CHIOMENTI

Tax Key News - Real Estate

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I Legislation

Withholding tax exemption for dividends distributed by companies resident in Italy to foreign collective investment undertakings

(Art. 1, par. 631 - 633, Law no. 178 of 30 December 2020, "Budget Law 2021")

Article 1, par. 631 - 633, of the Budget Law 2021 introduced favorable tax provisions for foreign undertakings for collective investment ("**UCIs**") that invest in companies resident in Italy, provided that they fulfill certain requirements.

In particular, as a result of the amendments, dividends and capital gains relating to shareholdings in companies resident in Italy are not subject to income tax in Italy, if they are realized by foreign UCIs set up:

(i) in accordance with Directive 2009/65/EC ("UCIs Directive"); or
(ii) in a Member State or in an EEA State which guarantees an adequate exchange of information with Italy, provided that the relevant fund manager is subject to prudential supervision in the country where it is established, in accordance with Directive 2011/61/EU (AIFM Directive).

This amendment was introduced with the purpose to eliminate the discriminatory tax treatment for foreign UCIs with these characteristics in comparison to UCIs established under Italian law. Indeed, such treatment turned out to be incompatible with the principles regarding the freedom of establishment and the free movement of capital, as laid down in the Treaty on the Functioning of the European Union (TFEU).

In particular, UCIs set up in Italy, although subject to corporate income tax (*IRES*) pursuant to art. 73, par.1, lett. c) of Presidential Decree no. 917 of 22 December 1986 ("**TUIR**"), are exempt from such tax. Moreover, dividends distributed by companies resident in Italy to Italian UCIs are exempt from withholding and income tax in Italy. Similarly, capital gains realized by an Italian UCIs on such participations are exempt from income tax.

Conversely, with exception to the case in which treaties against double taxation can be applied, a foreign UCIs (prior to the amendments introduced by the 2021 Budget Law) was subject to:

(i) withholding tax at the rate of 26% on dividends distributed by companies resident in Italy; and
(ii) substitute tax, at a rate of 26%, on capital gains deriving from the transfer of so-called "*qualified shareholdings*" (partecipazioni qualificate), pursuant to art. 67 TUIR, in companies resident in Italy.

The amendment introduced by Budget Law 2021 is deemed as effective for dividends received and capital gains realized as from 1 January 2021. However, it should be pointed out that, with regards to previous amendments with a similar purpose, the Italian Tax Authority has deemed such amendments to be retrospectively applicable, allowing to submit a refund request of the withholding taxes applied (Circular no. 32/E/2011).

Furthermore, such amendment may also have a positive effect on the investment structures of EU UCIs (beneficiaries of the exemption) which include an intermediate *holding company.*

Finally, as previously mentioned, the rule provides for the application of the exemption to EU UCIs, while it does not apply to non-EU UCIs, for which a discriminatory tax treatment is still ongoing in comparison with Italian UCIs abovementioned.

Tax credit for rents for the use of non-residential properties

(Art. 8 and 8-*bis* of Law Decree no. 137 of 28 October 2020 and art. 1, par. 602, Budget Law 2021)

Articles 8 and 8-*bis* of Law Decree no. 137 of 28 October 2020 ("**Ristori Decree**"), converted with amendments into Law no. 176 of 18 December 2020, has extended, with certain amendments, the tax credit related to rents paid for the use of non-residential properties, set out by Article 28 of Law Decree no. 34 of 19 May 2020 ("**Rilancio Decree**"), which provides for a tax credit of 60% (or 30% in the case of complex service contracts or leases of business) of the monthly amount of the rents paid for the use of non-residential properties.

Article 8 of the Ristori Decree:

a) has extended the tax credit to October, November and December 2020 for companies operating in the sectors identified in Annex 1 ("Annex 1") of the same decree (*i.e.*, *inter alia, those operating in* the catering sector, those involved in film and theater activities, sports centers and gyms)
b) regardless of the amount of revenue reported in the previous tax year (2019).

On the other hand, a reduction in turnover of at least 50% in the months of October, November and December 2020 compared to the corresponding months of 2019 remains a requirement for the tax credit.

Moreover, art. 8-*bis* of the Ristori Decree, introduced with the conversion into Law of such decree, has extended, for the same months, the tax credit for leases also to companies operating in the sectors identified in attachment 2 ("Attachment 2") of the same Decree (*i.e., inter alia,* those operating in the retail sector and in personal services) and to companies carrying out activities under ATECO codes 79.1, 79.11 and 79.12 *(i.e., inter alia,* those operating in the retail sector and in personal services*)*. (i.e., *inter alia*, those operating in the retail sector and in personal services) and companies that carry out activities under ATECO codes 79.1, 79.11 and 79.12 (*i.e.,* travel agencies and tour operators) that have their operational headquarters in areas of the national territory characterized by a scenario of maximum severity and a high level of risk (so-called red zones).

Furthermore, art. 1, par. 602, of the Budget Law 2021 has extended, until April 30, 2021, the tax credit for travel agencies and *tour operators.*

Exemption from the second instalment of the property tax ("imposta municipale unica - IMU") of 2020 (art. 9 and 9-*bis* Ristori Decree) and from the first instalment of 2021 for properties in tourism and entertainment sector (art. 1, paras. 599 - 601, Budget Law 2021)

Art. 9 of the Ristori Decree provides for exemption from payment of the second instalment of IMU, due on 16 December 2020, as laid down in art. 1, paras. 738 – 783, of Law no. 160 of 27 December 2019, for properties and related appurtenances intended for the activities listed in Annex 1 mentioned above (*i.e.*, *inter alia* catering, cinema and theater activities, sports centers and gyms), provided that the owners are also the managers of the activities.

In addition, art. 9-*bis* of Ristori Decree, at the time of conversion into law, has extended the same exemption also to property and related appurtenances in which the activities listed in Attachment 2 mentioned above regarding, *inter alia*, retail sales and personal services are carried out, provided that *(i)* the owners are also managers of the activities and *(ii)* the properties are located in municipalities characterized by a scenario of maximum severity and a high level of risk (so-called red zones).

On top of that, it should be pointed out that art. 1, paras. 599 - 601 of Budget Law 2021 has cancelled the duty to pay the first instalment of IMU due for the year 2021, in relation to property used in the tourism sector, for trade fair events and in the entertainment sector.

In particular, such rule applies, *inter alia,* to:

(i) real estate properties used as beach and thermal resorts;
(ii) property included in the D/2 cadastral category (*e.g.,* hotels) and relative appurtenances, farmhouses, homes and vacation apartments, *bed and breakfasts*, residences and campsites;
(iii) property included in the D cadastral category used by companies that set up exhibition structures as part of trade fairs or events;
(iv) property intended for discos and similar.

For the properties identified in points ii) and iv), the measure applies under the requirement that the related IMU taxpayers are also managers of the activities carried out therein.

Extension of the tax incentives related to energy efficiency works and other tax incentives regarding the renovation of buildings

(Art. 1, paras. 58 - 59, Budget Law 2021)

Article 1, paras. 58 - 59, has extended to 2021 the tax incentives provided for by art. 14 and 16 of Law Decree no. 63/2013 in relation to the expenses incurred for energy efficiency works and renovation of buildings.

Furthermore, the same provision has also extended for 2021 the so-called *bonus facciate*) referred to in art. 1, par. 219, of Law no. 160/2019, which gives a deduction equal to 90% of the expenses incurred for interventions aimed at the recovery or renovation of the external facade of buildings.

It should be pointed out that there has not been any amendments to the requirements for benefiting from such tax incentives or for the transfer of tax credits deriving from such tax incentives.

Amendments to the so-called *Superbonus 110%* provisions

(Art. 1, paras. 66 - 74, Budget Law 2021)

The Budget Law 2021 has set out certain extensions and amendments to the so-called *Superbonus 110%,* set forth by in art. 119 of the Rilancio Decree which, in a nutshell, has introduced an income tax deduction equal to 110% of the expenses incurred for specific works on buildings regarding: the improvement of the energy efficiency of buildings, anti-seismic works, the installation of photovoltaic systems and infrastructures for recharging electric vehicles.

The provisions at issue are still subject to approval by the Council of the European Union.

The new provisions have extended until 30 June 2022 (compared to the previous 31 December 2021) the validity of the *Superbonus 110%* for expenses related to energy efficiency and earthquake-resistant works.

The deduction is divided into (i) 5 equal annual instalments for expenses incurred up to 2021, and (ii) 4 equal annual instalments for expenses incurred in 2022. Moreover, apartment buildings may benefit from a further extension of the abovementioned deduction also in case of expenses borne until the end of 2022, provided that, within 30 June 2022, at least 60% of the works have been already completed.

The new provisions have extended the application of *Superbonus 110%* also to works made on buildings consisting of 2 to 4 real estate units separately stacked, even if owned by a single owner or in co-ownership between several people.

In addition, the duty to sign a third-party liability insurance for professionals entitled to issue certificates and asseverations is now considered to have been fulfilled, when they have already signed an insurance policy for damages deriving from their professional activities.

Moreover, the expenses related to the works admitted to the *Superbonus 110%,* incurred in 2022, can be subject to option for the transfer of the corresponding tax credit or for the discount on the invoice, pursuant to art. 121 of the Ristori Decree.

It is worth pointing out that the Recovery Plan should further extend the *Superbonus 110%*.

Step-up of the tax value of land and non-listed shares

(Art. 1, paras. 1122 - 1123, Budget Law 2021)

The Budget Law 2021, has extended the option for step-up, pursuant to articles 5 and 7 of Law no. 448/2001, to shares held in non-listed companies and land (both building land and land for agricultural use). Such step-up is effective as long as the expert's sworn appraisal certifying such values is drafted within 30 June 2021.

The substitute tax is due at a rate of 11%; the taxpayer may elect for paying the substitute tax in three equal instalments, the first of which within 30 June 2021. A yearly 3% interest rate applies on the remaining two instalments.

II Case law

Leasing agreement related to real estate properties and property tax (IMU) (Supreme Court, Order no. 585 of 15 January 2021)

The Supreme Court, in the decision at issue, has ruled on the identification of the person liable for the property tax (IMU) relating to a property in the event of termination of the leasing agreement if the lessor has not obtained yet the full availability of the asset.

In accordance with the prevailing case law (Supreme Court, no. 13793/2019; Supreme Court no. 25249/2019; Supreme Court no. 29973/2019), the Court held that, in the event that a leasing agreement is prematurely terminated, due to late payment of the lessee, the liability for the purposes of IMU is in the hands of the leasing company, even though the latter has not obtained yet the full availability of the asset, due to a breach by the lessee. Indeed, with reference to IMU, what is important for the purposes of identifying the tax liability is the legal title (contractual title) that justifies the availability of the asset and not the actual availability of the same. This conclusion is valid both in the case of natural expiry of the leasing and in the case of early termination.

The new rule on the interpretation of deeds for registration tax purposes and its retroactive application (Constitutional Court, judgment 16 March 2021, no. 39)

Article 1, para. 87, letter a) of the 2018 Budget Law amended Article 20 Presidential Decree No. 131 of 26 April 1986 ("**TUR**"), which currently provides as follows: "Registration tax is applied according to the inherent nature and legal effects of the deed submitted for registration, even if the title or apparent form does not correspond to it, on the basis of the elements inferable from the deed itself, regardless of extratextual elements and related deeds, except as provided for in subsequent articles".

In turn, Article 1, para. 1084, of the 2019 Budget Law, by following the same line of reasoning clearly set forth by the Explanatory and Technical Notes to the 2018 Budget Law, specified that "Article 1, par. 87, letter a) of Law No. 205 of 27 December 2017, constitutes authentic interpretation of Article 20, par. 1, of Presidential Decree No. 131 of 26 April 1986", thus applying retrospectively and to pending litigation proceedings.

the Italian Constitutional Court, by resuming the arguments developed in Decision 2020, reiterated that the amendments brought to Article 20 TUR had the effect of "*leading the mentioned Art. 20 back to its original scope, where the interpretation, in line with the peculiarities of tax law, is limited to the legal effects of the act submitted for registration*".

On the other hand, the Italian Constitutional Court restated that a different interpretation of Article 20 TUR "*would entail an arbitrary and illogical interpretation of the provisions at hand and would cause inconsistencies in the tax system, in light of the enactment of a general anti avoidance rule through Art. 10-bis of Law No. 212 of 2000. Indeed, such interpretation would allow the Italian Tax authorities to apply an anti-avoidance rule without granting the taxpayer with the right to be heard and proving the existence of an undue tax advantage and the lack of economic substance, thus preventing the taxpayer from pursuing any legitimate tax planning (which is, on the contrary, undoubtedly admitted in the Italian and European Union tax system)*".

On this ground, having recognized the systematic nature of the amendments brought to Article 20, the Italian Constitutional Court, therefore, excluded any profile of unreasonableness in Article. 1, para. 1084, of the 2019 Budget Law.

With the decision at stake, it seems lawfulness to consider as definitively settled the issue of the retroactivity of the amendments brought to Article. 20 TUR.

III Italian Tax Authority's Rulings

The new real estate securitization: guidelines of the Tax Authority on the tax aspects (Ruling no. 132 of 2 March 2021)

On 2 March 2021 the Italian Tax Authority released the ruling no. 132 of 2 March 2021 (the "**Ruling 132**"), which provides the first guidelines on the tax regime applicable to the real estate securitization vehicles established as corporate entities under the new article 7.2 of the Securitization Law ("**SPV 7.2**"), recently introduced by Decree-Law no. 34 of April 30, 2019, converted, with amendments, by Law no. 58 of June 28, 2019.

SPV 7.2 raises the financial resources necessary for the real estate investment by issuing securities (*i.e.* notes) not listed on regulated markets, which may be underwritten by professional investors. The cash flows deriving from the properties (*i.e.* from the rent and/or the sale) shall be used exclusively to repay the securities and to pay the costs of the securitization.

From an accounting perspective, the assets, liabilities, revenues and expenses related to the activities of the SPV 7.2 are not accounted for in the balance sheet or the profit and loss statement of the company, but will be described in an annex to the financial statements (off-balance sheet accounting).

With Ruling 132, the Italian tax authorities provided clarification on the following tax aspects:

(i) direct taxes exemption applicable to SPV 7.2
(ii) tax treatment of the proceeds distributed under the notes issued by SPV 7.2
(iii) VAT regime of the SPV 7.2
(iv) mortgage and cadastral taxes on the purchases of properties by the SPV 7.2.

The Tax Authority confirmed the applicability to SPV 7.2 of the clarifications already provided in the past for the special purpose vehicles for securitizations of receivables. With reference to vehicles for securitization of receivables ("SPV"), the tax authority clarified that the SPV is not the owner of any income for tax purposes (Circular no. 8/E of February 6, 2003, Ruling no. 222/E of December 5, 2003 and Ruling no. 77/E of August 4, 2010) since:

a) under article 3, paragraph 2, of the Securitization Law "*the receivables related to each transaction [...], the relative collections and the financial assets acquired with them constitute* ***separate assets*** *to all effects from those of the company and those related to other transactions*";
b) the proceeds arising out from the separate assets shall be used to pay the proceeds under the notes issued by the SPV.

Ruling 132 clarified that the same tax treatment shall apply to the SPV 7.2 for the real estate securitization. Therefore, for the purposes of corporate income tax (IRES):

(a) the profits deriving from the management of the real estate assets, during the securitization, are not included in the taxable income of the SPV 7.2;
(b) the residual profit resulting at the end of the securitization, *i.e.* after the payment of all the amount due under the notes, and attributed to the SPV 7.2 pursuant to the conditions of the notes, if any, would be qualified as taxable income in the hands of the SPV 7.2.

For the purposes of the regional tax on productive activities (IRAP), the profits arising out from the real estate assets, during the securitization, are not included in the IRAP taxable base since they are not accounted for in the financial statements of the SPV 7.2, in light of the features described above. Only the residual profits attributed to the SPV 7.2. at the end of the securitization, if any, would be included in the taxable base for IRAP purposes.

The Tax Authority confirmed that proceeds paid under the notes issued by SPV 7.2 are subject to the same tax treatment of proceeds from the notes issued by a vehicle for securitization of receivables, pursuant to article 6, paragraph 1, of the Securitization Law (in light of article 7, paragraph 1, letter b-*bis*), which extends to the SPV 7.2 the rules regarding the vehicle for securitization of receivables).

Therefore, such proceeds:

(a) are exempt from withholding tax if the noteholder is a collective investment undertaking (including real estate investment funds) or a pension fund established in Italy, or one of the following non-resident entities: *(i)* entities resident for tax

purposes in States that allow the exchange of information, *(ii)* investment funds, subject or not to supervision, established in States that allow the exchange of information *(iii)* international entities established under international agreements *(iv)* central banks or entities that manages a State's official reserves;

(b) are subject to tax in case of noteholders different from those mentioned in point (a), with different tax regimes depending on the kind of noteholder.

The Tax Authority clarified that the SPV 7.2 carries out "*a complex activity of management of real properties relevant for VAT purposes*" pursuant to Article 3 of VAT Law, even if it carries out also a securitization activity. In particular, unlike the REOCo, where the proceeds of the real estate activity shall be transferred to a securitization vehicle (which carries out the securitization of receivables), the SPV 7.2 retains such proceeds for the purposes of its other activity, *i.e.* the securitization of real estate proceeds in the interest of the noteholders.

The Tax Authority clarified also that the real estate transactions carried out by the SPV 7.2 are subject to the ordinary VAT rules applicable to real estate transactions carried out by other entities, including those relating to the right to deduct the VAT.

The Tax Authority clarified that the SPV 7.2. cannot benefit from the reduced transfer taxes applicable to the transactions carried out by a REOCo (under article 7.1, paragraph 4-*bis*, of the Securitization Law).

Tax free step-up of assets for the hotel industry (Ruling no. 200 of 23 March 2021)

The Italian Tax Authority has provided guidelines for the application of the free step-up regime of business assets for entities operating in the hotel industry pursuant to art. 6-*bis* of Law Decree no. 23/2020 (*i.e.* step up of the tax value without the payment of a step-up tax) in case of lease of business.

Usually, the step-up of the tax value of assets (*e.g.* real estate assets) is subject to the payment of a tax on the difference between the initial value and the value resulting from the step up.

The Tax Authority underlined that the new free step-up is aimed at supporting the hotel industry.

On this basis, the Italian Tax Authority clarified that the free step-up may be applied by the owner of the assets (*e.g.* the property) even if the hotel business is carried out by a third party under a business lease agreement (*affitto d'azienda*), provided that the revenues of the owner of the assets derive solely from the rents under the lease agreement.

Lease tax credit and non-commercial entities (Ruling no. 160 of 8 March 2021)

The Italian Tax Authority has provided clarifications regarding the possibility, for a non-commercial entity, which does not qualify as VAT person, only occasionally carrying out commercial activities, to benefit from the so-called *lease tax credit* (set out by art. 28 of Law Decree no. 34/2020) with reference to the rents paid for the real estate properties in which the said entity carries out its statutory activities.

It is preliminarily worth noting that, by referring to previous guidelines (Circular letter no. 14/E/2020 and Resolution no. 68/E/2020), the Italian Tax Authority has clarified that non-commercial entities may benefit from the abovementioned tax credit in relation to the cost incurred for the rent of real estate properties for non-habitable use intended for institutional purposes, even when (as it occurs in the case at stake) the entity carries out *(i)* both institutional activities and *(ii)* non-prevailing commercial activities, by means of which the entity obtains revenues, exclusively relevant for corporate income tax (IRES), not exceeding 5 million euros.

In light of the above, the Italian Tax Authority has pointed out that the Applicant may benefit from the tax credit at stake with reference to the rents relating to the real estate properties used as institutional offices, on the amount paid gross of VAT, since VAT represents a cost increasing the rent due by the Applicant.

Real estate tax incentives (Sismabonus and Ecobonus) and the tax consolidation regime (Ruling no. 133 of 2 March 2021)

The Italian Tax Authority has clarified the methods to use within a domestic tax consolidation regime the tax credits deriving from *(i)* energy requalification works (art. 14 of Law Decree no. 63/2013), *(ii)* works aimed at reducing seismic risk (art. 16 of Law Decree no. 63/2013) and *(iii)* works to achieve energy efficiency (art. 16-*bis*, paragraph 1, letter h), of Presidential Decree no. 917/1986).

In particular, the Italian Tax Authority pointed out that each company included in the tax consolidation regime may transfer its tax credits for the purpose of offsetting against the corporate income tax (IRES) due from the consolidating company for an amount not exceeding the IRES resulting, by way of balance and advance payment, from the consolidated tax return.

The transfer of tax credits is, therefore, solely allowed for the purpose of offsetting with the IRES of the group and, for the part not used by the company, to pay other taxes.

Healthcare properties: applicability of the tax incentives for renovation works in case of a subsequent change of use of the property (Ruling no. 191 of 18 March 2021)

The Italian Tax Authority has provided certain clarifications on some real estate tax incentives, with respect to healthcare properties.

According to such ruling, the tax incentives at stake intended for residential buildings will still be applicable even when a property, due to building works carried out on it, is subject to a change of use (*cambio di destinazione d'uso*), in this case, from healthcare to residential, office and commercial) and to an increase in the number of real estate units.

Trust: the application of gift tax is excluded when the transfer of wealth is missing (Ruling no. 106 of 16 February 2021)

The Italian Tax Authority has clarified that, in principle, the attribution of assets and/or rights to the beneficiaries of a trust by the trustee can lead to the application of gift tax under certain conditions: the contribution of assets and/or rights in the trust would not seem to be relevant for gift and estate tax purposes.

In light of the above, with reference to the case at stake (*i.e.*, a foreign trust where the settlor is at the same time beneficiary), the Italian Tax Authority has clarified that, by recalling a recent judgment issued by the Supreme Court (Cass., judgement 29 May 2020, no. 10256), the application of gift tax is excluded due to the lack of the objective

requirement, as referred to in art. 1 of Legislative Decree no. 346/1990, since there is no transfer of wealth.

Real estate funds: VAT aspects in case the fund manager (SGR) is included in a VAT group (Ruling no. 220 of 26 March 2021)

The Italian Tax Authority has addressed the tax consequences of the inclusion in a VAT Group of the management company (SGR) of a real estate alternative investment fund.

Under the Italian VAT Group regime, the entities included in such group are treated as a single taxable person for VAT purposes and a specific VAT identification number is attributed to the VAT Group. As a consequence, in a nutshell, supplies of goods and services between members of the VAT group are not relevant for VAT purposes.

IV Scholars

Assonime - Circular no. 6/2021 of March 5, 2021 - "Tax free" step-up regime of certain business assets and tax recognition of the higher values booked in the balance sheet

Consiglio Nazionale del Notariato - Paper no. 27-2021/T of March 16, 2021 - The Superbonus 110%

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