

# Tax Key News - Real Estate

## Real Estate Taxation Review No. 4/2022

**Contents:** 1. Legislation – 2. Recent cases – 3. Italian Tax Authority's Rulings

### Highlights

- *Real estate funds: reduced mortgage and cadastral taxes (2% rather than 4%) for the purchase of real estate properties by EU real estate investment funds (Supreme Court Decision No. 28595 and No. 28810 of 3 October 2022)*
- *Split Payment for VAT purposes: list of entities required to apply the split payment mechanism for 2023*
- *Trust and real estate properties: Circular No. 34/E of 20 October 2022 of the Italian Tax Authority; Supreme Court Decision No. 26562 of 9 September 2022*
- *NPLs securitization: VAT exemption for services related to the securitization transaction (Ruling No. 513 of 14 October 2022)*

## I

## Legislation

### Updated list of entities required to apply the “split payment” for VAT purposes for 2023

The Ministry of Economy and Finance (“*Ministero dell’Economia e delle Finanze*” – [Dipartimento Finanze – Scissione dei pagamenti](#)) published the final list for the year 2023 of the entities required to apply the “split payment” mechanism for VAT purposes (pursuant to Article 17-*ter* of Presidential Decree No. 633/1972). The list is updated annually by the Ministry, pursuant to Article 1, paragraph 2, of the Decree of Ministry of Economy and Finance of 9 January 2018.

The list includes, for example, listed companies, companies or entities whose shares are held at least for 70% by Public Administrations, companies or entities related to National Social Security and Welfare institutions.

Under the “split payment” mechanism, VAT on the sale of goods or the supply of services to the entities included in the list mentioned above (*e.g.* lease of a real estate asset) is not charged in the invoice but is paid directly to the Tax Authority by the entity that purchased the goods or services.

### Tax step-up of business assets: procedures to revoke the option (in connection with the alternative step-up free of tax)

#### (Italian Tax Authority’s Provision of 29 September 2022)

The Italian Tax Authority defined the procedures to revoke the option (pursuant to Article 1, paragraphs 622 and 623 of Law No. 234/2021) for the step-up of the accounting and tax value of business assets executed under Article 110 of Law Decree No. 104/2020 with the payment of 3% substitute tax.

Taxpayers who opted for such regime may proceed to revoke the option with respect to single assets and for the entire stepped up amount. In such a case, capital gains or losses on the disposal and tax-deductible depreciations are determined based on the tax value before the step-up.

In addition, Article 8 of the Italian Tax Authority Provision defines the procedure to revoke the option for the step-up executed pursuant to Article 110 of Law Decree No. 104/2020 and to exercise a new option for the tax-free step-up (*i.e.* without the 3% substitute tax) set out for real estate of companies operating in the hospitality industry (pursuant to Article 6-*bis* of Law Decree No. 23/2020).

The tax-free step-up for the hospitality industry was recently addressed by the Italian Tax Authority in the Ruling No. 534 of 31 October 2022.

### Property tax (IMU) credit: approval of the self-certification form for the admission to the 2021 tax credit for the tourism industry

#### (Italian Tax Authority’s Provision of 16 September 2022)

The Italian Tax Authority approved the self-certification form that allows companies operating in the tourism industry to certify the requirements set forth in the European Commission’s Communication of 19 March 2020 C (2020) 1863 *final* “*Temporary Framework for State aid measures to support the economy in the current COVID-19*

*outbreak*” to access to the tax credit for property tax (IMU) paid in 2021 (introduced by Article 22 of Law Decree No. 21/2022).

The tax credit is equal to 50% of the amount paid for the second instalment of the property tax (IMU) for the year 2021 and is granted to companies operating in the tourism industry – among others, tourist accommodation companies, companies that manage outdoor accommodations, companies involved in the exhibition and congress industry, spa complexes – that suffered a decrease of revenue during the second quarter of 2021 of at least 50% compared to the same period of the 2019.

The self-certification can be filed until 28 February 2023.

### **Transfer of tax credits deriving from tax incentives for renovation works on buildings: changes to the liability rules for transferees**

#### **(Article 33-ter of Law Decree No. 115 of 9 August 2022, converted into Law No. 142 of 21 September 2022)**

Amendments are made to the rules relating the transfer of tax credits deriving from the so-called renovation works on buildings, granted to taxpayers for expenses incurred for certain renovation works (*e.g.* Superbonus, Ecobonus). These bonuses may be used by the taxpayer by means of a tax deduction or may be converted into tax credits transferable to third parties, by “discount on invoice” by the supplier or by sale (*e.g.*, to a bank), pursuant to Article 121 of Law Decree No. 34/2020.

Paragraph 6 of Article 121, in the previous version, stated that, in the event of non-fulfillment, even partial, of the requirements for the bonuses, the Italian Tax Authority could recover the amount of the bonuses only from the person that accrued the tax credit (and transferred it) and not from the transferee, without prejudice to the joint liability of the transferee in the case of “concurring in the breach”.

After the inclusion of Article 33-ter in Decree No. 115/2022 (so-called “Decreto Aiuti-*bis*”), the joint liability of the transferee is now limited to cases of concurring in the breach with “willful misconduct or gross negligence”, provided that the tax credits are supported by specific documents (conformity permits, technical reports and certifications pursuant to Articles 119 and 121 paragraph 1-ter of Law Decree 34/2020).

For the guidelines provided by the Italian Tax Authority in this respect with Circular No. 33/E of 6 October 2022, see “Section III – Italian Tax Authority’s Rulings” of this document.

## **II**

### **Recent case law**

#### **Foreign real estate funds: reduced mortgage and cadastral taxes (2% instead of 4%) for sale and purchase of real estate assets in Italy**

##### **(Supreme Court Decisions No. 28595 and 28810 of 3 October 2022)**

The Supreme Court confirmed the applicability of transfer taxes (mortgage and cadastral taxes) at the reduced rate of 2%, instead of 4%, provided for Italian closed-ended real estate investment funds (pursuant to Article 35, paragraph 10-ter, Decree-Law 223/2006) even in case of real estate purchased by a German open-ended real estate investment fund.

The Decision originates from a claim for reimbursement submitted by a management company of a German open-ended real estate investment fund for the higher mortgage



and cadastral taxes paid in connection with the purchase of two properties located in Italy (4% instead of 2% applicable to real estate funds established in Italy).

The Supreme Court referred to the Decision of 16 December 2021 of the Court of Justice of the European Union in Joined Cases C-478/19 and C-479/19, according to which the reduced transfer taxes would apply also to purchases and sales made by a real estate fund established in an EU Member State, regardless of whether the fund is closed or open ended, in light of the principle of free movement of capital set forth in Article 63, of Treaty on Functioning of European Union (TFUE).

The Supreme Court stated that the application of reduced transfer taxes only in favor of Italian closed-ended real estate funds would not be justified either in light of possible anti-avoidance reasons or for reasons of public income. Accordingly, the Court finds a conflict between the above-mentioned Article 35, paragraph 10-*ter* and the principle of freedom of movement of capital set forth at the European level, and considers its disapplication necessary in the case at stake.

The Decision could be relevant to consider possible requests for refund to the Italian Tax Authority of the mortgage and cadastral taxes applied at the rate of 4% (instead of the reduced rate of 2%) on the purchase of real estate located in Italy by real estate funds established in another EU Member State.

### **Real estate financial leasing and property tax (IMU): taxation in the absence of repossession**

#### **(Supreme Court Decision No. 26247 of 6 September 2022)**

The Supreme Court addressed the rules concerning the liability for property tax (IMU) in case of termination of a financial leasing agreement without repossession by the leasing company.

Under IMU rules, the taxable person is the owner (or the holder of other rights on the property), while, in case of financial leasing, the taxable person is the lessee (and not the leasing company) for all the duration of the agreement.

The Supreme Court, according to previous cases law (see Supreme Court Decision No. 13793/2019, Supreme Court Decision No. 299737/2019 and Supreme Court Decision No. 418/2021) held that, in case of early termination of the financial *leasing* agreement, the taxable person for property tax (IMU) purposes is the leasing company, regardless of the fact that the property has not been repossessed.

The termination of the financial leasing agreement would constitute an untitled possession of the property by the lessee, which is irrelevant for property tax (IMU) purposes; therefore, notwithstanding the leasing company has not repossessed the property, it would qualify anyway as taxable person for the property tax (IMU) purposes.

### **Trust and real estate assets: indirect taxes applicable on contributions**

#### **(Supreme Court Decision No. 26562 of 9 September 2022)**

The Supreme Court stated the application of inheritance and gift tax in the lump-sum of Euro 200, rather than at the proportional rate (up to 8%) in case of contribution of real estate assets to a trust.

The Court stated that, notwithstanding Article 2, paragraph 47, of Law Decree No. 262/2006 provides for the application of such taxes on a proportional basis in case of



“*constitution of destination constraints*”, such provision would not be extendable to deeds by which assets or rights are contributed to a trust. Indeed, the proportional taxes apply in case of enrichment of the entity receiving the asset; conversely, such enrichment does not occur upon the establishment of the trust (see Supreme Court Decision No. 17749/2022, Supreme Court Decision No. 13/21, Supreme Court Decision No. 224/21).

Therefore, the Court deemed that the transfer of real estate asset to the trust is subject to fixed transfer taxes (Euro 200), also for registration, mortgage and cadastral taxes purposes (see Supreme Court Decision No. 975/2018; Supreme Court Decision No. 16705/2019; Supreme Court Decision No. 8082/2020, Supreme Court Decision No.19747/2022).

On the other hand, only the transfer to the beneficiary of the *trust* of the properties, by way of stable patrimonial attribution, will be relevant for the purposes of the application of the above-mentioned proportional taxes. The Italian Tax Authority provided guidance on these topics in Circular No. 34/E of 20 October 2022, cfr. “Section III – Italian Tax Authority’s Ruling” below in this document.

### **Partial demerger of a real estate company and abuse of law**

#### **(Supreme Court Decision No. 27709 of 22 September 2022)**

The Supreme Court ruled for an abuse of law in case of a transaction that involved the following steps: (i) partial demerger, with assignment to the beneficiary company of all the real estate assets of the demerged company, (ii) re-purchase by the demerged company of some of the real estate assets at a price lower than the market value, and (iii) sale by a shareholder of all its shares held in the de-merged company and in the beneficiary company to the other shareholders.

The Court deemed the transaction abusive due to the avoidance of the provisions concerning the assignment to shareholders of real estate assets.

According to the Court, the aim of the transaction is not a true reorganization of the company or of its real estate business, but the avoidance of the tax rules on the exit of the shareholders from the company.

## **III**

### **Italian Tax Authority’s Rulings**

#### **NPLs securitization: VAT exemption for services related to the securitization transaction**

##### **(Ruling No. 513 of 14 October 2022)**

The Italian Tax Authority published guidelines regarding the application of VAT exemption under Article 10, paragraph 1, number 1, of Presidential Decree No. 633/1972, with reference to specific services provided in a NPLs securitization transaction, considered that Article 10 provides for VAT exemption for services relating to “*the granting and negotiation of credits, the management of the same credits by the grantors and the financing transactions*”.

The Tax Authority, in accordance with the Court of Justice of the European Union’s case law, outlined the criteria to be applied to assess whether such services can be qualified as exempt for VAT purposes under the above-mentioned provision.



## **VAT deductibility and transaction costs in case of holding companies**

### **(Ruling No. 529 of 27 October 2022)**

The Italian Tax Authority published guidelines regarding the right to deduct VAT by a holding company in relation to so-called “transaction costs” incurred for professional services (*e.g.*, legal fees, legal due diligence, accounting, tax, financial, and commercial due diligence) in relation to the acquisition of a target company and the granting of a bond (aimed at financing the acquisition of the target and at financing the target with a subsequent intercompany loan).

The Tax Authority confirmed that the holding company carries out an economic activity relevant for VAT purposes and that the aforementioned costs were inherent to that activity, thus deductible for VAT purposes.

The Ruling confirmed the VAT deduction even if the transaction costs were incurred before the active management of subsidiaries started, provided that there is an immediate and direct connection with the overall economic activity carried out by the holding or if the costs for the services are part of the holding company’s general costs.

Finally, with respect to the determination of the pro-rata rate, the Italian Tax Authority confirmed that the intercompany loan cannot be considered as a transaction outside the activity of the holding. Therefore, such transaction, being exempt from VAT, must be included in its VAT pro-rata ratio, pursuant to Articles 19, paragraph 5, and 19-*bis* of Presidential Decree No. 633/1972.

## **Trust - Tax Authority’s guidelines on the tax treatment**

### **(Circular No. 34/E of 20 October 2022)**

The Italian Tax Authority provided guidelines on income taxes and indirect taxes applicable to trusts, as well as on tax monitoring obligations for assets held abroad. Such clarifications have been provided in the context of the public consultation of the draft of Circular Letter made available in August 2021 and ended on 30 September 2021.

The Tax Authority confirmed that the deed of establishment and/or contribution where the settler transfers real estate assets to the trust is subject to registration tax, mortgage and cadastral taxes in the lump-sum of Euro 200, taking into account that such transfer does not imply a definitive attribution of ownership to the trust, which merely manages them under an asset segregation regime. Therefore, such taxes would apply proportionally when the real estate assets are definitively assigned to the beneficiary of the trust. In this respect, the position of the Italian Tax Authority is aligned with the Supreme Court (see Decision No. 8082/2020).

The Circular Letter addresses also the tax monitoring obligations related to the trusts and the persons related to the trusts (*i.e.*, settlor, trustee protector, beneficiaries).

Please refer to our Tax Department’s observations on the recent Circular on this link: <https://www.chiomenti.net/public/files/0/Newsalert-21-ottobre-The-Italian-tax-authorities-released-their-Guidance-concerning-the-taxation-of-trusts-and-beneficiaries-in-Italy-Main-highlights-.pdf>.

## **Transfer of tax credits deriving from tax incentives for buildings renovation: new guidelines from the Italian Tax Authority on transferees’ liability**



**(Circular No. 33/E of 6 October 2022)**

On October 6, the Italian Tax Authority published the Circular No. 33/E which provides, *inter alia*, new guidelines on the joint liability of the transferee (with the transferor) of the tax credits deriving from the tax incentives for renovation of buildings.

**Offsetting of financial transaction tax (FTT) with tax credits deriving from tax incentives for buildings renovation**

**(Ruling No. 453 of 13 September 2022)**

The Italian Tax Authority provided guidelines with respect payment procedures of the financial transaction tax (“FTT”) by a non-resident financial entity and confirmed the possibility to offset it with tax credits purchased from third parties and deriving from tax incentives for renovation of buildings.

The Tax Authority clarified that non-resident entities may carry out FTT payment (i) through their permanent establishment in Italy, if any, (ii) by appointing an Italian tax representative, or (iii) directly, by requesting an Italian tax code, if they do not have it. In addition, in case of termination of the permanent establishment in Italy, the obligation to pay may be fulfilled by keeping the Italian tax code of the permanent establishment (see Ruling No. 347/2020). Alternatively, and in the absence of a law prohibition, the non-resident entity may also choose to appoint, as tax representative, the Italian permanent establishment of another company of the same group.

Finally, the Italian Tax Authority confirmed that the offset of tax credits deriving from building bonuses with the FTT shall be carried out through the reserved area of the website of the Italian Tax Authority, by communicating the option to use them for offset through the “F24” payment form.

---

**Contact**

**Giuseppe Andrea Giannantonio**  
Partners – Chiomenti  
[giuseppeandrea.giannantonio@chiomenti.net](mailto:giuseppeandrea.giannantonio@chiomenti.net)

**Gabriele Paladini**  
Counsel – Chiomenti  
[gabriele.paladini@chiomenti.net](mailto:gabriele.paladini@chiomenti.net)

**Giulia Bighignoli**  
Senior Associate – Chiomenti  
[giulia.bighignoli@chiomenti.net](mailto:giulia.bighignoli@chiomenti.net)

