FIVELEX
STUDIO LEGALE E TRIBUTARIO

Tax | Update

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I. MINISTERIAL PRACTICE

CIRCULARS

✓ **Corporate Welfare – Interpretative Clarifications (Circular no. 23/E of 1 August 2023)**

With Circular no. 23 of 1 August 2023, the Italian Tax Authorities provided some clarifications on the objective and subjective scope and on the application modalities of Decree-Law no. 48 of 4 May 2023 ("**Labour Decree**"), which once again intervened on employee income benefits.

In particular, with this provision, the legislator has provided for an increase to Euro 3.000 of the exemption limit for fringe benefits (pursuant to art. 51, par. 3 of Presidential Decree no. 917 of 22 December 1986 ("Consolidated Income Tax Law", "**TUIR**") in the "ordinary" way, equal to Euro 258.23), exclusively in favour of employees with dependent children and limited to the fiscal year 2023.

Among the various clarifications provided, the Italian Tax Authorities specified that the relief:

(i) from a subjective point of view, it is intended for employees with children who are dependent and whose income does not exceed Euro 2.840,51 (or Euro 4.000 for children up to the age of 24). Whether or not the income limit is exceeded must be verified as at 31 December 2023;
(ii) applies in full to each parent, holder of income from employment and/or assimilated employment, even in the presence of only one child, provided that the same is a dependent child for tax purposes;
(iii) does not apply in relation to sums paid for utilities by the employee in 2023, referring to consumption pertaining to 2022, which have already benefited from the fringe benefit exemption threshold for 2022.

The Italian Tax Authorities also clarified that the declaration by which the employee declares that he is entitled to the relief can be made in a modality agreed with the employer.

✓ **Tax credits in the energy sector and VAT rates in the gas sector (Circular no. 24/E of 2 August 2023)**

With the Circular No. 24 of 2 August 2023 the Italian Tax Authorities provided clarifications on tax credits in the energy sector and VAT rates in the gas sector.

The Circular reminds that tax credits relating to the second quarter of 2023 can be used by 31 December 2023, exclusively by offsetting, and that tax credits relating to the first quarter of 2023 as well as those relating to the second quarter of 2023 cannot be requested for reimbursement.

For the purposes of verifying the prerequisite for access to the benefits for energy-intensive and non-energy-intensive companies, the tax credit recognised for the previous quarter does not fall within the notion of "subsidy".

In the event of any adjustment for the correction of erroneous actual data, the enterprise that has utilised the tax credit for the purchase of electricity to a greater extent than that resulting from the adjustment must repay the greater amount used as compensation, plus interest accrued in the meantime. On the other hand, an undertaking that has used the tax credit for the purchase of electricity to a lesser extent than that resulting from the adjustment balance may, provided all the other conditions laid down in the rule are fulfilled, offset the higher tax credit to which it is entitled, subject to the time limit for its use.

The tax credits in question:

(i) are not subject to the annual limits of compensation;

(ii) do not contribute to the business income or the IRAP tax base and do not count towards the ratio referred to in art. 61 (deductibility of interest expense) and art. 109, par.5 of the TUIR (deductibility of expenses and of the other negative components other than interest expense);
(iii) may be cumulated with other concessions relating to the same costs, provided that such cumulation - also taking into account the non-competition in the formation of income and the taxable base of the regional tax on productive activities - does not lead to the cost incurred being exceeded.

The Circular also dwells on the reduced VAT rate at the reduced rate of 5% applicable to supplies of methane gas for combustion, established until the third quarter of this year. The Italian Tax Authorities confirms that the 5% VAT rate is applicable, on a temporary basis:
(i) both to supplies of methane gas for civil and industrial uses ordinarily subject to the 10% rate;
(ii) both to those for civil uses (exceeding the annual limit of 480 cubic meters) and industrial uses ordinarily subject to the rate of 22%.

RESPONSES TO REQUESTS FOR ADVANCE TAX RULINGS

✓ **Taxation of Dividends and Capital Gains - EU/EEA UCITS (Response to the request for advance tax ruling no. 409 of 1 August 2023).**

The Italian Tax Authorities with its response to the request for advance tax ruling no. 409 of 1 August 2023 clarified that a Luxembourg mutual fund constituted in the form of a SCSp ("socieètè en commandite spèciale"), whose general partner is a company authorised to manage alternative investment funds, i.e. subject to forms of supervision pursuant to the AIFM Directive, benefits from the regime of exemption from withholding tax on dividends distributed by directly participated companies resident in Italy (art. 27, par. 3 of the Presidential Decree No. 600 of 29 September 1973).

In order to obtain the non-application of the withholding tax on dividends, the Italian Tax Authorities has specified that the fund must submit to the resident investee company appropriate documentation attesting to the existence of the requirements, in particular:
(i) the self-certification attesting the establishment of the fund in Luxembourg;
(ii) the self-certification attesting to the manager's residence in Luxembourg;
(iii) a copy of the certification issued by the Supervisory Authority attesting to the manager's registration, in accordance with the OMFI Directive, at the Supervisory Authority and to its status as a supervised entity.

✓ **Mortgage and cadastal taxes regime to be applied to expropriation decrees by which the simultaneous transfer of ownership of several immovable properties in favour of a single beneficiary is ordered (Response to the request for advance tax ruling no. 410 of 1 August 2023).**

The Italian Tax Authorities provided clarifications on the correct taxation to be applied to expropriation decrees for the purposes of mortgage and cadastral taxes involving the simultaneous transfer of several immovable properties in favour of a single beneficiary.

Referring to Italian Tax Authorities Resolution no. 254/E of 31 July 2022 and to INPS Circular no. 257/T of 4 November 1998, the Italian Tax Authorities clarified that, for the purposes of registration, mortgage and cadastral taxes, expropriation decrees providing for separate real estate transfers in the hands of different parties are qualified as "*multiple deeds*" ("*atti plurimi*") and therefore taxes must be applied to each transfer.

According to the Italian Tax Authorities, even expropriation decrees involving the simultaneous transfer of several immovable properties in favour of a single beneficiary will be subject to the same number of mortgage and cadastral taxes, at the fixed rate of Euro 50, as the number of transfers, since they "*refer to distinct and autonomous subjects*

and expropriated properties, irrespective of the cadastral value given to the notion of owner company".

✓ **VAT - Transactions (supply of buildings as depreciable assets) excluded from the formation of the deductible proportion (Response to the request for advance tax ruling no. 413 of 3 August 2023).**

The Italian Tax Authorities provided clarifications on VAT deduction pro-rata, stating that the sale of buildings classified as "depreciable assets", in accordance with the criteria established for the purposes of direct taxation and different from the so-called "*goods*" (art. 92 of the Consolidated Income Tax Act) or "*assets*" (art.90 of the Consolidated Income Tax Act), do not contribute to the formation of the VAT deduction pro-rata calculation.

Recalling the Court of Justice of the European Union judgment of 6 March 2008 (Case C-98/07) and art. 174, par. 2, lett. a), of the VAT Directive, the Italian Tax Authorities stated that the calculation of the pro-rata deduction should not take into account the amount of turnover relating to supplies of "*capital goods*" used by the taxable person in his business, since such supplies could "*distort the real meaning of the VAT deduction insofar as they do not reflect the taxable person's business activity*".

The Italian Tax Authorities clarified that for the identification of "*depreciable fixed assets*", the "*criteria laid down for them for direct tax purposes*" must be taken into account.

✓ **Application of the Convention between Italy and Germany in respect of a German tax-transparent partnership in connection with the capital gain on the sale of a shareholding in an Italian company (Response to the request for advance tax ruling no. 418 of 16 August 2023).**

The Italian Tax Authorities ruled on the taxation of the capital gain realised by a holding company under German law constituted in the form of a Kommanditgesellschaft ("**KG**") following the transfer of 100% of the share capital in a s.r.l. tax resident in Italy. From a civil law point of view, the KG is assimilated to an Italian S.a.s. and from a tax point of view, it is considered transparent (with the consequence that the income produced is attributed proportionally to the shareholders).

According to ar.13 par. 4 of the Double Taxation Convention between Italy and Germany, gains from the sale of shares " *are taxable only in the Contracting State of which the seller is a resident*". Therefore, the income should only be taxable in Germany (the seller's State of residence). The petitioner's doubt arises from the fact that double taxation treaties do not normally apply to partnerships, given their peculiar status of "*tax transparency*"'.

The Additional Protocol to the Italy-Germany Convention, in paragraph 2, states that "*a partnership shall be considered to be a resident of the Contracting State according to Article 4, paragraph 1, if it has been constituted in accordance with the law of that State or if it has in that State the principal object of its activities. However, the limitations on the right to tax of the other Contracting State contained in Articles 6 to 23 shall only apply to the extent that the income arising in that State or the assets situated therein are subjected to the tax of the first-mentioned State*".

In the present case, the income of the partnership is fully taxed in the state of residence of the entity (Germany) by a participant with a certificate of residence in Germany, therefore, the capital gain from the sale of the entire share capital in the s.r.l. must be taxed exclusively in Germany.

✓ **Capital income distributed while participating in an AIF - Additional Amount (Response to the request for advance tax ruling no. 420 of 25 August 2023).**

The Italian Tax Authorities clarified the qualification of equalisation interest (so-called "*additional amount*") - especially in the case of closed-end alternative investment funds (AIFs) - which are paid to the fund by "*new investors*" and distributed by the fund to "*previous investors*".

As a rule, the rules or deeds of incorporation of collective investment undertakings of the closed-end type provide that, during the subscription period, participants may join in different stages. In such cases, in order to ensure equal treatment between new investors and initial investors, the rules also provide that new entrants must pay an additional amount corresponding to a given interest rate calculated on the amounts that they would have had to pay if they had subscribed to the AIF on the date of initial admission of previous investors.

The equalisation interest does not increase the investor's share in the fund, and thus does not qualify as a capital contribution and does not reduce the residual commitment to pay capital upon request of the manager. Instead, it is distributed to the previous investors in proportion to each one's share.

From an economic and financial point of view, therefore, equalisation interest serves the function of rewarding pre-existing investors for having committed their financial resources to the mutual fund for a longer period of time than subsequent investors.

The Italian Tax Authorities, therefore, concludes that such additional amount has the nature of income distributed by the fund, taxable under art. 44, par. 1, lett. g), of the TUIR. As a result, the Italian fund manager, or the entity involved in the collection of the income, applies the withholding tax provided for by art. 26-*quinquies* of Presidential Decree No. 600 of 29 September 1973 with respect to Italian investors and foreign investors not on the "white list"; this withholding tax is levied on non-resident investors if the issuer is a fund established in a European Union country or in a European Economic Area (EEA) country with a supervised manager, otherwise it is an withholding tax.

If the fund, as in the case of the Italian Tax Authorities 's response, is set up abroad, the tax applies only to Italian investors.

- ✓ **Facilitated settlement of pending disputes - Acts subject to definable disputes and declaratory effects (Response to the request for advance tax ruling no. 422 of 30 August 2023 e Response to the request for advance tax ruling no. 423 of 30 August 2023).**

With the two responses to the request for advance tax ruling, the Italian Tax Authorities provided explanations in relation to the possibility, by adhering to the definition of pending litigations (introduced by the Budget Law 2023), to "regenerate" a VAT credit.

In the Response to the request for advance tax ruling no. 422, the petitioner had received a claim for the recovery of a tax credit unduly used for offsetting in the year 2020 in excess of the Euro 1.000.000 limit.

The Italian Tax Authorities first of all states that disputes concerning unduly used tax recovery acts fall within the scope of the rule and are therefore definable. The taxpayer can therefore define the dispute by paying an amount equal to 90% of its value. Moreover, it is reiterated that the definition is reached by submitting the application and paying the first instalment or the full amount by 30 September 2023, but that the finalisation is conditional on the outcome of the control carried out by the Italian Tax Authorities (which may also be waived in the event of a refusal, to be notified by 30 September 2024).

The payment of the sums due under the facilitated settlement of pending litigation has the sole purpose of defining the dispute that has arisen. If the taxpayer wishes to "regenerate" the VAT credit to be subsequently recovered as a deduction in the first periodic tax assessment or in the annual return, he must proceed to pay the tax amount indicated in the recovery notice and waive the dispute in respect of the same tax. Only after payment of the tax owed it will be possible to settle only the amount of the penalties

connected with the tax and the amount of the interest by submitting the claim. In this way, he will be able to carry forward the VAT credit repaid, corresponding to the amount indicated in the recovery notice, in his VAT return 2024 for the fiscal year 2023.

The Italian Tax Authorities came to the same conclusions in its Response to the request for advance tax ruling no. 423.

RESOLUTIONS

✓ **Establishment of the tax codes for the payment, by means of the 'F24 Versamenti con elementi identificativi' (F24 ELIDE) form, of the sums due for the regularisation of crypto-activities and related income, referred to in art. 1, par. from 138 to 142, of the Budget Law 2023 (Resolution no. 50/E of 9 August 2023)**

Tax codes are established for the payment, by means of the "*F24 Versamenti con elementi identificativi*" form (F24 ELIDE), of the sums due for the regularisation of crypto-assets and related income realised by 31 December 2021 pursuant to art. 1, par. From 138 to 142 of the Budget Law 2023. The following tax codes are therefore introduced:

(i) "1718", entitled "*Emergence of crypto-currencies - Article 1, paragraphs 138 to 142, of Law no. 197 of 29 December 2022 - Penalty for breach of tax monitoring obligations*";

(ii) "1719", entitled "*Emergence of crypto-currencies - Article 1, paragraphs 138 to 142, of Law no. 197 of 29 December 2022 - Substitute tax due on the values of crypto-assets subject to the regularisation request".*

For the payment of the amounts due, offsetting pursuant to art. 17 of Legislative Decree no. 241 of 9 July 1997 is excluded. The payment of the reduced penalty and the substitute tax must be made by 30 November 2023.

ORDERS

✓ **Implementing provisions for the regularisation of crypto-activities and related income (Italian Tax Authorities Order no. 290480 of 7 August 2023)**

The Italian Tax Authorities approved the model and related instructions for the application for regularisation of crypto-assets pursuant to art.1, par. from 138 to 142, of the Budget Law 2023 by natural persons, non-commercial entities and simple and equivalent companies within the meaning of art. 5 of the TUIR resident in Italy.

The subject of the regularisation request are cryptocurrency assets represented by cryptocurrencies, including those subject to and/or resulting from staking activity:

(i) held on or before 31 December 2021, which are not reported in the RW box of the "*Modello Redditi Persone Fisiche*"; and/or

(ii) income realised on or before the same date the disclosure of which has been omitted in the annual tax return.

Violations of tax monitoring obligations as well as violations of declaration obligations for income tax purposes can therefore be regularised.

The application must be submitted to the Italian Tax Authorities by 30 November 2023, enclosing the receipt for the payment and the accompanying report.

LEGAL CONSULTANCIES

✓ **Tax returns - Signing and storage - Unsuitability of simple electronic signatures - Presidential Decree no. 322 of 22 July 1998 and Ministerial Decree of 17 June 2014 (Italian Tax Authorities Legal Consultancy no. 1 of 30 August 2023)**

In its first response to legal consultancy of the year, the Italian Tax Authorities clarified that the use of a "simple", and thus not qualified, digital or advanced, electronic signature is not suitable for signing tax-relevant IT documents (in particular tax returns to be kept by taxpayers).

According to the provisions of art. 2 of the Ministerial Decree of 17 June 2014 the formation, issuance, transmission, storage, copying, duplication, reproduction, performance, temporal validation and signing of IT documents for tax purposes shall take place in compliance with the technical rules adopted pursuant to art. 71 of Legislative Decree no. 82 of 7 March 2005.

Please note that the guidelines issued by the Authority for Digital Italy in implementation of the aforementioned art. 71 establish that, in the case of an IT document formed through the use of software tools or cloud services, the immodifiability and integrity of the document is guaranteed by the affixing of a qualified electronic signature, digital signature or qualified electronic seal or advanced electronic signature.

II. UPDATE ON REGULATION

✓ **Conversion Law of the Law Decree no. 57 of 29 May 2023 on urgent measures for territorial entities as well as to ensure the implementation of the "PNNR" and for the energy sector (Conversion Law no. 95 of 26 July 2023)**

Law no. 95 of 26 July 2023, converts with amendments the Law Decree no. 57 of 29 May 2023 on urgent measures for territorial entities, as well as to ensure the timely implementation of the National Recovery and Resilience Plan and for the energy sector.

Among the main new features, art. 3-*ter*, par. 8 requires the Regulatory Authorities for Energy, Networks, and Environment to define the guaranteed minimum prices, i.e., the revenue integrations resulting from participation in the electricity market, for production from biogas and biomass-fuelled plants, which benefit from incentives expiring by 31 December 2027 or which, by the same deadline, renounce the incentives in order to join the scheme provided for by the decree.

✓ **Omnibus Law Decree: main tax news (Law Decree no. 104 of 10 August 2023)**

The Lae Decree no. 104 of 10 August 2023 published in the Official Journal no. 186 of 10 August 2023 and in force from 11 August 2023 ("**Omnibus Decree**"), pending conversion, introduces the following tax provisions:

(i) Tax Credit for Research and Development in microelectronics

Art. 5 of the Omnibus Decree establishes a new tax credit for companies investing in research and development projects related to the semiconductor sector. Costs listed in art. 25, par. 3, of EU Regulation no. 651 of 17 June 2014 are eligible for the tax credit, with the exclusion of expenses related to real estate, incurred from 11 August 2023 until 31 December 2027.

The tax credit can only be used by offsetting via the F24 form from the fiscal year following the one in which the costs were incurred.

Offsetting is subject to the issuance of a certification by qualified entities certifying that the costs have actually been incurred and that they correspond to the accounting documents prepared by the beneficiaries. To benefit from the incentive, companies are required to request the certification of research and development activities pursuant to art. 23, par. from 2 to 5 of Law Decree no. 73 of 21 June 2022.

(ii) Superbonus "*villette*"

Art. 24 of the Omnibus Decree has extended from 30 September 2023 to 31 December 2023 the final deadline by which individuals not acting in the course of business activities may benefit from the 110% Superbonus in relation to subsidised expenses incurred for works on so-called "*villette*". The condition for accessing the relief remains the same: as at 30 September 2022, work must already have been carried out for at least 30% of the total intervention (art. 119, par 8-*bis* of the Law Decree no. 34 of 19 May 2020).

(iii) Building interventions - unused tax credits

Art. 25 of the Omnibus Decree introduces a new requirement in cases of option for the assignment of credits or discount on fees. Transferees of tax credits that are in a situation of unusability, other than that of the expiry of the terms for use in offsetting, must notify the Italian Tax Authorities within 30 days from the knowledge of the event that determined it. If the knowledge of the event that determined the non-usability of the credit occurred before 1 December 2023, the communication must be made by 2 January 2024.
Failure to notify within the prescribed time limit shall result in the imposition of an administrative penalty of Euro 100.

(iv) Extraordinary tax on banks' extra-profits

Art. 26 of the Omnibus Decree introduces, for the year 2023 only, a new tax intended to affect the increase in margins drawn by banks due to rising interest rates.

The extraordinary tax is determined by applying a rate of 40% on the higher between the following values:

a. the amount by which the interest margin for the fiscal year prior to the fiscal year ending 1 January 2023 exceeds the interest margin for the fiscal year prior to the fiscal year ending 1 January 2022 by at least 5%;
b. the amount by which the interest margin in the fiscal year prior to the fiscal year ending 1 January 2024 exceeds the interest margin in the fiscal year prior to the fiscal year ending 1 January 2022 by at least 10%

The extraordinary tax is payable, in each case, up to an amount equal to 0,1% of the asset value for the fiscal year prior to the fiscal year current on 1 January 2023.

The extraordinary tax is non-deductible from IRES and IRAP.

III. CASE-LAW UPDATE

✓ **Burden of proof for the taxpayer challenging the rejection of the claim in income tax refund disputes (Supreme Court, 3 July 2023, no. 18644)**

The Supreme Court has ruled on the subject of litigation for income tax refund claims. In particular, it was stated that the taxpayer who challenges the rejection of a refund application has the quality of a "*plaintiff in the substantive sense*" and therefore the burden of proof rests on him. Consequently, in order to classify the payment made by the withholding agent as undue, "*it is not sufficient merely to allege that the withholding agent incorrectly classified the income, it is necessary to prove that the correct classification would have excluded the tax liability or resulted in a less burdensome tax liability*".

In the present case, the withholding agents are appealing following the Italian Tax Authorities' silent refusal of their request for reimbursement of the withholding tax incurred on the sums paid by the company following their withdrawal.

In the Court's view, however, the appellants did not prove whether or not the erroneous classification of the income category resulted in a more onerous taxation.

- ✓ **For the purposes of the refund of VAT originally paid on exempt transactions, the final assessment that recovers the register is the prerequisite for the refund (Supreme Court, 22 August 2023, no. 25013)**

The Supreme Court has ruled on the issue of refunds arising from the re-qualification by the Italian Tax Authorities, by means of an assessment, of a transfer of warehouse assets into a transfer of a business, with the result that the transaction changed from being subject to VAT to being subject to registration tax and, therefore, exempt from VAT.

According to the previous consolidated case-law orientation, the assessment does not constitute the post-payment event representing the "prerequisite for refund" referred to in art. 21 of Legislative Decree no. 546 of 31 December 1992. The refund could therefore only be obtained if requested within two years from the original payment of the VAT subsequently found to be undue, and not from the Italian Tax Authorities' assessment. In concrete terms, the refund was in fact never due for expiry of the time limit.

This practice had already been censured by several rulings of the European Court of Justice, which had established the principle, already transposed, albeit in a compressed manner, into national law, that obtaining reimbursement must not be excessively difficult. The previous consolidated case-law orientation and the ensuing practice were ultimately overtaken by Judgment no. 25013 of 22 August 2023, in which the Court affirmed the principle of law according to which the final assessment represents the "*prerequisite for the refund*" mentioned in art. 30-*ter* of Presidential Decree No. 633 of 26 October 1972, which in the meantime was introduced by Law no. 205 of 27 December.

- ✓ **Exclusion of entitlement to credit under art. 165 of the TUIR for taxes paid abroad in the event of failure to file the tax return (Supreme Court, 31 July 2023, no. 23190)**

Art. 165, par. 8 of the TUIR provides that "*the deduction is not available in the event of failure to file a return or failure to indicate income earned abroad in the return filed".*

In its Judgement no. 23190 of 31 July 2023, the Supreme Court provides a strict interpretation of the mentioned article, establishing the principle that the tax credit due for the tax paid abroad pursuant to art. 165 of the TUIR is precluded when the declaration is omitted, even in situations where the omission is legitimate.

In the present case, the refund application concerned withholding taxes paid by the employer on the employment services rendered in Congo by an Italian worker. The worker, having earned no income in addition to the employment income indicated in the certificate drawn up by the employer ("*certificazione unica*", so called "CU"), and considering that the single certificate issued by the employer had the full effect of replacing the declaration, he was exempt from the obligation to submit the declaration. The submission of the declaration was held to be a condition for receiving the deduction even in cases, such as the present one, where the taxpayer was not obliged to submit it. The consequence was the denial to the applicant of the deduction.

- ✓ **Inapplicability of dividend washing rules to the profit-sharing income of a partner in a partnership (Supreme Court, 2 August, no. 23652)**

The Supreme Court clarified that the applicability of the dividend washing provisions of art. 109 of the TUIR, par. 3-*bis* to 3-*quinquies*, to a capital loss on a partnership interest must be excluded.

In the present case, the capital loss realised was related to a shareholding in a S.a.s. In application of the principle of transparency under art. 5 of the TUIR, the income of the partnership was considered to be the income of the partner, and therefore imputed to the latter, who had included it in his tax return as participation income.

Since the condition of the existence of untaxed dividends for the application of the dividend washing legislation is not met, the applicability of the latter must be excluded.

The Court also clarified that the circumstance that the participant is a limited company does not change the reference framework since the profit-sharing income of the partner of a partnership is the taxpayer's own income also for IRES purposes.

IV. ASSONIME CIRCULARS

✓ **Circular no. 22/2023 - The allocation of subjective tax positions in the event of a demerger in the light of certain practice documents and a Supreme Court Decision**

The Assonime Circular analyses the attribution of subjective tax positions in the event of a corporate demerger in light of the interpretative interventions provided by the Italian Tax Authorities and the jurisprudence of legitimacy.

Assonime dwells on the indications provided in Italian Tax Authorities Circular no. 31 of 1 August 2022, which innovated the procedures to be followed for the purpose of applying the so-called vitality test (pursuant to art. 173, par. 10, of the TUIR) on the response to Italian Tax Authorities Response to request for advance tax ruling no. 353 of 20 June 2023 relating to a partial demerger involving companies adhering to the same tax consolidation scheme, and on the Italian Tax Authorities Response to request for advance tax ruling no. 383 of 31 March of the same year which, again on the subject of partial demerger, provides guidance on the criterion for the allocation of the IRAP credit accrued by the demerged company before the demerger operation.

Reference is also made to the Supreme Court Judgement no. 3591 of 6 February 2023, according to which the partial split of the consolidating company, which does not interrupt the consolidation, may nevertheless result in the transfer to the beneficiary of a portion of the losses accrued under the consolidated regime.

✓ **Circular no. 23/2023 - Taxation of non-residents with respect to capital gains arising from the disposal of participations in non-resident companies and entities the value of which consists predominantly of real estate located in the national territory**

The Circular illustrates the main application issues concerning the scope of application of the new provisions on the taxation of non-resident persons, with reference to “income produced in Italy” and consisting of capital gains arising from the disposal of participations in non-resident companies and entities the value of which derives, for more than half, from real estate located in the territory of the State. The Circular clarifies that what is the underlying rationale and the compliance with the OECD Model Convention.

The Circular focuses on the treatment of the legal basis, which is supplemented only in the event of the realisation of other income (“*redditi diversi*”) arising from the sale of shares for valuable consideration and not also in the case of realisation of capital income in the event of withdrawal of the shareholder/investor, liquidation of the company and the like, and on the criteria for verifying the threshold of prevalence of real estate.

It is also clarified that these new provisions are not applicable to collective investment undertakings (OICRs) that are established in an EU or EEA country in accordance with the UCITs or AIFM directives, in respect of which the ordinary exemption regime remains confirmed, regardless of their legal form. In this context, the problematic aspects relating to the treatment reserved for those foreign investors - which are not UCITs or, in any case, are UCITs other than EU/EEA - with reference to the capital gains realised by them following the sale of any units of real estate UCITs held by them is also analysed.

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