CHIOMENTI

Tax Key News – Real Estate

Review on real estate taxation No. 2/2021

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Highlights

- ***Tax free step up of assets for entities operating in the hotel and thermal sectors****: interpretative rule concerning the scope of application of tax-free step-up of assets*
- ***Conversion of a joint-stock company into a real estate SICAF****: Italian Tax Authority's guidelines on the tax regime of the conversion (Ruling No. 220/2021)*
- ***Revocation of trust and real estate properties****: Italian Tax Authority's guidelines on the indirect taxes on the transfer of assets to the settlor (Ruling No. 352/2021)*
- ***Sale of "building rights" (diritti di cubatura)****: the Italian Supreme Court confirms the application of registration tax at 3% (Italian Supreme Court, Joint Divisions, decision No. 16080/2021)*

I Legislation

Extension of the tax credit for rental fees on non-residential properties and for lease of going concern

(Art. 4 of Law Decree No. 73 of 25 May 2021, as converted into Law No. 106 of 23 July 2021)

Article 4 of Law Decree No. 73 of 25 May 2021 ("**Sostegni-*bis* Decree**") provides for an extension of the tax credit for rental fees on non-residential properties and for the lease of going concern, introduced by article 28 of Law Decree No. 34 of 19 May 2020, as converted into Law No. 77 of 17 July 2020 ("**Rilancio Decree**") and subsequent amendments.

In particular, article 4, paragraph 1 of Sostegni-*bis* Decree provides that companies operating in the tourism sector, travel agencies and tour operators can benefit from such allowance with reference to the lease fees paid until 31 July 2021, provided that they have registered revenues reductions equal to at least 50% of the revenues registered on the same months of 2019.

Such allowance had already been extended in favor of the abovementioned entities until 30 April 2021 pursuant to article 1, paragraph 602 of Law No. 178/2020 ("**2021 Budget Law**").

Moreover, article 4, paragraph 2 of Sostegni-*bis* Decree extends the allowance also to the lease fees paid between January 2021 and May 2021 by entities and by individuals carrying out business activities or professional activities, provided that:

a) in 2019 they have registered revenues not higher than € 15 mln;
b) the average amount of revenues registered between 1 April 2020 and 31 March 2021 is lower than 30% of the average of revenues registered between 1 April 2019 and 31 March 2020. Such condition is not required with reference to those entities and individuals that began their business activity starting from 1 January 2021.

Lastly, in relation to lease fees paid between January 2021 and May 2021, the allowance is applicable also to non-commercial entities (including third sector and recognized religious entities), as well as to businesses carrying out retail activity.

With reference to further tax law provisions provided by Sostegni-*bis* Decree, please refer to our Tax Newsalert available at the following link ENG---Newsalert-DL-Sostegni-bis

Amendments to the step-up regime for business assets and equity holdings

(Art. 1-*bis*, of Law Decree No. 41 of 22 March 2021, as converted into Law No. 69 of 21 May 2021)

The provision introduced upon the conversion of Law Decree No. 41 of 22 March 2021 ("**Sostegni Decree**") extends the possibility to opt for the step-up regime of business assets and equity holdings accounted for in the financial statements as of 31 December 2019, as provided for by article 110 of Law Decree No. 104 of 14 August 2020.

In particular, according to such new provision, it will be possible to step-up the value of business assets and equity holdings accounted for also in the financial statements following the one as of 31 December 2019 (*e.g.,* 2020 financial statement), but only with

reference to those assets that have not been subjected to the step-up in the previous financial statements, without the possibility to release the step-up reserve and to align the tax value to the higher book value.

Interpretative rule on tax-free step-up of assets for businesses operating the hotel and thermal sectors

(Art. 5-*bis* of Law Decree No. 41 of 22 March 2021, as converted into Law No. 69 of 21 may 2021)

The provision at issue has been introduced upon the conversion of the Sostegni Decree and provides for an authentic interpretation rule aimed at extending, from a subjective point of view, the possibility to apply the tax-free step-up of business assets and equity holdings as resulting from the financial statements as of 31 December 2019, according to article 6-*bis*, of Law Decree No. 23 of 8 April 2020 ("**Liquidità Decree**"), provided for "*companies and entities operating in the hotel and thermal sectors*".

Thanks to this new interpretative rule, the tax-free step-up regime will also be applicable with reference to *(i)* real estate properties for hotel use leased or rented to entities operating in the hotel and thermal sectors, as well as *(ii)* real estate properties under construction, renovation or completion.

With reference to further aspects related to such provision, please refer to our Tax Newsalert available at the following link The new interpretative rule on tax free step-up for entities operating in the hotel and thermal sectors.

II Case law

The lease of a real estate property does not constitute a permanent establishment for VAT purposes

(ECJ, decision of 3 June 2021, *Titanium Ltd.*, C-931/19)

The European Court of Justice held that the activity of leasing a real estate property in a Member State other than the State of residence of the owner of such property does not constitute a permanent establishment for VAT purposes if the owner of such property does not have its own personnel where the property is located.

In the case at issue a property management company (*i.e.,* Titanium Ltd.), based in Jersey, leases a property in Austria. To this it appointed a local real estate management company acting as a service provider for the management of the assets. However, with reference to said transaction, Titanium Ltd. retained the key decision-making powers (*i.e.*, *inter alia*, the power to determine the economic and legal conditions of the lease).

The European Court of Justice held that a structure without its own staff cannot fall within the notion of permanent establishment which, as defined in European case law (*ex multis* ECJ, decision of 28 June 2009, C-73/06; ECJ, decision of 20 February 1997, C260/95), requires a sufficient degree of permanence and a structure that are capable, in terms of human and technical equipment, of independently providing the services at issue.

With reference to such judgment, please refer to our Tax Newsalert, available at the following link Newsalert ECJ decision in the Titanium case.

The "solar flat roof" (*lastrico solare*) registered as F/5 shall not be deemed to be an instrumental property

(Supreme Court., order No. 15192 of 1 June 2021)

The Italian Supreme Court held that, since the "solar flat roof" does not qualify as an instrumental property, its sale is deemed to be exempt from VAT pursuant to article 8-*bis* of Presidential Decree No. 633/1972, being instead subject to the application of the proportional registration tax (*i.e.*, 9%), as well as the mortgage and cadastral taxes at the fixed amount of € 50 each.

The transfer of "building rights" to third parties is subject to registration tax at 3%

(Supreme Court, Joint Divisions, decision No. 16080 of 9 June 2021)

By putting an end to a conflicting interpretation, the Joint Divisions of the Italian Supreme Court held that the transfer of the building right with which the owner of a property detaches, in whole or in part, the right to build in favor of the owner of another property with the same urban plan must be deemed to be a deed immediately transferring (*atto immediatamente traslativo*) a building. This deed does not require the written form for the purpose of its validity, according to art. 1350 of the Italian Civil Code and may be "registered" (*trascritto*) pursuant to article 2643 No. 2-*bis* of the Italian Civil Code.

This deed is subject to a proportional registration tax (at a rate of 3%), qualifying as a "different" deed concerning the provision of services relating to assets pursuant to article 9 of the Tariff, part I, of Presidential Decree No. 131/1986. In case of registration (*trascrizione*) and transfer, a fixed rate of mortgage and cadastral tax will apply pursuant to article 4 of the Tariff, Legislative Decree No. 347/1990 and article 10 paragraph 2 of the same decree.

Taxable person with refence to property tax (IMU) in case of termination of the leasing agreement

(Italian Supreme Court, order No. 9624 of 16 April 2021)

The Italian Supreme Court, in accordance with its previous decisions, held that in case of termination of the leasing agreement due to the non-performance of the lessee, the taxable person for property tax (IMU) purposes is deemed to be the lessor, even though he/she has not obtained yet the material availability of the property because of the lessee's failure to return it. Indeed for tax purposes it is relevant the existence of a contractual relation which allows the qualified custody of the property, rather than its material possession.

III Italian Tax Authority's rulings

Registration, mortgage and cadastral taxes at fixed amounts shall be applied on the contribution to real estate funds

(Ruling No. 376 of 27 May 2021)

The Italian Tax Authority has clarified that the transfer, by means of contribution, of a new real estate property from a construction company to a real estate fund can benefit from

the facilitation regime, as set forth by article 7, paragraph 1, of Law Decree No. 34 of 30 April 2019. In a nutshell, such regime consists of applying the registration, mortgage and cadastral taxes at the fixed amount of 200 euros each.

To this end, it is necessary that the transfer relates to an entire building in favor of a construction company that, within the next 10 years, intends to demolish and rebuild it in accordance with earthquake-resistant regulations and with the obtaining of the energy class NZEB, A or B.

In particular, the Italian Tax Authority has clarified that the contribution of real estate property to a real estate fund may fall within the notion of "disposal" (*alienazione*), as identified by the rule at stake, provided that the all the above mentioned requirements are met.

Lastly, it should be noted that the Italian Tax Authority has not provided any clarification with reference to the transfer of equity holdings following the contribution of real estate properties to the same fund.

UCIs are excluded from real estate tax incentives (the s.c. "*Ecobonus*" and "*bonus facciate*")

(Ruling No. 372 of 25 May 2021)

The Italian Tax Authority has clarified that undertakings for collective investment (UCIs) (*i.e.,* in the case at stake these are SICAF, meaning investment companies with fixed-capital) - since they are taxable persons for IRES purposes but exempt from it - cannot benefit from the deductions provided for interventions meant for energy requalification (pursuant to article 14 of Law Decree No. 63 of 4 June 2013) and for renovation of buildings facades (pursuant to article 1, paragraphs 219 - 224, of Law No. 160 of 27 December 2019), not even by means of one of the alternative methods provided for, such as the assignment of tax credit or the discount on the invoice (s.c. *sconto in fattura*).

The company carrying out also the role holding company is deemed to be excluded from the tax-free step-up of hotel properties

(Ruling No. 450 of 30 June 2021)

The Italian Tax Authority has clarified that a company that owns two hotels leased to its participated companies operating in the hotel sector cannot benefit from the tax-free step-up of hotel properties, as laid down in article 6-*bis* of Law Decree No. 23 of 8 April 2020.

Indeed, according to the Italian Tax Authority's interpretation, since the company carries out both real estate activities and activities as a holding company, it cannot fall within the purpose contemplated by abovementioned article 6-*bis* of Law Decree No. 23/2020, namely, "*to support the hotel and thermal sectors*". Indeed such purpose exclusively allows those entities operating in such sectors in order to obtain the higher values in the financial statements without having to pay substitute tax.

Tax credit for rental fees on non-residential properties may be applicable also in case of reduction in revenues

(Ruling No. 367 of 24 May 2021)

On 24 May 2021, the Italian Tax Authority clarified that the taxpayer is eligible to benefit from the tax credit for rental fees on non-residential properties for 2020 notwithstanding of the requirement for a reduction in revenues, pursuant to article 28, paragraph 5, of Law

Decree No. 34/2020, provided that the municipality in which the taxpayer has its tax domicile and operational headquarters is included among those affected by a calamitous event. In such case it is necessary that the resulting state of emergency will still be in force at the date of declaration of the state of emergency for Covid-19.

Tax credit for rental fees on non-residential properties and the transfer of going concern with retention of title (*riserva di proprietà*)

(Ruling No. 256 of 16 April 2021)

In order to benefit from the tax credit for rental fees on non-residential properties, pursuant to article 28 of Law Decree No. 34 of 19 May 2020, in case of transfer of a going concern with retention of title (*riserva di proprietà*), the Italian Tax Authority has clarified that the condition regarding the reduction in revenues must be calculated taking into account the share of revenues deriving from the going concern transferred with regard to the months of reference for the tax credit. For this purpose, the reduction in revenues of the acquiring company is not relevant.

Tax regime applicable in case of conversion of a joint-stock company into a real estate *SICAF*

(Ruling No. 370 of 24 May 2021)

The Italian Tax Authority held that the conversion of a joint-stock company into a real estate investment SICAF, even though it does not fall within the category of transformations governed by article 2500-*septies* of the Italian Civil Code, implies a change in the company's by-laws. Such amendments, for the purposes of direct taxation, determine a "switch" from the business regime to the exemption regime which is typical of real estate funds.

In particular, for income tax purposes, in case of lack from a specific regulatory provision, the conversion transaction is deemed to be similar to a so-called heterogeneous transformation (*trasformazione eterogenea*) pursuant to article 171 of Presidential Decree No. 917/1986 ("**Italian Tax Consolidation Act**"), thus entailing the following effects:

- for IRES purposes, it is necessary to determine the income stemming out from the period between the conversion and the date on which said transaction becomes legally effective, on the basis of the results of the financial statements, taking into account the profit at normal value (*realizzo a valore normale*)- according to article 9 of the Italian Tax Consolidation Act - of all the elements constituting the company's assets at the time when the conversion transaction becomes legally effective, as well as drafting a specific tax return;
- the capital gains related the assets pertaining to the company and constituting part of the company's going concern are subject to taxation at the time of the conversion transaction, since the transition to a different tax regime implies that the assets leaves the company's regime;
- the reserves, other than those referred to in article 47, paragraph 5, of the Italian Tax Consolidation Act, which are present in the company's balance sheet prior to conversion transaction, are subject to taxation in relation to shareholders in the tax period in which they are distributed or used for purposes other than to cover losses, provided that they are reported in the financial statements by indicating their origin.

For IRAP purposes, the income is determined by applying *(i)* the rules for determining the taxable base provided for limited liability companies and commercial entities in the period between the conversion transaction and its legal effectiveness, and *(ii)* the rules for SICAF in following tax periods.

For indirect taxes purposes, the Italian Tax Authority has clarified that

- VAT shall not apply because the transfer of assets in connection with conversions constitutes a transaction excluded from the scope of application of the tax (pursuant to article 2, paragraph 3, letter f) and art. 3, paragraph 4, letter d) of Presidential Decree No. 633/1972) in case, once the transaction is completed, the resulting entity continues to qualify as a taxable person for VAT purposes carrying out commercial activities;
- the registration tax on the deed of conversion shall apply at a fixed rate of € 200 (article 4, paragraph 1, letter c), of the Tariff Part I, Presidential Decree No. 131/1986) and must be paid only once, despite the plurality of amendments brought by this transaction on the by-laws, because said amendments are deemed to be legally necessary to assure the compliance of the company's by-laws with the legal and regulatory framework governing SICAF;
- the mortgage and cadastral taxes shall apply at the fixed amount of € 200 each.

The assignment of tax credits for real estate incentives

(Ruling No. 369 of 24 May 2021)

On 24 May 2021, the Italian Tax Authority clarified that if the assignment of the tax credits related to the s.c. "*ecobonus*" (article 14 of Law Decree No. 63/2013) and "*sismabonus*" (article 16 of Law Decree No. 63/2013) is carried out between the parties in return for payment, such transaction is deemed to have a financial purpose and nature. Therefore, for VAT purposes, it falls within the category of transactions which are exempt from it according to article 10, paragraph 1, No. 1) of Presidential Decree No. 633/1972. Moreover, the deed related to the assignment of a tax credit falls among those deeds for which there is no obligation to request the registration pursuant to article 5 of the Table attached to the Presidential Decree No. 131/1986.

Indeed, with regard the VAT regime, it should be noted that the assignment of tax credits may give rise to transactions having a financial nature, falling within the scope of application of VAT but exempt under article 10, first paragraph, No. 1) of Presidential Decree No. 633/1972, or to transactions having a non-financial nature, excluded from the scope of application of VAT under article 2, paragraph 3, letter a) of the abovementioned decree.

For such reason, in relation to the assignment of the tax credits, the assignee has, in any case, the right (but not the obligation) to invoice, also at the request of the counterparty, the transaction exempt from VAT pursuant to article 10, paragraph 1, No. 1) of Presidential Decree No. 633/1972, indicating in it the same amount of the consideration agreed upon in the assignment agreement.

Indirect taxes on the transfer of assets to the settlor in case of revocation of trust

(Ruling No. 352 of 18 May 2021)

The Italian Tax Authority clarified that the gift tax shall not apply when the real estate assets held in a trust are transferred back to the settlor who set up the same trust, since there isn't any inter-subjective transfer due to the lack of the objective requirement according to article 1 of Legislative Decree No. 346/1990.

In principle, the transfer of assets and/or rights held in trust to the beneficiaries of the trust by the trustee determines the application of inheritance and gift taxes, when the requirements provided for by the provisions of Legislative Decree No. 346/1990 are satisfied.

If following the abovementioned deed of revocation of trust the real estate assets held in the trust were transferred back to the settlor who had set up the trust and drawn up the relative management plan, this would lead to the transfer of the trust assets by the trustee in favor of the settlor.

It should be noted that the beneficiaries of said transfer coincide with the settlor of the trust. Consequently, the absence of an inter-subjective transfer entails the non-application of gift tax due to the lack of the objective requirement, not implying any transfer of wealth.

For the purposes of registration tax, this deed of revocation of trust is included among the acts to be registered in a fixed term, with fixed amount, if drawn up by public deed or authenticated private deed, since it does not entail any "asset services" (*prestazioni a carattere patrimoniale*).

The mortgage and cadastral taxes are due in a fixed amount due to the formalities to be carried out for registration (*trascrizione*) and for cadastral registrations.

VAT rates applicable to services performed in Marina Resort

(Ruling No. 360 of 20 May 2021)

The Italian Tax Authority clarified the VAT rates applicable to services rendered in Marina Resorts for the stationing and overnight stay of yachtsmen, as well as related services (such as hauling and launching).

Specifically, the Italian Tax Authority deemed that the 10% VAT rate may be applied to contracts entered into by the Marina Resorts for the accommodation and overnight stay of yachtsmen within their own watercraft moored therein and – by virtue of the amendment made by article 1, paragraph 598, of Law No. 178/2020 – regardless of the type of contract (seasonal, annual, multi-year).

Only the rental of mooring spaces for boats remains subject to the ordinary VAT rate.

With reference to the expression "*services rendered to accommodated guests*" (No. 120 of Table A, part III, attached to the VAT Decree), the Italian Tax Authority held that the application of the reduced tax rate is limited to the services enabling guests to stay in the accommodation facility and meet his/her needs and requirements (see Resolution No. 88/E of 15 March 2002). Therefore, the abovementioned expression includes not only the performance of accommodation services, but also those services which are strictly "ancillary" to it.

Therefore, in the case of Marina Resorts, are eligible for VAT not only the reception services and the provision, in the tourist harbor, of a stretch of water for the overnight stay of yachtsmen on board their boats, but also the strictly ancillary services, such as cleaning services, mooring assistance, booking, security and surveillance services and the charging of consumption.

Instead, with regard to *(i)* the services on the boats performed as part of the stationing in the harbor and *(ii)* the contracts for stationing on land (so-called dry harbor), it is noted that for article 32, paragraph 1, of Law Decree No. 133/2014, the Marina Resorts are "*structures organized for the stay and overnight stay of yachtsmen within their own watercraft moored in the specially equipped stretch of water*".

In light of the abovementioned notion, the Italian Tax Authority has excluded from the application of the reduced VAT rate the services rendered by the Marina Resorts on boats (*e.g.,* hauling, launching) performed within the stationing in the harbor, entailing the

movement of the boat from the water to the mainland and vice versa: these services are not per se referable to those typically accommodating as set forth by No. 120 of Table A, Part III, attached to the VAT Decree. Indeed this provision, through the regulatory reference mentioned above, would be understood to apply to services strictly provided for the accommodation of yachtsmen in their own pleasure craft moored in the specially equipped waters.

Similar considerations apply to shore-based contracts. These are services rendered on a boat that is stationed on land.

As they are not directly inherent to the provision of accommodation, the services on boats performed as part of the stationing in the harbor and the contracts for stationing on land (so-called dry harbor) are therefore subject to VAT at the ordinary rate.

Tax regime of dividends paid to EU/EEA funds

(Ruling No. 327 of 11 May 2021)

The Italian Tax Authority has clarified that the withholding tax, pursuant to article 27, paragraph 3, of Presidential Decree No. 600/1973, is not applied to dividends distributed by resident companies as from 1 January 2021 to funds set up in an EU State (in this case, the Netherlands) whose management company, resident for tax purposes in the Netherlands, is subject to forms of supervision pursuant to the AIFM Directive (Directive 2011/61/EU).

As it is known, article 1, paragraph 631, of the 2021 Budget Law amended the aforementioned article 27, paragraph 3, adding the period for which the 26% withholding tax is not applied on the dividends paid to foreign undertakings for collective investment (UCIs) that comply with Directive No. 2009/65/EC and to UCIs, not complying with Directive No. 2009/65/EC, whose manager is subject to forms of supervision in the foreign country in which it is established pursuant to Directive No. 2011/61/EU, established in the Member States of the European Union and in the States party to the Agreement on the European Economic Area (EEA) allowing an adequate exchange of information.

With reference to this provision, please refer to out Tax Newsalert available at the following link Tax Key News – Real Estate n. 1/2021.

IV Legal scholars

National Council of Notaries (*Consiglio Nazionale del Notariato*) – Paper No. 11-2021/T – *DAC 6 duties in the notary activity*
Consorzio Studi e Ricerche Fiscali Gruppo Intesa Sanpaolo, Paper No. 1/2021 –

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