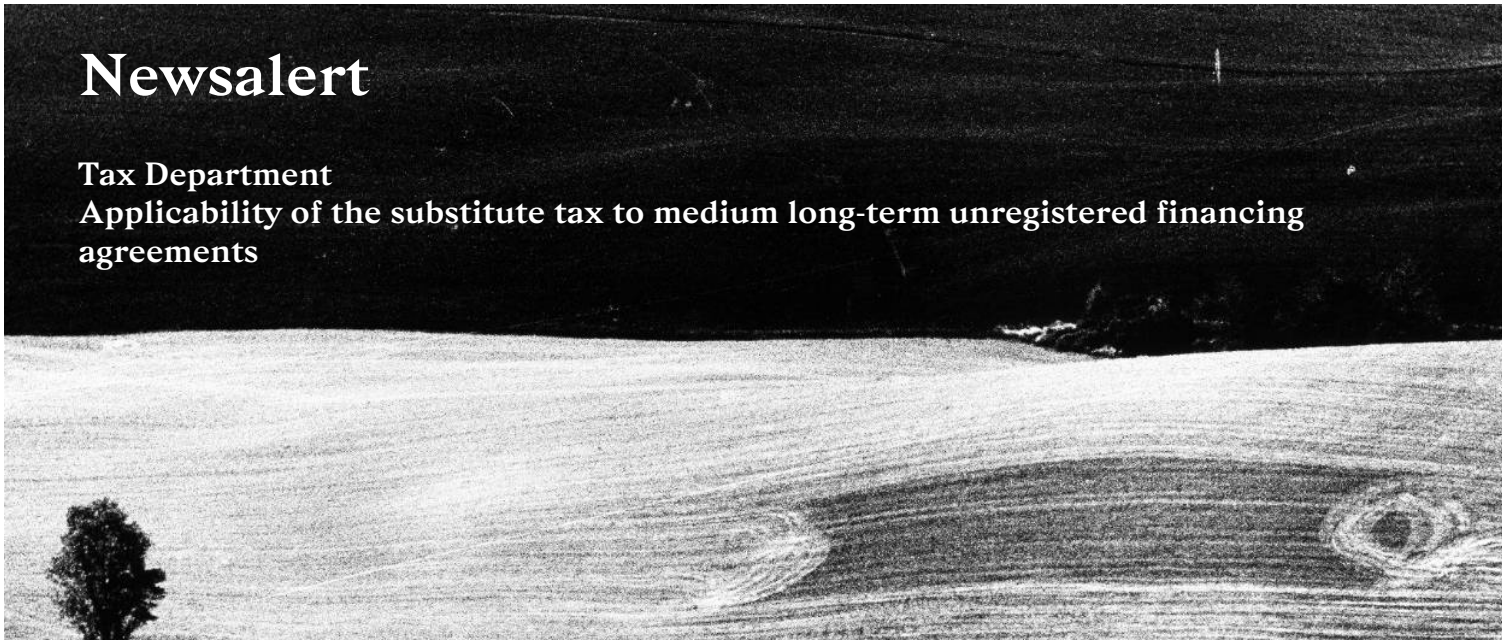

Newsalert

Tax Department
Applicability of the substitute tax to medium long-term unregistered financing agreements

Introduction

The Italian Tax Authorities have released ruling No. 956-15/2018, not published, providing certain clarifications on the possibility to apply the Italian substitute tax on medium and long-term financing agreements, and on the related security package, in case the agreements are not registered. The request for clarifications was publicly raised by the Italian Banking Association ("**ABI**").

More specifically, the need for clarifications on the matter became impellent after many local offices of the Tax Authorities adopted a draconian approach according to which the substitute tax on medium long-term financing agreements and on the related guarantees could only be applied insofar as the main financing agreement had been registered with the Tax Authorities.

Legislative framework

On the basis of Articles 15 to 20 of Presidential Decree No. 601 of 29 September 1973, medium and long-term financing agreements (*i.e.,* with a maturity exceeding eighteen months) are subject, where certain requirements are met, to the payment of a substitute tax in lieu of the ordinary registration, stamp, mortgage, cadastral and concession taxes.

According to the relevant tax law provisions, the perimeter of the substitute tax also includes all acts, deeds, contracts and formalities relating to the financing agreement (*i.e.*, their execution, amendment and cancellation) as well as the guarantees of any type granted by anybody and at any time and their splitting or cancellation in whole or in part, including the assignment of receivables entered into in relation to such financing agreement.

In order to benefit from the substitute tax regime, the parties shall mandatorily exercise the relevant option in writing in the financing agreement, despite not being obliged to register such deed with the Tax Authorities.

The recent approach adopted by the Tax Authorities and ABI's opinion

ABI has highlighted that a new approach was recently adopted by several local offices of the Tax Authorities. Indeed, upon registration of the deeds of guarantee relating to a certain financing agreement, the Tax Authorities claimed the payment of the indirect taxes which would have been ordinarily applied, irrespective of the fact that the election for the substitutive tax had been made in the financing agreement. The Tax Authorities held that indirect taxes should have been ordinarily applied given that the principal financing agreement had not been registered.

The adoption of this approach led to the issuance of a number of notices of assessment towards the financing parties of the agreement, by means of which the Tax Authorities claimed the indirect taxes connected to the financing agreement and to its guarantees according to the ordinary rules. The financing banks, despite filing an appeal, were required to pay the full amount of taxes claimed by the Tax Authorities within 60 days from the notification of the relevant notices, also in light of the fact that in these cases the possibility of requesting the suspension of collection while awaiting trial is precluded.

In its ruling request, ABI highlighted the inconsistency of this approach which, according to the banking association, leads to results that are contrary to the rationale of the law and are detrimental in terms of operational uncertainty and bureaucratic hindrance.

Firstly, ABI pointed out that no evidence can be found in the wording of the law provisions according to which the applicability of the substitute tax regime is subject to the registration of the financing agreement. This is further confirmed by the fact that the substitute tax regime is located in an *ad hoc* and autonomous legislative measure, rather than being contained in the law provisions governing the replaced indirect taxes (*e.g.*, registration tax law, mortgage and cadastral tax law).

A further line of reasoning put forward by the ABI, fully embraced by the Tax Authorities in their answer, was based on the circumstance that financing agreements granted by banks are included amongst the banking contracts governed by Legislative Decree n. 385 dated 1 September 1993 ("**Consolidated Law on Banking**"), for which the relevant tax law requires registration only in "*case of use*".

Finally, ABI emphasized how the approach adopted by the Tax Authorities conflicts with the need for operational flexibility underlying all financing operations, especially when the features of such operations include significant amounts and numerous Italian and foreign intermediaries. In such cases, in fact, the execution of the agreement by means of exchange of correspondence or through a non-notarized private agreement better suits

the needs of the parties involved, allowing them to draft the agreement in a single language only and not requiring them to be physically present to the execution at the same time.

In the answer, the Tax Authorities take notes of the remarks raised by the banking association and adhere to its interpretation.

In particular, the Tax Authorities confirmed that the financing agreements entered into by the banks fall within the scope of the banking and financial contracts governed by Consolidated Law on Banking for which – although written form is essential – no public form is required as a validity condition (*i.e.*, *ad substantiam*). Accordingly, Italian Tax Authorities confirmed that no registration obligation is triggered in the scenario where the agreement is not executed in a public form.

It follows that, even where a certain financing agreement had not been registered, the deeds of guarantee relating thereto fall within the scope of application of the substitute tax, as long as the requirements to benefit from such regime – amongst which the written confirmation that the parties intend to elect for the regime – were met.

For any clarification, please contact the Tax Department at tax@chiomenti.net