

Newsalert

Tax Department

Real Estate Securitization Vehicles: first guidelines issued by the Italian tax authorities

With ruling no. 132 of March 2, 2021 (the "**Ruling 132**"), the Italian tax authorities provided the first guidelines with regard to the tax regime, for direct and indirect tax purposes, applicable to real estate securitization vehicles established according to article 7.2 of Law no. 130 of April 30, 1999 ("**Law 130**"), a provision introduced by Decree-Law no. 34 of April 30, 2019, converted, with amendments, by Law no. 58 of June 28, 2019.

The case under analysis

The case regards a vehicle set up to carry-out one or more securitizations of the proceeds deriving from the ownership of real estate, registered movable property and real or personal rights having as their object the same property, pursuant to articles 7, paragraph 1, letter b-bis), and 7.2 of Law 130 ("**SPV 7.2**").

SPV 7.2 intends to participate in public auctions in which it may purchase from a ReoCo, established pursuant to article 7.1 of Law 130, certain photovoltaic plants (instrumental buildings) resulting from leasing contracts which have already expired and have not been fully fulfilled or which have already been terminated or dissolved.

These buildings will be the object of the real estate securitization by SPV 7.2. In particular, SPV 7.2 will invest in bringing the facilities back into operation, renting them out and, if necessary, disposing of them in order to pursue its corporate purpose.

SPV 7.2 will raise the financial resources necessary for the securitization transaction by issuing securities not listed on regulated markets, which will be underwritten by an Irish bank and an Italian bank. The flows deriving from the properties (*i.e.* from the rent and the possible sale) are aimed to satisfy the rights incorporated in the securities issued and to pay the costs of the securitization.

From an accounting perspective, SPV 7.2. represents that the plants, assets, liabilities, costs and revenues connected with the company's activities will not be reflected in the balance sheet or in the profit and loss statement, but will be described in an annex of the notes to the financial statements.

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

- (i) direct taxes (corporate income tax – "**IRES**" and regional tax on business activities – "**IRAP**") applicable to SPV 7.2,
- (ii) tax regime for income deriving from the securities issued by SPV 7.2,
- (iii) VAT regime of the SPV 7.2 and
- (iv) mortgage and cadastral taxes on purchases of property by the SPV 7.2.

Clarifications of the Italian tax authorities

1. Direct taxes (IRES and IRAP) applicable to the SPV 7.2



The Italian tax authorities confirmed the applicability to SPV 7.2 of the clarifications already provided in the past for vehicles for securitizations of receivables. On the other hand, they give assumption on the accounting and regulatory treatment proposed by the SPV 7.2.

With reference to vehicles for securitization of receivables, on the basis of article 3, paragraph 2, of Law 130, according to which "*the receivables related to each operation [...], the relative collections and the financial assets acquired with them constitute separate assets to all effects from those of the company and those relative to other operations*", the Italian tax authorities clarified that in carrying out each receivables securitization transaction, since the destination of the "segregated assets" remains in place, the vehicle is not the owner of any income that may become relevant 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).

In Ruling 132, the Italian tax authorities confirmed that also for SPV 7.2 the assets and rights acquired as part of the real estate securitization transaction "constitute segregated assets" (article 7.2, paragraph 2, of Law 130) and that the existence of the "segregated assets" excludes, *per se*, the attribution to the SPV 7.2 of an income relevant for tax purposes, pursuant to art. 83 of Presidential Decree no. 917 of December 22, 1986 ("**Income Tax Code**").

Therefore, as for traditional securitization vehicles, for IRES purposes:

- (a) the economic results deriving from the management of the securitized assets, during the course of the securitization, are not included in the IRES taxable base;
- (b) any residual profit resulting once all the creditors of the segregated assets have been satisfied, on the other hand, are included in the IRES taxable base, pursuant to article 83 of the Income Tax Code (in the fiscal year in which this income becomes available to the vehicle).

For IRAP purposes, the accounting derivation principle (*i.e.* the direct taking from the financial statements), pursuant to Legislative Decree no. 446 of 15 December 1997, is applicable. Therefore:

- (i) the economic results deriving from the management of securitized assets, during the course of the securitization, are not included in the IRAP taxable base to the extent that, as in the case of Ruling 132, they are not accounted for in the profit and loss statement; and
- (ii) any residual profit resulting once all the creditors of the segregated assets have been satisfied is included in the IRAP taxable base to the extent that it becomes available to the SPV 7.2 and is accounted for as a relevant item for IRAP purposes.

2. Tax regime for income deriving from securities issued by SPV 7.2

The Italian tax authorities confirmed that proceeds on securities issued by SPV 7.2 are subject to the same tax regime of proceeds on securities issued by a vehicle for securitization of receivables.

In particular, by virtue of the reference made by article 7, paragraph 1, letter b-bis), article 6, paragraph 1, of Law 130 applies to SPV 7.2, pursuant to which "*For the purposes of income tax, [...] the same treatment is applied as that established for bonds issued by joint-stock companies with shares traded on regulated Italian markets and for similar securities, including the treatment provided for by Legislative Decree no. 239 of April 1, 1996*".

Consequently, in accordance with Legislative Decree no. 239/1996, such proceeds:

- (a) are subject to substitute tax at the rate of 26%, if paid to individuals who do not carry out business activities, partnerships pursuant to art. 5 of the Income Tax Code (with some exclusions), non-commercial entities (excluding collective investment undertakings), entities exempt from IRES and non-resident entities other than those who benefit from the specific exemption described in point (b);
- (b) are not subject to the substitute tax in the hands of companies resident in Italy, individuals who carry out business activities, collective investment undertakings (including real estate investment funds) and pension funds established in Italy, as well as the following non-resident entities: (i) entities resident in States that allow for an adequate exchange of information, (ii) international entities or bodies established on the basis of international agreements made enforceable in Italy, (iii) foreign institutional investors, subject or not to supervision, even not subject to tax, established in States that allow for an adequate exchange of information, (iv) central banks or bodies that also manage the State's official reserves (sovereign wealth funds).

3. VAT Regime of the SPV 7.2

Preliminarily, the Italian tax authorities noted that SPV 7.2 carries out an activity similar to the ReoCo's one, *i.e.* "*a complex activity of management of real properties relevant for VAT purposes*" pursuant to Article 3 of Presidential Decree 633/1972 (see Ruling no. 18/2019 on ReoCo), the proceeds of which, however, are not transferred to a securitization vehicle, but

retained for itself as they are allocated for the other activity carried out by the same (*i.e.* the ordinary securitization transaction).

Accordingly, the Italian tax authorities clarified that in relation to the transactions carried out by SPV 7.2 as part of its real estate activity (in this case, the rental and sale of instrumental buildings) the VAT rules provided for in art. 10, paragraph 1, no. 8 and 8-*ter*), of Presidential Decree no. 633/1972 are certainly applicable.

In addition, the Italian tax authorities clarified that the VAT paid by SPV 7.2 shall be deducted in accordance with the ordinary principles governing this rule, as per article 19 *et seq.* of Presidential Decree no. 633/1972, including application of the pro-rata deductibility as per article 19, paragraph 5 and 19-*bis*, in the event that SPV 7.2 also carries out exempt transactions pursuant to article 10 of Presidential Decree no. 633/1972.

With regard to the separate application of VAT in relation to the various activities pursuant to art. 36, paragraph 3, of Presidential Decree no. 633/1972 (in the case at hand, the company rents and sells business buildings and does not exclude the possibility of purchasing also residential buildings in the future), the Italian tax authorities confirmed that SPV 7.2 may also opt for such regime in order to reduce the impact of exempt output transactions on the right to deduct the VAT paid on the purchase of goods and services.

4. Mortgage and cadastral taxes on the purchases of real estate assets by SPV 7.2

The Italian tax authorities have clarified that the transfer of instrumental buildings resulting from financial leasing contracts expired and not completely fulfilled or already subject to termination or dissolution, carried out by a ReoCo towards an SPV 7.2, is subject to mortgage and cadastral taxes in a fixed amount, pursuant to Article 7.1, paragraph 4-*ter*, second sentence of Law 130.

This rule, in fact, applies to transfers of properties with the above characteristics "made to and by the same company" (*i.e.* ReoCo).

Otherwise, the provision set out in paragraph 4-*bis* of the same article 7.1 would not be applicable to this transfer, since this provision provides for the application of fixed registration, mortgage and cadastral taxes for the deeds relating solely to the transfer of goods and rights, including real estate, in favour of the ReoCo.

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