

Newsalert No. 9/2021

Tax Department

New provisions regarding the Patent Box regime

October 22nd 2021

The new Patent Box regime: introduction of the new super-deduction mechanism for research and development costs over the previous “income exemption” mechanism

Law Decree No. 146/2021 (“**Law Decree**”) published on October 21st 2021 in the Official Gazette (in force from October 22nd 2021 and subject to conversion into Law within 60 days from its publication), containing provisions on tax and labour matters, includes *inter alia* significant amendments regarding the Patent Box regime. In particular, Article 6 of Law Decree, entitled “*Semplificazioni della disciplina del patent box*”, aims at rewriting the entire regime at hand and replaces the current Patent Box regime with a “super deduction” of research and development costs.

The “super deduction” will be applied to the costs incurred by taxpayers for creating and developing qualified intangible assets – including trademarks - directly or indirectly used by the taxpayers (so-called “**Facilitated Costs**”). In detail, the “super deduction” will be relevant for Italian corporate income tax (IRES) and regional production tax (IRAP) purposes to the extent of 90% of the Facilitated Costs incurred. Such case represents a significant discontinuity with respect to the current Patent Box regime, where the tax benefit consisted of a partial tax exemption for incomes deriving from the direct or indirect use of qualified intangible assets.

The “super deduction” may be used by companies and other entities generating business income, with or without legal personality, including those resident outside of Italy (provided that they are resident in States having entered into a double tax treaty in force with Italy and having implemented an effective exchange of information). Moreover, the regime cannot be revoked for five years and can be renewed on an optional basis.

In order to avoid any duplications of the benefit, it is expressly provided that the Facilitated Costs cannot be included in the research and development tax credit, regulated by Law No. 160/2019.

The provision implementing the “super deduction” and the procedures to exercise the option for the new regime will be regulated by a specific Provision of the Director of the Italian Revenue Agency (not yet available).

Documentation and penalty exemption

In line with the previous regime, Law Decree introduces the option, for the taxpayers who intend to benefit from the “super deduction”, to draft a specific *set of documents* in order to avoid administrative penalties in case of any adjustments on the Facilitated Costs made by the tax authorities during a Tax audit. Otherwise, the administrative penalties – ranging between 90% and 180% of the higher tax due (pursuant to Article 1, para. 2 of Legislative Decree No. 471 of 18th December 1997) – will be applicable.

The *set of documents* to be prepared by the taxpayers must comply with specific criteria included in the Provision to be issued by the Director of the Italian Revenue Agency.

Interim period after the introduction of the new regime

Law Decree contains various provisions aimed at regulating the relationship between the new regime and the previous Patent Box regime. In particular, the table below summarises some of the possible scenarios, based on Article 6, para. 10 of Law Decree:

#	Case Study	Preliminary remarks
1	Agreement in place	No switch to the new regime. Reasonably, the Agreement remains valid until the end of the five-year period (<i>to be confirmed</i>)
2	Self-liquidation procedure in place	No switch to the new regime
3	<i>Ruling/renewal</i> request submitted but Agreement not yet reached	It is possible to switch to the new regime. Reasonably, once the Agreement is reached it should be valid until the end of the five-year period (<i>to be confirmed</i>).
4	<i>Ruling/renewal</i> request submitted, Agreement not yet reached and option not exercised	Case not addressed in Law Decree
5	Self-liquidation procedure for fiscal year 2020 with option exercisable through the 2021 tax return (concerning fiscal year 2020)	Case not addressed in Law Decree

Final considerations

Law Decree contains significant changes to the Patent Box regime which will have to be assessed by the operators and, in particular, in the light of the new mechanism to determine the tax benefit. Indeed, the tax benefit will be focused on cost incurred rather than on the qualified income generated by the exploitation of intangible assets.

It is also worth pointing out that Law Decree does not address several possible cases in which taxpayers may fall into. Indeed, a lack of harmonization during the interim “phase” between the previous regime and new one could trigger distorting effects. Therefore, specific amendments or detailed instructions in the Provision of the Director of the Italian Revenue Agency to be issued are needed to regulate a reasonable and fair introduction and transition to the new regime.

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