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TAX

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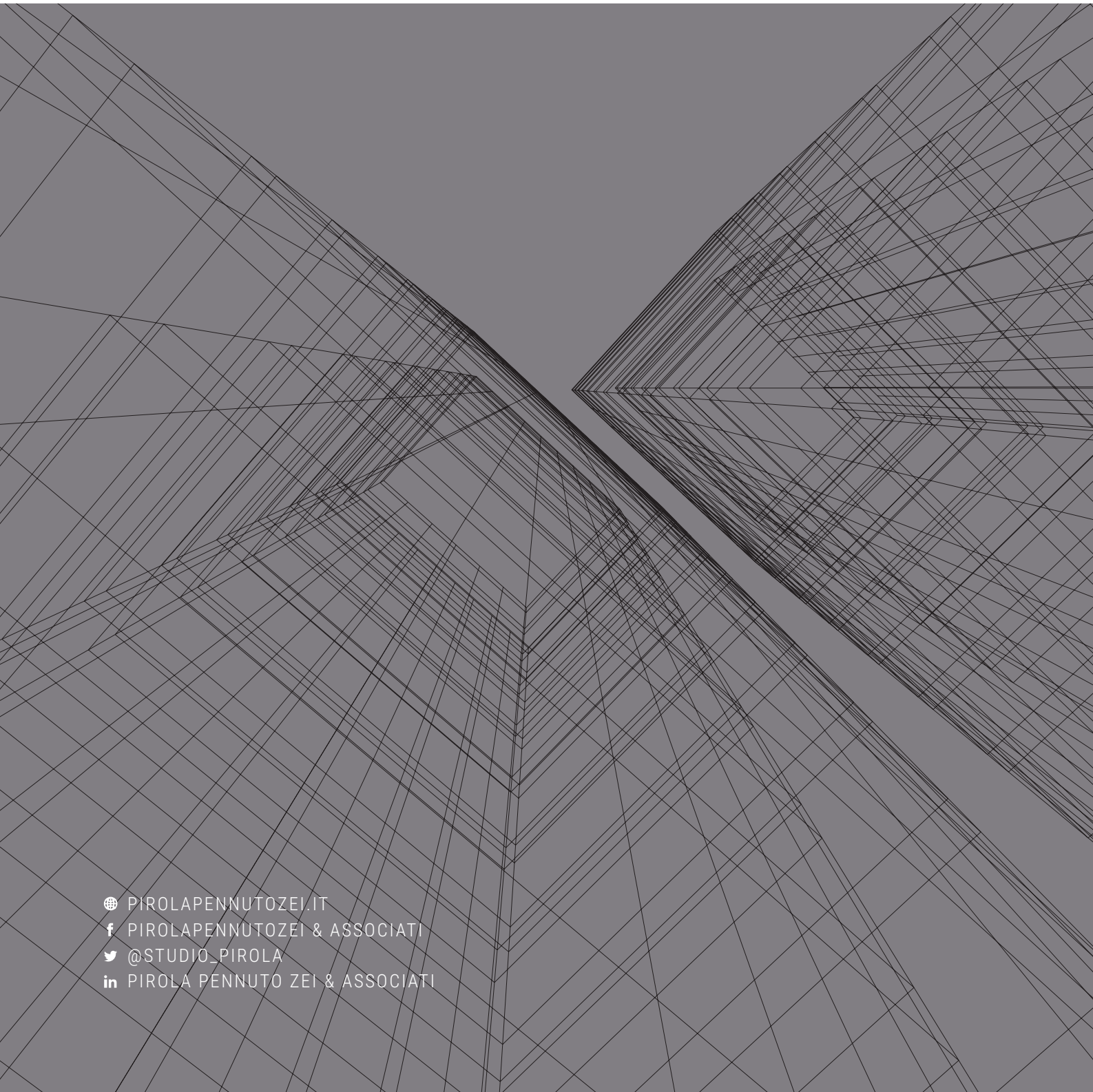

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LEGISLATION

1.1

Amendment to the facilitated tax regime applicable to incomes from the use of software protected by copyright, industrial patents, designs and models, processes, formulas and information related to business, commercial, or scientific knowledge which can be legally protected. Decree of the Ministry of Economic Development dated 28 November 2017 (*Official Gazette No. 30 dated 6 February 2018*)

Decree dated 28 November 2017, related to the so called Patent Box regime, was published in the Italian Official Gazette No. 30 on 6 February 2018. It intervenes mainly on measures introduced by Art. 1, paragraphs from 37 to 45, of Law dated 23 December 2014, No. 190 as amended by Law Decree dated 24 January 2015, No. 3 on the optional tax regime[1] applicable to incomes from the use of software protected by copyright, industrial patents, designs and models, processes, formulas and information related to business, commercial, or scientific knowledge which can be legally protected[2].

Definition of intangible assets

As specified by Art. 6, the option relates to incomes resulting from the use of the following intangible assets:

1. software protected by copyright;
2. industrial patents[3];
3. designs and models which can be legally protected;
4. processes, formulas and information related to business, commercial, or scientific knowledge which can be legally protected;

1 The option is irrevocable and it is renewable, lasting for a period of five tax years. The regime applies to taxpayers that have the right to exploit the intangible assets. In case of extraordinary operations, like mergers or demergers, the assignee takes the rights of the option.

2 The Decree (Art. 9) intervenes also on the income that qualifies for the patent box once the option is exercised. The 50 percent of the income derived from the exploitation or direct use of qualifying intellectual property does not concur to the formation of the business income.

3 Granted or in the process of being granted comprising patents on inventions including biotech inventions and related certificates; utility models; plant varieties and semiconductors' topographies.

5. two or more listed intangible assets, "*where complementary and jointly exploited for the realization of a product or process*".

Applicable domestic law, EU law, and other international provisions on industrial and intellectual property should be taken into account to elaborate the definition of the listed qualifying intangible assets and the related existence and protection requirements.

R&D activity

The Decree also explains which activities can qualify as R&D activities (Article 8) for the development, maintenance, and improvement of intangible assets:

1. fundamental research;
2. applied research, meaning the activity to acquire new know-hows to result in development of new products;
3. design;
4. ideation and creation of software protected by copyright;
5. research, tests, surveys, and studies aimed at obtaining and maintaining protection of rights and adopting systems against counterfeiting, management of litigations and agreements.

The Decree further provides a grandfathering clause for taxpayers who opted for the patent box regime in relation to trademarks, including collective trademarks, registered or in the process of registration in the two fiscal years following the fiscal year including 31 December 2014 (article 13). Should this be the case, the option lasts 5 years or until 30 June 2021 and cannot be renewed.

It is further specified that income from use of above listed intangible assets realized from transactions incurred with companies which directly or indirectly control the company, are controlled by the same company which controls the company does fall within the scope of the Agreement with the Revenue Agency, Art. 31-*ter* of Decree of the president of the Republic No. 600/1973 (Agreements for companies with international trades).

GUIDANCE

2.1

Probatory ruling – merger through acquisition of a company which is not consolidated – non-enforceability of what envisaged by Art. 13, paragraphs 3 and 6, of Ministerial Decree dated 9 June 2004. Ministerial Resolution dated 2 February 2018, No. 13/E

Resolution No. 13/E provided clarifications with reference to a merger through acquisition of a consolidating company with a company which is not part of the consolidated group, and more in specific to a "*Special Purpose Acquisition Company*" (SPAC) regulated under the Italian law - *BETA - SIV form* (*Special Investment Vehicle*) as in compliance with the Regulation of the Italian Stock Exchange. The company *BETA* performed a business combination transaction by acquiring a company (*ALFA*) in 2017 and merging the same through acquisition – *ALFA* had adhered to the Tax Consolidation as consolidating company. The Revenue Agency intervened on two themes mainly:

- the continuation of the Tax Consolidation as in compliance with Art. 124, paragraph 5, of the TUIR (Italian Income Tax Act);
- the carry-forward of tax losses (with specific reference to the case at hand, round Euro 24 millions) accrued by the merged company ALFA in the period 1.1.2017[4].

With specific reference to the last item, it is specified that ALFA tax losses of the period 1.1.2017 must be included in the Consolidation overall income for FY 2017.

Due to the merger having no retroactive effect, ALFA anticipates the end of its fiscal period on the day in which the merger become effective: also the results of such period is absorbed in the Consolidation. In practice, as clarified by the Resolution, "*the fact that such fiscal period does not end on the same day of the fiscal period of BETA (merging company) and of the controlled companies has no actual relevance, but it is merely a consequence of the merger with no retroactive effect.*"

4 As opinion of the requesting company, *ALFA* tax results pre-merger shall be included in the Consolidation overall income for FY 2017. This on the grounds that should the Consolidation continue, there are no reasons not to consider the results of the merged company (formed consolidating company) *ALFA* in the determination of the 2017 Group income. It is specified that, according to the estimations made of the period from 1.1.2017 to the day the merger comes into effect, *ALFA* generated losses for Euro 24 million.

On the issue, reference can be made also to Ministerial resolution No. 251/E/2008 on the continuation of the group taxation in presence of reverse merger of the consolidating company.

2.2

Legal Advice - dynamic ticket pricing for the show business. VAT liability. Criteria for the determination of the sale price of free tickets as per Art. 3, paragraph 5, of Decree of the President of the Republic No. 633/1972. Ministerial Resolution dated 15 February 2018, No. 15/E

Resolution No. 15/E provides clarifications with reference to the dynamic ticket pricing for the show business and the connected tax liability for VAT purposes. It is specified that, as in compliance with Art. 3, paragraph 5, of the VAT Decree, free performances are VAT exempt only if recognized to subjects who are in possess of entry tickets granted for free by the organizers within the limit of 5% of the spaces available. Free tickets exceeding such limit shall be subject to VAT.

In presence of dynamic ticket pricing, the maximum full price applied during the sale period to tickets of a specific type must be considered as the amount to which reference must be made in order to determine the price of eventual free tickets on which VAT must be computed.

CASE LAW

3.1

VAT – Supreme Court, Judgement dated 7 February 2018, No. 2905

With Judgement No. 2905, the Supreme Court intervened on the issue of objectively non-existing operations. The Judges established that, for operations (as for the case at issue) considered fully or partially non-existing whose invoice is expression of a service granted by credit instruments and reference to operations which have never been performed, the Financial Administration must provide probatory elements , even if merely assumptions (see to this extent Judgements of the Supreme Court Section V 09/09/2016 No. 17818, No. 21953 year 2007, No. 9784 year 2010, No. 9108 year 2012, No. 15741 year 2012, No. 23560 year 2012, No. 27718 year 2013, No. 20059 year 2014, No. 26486 year 2014 and No. 9363 year 2015; similarly, Judgements of the Court of Justice dated 6 July 2006, Case C-439/04, 21 February 2006, Case C-255/02, 21 June 2012, Case C-80/11, 6 December 2012, Case C-285/11 and 31 November 2013, Case C-642/11). Moreover, the invoice may be considered as probatory element in favor of the company even for direct taxation and VAT "*only if compliant with the requirements of form and content as set forth by Decree of the President of the Republic dated 26 October 1972, No. 633, Art. 21 (see also Art. 226 of Council Directive2006/112/EC dated 28 November 2006)*" (see to this extent Judgements of the Supreme Court No. 21980 year 2015, No. 21446 year 2014, No. 24426 year 2013, No. 9108 year 2012 and No. 5748 year 2010).

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TAX NEWSLETTER | 1-15 FEBRUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 15 FEBRUARY 2018.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY TAX DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM