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ANTIAVOIDANCE RULES AFTER ATAD

FRANCESCO NOBILI

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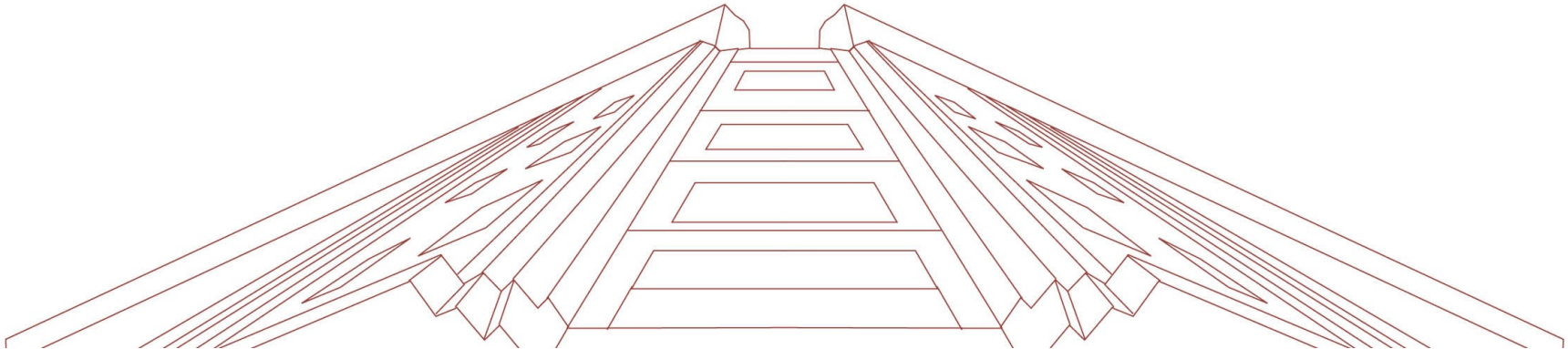

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1. Previous Italian regime: art. 37-bis, Presidential Decree no. 600/73, covered only the transactions mentioned in the same article (mainly, business restructuring). The definition of “abuse of law” provided by art. 37-bis was quite broad (and not so clear) and caused several disputes with the Italian Tax Authorities.

2. The new antiavoidance rule (art. 10-bis, Law no. 212), in force starting from 2015, is a general rule which covers all the cases and all the taxes (i.e.: income tax, indirect taxes, etc.). Art. 10-bis gives a more accurate definition of “abuse of law”. The concept of abuse of law is ‘residual’, *i.e.* applies only when a transaction cannot be assessed under other specific rules.

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3. In particular, art. 10-bis focuses on three main elements:

   i) transactions devoid of economic substance;

   ii) which reap undue tax advantages despite formally respecting the law;

   iii) such tax advantages are the essential effect of the transaction.

   According to art. 10-bis, par. 3, operations with valid non-fiscal underpinnings (including reorganizations or management decisions to improve the structure or operations of a business or professional activity) are not considered abusive.

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4. According to the new rule and the interpretation of the Italian Tax Authorities (Document no. 93/E/16), if the tax advantage is not undue the antiavoidance rule is not applicable and no other conditions must be checked. With this reference, paragraph 4 of art. 10-bis grants the freedom of choice between optional regimes and operations bearing a different tax burden. Only if the tax advantage is undue, the other conditions must be checked in order to apply the antiavoidance provision.

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5. According to art. 6, paragraph 1 and paragraph 2, of "ATAD" 1 (EU Anti-Tax Avoidance Directive no. 2016/1164), "*a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. (..) An arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality*".

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6. On 28 December 2018 Legislative Decree No. 142 of 29 November 2018 ("LD 142/2018") has been published in Official Gazette No. 300, thus implementing "ATAD" 1. However, such Decree, as confirmed by the explanatory report, did not implement art. 6 of "ATAD" 1 because art. 10-bis was already considered in line with art. 6 of the same "ATAD 1". This view is in line with the comments of the majority of the Italian literature.

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Corso Europa, 2 - Milano
+39 02 7636931
studiobiscozzinobili@slta.it
slta.it