGR). The tax neutrality of the transaction examined in the ruling has been confirmed both for income tax purposes (for the funds and the unitholders) and for transfer taxes purposes (registration, mortgage and cadastral taxes)².

This is the first ruling published by the Tax Authority about a merger between real estate funds.

For income tax purposes, the Italian Tax Authority confirmed that the transaction is not subject to income tax either at the level of the funds participating in the merger, on the basis of the income tax exemption provided for real estate funds (pursuant to Article 6 of Law Decree No. 351/2001), nor at the level of the unitholders, since they realise none of the income provided for in the Italian Income Tax Code (*i.e.*, income from participations pursuant to Article 44, paragraph 1, lett. g) of Presidential Decree No. 917/1986 or capital gains from the sale of units pursuant to Article 67, paragraph 1, lett. *c-ter*) of Presidential Decree No. 917/1986.

With regard to indirect taxes, the Tax Authority clarified that:

- (i) for VAT purposes, the merger of the real estate funds, managed by the same management company, entails an “*internal transfer*” of assets between separate VAT accounting³, as the management company only is considered a VAT taxable person and not the funds. The Tax Authority stated that such transfer should fall outside the scope of VAT, except for transfers of properties to a fund which has a lower right to deduct VAT (under the pro-rata rule) than the transferor (according to the ordinary rules on “internal transfers” for VAT purposes);
- (ii) for registration tax purposes, the transaction is to be considered as a “*mere reorganization with no changes relevant from a legal/economic perspective*” and, therefore, the registration tax is Euro 200⁴;
- (iii) mortgage and cadastral taxes are applicable at Euro 200 each, since there is no transfer of ownership relevant for the purposes of these taxes.

Korean investment funds and investment in an Italian real estate fund: withholding tax exemption (Article 7, paragraph 3, of Law Decree No. 351/2001)**(Ruling No. 169 of 26 January 2023)**

² For further details and preliminary considerations, see our Tax Alert – “*Tax neutrality of the merger between real estate funds: Tax Authority guidance issued on February 8, 2023*” <https://www.chiomenti.net/public/files/0/Tax-Alert--Tax-Real-Estate-IT.pdf>

³ For further details, see Italian Tax Authority's Ruling No. 220/2021, in which considerations on “internal transfers” in relation to real estate funds are provided.

⁴ Pursuant to Article 11 of the Tariff Part 1 annexed to Presidential Decree No. 131/1986 in the case of a public deed or private contract or pursuant to Article 4, paragraph 1 of the Tariff Part 2 annexed to Presidential Decree No. 131/1986.



The Italian Tax Authority provided clarifications on the exemption from withholding tax for proceeds distributed by Italian real estate funds (or real estate SICAFs) to certain foreign investors.

The case examined by the Tax Authority regards proceeds distributed by an Italian investment fund to a *société à responsabilité limitée* established under Luxembourg law and wholly owned by two investment funds established under Korean law. The Korean funds were established as *real estate investment trusts*.

First of all, the Tax Authority confirmed its interpretation of the withholding tax exemption provisions for proceeds distributed by real estate funds, in line with previous guidance:

- the exemption from the Italian withholding tax as of Article 7, paragraph 3 of Law Decree No. 351/2001 applies if (i) the foreign fund meets the substantive requirements as well as the same investment purposes as Italian UCIs, and (ii) there is a supervision over the fund or the manager (Circular No. 2/E/2012);
- the withholding tax exemption applies also in case the investment in the Italian real estate fund is made through fully-owned corporate vehicles resident in so-called *white-listed* States (e.g. Luxembourg).

With reference to the case at issue, the Italian Tax Authority stated that the supervision by the competent Korean authority – Financial Supervisory Service (FSS) – satisfies the supervision requirement mentioned above.

With reference to the comparability of Korean investment funds to Italian UCIs, the Tax Authority stated that this point must be verified on the basis of the law in force in Korea, not expressing an opinion on this aspect – in line with previous rulings on the matter.

VAT separate accounting for real estate funds

(Ruling No. 23 of 13 January 2023)

The Italian Tax Authority provided clarifications on the VAT regime of the real estate funds, with reference to (a) the determination of the VAT *pro-rata* deduction and (b) the option for the VAT separate accounting (Article 36, paragraph 3 of Presidential Decree No. 633/1972).

The case under analysis related to a real estate fund investing entirely in commercial properties leased with the application of VAT on rents, pursuant to Article 10, paragraph 1, n. 8 of Presidential Decree No. 633/1972.

One of the properties was to be sold under the VAT exemption regime (set out by Article 10, paragraph 1, n. 8-*ter* of Presidential Decree No. 633/1972).

The VAT exempt transfer results, briefly, in a reduction of the fund's VAT deduction percentage, according to the VAT *pro-rata* mechanism.

According to the Tax Authority, the sale of the property cannot be considered an "occasional activity" for VAT purposes with respect to the rental activity of the fund; therefore, it cannot be excluded from the calculation of the VAT *pro-rata* deduction pursuant to Articles 19, paragraph 5 and 19-*bis*, paragraph 2 of Presidential Decree No. 633/1972.

The Tax Authority stated, also, that such transfer (exempt from VAT) cannot be subject to the VAT separate accounting – pursuant to Article 36, paragraph 3 of Presidential Decree



No. 633/1972 – in order to limit the negative effects on the VAT deduction under the *pro-rata* mechanism.

Advisory services and VAT exemption

(Rulings No. 11 of 12 January 2023 and No. 179 of 31 January 2023)

The Italian Tax Authority issued again clarifications on the VAT exemption regime for advisory services provided by an advisor to a management company and relating to investment funds, on the basis of the rules on the VAT exemption for fund management (Article 10, paragraph 1, No. 1 of Presidential Decree No. 633/1972).

VAT Group requirements

(Ruling in point of law No. 3 of 17 January 2023)

The Italian Tax Authority provides clarifications on the subjective requirements in case of inclusion in a VAT Group (pursuant to Article 70-*bis* of Presidential Decree No. 633/1972) with reference to holding companies.

The VAT Group requires the existence of the so-called “economic appurtenance” pursuant to Article 70-*ter*, paragraph 2, of Presidential Decree No. 633/1972 (*i.e.*, carrying out a main activity of the same kind or complementary/interdependent activities or activities that benefit one or more of the entities belonging to the VAT Group). According to the Italian Tax Authority, the circumstance that the holding companies do not perform “active” and “operational” functions in the industries of the other companies of the group, is not *per se* an obstacle to the existence of the economic appurtenance, which must be assessed in relation to the peculiar role that the same hold, from a strategic point of view, being at the top of the group.

The Tax Authority also provides clarification on the parent–subsidiary relationship. In particular, when the financial appurtenance with the parent company exists (from which derives the existence of the economic and organisational links) the subsidiary company belongs to the perimeter of the VAT Group, even if the parent company is excluded due to the absence of the organizational appurtenance.

The transfer of “building rights”: VAT and registration tax

(Ruling No. 69 of 18 January 2023)

The Italian Tax Authority acknowledged the guidance provided by the Joint Divisions of the Italian Supreme Court (SS.UU. 9 June 2021 no. 16080⁵) with respect to the transfer of “building rights” (*cessione di cubatura*).

According to the Supreme Court, the disposal of the “building rights” by which the owner of a land transfers the “right to build” to the owner of another land, within the limits

⁵ See Tax Key News – Real Estate No. 2/2021. Available at the following link: <https://www.chiomenti.net/public/files/0/Tax-Key-News-RE-n-2-del-2021-ITA.pdf>



provided by the urban plan, is subject to VAT at the rate of 22% (under article 3, paragraph 1, of Presidential Decree No. 633 of 1972) and to registration tax of Euro 200.

Sale and lease back: VAT aspects

(Resolution No. 3 of 3 February 2023)

The Resolution regards certain VAT aspects of the sale and lease back in light of the recent Supreme Court case law⁶.

In brief, according to the Tax Authority, the sale and lease back transaction can be qualified, alternatively, as (i) a transfer of an asset (to the leasing company) and a subsequent supply of services (the lease to the tenant) or as (ii) a financing transaction. Such alternatives depend on the contractual clauses and the behavior of the parties.

The Resolution also points out some elements to carry out the above analysis.

Italian listed real estate investment companies (SIIQs)

The Italian Tax Authority provided clarifications about the tax regime applicable to Italian listed real estate investment companies (SIIQs) in the following rulings: No. 60 of 17 January, No. 61 of 18 January, No. 142 of 23 January, No. 195 of 7 February, No. 197 of 7 February and No. 201 of 7 February 2023.

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⁶ Supreme Court decision No. 11023 of 27 April 2021; *in terminis* Order No. 40930 of 21 December 2021; Orders Nos. 20327 and 20328 of 23 June 2022, which transpose the guidelines of the Court of Justice of the European Union (C-201/2018, *Mydibel SA v Etat belge*).

