

Tax Key News - Real Estate

Quarterly Review of Real Estate Taxation No. 2/2022

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I

Legislation

Deductibility of equity contribution: European Commission's proposal for a Directive (DEBRA)

(Proposal 22.12.2021 No. COM (2022) 216 of 11 May 2022)

The European Commission proposed an initiative to limit the use of debt instruments by European companies in order to encourage the financing of companies by shareholders through equity instruments. The proposal, aimed at taxpayers subject to corporate income tax in one or more Member States, provides for a deduction for equity increases and a partial limitation of the deductibility of interest expenses.

From an Italian perspective, this Directive, if approved, will affect the NID (notional interest deduction) provisions and the deductibility of interest expenses for corporations.

Repeal of “systematic loss” rule from the tax period ongoing as of 31 December 2022

(Article 9, Law Decree No. 73 of 21 June 2022)

The provision repealed the discipline of shell companies (s.c. systematic loss companies) set out in Article 2, paragraphs 36–*decies*, 36–*undecies* and 36–*duodecies* of Law Decree No. 138/2011.

The repeal is effective as of the ongoing tax period on 31 December 2022 (thus from 2022 for companies with a tax period coinciding with the calendar year).

As a consequence of this repeal, the penalizations set out in Article 30 of Law No. 724/1994 (shell companies discipline) shall not apply where: (i) the tax periods 2017, 2018, 2019, 2020 and 2021 resulted in a tax loss; or (ii) four of the aforementioned periods resulted in a tax loss and the remaining one had a taxable income below the minimum income determined according to the provisions for shell companies.

Deadline for requesting the registration of deeds subject to registration tax in fixed term

(Article 14, Law Decree No. 73 of 21 June 2022)

As a result of the amendments to Article 13, paragraphs 1 and 4 and to Article 19, paragraph 1 of Presidential Decree No. 131/1986 (Consolidated Law on Registration Tax), the term for the registration of deeds subject to registration tax in fixed term has been increased from 20 to 30 days. This provision concerns deeds other than those executed as notarial deed.

Extension of the deadline for the filing of the property tax (IMU) return for the 2021 fiscal year

(Article 35, paragraph 4, of Law Decree No. 73 of 21 June 2022)

The deadline to file the property tax (IMU) return for the fiscal year 2021 (pursuant to Article 1, paragraph 769 of Law of 27 December 2019) is postponed from 30 June 2022 to 31 December 2022.

Superbonus Hotel 80%: implementation of further measures under the Recovery and Resilience Plan



(Article 38, paragraph 1 of Law Decree No. 36 of 30 April 2022)

The financial budget of the tax incentive for the requalification of properties intended for hospitality use (the s.c. Superbonus Hotel 80%) has been increased of Euro 98 million.

The provisions of the Superbonus Hotel 80% apply, for instance, to hotels, spa complexes and marinas.

Tax credit for tourism related companies for IMU paid in 2021

(Article 22 of Law Decree No. 21 of 21 March 2022 converted into Law No. 51 of 20 May 2022)

A tax credit equal to 50% of the IMU balance payment of the year 2021 is granted to companies operating in the tourism industry that own properties enrolled in the cadastral category "D/2", provided that: (i) the owner of the property carries out the accommodation activity; and (ii) its turnover of the quarter of April–May–June 2021 is decreased at least of 50% compared to the corresponding period of 2019.

News on real estate tax incentives (so-called *bonus edilizi*)

(Article 14, paragraph 1, letter b and art. 57, paragraph 3 of Law Decree No. 50 of 17 May 2022 converted into Law No. 91 of 15 July 2022)

Transfer of tax credits deriving from the tax incentives relating building works

This provision applies to the transfer by banks and their related companies (s.c. "*società appartenenti ad un gruppo bancario*"), including AIFMs, of the tax credits deriving from the Superbonus 110% and other building bonuses.

The amendment concerns tax credits for which the communications relating to the first disposal (or invoice discount) that have been filed to the Italian Tax Authority starting from 1 May 2022.

(Article 10-*bis* of Law Decree No. 21 of March 2022, as converted into Law No. 51 of 20 May 2022)

The obligation of SOA certification ("*Società organismo di attestazione*") for contractors or sub-contractors carrying out building works under the Superbonus 110% and other building bonuses

Starting from 1 January 2023, in order to benefit from the Superbonus 110%, or other building bonuses, for the execution of works for an amount exceeding Euro 516,000, shall be contracted to companies with the SOA certification (issued by certification entities, pursuant to Article 84 of the Public Contracts Code). Alternatively, the contractor shall provide evidence that a contract for the release of the aforementioned certification has been entered into (this option will not be permitted from 1 July 2023).

(Article 23-*bis* of Law Decree No. 21 of 21 March 2022 as converted into Law No. 51 of 20 May 2022)

Mandatory indication of the national labour agreement (CCNL) applied by construction companies in order to benefit from tax incentives for building works exceeding Euro 70,000



For buildings works commenced after 27 May 2022 for a total amount exceeding Euro 70,000, it is necessary to indicate in the contract of the works and in the relevant invoices the national labour agreement applied for the recognition of the following building bonuses: Superbonus 110%; bonus elimination of architectural barriers; bonus adaptation of work environments; furniture bonus and facade bonus. This provision also applies to the transfer of the relevant tax credit or invoice discount assignment (respectively: Articles 119, 119-*ter*, 120 and 121 of D.L. No. 34/2020).

Tax credit for investments in so-called “intangible assets 4.0”

(Article 21 of Law Decree No. 50 of 17 May 2022)

The tax credit for investments in intangible assets (*e.g.* software, systems, platforms and design applications), included in Annex B attached to Law No. 232/2016, is increased. In particular, the amount of the tax credit is increased from 20% to 50% for investments made from 1 January 2022 to 31 December 2022 (or by 30 June 2023, to the extent that by 31 December 2022 the relevant order is accepted by the seller and the payment of advances for an amount at least equal to 20% of the acquisition cost has been made).

Register of beneficial owners: regulation establishing the regime for reporting data and information to the Commercial Register (“Registro delle imprese”) on the beneficial ownership of private entities, trusts and similar legal arrangements

(Ministry of Economy and Finance Decree No. 55 of 11 March 2022, published in the Official Gazette No. 121 of 25 May 2022)

The decree regulating the procedures for the disclosure in special sections of the Commercial Register of information on beneficial owners of private entities, trusts relevant for tax purposes and legal arrangements similar to trusts have been published. However, the implementing provisions on the operational methods remain to be issued.

II

Case-law

Interpretation of deeds for registration tax purposes under Article 20 of Presidential Decree No 131/1986: question of compatibility with EU VAT law referred to the Court of Justice

(Supreme Court, Decision No. 10283 of 31 March 2022)

In this Decision, the Italian Supreme Court had asked to the European Court of Justice to clarify whether Article 20 of Presidential Decree No. 131/1986 concerning the interpretation of deeds for the purposes of registration tax (as amended in 2018) is contrary to European Union VAT law (and in particular to Article 5 No. 8 of Directive 77/388 and Article 19 of Directive 2006/112). Pursuant to Article 20 of Presidential Decree No. 131/1986, for the purposes of registration tax, the qualification of a deed must be based on its legal effects only and not on extra-textual elements or elements contained in separate deeds.

In the case at stake, the Italian Tax Authority re-characterized a property sale and purchase agreement into a going concern transfer (which is out of the scope of VAT pursuant to Article 2, paragraph 3, lett. b of VAT Law), disregarding the characterization as sale of property (subject to VAT) given by the parties. On this basis, the Italian Tax Authority recovered the VAT deducted by the purchaser on the purchase of the property,



which, according to the Italian Tax Authority, was not due since the transaction was, for VAT purposes, a sale of a going concern (thus outside the scope of VAT).

According to the Supreme Court, Article 20 would prevent a transfer of assets broken down into a plurality of separate deeds from being re-characterized for VAT purposes as a going concern transfer. Hence, according to the Court, there would be a conflict with the European law provisions on VAT (as a harmonized tax).

Deduction of VAT paid on the purchase of residential properties

(Supreme Court, Decision No. 19952 of 21 June 2022)

The Court addressed the limitation of VAT deduction on the purchase of residential properties provided by Article 19-*bis*1 paragraph 1, letter i) of Presidential Decree No. 633 of 26 October 1972. This rule provides for, in brief, the non-deductibility of VAT paid on the purchase of residential properties for VAT entities other than companies whose exclusive or main business purpose is the construction of such (residential) properties.

The Supreme Court clarified that the deduction of VAT paid on the purchase of residential properties must be allowed where there is inherence between such properties and the economic activity carried out by the purchaser for VAT purposes. The assessment of the inherence may also be based on prospective assessments. Therefore, according to the Supreme Court's case law, the deduction of VAT on the purchase of residential properties is not limited to companies that mainly or exclusively carry out construction activities.

VAT deduction on the purchase of residential properties to be used to carry out a professional activity

(Supreme Court, Decision No. 13259 of 28 April 2022)

The Supreme Court stated that VAT paid by a professional (*e.g.* a lawyer) on the purchase of a residential property (cadastral category "A/2" – dwellings) intended to be used as a professional office (that would have a different cadastral category, *i.e.* "A/10") is deductible for VAT purposes if, regardless of the cadastral category attributed, it is demonstrated by objective elements that the property is instrumental to the purchaser's professional activity.

According to the Supreme Court, in such case, the "objective VAT non-deductibility" regime set out by Article 19-*bis*1, paragraph 1, lett. i) of Presidential Decree No. 633/1972 does not apply to VAT paid in connection with the purchase of properties for residential use.

The Supreme Court therefore considered this rule as a relative presumption that can be overcome by demonstrating the inherence of the asset purchased with VAT (residential property) with respect to the economic activity for VAT purposes of the purchaser.

Eligibility of energy requalification tax incentives also for companies' instrumental properties

(Supreme Court, Decision No. 15672 of 17 May 2022)

The Supreme Court, in accordance with its consolidated case law, confirms that the tax incentive for energy-efficiency (Ecobonus) pursuant to Article 14 of Law Decree No. 63/2013 and Article 1, paragraphs 344–347 of Law No. 296/2006 is applicable also to renovation works performed by companies on their buildings.



Limits to the deduction of the Municipal property tax (IMU) on commercial properties for income tax purposes: the decision of the Constitutional Court

(Constitutional Court, Decision No. 156 of 20 June 2022)

The Constitutional Court held that the question of constitutionality raised by the Regional Tax Court of Parma, concerning the limitation on the deductibility of IMU due on instrumental properties, from corporate income tax (IRES) for the tax periods from 2014 to 2016 (see Article 14, paragraph 1, first sentence, of Legislative Decree No. 23 of 14 March 2011) was manifestly unfounded.

In relation to the 2012 tax period, the Constitutional Court already ruled on the same provision with Decision No. 262/2020, which declares the constitutional illegitimacy due to its conflict with Articles 3 and 53 of the Italian Constitution.

The Court declared the question manifestly unfounded for lack of motivation, on the part concerning the instrumentality of the properties on which the IMU to be deducted had been paid, with respect to the corporate activity carried out.

On the other hand, the Court did not accept the objection raised by the State Attorney's Office, namely that the matter would be already covered by Decision No. 262/2020 (the Court held that there were no grounds for extending the declaration of constitutional illegitimacy to the tax periods after 2012).

Real estate collective investment undertakings – Fiscal transparency regime for non-institutional investors resident in Italy

(Supreme Court, Decision No. 19739 of 20 June 2022)

The Supreme Court clarified the calculation of the percentage of participation in a real estate collective investment undertaking (UCI) concerning the so-called non-institutional investors resident in Italy (which include individuals) for the fiscal transparency regime under Article 32 of Law Decree No. 78/2010.

The fiscal transparency regime provides that income derived from real estate UCIs is attributed, regardless of distribution, to "non-institutional" investors holding a participation stake higher than 5% (the imputation is proportional to the participation percentage).

For the purposes of the 5% test, Article 32, paragraph 3-*bis* provides that shall be taken into account: "*participations held directly or indirectly through subsidiaries, fiduciary companies or intermediaries*" and "*participations imputed to family members indicated in Article 5, paragraph 5, of the Consolidated Law on Income Taxes pursuant to Presidential Decree No. 917 of 22 December 1986*".

The Court clarified that the participation of family members shall be attributed to a single participant for the purposes of calculating the 5 per cent threshold provided that such family members are considered intermediaries. In that case, in fact, the participation held through intermediaries shall be attributed to a single participant for the purposes of calculating the 5%.

III

Italian Tax Authority's Rulings**Fund management and sub-advisory services: VAT profiles****(Ruling No. 206 of 22 April 2022)**

The Italian Tax Authority clarified that services supplied by an advisor to a fund manager (*i.e.* AIFM) of regulated investment funds (undertakings for the collective investment in transferable securities or real estate investment funds) are exempt from VAT with respect to services for which there is an intrinsic connection with the fund management activity performed by the AIFM.

The relevant provision is Article 10, paragraph 1, n.1 of Presidential Decree No. 633/1972, which provides for VAT exemption for the management of investment funds.

These guidelines require a case-by-case analysis of the services actually supplied by the advisor to the AIFM.

Singapore investment fund and investment in an Italian real estate fund: exemption from withholding tax on proceeds (Article 7, paragraph 3 of Law Decree No. 351/2001)**(Ruling No. 327 of 9 June 2022)**

The Italian Tax Authority provided new clarifications with respect to the tax regime applicable to proceeds deriving from the participation in an Italian real estate investment fund.

The case can be summarized as follows:

- A Singapore management company (the applicant of the Ruling) manages a fund ("Umbrella VCC") that is organized into several sub-funds, including the sub-fund Alfa intended to invest in Europe;
- The Alfa sub-fund invested indirectly (through vehicles resident in *white-listed* countries) in an Italian real estate investment fund by issuing, in turn, type A and B shares;
- Umbrella VCC issued additional shares (management *shares*) subscribed by the management company; and
- Shares B issued by the Alfa sub-fund are owned by a Singapore company that controls the management company.

The Italian Tax Authority held, with reference to the case at stake, the application of the exemption from withholding tax on proceeds deriving from Italian real estate investment funds pursuant to Article 7, paragraph 3 of Law Decree No. 351/2001, confirming that:

- in order to disapply the withholding tax, foreign funds must meet the same substantive requirements and investment purposes as Italian funds, as well as a form of supervision over the fund or manager (Circular Letter No. 2/E/2012);
- the exemption regime also applies in the event that the investment in the Italian real estate fund is made through entirely owned corporate vehicles resident in *s.c. white listed* States.

In particular, according to the Italian Tax Authority, the Alfa sub-fund is to be considered as a real estate collective investment fund comparable to an Italian real estate collective investment fund since the *management* shares assigned to the management company and the type B shares assigned to its parent company do not affect its management



independence with respect to investors. As confirmation: (i) the management policy is predefined and can only be changed by class A shareholders; (ii) the applicant management company is authorized to exercise full discretion in the fund's investment policies; and (iii) the unit holders of type B shares cannot participate in decisions regarding changes in investment policies.

Transfer of properties enrolled in the cadastral category “F/4” and indirect taxes

(Ruling No. 167 of 6 April 2022)

The Italian Tax Authority addressed the tax regime applicable, for the purposes of VAT and transfer taxes (*i.e.* registration tax and mortgage and cadastral taxes), to the sale of buildings subject to building renovation and classified in cadastral category “F/4” at the moment of sale.

In the cadastral category “F/4” are registered cadastral units in course of definition. In the case at hand, the Italian Tax Authority held the applicability of the following regime: (i) VAT with the rate of 22%; (ii) registration tax with the fixed amount; and (iii) mortgage and cadastral taxes with the rate of 4% (this rate appears to be the result of an oversight as in the case at hand one of the parties was a real estate investment fund and therefore the 2% rate should have been applied).

DAC6 - New guidelines of the Italian Tax Authority

(Circular Letter No. 12/E of 13 May 2022)

The Italian Tax Authority provided further clarifications on the regime of cross-border mechanisms subject to the reporting obligation pursuant to Legislative Decree No. 100/2020 transposing in Italy the DAC 6 Directive, taking into account some issues raised in the comments received following the public consultation of the previous Circular Letter No. 2/E of 2021.

Further clarification on real estate tax incentives

(Circular Letter No. 19/E of 27 May 2022)

The Italian Tax Authority provides further clarifications on the provisions on real estate tax incentives (*e.g.* the so-called *Ecobonus*) and on measures to counter fraud related to the transfer of the tax credits deriving from such incentives.

(Circular Letter No. 23/E of 23 June 2022)

The Italian Tax Authority provided further clarifications on the rules governing the Superbonus 110% pursuant to Article 119 of Law Decree No. 34/2020 (a tax incentive for certain renovation works on buildings that may be converted into a tax credit transferable to third parties). In addition, the Italian Tax Authority addresses the matter of the responsibility of the transferee of the tax credits deriving from such tax incentive.

Revaluation of hotel properties

(Ruling No. 269 of 18 May 2022)

The Italian Tax Authority provided clarification on the applicability of the revaluation regime provided for in Article 6-*bis* of Law Decree No. 23/2020 with respect to a company engaged in a real estate rental activity, where the tenant carries out the hotel activity.



The Tax Authority confirmed the approach provided in Circular Letter No. 6/E of 1 March 2022, holding that it is possible to benefit from the revaluation regime in the case at stake, since the property is intended for hotel use and the tenant is a company operating in the hotel industry.

IV

Studies

Association of Italian Joint Stock Companies (ASSONIME) – Circular Letter No. 19/2022 of 19 June 2022: From Patent Box to 110% increase

and Circular Letter No. 20/2022 of 24 June 2022 – The 2022 income and IRAP return of corporations and related payments

Italian Banking Association (ABI) CIRCULARS – Taxation Series No. 14 of 24 June 2022 – Commentary on Circular Letter No. 23/E of 23 June 2022 issued by the Italian Tax Authority on building bonuses

National Notarial Council (Consiglio Nazionale del Notariato) – Study No. 1–2022/B – Register of beneficial owners (approved by the Anti–money laundering sector on 15 June 2022)

Contact

Giuseppe Andrea Giannantonio

Partner – Chiomenti

giuseppeandrea.giannantonio@chiomenti.net

Gabriele Paladini

Counsel – Chiomenti

gabriele.paladini@chiomenti.net

Giulia Bighignoli

Senior Associate – Chiomenti

giulia.bighignoli@chiomenti.net

