CHIOMENTI

Tax Key News - Real Estate

Review on real estate taxation n. 1/2021

Summary: 1. Legislation – 2. Case law – 3. Italian Revenue Agency's rulings

Highlights

- ***Budget Law 2021*** *(Law no. 178 of 30 December, 2020): rules of interest to the real estate industry*
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- ***Property Tax (IMU)****: constitutional illegitimacy of the non-deductibility of IMU from income taxes for instrumental properties (Constitutional Court, judgment no. 262 of 4 December 2020)*
- ***EU Funds:*** *withholding tax exemption for dividends distributed by Italian companies to EU collective investment undertakings*
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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 Revenue Agency 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.

News on tax credit for leases

(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 discipline applicable to the tax credit for leases, laid down in Art. 28 of Law Decree no. 34 of 19 May 2020 ("**Rilancio Decree**"), which provides for a tax credit to the extent of 60% (or 30% in the case of complex service contracts or leases of business) of the monthly amount of the rental, *leasing* or concession fee of real estate property for non-residential use intended for the performance of industrial, commercial, artisan, agricultural or tourist interest activity or for the habitual and professional exercise of self-employment activity.

Article 8 of the Ristori Decree:

a) has extended the tax credit for lease to the months of 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 and compensation 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 condition to access to such measure.

Moreover, art. 8-*bis* of the Ristori Decree, introduced at the time of conversion, 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).

Finally, it should be noted that art. 1, par. 602, of the Budget Law 2021 has extended, until April 30, 2021, the tax credit to be benefitted from 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)

Art. 1, paras. 66-74, has provided for s extensions and amendments to the provisions regarding the so-called *Superbonus 110%,* set forth by in art. 119 of the Rilancio Decree which, in short, has introduced an income tax deduction equal to 110% of the expenses incurred for specific building works 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.

Changes to the regime of short leases

(Art. 1, paras. 595 - 597, Budget Law 2021)

Art. 1, paras. 595 - 597, has provided that, starting from the 2021 tax period, the special tax treatment of short leases, as laid down in art. 4 of Law Decree no. 50 of 24 April 2017 (*i.e.* the so-called "*cedolare secca*" on rents) will be applied by a single owner only on short leases of no more than 4 apartments for each tax period. In the other cases, for consumer protection and competition purposes, the lease activity is deemed to be exercised as a business activity, thus excluded from the special tax treatment set out for short leases.

This provision is also applicable in relation to contracts concluded through subjects carrying out real estate intermediation activities or subjects who manage telematic websites.

Extension of the option for step-up of the tax value of land and shares held in non-listed companies

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

Article 1, paras. 1122 - 1123, 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

Deduction of input VAT paid on expenses related to real estate transactions later abandoned (EU Court of Justice, judgment 12 November 2020, C-734/19)

The EU Court of Justice has clarified that the right to deduct the input VAT, paid on property and services acquired for the purpose of carrying out taxable transactions, is maintained even if the investment projects initially planned have been abandoned due to circumstances beyond the taxable person's control (in light of articles 167, 168, 184 and 185 of Directive 2006/112/EC).

VAT regime applicable to the sale of residential property units with a hotel destination (Supreme Court, Order No. 24599 of 5 November 2020)

According to the Supreme Court the sale of real estate units forming part of a building complex intended as a tourist hotel residence, but stacked as A/2 (a civilian residence) in the Real Estate Registry (*Catasto*), is not subject to the reduced VAT rate of 10% pursuant to no. 127-*undecies*) of Table A, part III, attached to Presidential Decree no. 633 of 26 October 1972 applicable to residential properties.

The Supreme Court has stated that the reduced VAT rate pursuant to the abovementioned rule applies only to cases of actual use of buildings as private homes and to protect the civil housing needs of individuals or families (*i.e.* concrete destination to stable accommodation for the conduct of their private lives with stability), meaning the purposes other than those of tourist hotels.

Inapplicability of *Ecobonus* deduction on properties leased by real estate companies (CTP Milan, judgment 10 November 2020, n. 2276)

The judges have noted that the deduction for the so-called *Ecobonus* laid down in art. 1, par. 344 and followings of Law no. 296/2006, does not apply to real estate management companies with regards to works carried out on properties that will be leased to third parties.

According to the Court, the requirement for applying such deduction is that the costs have "*remained chargeable to the taxpayer*". Consequently, the costs should not be deductible for income tax purposes since, otherwise, the corresponding amount, remaining excluded from taxation, could not be considered as being borne by the taxpayer.

This position is in contrast with recent judgments of the Supreme Court (Cass. judgment 23 July 2019, no. 19815; Cass. judgment 12 November 2019, no. 29162) and with a recent position of the Revenue Agency (Resolution no. 34/E/2020 of 25 June 2020).

Tax regime of indirect taxes regarding the transfer of buildings (Supreme Court, order no. 27123 of 27 November 2020)

The Supreme Court, in accordance with its previous position, has stated that the sale of a building, carried out by a VAT taxable person before its completion, is deemed as excluded from the application of the specific rules for the sale of real estate properties (art. 10, no. 8-*bis*) and 8-*ter*) of Presidential Decree no. 633 of 26 October 1972), and is subject to VAT (22%) in accordance with ordinary provisions on sale of goods, because it is deemed as an asset that is still in the "production circuit". Consequently, registration, mortgage and cadastral taxes must be applied on a fixed basis.

However, as in the case referred to in the order, should the sale of an unfinished building be made in favor of a "private individual who is the final user", the VAT treatment pursuant to art. 10, no. 8-*bis*) and no. 8-*ter*), of Presidential Decree no. 633 of 1972 and the proportional mortgage and cadastral taxes must be applied. Indeed, in this case, the actual completion of the works coincides with the deed of purchase.

Non-deductibility of property tax (IMU) from income taxes for instrumental real estate properties (Constitutional Court, judgment December 4, 2020, no. 262)

The Constitutional Court has declared the constitutional illegitimacy of art. 14, par. 1, of Legislative Decree no. 23/2011, with regards to the text in force *pro tempore* (for 2012), in the part in which it provided that, also for instrumental properties, the property tax (IMU) was non-deductible from corporate income taxes, being in contrast with art. 3 and 53 of the Constitution, under the consistency and rationality profile.

This is because, "*once the legislator, in its discretion, has deemed as "taxable" ("presupposto d'imposta") the possession of the "total net income"* (art. 75, par. 1, of Presidential Decree no. 917 of 22 December 1986), *choosing to give preference to the analytical determination of the income, he cannot, without breaking a consistency constraint, make a clearly and entirely inherent tax cost non-deductible*", such as that represented by the IMU relating to capital goods "*which represents a certain and inherent charge, constituting a necessary cost that acts as an ordinary factor of production, which the entrepreneur cannot avoid".*

Furthermore, the Constitutional Court has excluded the possibility to extend the unconstitutionality to the years following the 2012, since the tax rules have gradually recognized a partial deductibility of IMU on capital properties from income taxes..

Leased real estate properties: tax liability for IMU purposes (Supreme Court, Order no. 27631 of 3 December 2020 and Order no. 585 of 15 January 2021)

The Supreme Court, in the decisions at issue, has expressed its opinion on the identification of the person liable for the property tax (IMU) relating to a property leased in the event of termination of the contractual relationship which has not been followed by the immediate return 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 of Cassation held that, in the event that a *leasing* contract is prematurely terminated, due to late payment of the user, the subjective liability for the purposes of IMU is determined in the hands of the *leasing* company, even though the latter has not acquired yet the material availability of the asset, due to failure to return it by the user. Indeed, with reference to IMU, what is important for the purposes of identifying the tax liability in this area is the contractual title that justifies the possession of the asset and not the actual availability of the same. This conclusion is valid both in the case of natural expiry of the lease and in the case of early termination.

III Italian Revenue Agency's Rulings

Tax regime of advisory services performed by a third-party company in favor of a manager of alternative investment funds (AIFs) with respect to securities (Ruling no. 628 of 29 December 2020)

The tax authority has addressed the VAT treatment of certain advisory services provided by a third party company (*advisor*) to a company authorized to manage alternative investment funds (AIFs) pursuant to Directive 2011/61/EU (AIFM Directive).

In the case at issue, the advisory services consisted of: (i) arranging meetings with selected operators to generate potential investment transactions; (ii) identifying, assessing and

structuring investment processes in potential *target* companies, as well as taking care of the subsequent implementation phase of the investments themselves; (iii) identifying, assessing and structuring any disinvestment processes; (iv) identifying external consultants and service providers necessary for the specific investment strategy.

The Revenue Agency has clarified that:

(i) pursuant to art. 10, par. 1, no. 1) of Presidential Decree no. 633/1972, services relating to the "*management of funds*" are exempt from VAT;

(ii) this rule is characterized by an objective value, being applicable to all transactions that specifically concern the management of undertaking for collective investment, with no relevance to the subjective qualification of the service provider, who can, therefore, be a third party with respect to the company authorized to manage the AIF.
In particular, the services provided by the third party must constitute a "whole component" (*insieme distinto*), which has the effect of fulfilling the specific and essential functions of the management service of a fund (Court of Justice, Case C-169/04; Case C-44/11; Case C-464/12) and documents of the Revenue Agency, Resolutions No. 75/E/2007; No. 97/E/2013 and No. 61/E/2018);

(iii) This rule is applicable to AIFs provided that they have identical characteristics to UCITS, as defined by the Court of Justice. In particular, in order to be comparable to a UCITS it is necessary that: (*a) the AIF* is subject to "*specific state supervision*" (*b)* the AIF is participated in by several investors who are entitled to the benefits or bear the risk associated with the management and (*c)* the return on the investment made depends exclusively on the results of the management of the fund (Case C-595/13, paras. 51-52).

Further clarifications on *Superbonus 110%* matters (Circular no. 30/E of 22 December 2020)

The Agency has provided, in the form of answers to questions raised by the specialist press, further clarifications - in addition to those already contained in Circular no. 24/E/2020 and Resolution no. 60/E/2020 - in relation to the so-called *Superbonus 110%* pursuant to art. 119 of the Rilancio Decree.

In particular, the Agency has expressed its views on:

- the recent amendments made by the Agosto Decree, which has introduced paragraphs 1-*bis*, 1-*ter*, 4-*ter*, 9-*bis* and 13-*ter* to the above-mentioned art. 119;
- the documentation to be acquired at the time of affixing the compliance certificate on the communications to be sent to the Agency for exercising the option for the transfer of credit or for the discount on the invoice provided for by art. 121 of the Rilancio Decree.

Disapplication of the "shell companies rule" with respect to a real estate company (Ruling no. 591 of 15 December 2020)

The petitioner company, which carries out activities of buying, selling and managing real estate properties, has purchased a real estate complex - the only *asset* held by the same - and has started during 2019 a "heavy" renovation works on such asset, with the purpose of carrying out tourist rental activities therein.

Pursuant to art. 30, par. 4-*bis*, of Law no. 724/1994, in the presence of "objective situations" that make it impossible to obtain revenues, the taxpayer may file a request of ruling to the Italian Revenue Agency for the disapplication of the rules governing shell companies.

In the case at issue, the Revenue Agency has considered that the renovation works are to be qualified as an objective situation that prevents the company from getting the minimum level of revenues.

For this reason, the Revenue Agency has provided a positive opinion on the disapplication of the discipline of shell companies for the 2019 tax period.

Application of registration, mortgage and cadastral taxes in a fixed amount (Eur 200 each) on the transfer of an "properties exchange contract" in favor of a construction and renovation company (Ruling no. 613 of 22 December 2020)

The ruling concerns an exchange contract, entered into force in 2018, which has provided for the transfer of a building to be demolished and rebuilt and, as consideration, the duty to assign certain portions to the permutant.

The Revenue Agency has deemed that the following transfer of such exchange contract, which took place after the introduction of Art. 7 of Law Decree No. 34 of 30 April 2019, may benefit from registration, mortgage and cadastral taxes in the fixed amount of Eur 200 each, under the following conditions: (i) the transfer of the contract realizes, in accordance with the correct civil law procedures, the transfer of ownership of the entire building in favor of the transferee company and (ii) the transfer is made "*in favor of construction or real estate restructuring companies*", as required by Art. 7 of Law Decree No. 34/2019 (subject to a specific request in the deed and related assumption of commitment, by the acquiring company, to comply with the conditions set by the rule).

Free step-up for rented hotels (Ruling no. 637 of 31 December 2020)

The Revenue Agency has provided for some clarifications regarding the possibility for a company (the "**Applicant Company**") that owns: a) a building intended for hotel use leased to the parent company Alfa S.p.A; b) the hotel business leased to the parent company Alfa S.p.A. to carry out the free step-up of business assets, pursuant to art. 6-*bis* of Law Decree no. 23/2020.

Preliminarily, with reference to business lease transactions, in previous Revenue Agency's documents, the Tax Authority had specified that, if the parties, have agreed (as in the case at issue) that the lessor continues to calculate the depreciation, the step-up can only be carried out by the lessor (see Circulars no. 13/E of 2014, no. 11/E of 2009, no. 18/E of 2006 and no. 14/E of 2017).

With reference to the specific step-up rule at issue, the Revenue Agency has clarified that the rule applies to entities operating in the hotel sector and has held that the Applicant Company falls within the subjective scope of application of such rule, with no relevance to the circumstance that the parties have entered into a business rental contract having as its object the hotel business and, at the same time, a rental contract for hotel property. Moreover, the purpose of such rule (*i.e.* to support the hotel sector) is fulfilled also in the case at issue in which the management of the hotel business is granted to a party (Alfa S.p.A.), belonging to the same Group, which holds a 100% stake in the Company.

Lease tax credit: payment of business rent in advance (Ruling no. 440 and no. 442 of 5 October 2020)

The tax authority, in accordance with its previous documents (Circ. no. 14/E/2020; Circ. no. 15/E/2020), have clarified that, in cases where the rent is paid in advance (*e.g.* rent paid in 2019 but pertaining to 2020), it is necessary to identify the instalments relating to the months of possible use of the rental bonus, pursuant to art. 28 of the Rilancio Decree, setting them against the overall duration of the contract.

Furthermore, the Agency has considered that (in the event that the transfer of possession of the leased business took place during 2019) the requirement of the reduction in turnover must be calculated on the successor in title of the business lease contract, comparing the amount of turnover of each of the months of possible benefit of such tax credit and the turnover of the leased company referring to the same periods of the previous year, even if the company was in the possession of the grantor.

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