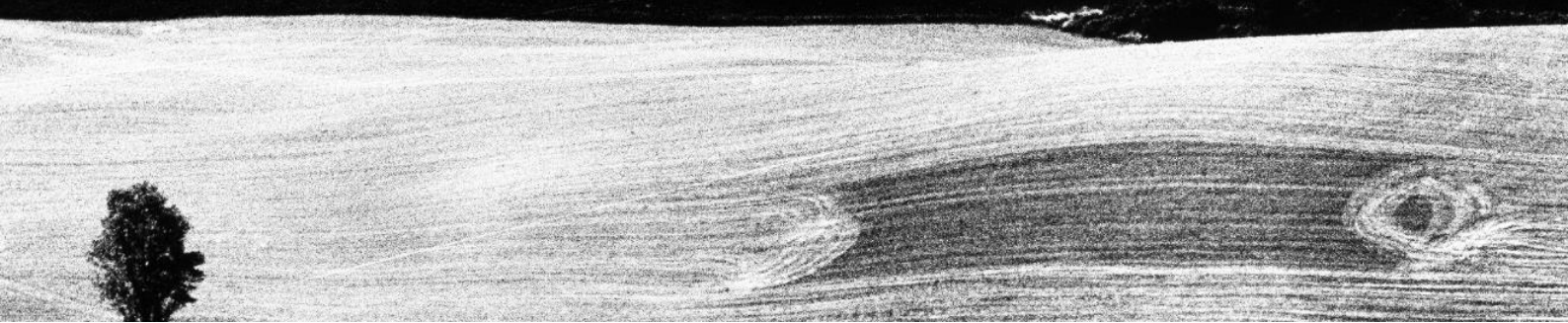


# Newsletter

Tax Department, Newsletter of October 31, 2019

New tax provisions introduced by the Law Decree No. 124 of 26 October 2019



## I. The Decree

Law Decree No. 124 of 26 October 2019 (hereinafter, the “Decree”), was published on the Italian Official Gazette n. 252 dated 26 October 2019 and entered into force on 27 October 2019. The Decree shall be further converted into law by the Italian parliament by 25 December 2019.

In details, the Decree sets forth certain innovative provisions, amongst which it is worth highlighting the followings: new provisions concerning the assumption of tax debts and set-off payments, a new regime related to the application of withholding taxes and set-off payments with respect to contract and sub-contract agreements, a new taxation regime applicable to the beneficiaries of foreign opaque trusts, a new threshold for payments in cash, amendments to Article 96 of the Presidential Decree No. 917 of 22 December 1986 (“ITCA”), certain provisions related to the interaction between the tax benefits arising from development of photovoltaic plants and the special tariff granted by GSE S.p.A., the re-opening of the deadline for the payment of the first instalment of the s.c. *definizione agevolata*, the increase of the criminal penalties for tax offences and certain amendments to the income tax advance payments.

## II. Provisions regarding the assumption of tax debts and set-off payments

*Provisions regarding the assumption of tax debts*

Article 1 of the Decree amends the regime applicable to assumption of tax debts set forth by Article 8, paragraph 2 of the Law No. 212 of 27 July 2000, now preventing the party who assumes the debt from the use of its own tax credits to offset the payments due.

According to the previous regime, the party assuming the tax debts was entitled to pay the tax due either by way of a direct payment or by offsetting its own tax credits; following the amendments provided by the Decree any payment offsetting is not allowed and penalties for delayed or omitted payment apply. The Decree also extends the statute of limitation to 31 December of the eighth year following the one in which the payment has been made.

*Provisions regarding limits to use tax credits as set-off payments for entities subjects to certain VAT measures*

Article 2 of the Decree states that VAT entities are now prevented from the use of any tax credits as set-off payment in case of revocation of VAT number or exclusion from the VIES database.

In case of revocation of VAT number due to the lack of subjective and/or objective requirements provided for by the Presidential Decree of 26 October 1972, No. 633, any available tax credit cannot be used to offset any payment due, irrespective of the circumstance that the tax credit has been arisen from the activity carried out with the VAT number subject to the revocation measure. In case of exclusion from the VIES database, only the set-off of VAT credits is prevented.

Such credits can only be claimed for refund or carried forward.

*Provisions regarding set-off payments for direct and substitute taxes*

Article 3 of the Decree extends the rules regarding set-off payments already in force with respect to VAT credits to direct and substitute taxes. In particular, credits relating to direct taxes exceeding Euro 5,000 can be used as set-off payments only after the tenth day following the filing of the income tax return from which they originate and upon submission of the F24 form exclusively through the electronic services of the Italian Tax Authorities.

The new provisions apply to credits accrued from the tax period ongoing at 31 December 2019.

The Decree also provides for a penalty equal to Euro 1,000 for each delegation of payment should the tax credits not be available for the set-off payments.

### III. Withholdings and set-off payments in contract and sub-contract agreements

Article 4 of the Decree introduces the new Article 17-*bis* of the Legislative Decree of 9 July 1997, No. 241, aiming at countering the omitted payments of withholding taxes and social security contributions due on employment income to be paid by contractors and subcontractors in their quality of withholding agents.

In particular, as of 1 January 2020, provided that certain conditions are met, the contracting company (the “**Client**”) is now required to pay the withholding taxes and the social security contributions – on behalf of the contractor – with regard to the workers employed for the execution of the agreement. The contractor is required to promptly provide (within 5 working days prior to the due date of payment) the funds necessary to the Client to pay the withholding taxes. The Client is prevented from the use of its own tax credits as set-off payments. The contractor may also use credits toward the Client to partially or totally set-off the payment for withholding taxes and social security contribution to be made to the Client.

The contractor is also required to provide the Client with the information necessary for the fulfilment of the payment obligation by 5 working days prior to the due date of payment.

The liability related to the computation of the withholding tax due still remains in the hands of the contractor who is still liable for any omitted payment in case of failure to provide the Client with the fund needed for the withholding payment.

Moreover, in case of failure to provide the required fund, the Clients are required to hold the payments due according to the contract or subcontract agreements and they are required to notify the Italian Tax Authorities such failure, if it lasts for more than 90 days.

The Clients are liable for the timely payment of the withholdings due by the contractors up to the amounts received, or in case of insufficient funds, up to the amount corresponding to the sum between the amount received and the consideration accrued and not yet paid to the

contractor. The Clients are also required provide the relevant receipts of payments to the contractors.

In case of failure of payment of the withholding taxes due a 30% penalty applies. The failure of payment may also trigger a criminal offence in case the unpaid withholdings exceed Euro 150,000 for each tax period.

The contractors can opt for the direct payment of the withholding taxes to the extent the following conditions are met:

- (i) the contractor has been active for at least 5 years or has made payments equal to more than Euro 2,000,000 over the previous two years;
- (ii) the contractor does not have any outstanding debt vis-à-vis the Italian tax or social security contribution authorities for an amount exceeding Euro 50,000.

Finally, the Decree provides for the application of the reverse charge mechanism with respect to VAT also in relation to contracts and subcontracts agreements characterized by the prevalent use of workforce at the Client's premises.

#### IV. Taxation of the beneficiaries of foreign opaque trusts

Article 13, paragraph 1, letter a) of the Decree provides certain amendments to the taxation rules applicable to Italian tax resident beneficiaries of foreign opaque trusts.

Pursuant to Article 73 of ITCA, opaque trusts – *i.e.*, trusts the beneficiaries of which are not identified – are treated as taxable persons for corporate income tax purposes; however, if the beneficiaries are identified, the trust qualifies as “transparent” and the income accrued by the trust is taxed directly in the hands of the beneficiary within the limit of the income attributable to them.

A transparent trust is regarded as a flow-through entity for corporate income tax purposes. Accordingly, its income is directly attributed to the beneficiaries on an accrual basis – regardless of any actual distribution and in proportion to their interest – is qualified as income from capital pursuant to Article 44, paragraph 1, letter *g-sexies*) of

ITCA and subject to taxes in the hands of the beneficiaries pursuant to the ordinary personal income tax regime. In case of transparent trust, due to the circumstance that the income has been already taxed in the hands of the beneficiaries, any distribution received from the trust is not relevant for income tax purposes.

On the other hand, in the lack of any specific provision, distributions made by opaque trusts – both Italian and non-Italian resident trusts – should be treated as not relevant for the purposes of direct taxation of Italian tax resident beneficiaries, although the Italian Tax Authority maintained that income derived by Italian resident beneficiaries out of opaque trusts resident in low tax jurisdiction States shall be subject to tax in the hands of the beneficiaries as income from capital according to Article 44, paragraph 1, letter g-*sexies*) of ITCA.

In light of the amendments provided by the Decree, new Article 44, paragraph 1, letter g-*sexies*) of ITCA expressly states that “*income paid to Italian tax resident beneficiaries by trusts and similar institutions established in States that are considered low tax jurisdictions under Article 47-bis of ITCA, even if the beneficiaries cannot be deemed as identified beneficiaries under Article 73*” qualifies as income from capital, to be taxed in the hands of the beneficiaries upon distribution.

As a result of the changes introduced by the Decree, it can be argued that distributions made by foreign opaque trusts as of today (up until the entry into force of the Decree) should not have been subject to taxation in the hands of the Italian tax resident beneficiaries.

Furthermore, Article 13, paragraph 1, letter b) of the Decree introduces a presumption according to which distributions made by foreign (opaque) trusts to Italian tax resident beneficiaries must be fully subject to tax in case no evidence that the amount distributed represents a capital distribution (not subject to taxation) rather than a distribution of the income accrued by the trust.

As a consequence of the above, due to the lack of any presumption according to which income is considered to be distributed primarily over capital, it may be advisable to set up dedicated bank accounts to distinguish the income accrued from the capital.

In the lack of any specific provision, Article 13 should apply to income distributions made by foreign opaque trusts occurred as from fiscal year 2020.

## V. Limitation to cash payments

One of the main purposes of the Decree is to increase the number of measures aimed at countering tax evasion and to enhance alternative tracked payment instruments. In this regard, Article 18 of the Decree sets forth a new threshold for cash payments – now equal to Euro 3,000 – by setting the limit to Euro 2,000 starting from 1 January 2020 to 31 December 2021, then reduced to Euro 1,000 starting from 1 January 2022.

In this context, the minimum penalty for money transfers exceeding the legal limit (equal to Euro 3,000 before the changes introduced by the Decree) is now equal to the new maximum amount allowed by the law (*i.e.*, Euro 2,000 for breaches committed and challenged from 1 July 2020 to 31 December 2021 and Euro 1,000 for breaches committed and challenged from 1 January 2022).

Article 23 of the Decree introduces new penalties for merchants and professionals who refuse to accept payments, of any amount, made through credit and debit cards. The previous threshold set at Euro 30, below which there was no obligation to accept payments made through credit and debit cards, has been therefore repealed.

Moreover, the Decree – in order to overcome the complaints made by the Council of State in the Opinion No. 1446/2018 with regard to the provisions of Article 5 of the Law Decree No. 179/2012, which introduced the obligation for merchants and professionals to adopt electronic payment systems – now provides for an administrative penalty equal to Euro 30, increased by an amount equal to 4% of the value of the transaction for which the electronic payment has been refused.

## VI. Amendments to the interest limitation rule for management companies

Article 35 of the Decree introduces an amendment highly awaited in the project finance industry related to the deductibility of interest expenses borne by management companies set forth according to

Article 184 of Legislative Decree of 18 April 2016, No. 50 (“**Public Procurement Code**”) in the context of the financing of long-term public infrastructure projects (“LTPIP”), for which Article 96 of ITCA, after ATAD amendments, had imposed some particularly restrictive conditions.

Based on the regime set forth following the ATAD amendments, the full deductibility of the interest expenses was granted to management companies upon the condition that the LTPIP was secured only by the guarantees listed in paragraph 8 of Article 96, ITCA. Indeed, according to the previous regime, the full deductibility was conditional upon the circumstance that the financing was not secured by assets other than those belonging to the LTPIP or by parties other than the management company, thus creating uncertainty in cases where the lending banks required guarantees by the shareholders of the management company.

According to the new provisions, in case a special purpose vehicle has been set up in order to segregate assets and liabilities deriving from the LTPIP, interest expenses are always fully deductible irrespective from the security package assisting the related project financing.

The amendments made by Article 35 of the Decree are the result of the consolidated practice concerning the financing of LTPIPs, on the basis of which:

- the financing is implemented through a scheme that provides for the incorporation of a management company aimed at creating a ring-fence structure (*segregazione patrimoniale*) for the LTPIP;
- the financing granted to the management companies is normally subject to several guarantees, also granted by third-parties, such as the shareholders of the management company.

On the other hand, in the event that the manager of the LTPIP is not represented by a management company set up to ring-fence the assets and liabilities of the LTPIP, the full deductibility of the interest expenses is still conditional upon the circumstance that the security package does not include guarantees given by third parties or guarantees granted on assets other than the ones pertaining to the same LTPIP.

The Decree also extends the full deductibility regime to the financing of LTPIP falling under Title III and IV (concession contracts and public-private partnership) of the Public Procurement Code, as well as to those falling under Title V of the same Code (the only case previously considered).

## VII. The new procedure set forth for the adjustments deriving from the potential incompatibility of the Energy Tariff Incentives with the Tremonti Ambiente benefits

Article 36 of the Decree provides for a new procedure aimed at resolving the issues – and the multitude of disputes that have arisen over time in the administrative and tax area – arising from the potential prohibition of overlapping of incentives relating to the production of energy from photovoltaic systems (incentive tariffs under the III, IV and V Energy Tariff, s.c. Italian “*Conto Energia*”) with the tax relief referred to in Article 6, paragraphs 13 to 19 of the Law of 23 December 2000, No. 388 (sc. “**Tremonti Ambiente**”, a measure repealed with effect from 26 June 2012), subordinating the maintenance of the right to benefit from the incentive tariffs – recognized by the Manager of Energy Services (*Gestore dei Servizi Energetici* or “**GSE**”) – through the full repayment of the tax savings deriving from the Tremonti Ambiente, without the application of penalties or interest.

The issue concerning the possibility to combine the two measures – which has always been doubtful under certain aspects – was exacerbated by the press release of 22 November 2017 by the GSE where it was pointed out that “*the tax relief under the Tremonti Ambiente is not cumulative with the incentive tariffs under the III, IV and V Energy Tariff*” and therefore the fruition of the latter incentive is subject to the waiver, by the taxpayer, of the tax benefit to be made by the date of 31 December 2018. Subsequently, this waiver obligation was suspended and, in the meantime, the Lazio Regional Administrative Court, with its decision of 29 May 2019, No. 6784, had instead recognized the cumulative nature of the Tremonti Ambiente and the incentive tariffs set out in the III, IV and V Energy Tariff.

In light of the provisions of the Decree, those who intend to continue to get the benefits of the Energy Tariff are required, by 30 June 2020, to pay a sum determined by applying the tax rate set forth for Italian

Corporate Income Tax or Personal Income Tax as the case may be *pro tempore* in force to the deduction allowed under the Tremonti Ambiente regime. Taxpayers are also required to submit a specific communication to the Italian Tax Authority.

Procedures and content of the communication will be detailed through an Act to be released by the Italian Tax Authorities. The communication shall also report any judicial proceedings currently pending with respect of the claims previously raised concerning the possibility to combine the tax benefits with the incentive tariff, as well as the commitment to waive such proceedings. The completion of the facilitated definition will therefore result in the extinction of the judicial proceeding.

In any case, taxpayers are still entitled to continue the judicial proceedings currently pending aimed at maintaining the cumulability of the two measures.

The Decree does not provide a prohibition of cumulation *ex lege* between the Tremonti Ambiente and the Energy Tariff, rather simply introducing a mechanism of "recapture" of the tax benefits for those who do not intend to pursue the judicial proceedings in order to avail themselves from the combination of the two measures.

## VIII. Re-opening of the deadline for the payment of the first instalment of the s.c. *definizione agevolata* pursuant to Article 3 of the Legislative Decree of 23 October 2018, No. 119

Article 37 of the Decree grants the chance of benefiting from the s.c. *definizione agevolata* provided for by Article 3 of Law Decree of 23 October 2018, No. 119, the terms of which expired on 31 July 2019 by extending the deadline for the payment of the first installment due on 30 November 2019 (2 December 2019, as 30 November falls on Saturday). Accordingly, taxpayers that failed to pay the first installment on the previously imposed due date, are now entitled to benefit from the new deadline for the payment.

No change has been made to the amount to be paid within the new deadline.

In case of late payment, should a collection procedure have been already started, the Italian Tax Authorities will freeze such procedures since the deadline for the payment of that instalment has now been extended.

The amnesty for delays not exceeding 5 days provided for by Article 3, paragraph 14-*bis* of Law Decree of 23 October 2018, No. 119 would apply also with respect to the new deadline of 2 December 2019.

## IX. Amendments to the tax offences

Article 39 of the Decree provides for substantial amendments to the criminal penalties for tax offences.

As regards the crime of fraudulent declaration through the use of invoices or other documents for non-existent transactions set forth by Article 2 of Legislative Decree of 10 March 2000, No. 74 (the "**Decree No. 74/2000**"), the Decree (i) increases the applicable penalty from "*1 year and 6 months to 6 years*" to "*from 4 to 8 years*" and (ii) introduces a further paragraph 2-*bis*, which provides for the imprisonment from 1 year and 6 months to 6 years if the amount of the untrue passive items is lower than Euro 100,000.

Article 39 of the Decree also amends the criminal penalty provided for the offence of fraudulent declaration by other artifices set forth by Article 3 of the Decree No. 74/2000, whose penalty is now increased from "*1 year and 6 months to 6 years*" to "*from 3 to 8 years*".

With respect to the crime of unfaithful declaration set forth by Article 4 of Decree No. 74/2000, the Decree provides for an increase of the criminal penalty from "*1 to 3 years*" to "*from 2 to 5 years*". Furthermore, according to the amendments introduced by Article 39 of the Decree, the thresholds required by the law in order to trigger the criminal offence are now reduced as follows: (i) the unpaid tax are now reduced to Euro 100,000 (previously, Euro 150,000) and (ii) the total amount of the unpaid positive items of income not reported in the tax return, also by reporting fictitious negative items of income, is now reduced to 10% of the total amount of the positive items of income reported or, in any case, to Euro 2 million (previously, Euro 3 million). Moreover, Article 4, paragraph 1-*ter* - according to which "*save as the cases included in previous paragraph 1-bis, no tax crime will be triggered with respect*

*to evaluations which, taken individually, differ by less than 10 per cent from their fair value. The amounts included in this percentage shall not be taken into account in the verification of the exceeding of the thresholds of criminality provided for in paragraph 1, letters a) and b)* – has been now repealed. Article 39 also modifies the penalty provided for the offence of omitted declaration (income taxes, VAT and withholding tax returns) set forth by Article 5 of Decree No. 74/2000, by increasing the applicable criminal penalty from “1 year and 6 months to 4 years” to “from 2 to 6 years”.

As regards to the offence of issuance of invoices or other documents in relation to non-existent transactions set forth by Article 8 of Decree No. 74/2000, the Decree (i) increases the penalty from “1 year and 6 months to 6 years” to “from 4 to 8 years” and (ii) introduces a further paragraph 2–bis which provides for the imprisonment from 1 year and 6 months to 6 years, if the amount declared in the invoices does not exceed Euro 100,000.

The Decree amends the criminal penalty applicable to for the crime of concealment or destruction of accounting documents, whose penalty are increased from “1 year and 6 months to 6 years” to “from 3 to 7 years”.

With respect to the offence of omitted payment of withholding taxes and omitted payment of VAT set forth by Articles 10–bis and 10–ter of Decree No. 74/2000, the Decree provides that (i) the threshold of unpaid withholding is decreased from “Euro 150,000” to “Euro 100,000” and (ii) the threshold of unpaid VAT is decreased from “Euro 250,000” to “Euro 150,000”.

Article 39 of the Decree also introduces Article 12–ter which set further cases to which the seizure set forth by Article 240–bis of the Criminal Code applies.

Finally, the Decree introduces Article 25–quinquiesdecies of Legislative Decree of 8 June 2001 No. 231, namely “Tax crimes”, according to which, in relation to the offence of fraudulent report through the use of invoices or other documents for non-existent transaction as per Article 2 of Decree No. 74/2000, a penalty from a minimum of Euro 129,000 up to a maximum of Euro 774,500 is applied to the entity.

The above-mentioned amendments will entry into force as from the date of conversion into law of the Decree.

## X. Changes to the amounts of the advance payments' instalments

Article 58 of the Decree modified the amount of the advance payments' instalments due for IRPEF, IRES and IRAP purposes by taxpayers carrying out economic activities for which the synthetic indexes of fiscal reliability (s.c. "*indici sintetici di affidabilità fiscale*", "**ISA**") have been approved and who report income not exceeding the limit established for each index, as well as from individuals having an interest in companies or associations applying the fiscal transparency regime and that are subject to the ISA.

According to the previous rules, advance payments had to be made in two installments, respectively equal to 40% and 60% of the taxes paid in relation to the previous tax period.

Following the amendments introduced by the Decree, the advance payments of IRPEF, IRES and IRAP are now due in two instalments equal to 50% each.

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