



**Newsletter**



**REAL ESTATE TAX INSIDER**

## **3Q 2020 Italian Real Estate Tax News**

LED Taxand summarizes hereinafter the main tax news regarding Italian real estate for the third quarter of the year 2020.

### **Law – Law Decree no. 104/2020 – Article 77, Paragraph 1. Extension of the tax credit for lease agreements.**

The tax credit for non-residential properties and business leases, provided for by article 28 of the Decree no. 34/2020 for the months of March, April and May (April, May and June for seasonal tourist-accommodation facilities), was extended by one month by the Decree no. 104/2020.

The mentioned credit, equal to 60% (reduced to 30% in case of business lease), applies only to subjects carrying out business activities, art or profession, with revenues or remuneration not exceeding € 5 million in the FY 2019 (for retail trade operators, the revenues threshold can be exceeded but in this case the percentages of the tax credit is reduced to 20% and 10%). Another condition to benefit from the tax credit is the decrease in the revenues or remuneration of the beneficiaries in one of the mentioned months by at least 50% compared to the same month in the previous fiscal year.

Finally, article 77, letter a), of the decree also includes spa facilities among the beneficiaries of the tax credit (in addition to hotels and agriturismo facilities, travel and tourism agencies and tour operators), regardless of the volume of revenues and remuneration for fiscal year 2019.

### **Law - Law Decree no. 104/2020 - Article 110. Italian step-up regime of business assets and participations.**

Article 110 of the Decree no. 104 introduces the possibility to step-up in the 2020 financial statements the values of tangible and intangible fixed assets (including non-depreciable fixed assets such as land) as well as participations, provided that the mentioned assets are included in the 2019 financial statements. The step-up can be executed only for accounting purposes or also for tax purposes, in the latter case a 3% substitute tax is due. Higher tax values are recognised for amortization and depreciation purposes starting from fiscal year 2021, while for capital gain/loss purposes from fiscal year 2024. In addition, the Decree

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introduces the possibility to realign the tax value of the assets to their accounting value, if higher. For details see our dedicated [Corporate Tax Insider no. 1/2020](#).

### **Law – Law Decree no. 76/2020 – Article 8. Exclusion from tenders in case of non-definitive irregularities.**

The previous Decree no. 32/2019 had already provided for the exclusion from public tender procedures in the event of non-definitive irregularities in the payment of taxes and social security contributions. This provision was first repealed and now reintroduced with the Decree no. 76/2020.

This latter decree modifies again Article 80 of the Legislative Decree no. 50/2016 (“*Codice degli appalti*”), introducing the right for the contracting authority to exclude companies from public tender procedures *i)* if the contracting authority is aware of and can adequately demonstrate that there are tax and social contribution irregularities made by the economic operator not definitively assessed and *ii)* if such irregularities constitute a “serious violation”.

In this regard, the current rule specifies that the violation is considered “serious” if it exceeds the threshold of € 5,000 referred to in Article 48-*bis* of the Presidential Decree no. 602/1973.

In the light of the new provision, the possibility that a tax assessment, even if incorrect or not definitive, leads to the exclusion of an economic operator constitutes a big risk of paralysis in the public tenders’ sector.

### **Case Law - Italian Supreme Court decision 13 August 2020 no. 17011. The indemnity received based on a warranty clause is taxable in the hands of the purchaser.**

The Italian Supreme Court analysed the tax treatment of warranty clauses included in share purchase agreements. In the case under discussion, the target company suffered costs related to tax claims concerning years preceding the sale (i.e. taxes and penalties following a settlement with the tax authorities) and, based on a warranty clause, the purchaser received an indemnity from the seller. The Supreme Court ruled that the indemnity received is taxable in the hands of the purchaser, regardless of the non-deductibility of the cost suffered by the target. In light of such decision, in case of purchase of shares, it would be advisable to evaluate the inclusion of gross-up clauses which allow the purchaser to receive, in addition to the indemnity, also an amount equal to the taxes due on such indemnity.

### **Case Law – Italian Constitutional Court decision 21 July 2020, no. 158/2020. Judgement on constitutional legitimacy of Article 20 of the Presidential Decree no. 131/1986.**

With this decision, the Constitutional Court declared groundless the question of constitutional legitimacy raised by the Supreme Court with order no. 23549 of 23 September 2019 in relation to article 20 of the Presidential Decree no. 131/86 (as amended by article 1, paragraph 87, letter a), of Law no. 205/2017, and by article 1, paragraph 1084, of the Law no. 145/2018), in the part in which it states that, in applying the registration tax “*according to the intrinsic nature and legal effects of the deeds submitted for registration, even if the title or apparent form does not correspond to it, it must be taken into consideration only the elements that can be inferred from the deed itself, regardless of extra-textual ones and related deeds, without prejudice to the provisions of subsequent articles*”.

According to the thesis of the Supreme Court, the mentioned article 20 would contrast with the principle of the prevalence of substance over form, since a substantive analysis of the deed submitted for registration would also involve the necessary consideration of elements external to the deed and in particular, also of elements that can be inferred from deeds possibly connected with that submitted for registration.

Instead, the Constitutional Court, solving a long jurisprudential conflict regarding the correct interpretation to be given to the aforementioned provision, stated that the current version of the article 20 does not violate the Constitution, as it excludes the possibility of requalifying, for the purposes of registration tax, the deeds submitted for registration on the basis of extra-textual elements or related deeds.

See our previous [Disputes Tax Insider no. 1/2020 of 5 August 2020](#).

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