

COVID-19 - Measures regarding individuals and their family businesses

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12 May 2020

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COVID-19 - Measures regarding individuals and their family businesses

This tax alert takes a look at certain measures recently introduced by the government, also in response to the COVID-19 outbreak. These measures may have a significant impact on individual taxpayers and their business activities.

Dividends received by non-commercial partnerships (*società semplici*) - Changes to article 32-*quater* of Law Decree no. 124 of 26 October 2019

Article 32-*quater* introduced a special tax regime for dividends paid to non-commercial partnerships ('NCPs'). According to this new rule, dividends must be taxed on a look-through basis to the partners of the NCP; however, some aspects were not expressly regulated and remained unclear.

These doubts have been removed (even if not completely) by article 28 of Law Decree no. 23 of 8 April 2020 (the so-called 'Liquidity Decree'), which has made some significant changes to article 32-*quater*.

First, it has extended the look-through regime to cases where dividends received by NCPs are distributed by non-resident companies and entities, including trusts ⁽¹⁾⁽²⁾.

Second, it is now expressly stipulated that:

- if the partners of the NCP are resident non-commercial entities, the dividend is fully taxable;
- the 26% or 1.20% withholding tax indicated in article 27 of Presidential Decree no. 600/1973 will apply if the NCP partners are not resident in Italy.

Third, it is explicitly established that the new look-through taxation regime will apply to dividends received as of 1 January 2020.

(1) Those indicated in article 73(1)(d) of Presidential Decree no. 917/1986 (the Italian Income Tax Code or 'IITC').

(2) However, there is still full taxation of profits distributed by businesses/entities resident or located in the low-tax countries or territories indicated in article 47-*bis* (1) IITC.

However, there will be a transitional regime for distributions approved by 31 December 2022 and made - by companies/entities subject to IRES - out of profits generated up to the fiscal year ('FY') in progress on 31 December 2019. These profits will be subject to the rules predating the 2018 Budget Law. Accordingly, the following percentages of the profits should be included in the income of partners:

- 40%, in the case of profits formed **up to** the FY in progress on **31 December 2007**;
- 49.72%, in the case of profits formed **after** the FY in progress on **31 December 2007** and **up to** that in progress on **31 December 2016**;

- 58.14%, in the case of profits formed **from** the FY in progress on **31 December 2017** and **up to** that in progress on **31 December 2019**.

Despite the above changes, there are still some unresolved issues. For instance, there are no express rules on the system of taxation for foreign dividends distributed to NCPs whose partners are non-resident, with the result that various different interpretations are possible⁽³⁾.

The following table summarizes all the different cases⁽⁴⁾ that can be extrapolated from the recast article 32-*quarter*⁽⁵⁾.

Source of the dividends	Type of NCP partner	Tax payable in Italy by the partner
Italian/foreign	Resident individual who is not an entrepreneur	26% WHT/substitute tax
Italian/foreign	Resident individual who is an entrepreneur	58.14% of the dividends are included in the partner's taxable income
Italian/foreign	Resident partnership (excluding NCPs)	58.14% of the dividends are included in the partner's taxable income
Italian/foreign	Resident company / resident commercial entity	5% of the dividends are included in the partner's taxable income
Italian/foreign	Resident non-commercial entity	100% of the dividends are included in the partner's taxable income
Foreign low-tax jurisdiction	Resident individual / resident legal entity	100% of the dividends are included in the partner's taxable income (unless there are any exemptions)
Italian	Non-resident individual / non-resident company or entity (not EU or EEA)	26% WHT
Italian	Non-resident company or entity (EU or EEA)	1.20% WHT

Temporary disapplication of article 2467 of the Italian Civil Code

Article 2467 of the Italian Civil Code establishes that repayments of shareholder loans can only be made after other creditors have been satisfied. If, moreover, a repayment is made in the 12 months prior to a declaration of bankruptcy, the repayment must be returned to the company⁽⁶⁾.

This rule is designed to discourage undercapitalization, which occurs when shareholders prefer to fund their company through debt rather than equity, so as to reduce their exposure to business risk.

Although article 2467 is one of a set of rules applying to limited liability companies (*Srls*), there are numerous precedents in case law to indicate that, on certain conditions (especially when there is a small ownership structure), it also applies to joint-stock companies (*SpAs*), even if there is no express rule to that effect.

In view of the possible economic and financial difficulties that businesses may encounter as a result of the COVID-19 epidemic, article 8 of the Liquidity Decree has intervened by stipulating that article 2467 will not apply to loans made to companies between 9 April (the date on which the decree came into force) and 31 December 2020. Therefore, shareholders have this window of time to lend funds to their companies without running the risk that their claims will be ranked lower than those of other creditors or that they may even have to return any repayments made to them in the 12 months before a declaration of bankruptcy.

A final point is that article 2497-*quinquies* of the Italian Civil Code stipulates that article 2467 also applies to loans made to a company by one that exercises powers of management and coordination over it, or by its subsidiaries. Therefore, article 8 of the Liquidity Decree also stipulates that between 9 April and 31 December 2020, article 2497-*quinquies* will not apply either.

(3) According to article 23(1)(g) IIRC, such income should be treated as Italian income.

(4) However, even after the changes made by the Liquidity Decree, article 32-*quarter* does not expressly regulate all the possible different cases that could arise in actual practice.

(5) We have not considered the possible application of the Parent-Subsidiary Directive or any double tax treaties.

(6) Article 2467 then establishes that: "shareholder loans means those granted, in whatever form, at a time when, also considering the type of activity pursued by the company, there was an imbalance between debt and equity or when the company's financial situation was such that an injection of capital would have been reasonable".

Donations made to combat the COVID-19 emergency: types of relief

The Cure Italy Decree⁽⁷⁾, currently being converted into law, has introduced special tax relief to encourage donations to be used to tackle the epidemic in Italy.

This tax relief differs according to the type of donor and a distinction is made between individuals and non-commercial entities on the one side, and businesses on the other.

It can be inferred from the technical report accompanying the Cure Italy Decree that the government intends these particular measures to run alongside (and not replace) those already in force before the Cure Italy Decree was enacted.

Under the Cure Italy rules⁽⁸⁾, **individuals and non-commercial entities** can deduct 30 percent of the donations they make in cash or in kind in 2020 to the state, to regional or local authorities, and to accredited non-profit bodies, foundations or associations, to help contain and tackle the COVID-19 emergency. This deduction is made from their gross tax and is capped at EUR30,000.

Businesses, on the other hand, can deduct⁽⁹⁾ (from their taxable business income) donations made in 2020 in cash or in kind to support measures combating the COVID-19 emergency⁽¹⁰⁾. To be deductible, these donations must be made to:

- charities ('ONLUS');
- international organisations of which Italy is a member;
- other foundations, associations, committees and organisations (established with a constitution or governing document drawn up in the form of a public deed or a certified and registered private agreement) whose purposes include humanitarian aid for populations struck by public disasters or other exceptional events;
- central, regional and local authorities and non-commercial public-sector bodies.

The Cure Italy Decree also stipulates that the above donations are fully deductible for IRAP purposes in the fiscal year in which they are made.

Finally, donations in kind made by businesses or by individuals and non-commercial entities must be valued in accordance with the rules set out in articles 3 and 4 of the decree issued by the Minister of Employment and Social Policy on 28 November 2019.

The following table summarizes the tax relief available to those who wish to help the fight against the COVID-19 epidemic by making the types of donation introduced by the Cure Italy Decree.

Beneficiary	Donor	Tax relief for the donor
<ul style="list-style-type: none">– The state.– Regional or local authorities.– Accredited non-profit bodies, foundations or associations.	Individuals/non-commercial entities	Deduction of 30% of the donation from income tax, up to a maximum of EUR30,000.
<ul style="list-style-type: none">– Charities ('ONLUS').– International organisations of which Italy is a member.– Other foundations, associations, committees and organisations (established with a constitution or governing document drawn up in the form of a public deed or a certified and registered private agreement) whose purposes include humanitarian aid for populations struck by public disasters or other exceptional events.– Central, regional and local authorities and non-commercial public-sector bodies	Businesses	Full deductibility of the donation from income tax and IRAP.

(7) Law Decree no. 18 of 17 March 2020

(8) Article 66(1) of the Cure Italy Decree.

(9) In accordance with article 66(2) of the Cure Italy Decree, which references article 27 of Law no. 133 of 13 May 1999, which in turn references the Prime Ministerial Decree of 20 June 2000.

(10) As expressly stipulated in article 27 of Law no. 133 of 13 May 1999, such donations are not subject to IRES or gift tax.

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Family Office and Private Client News / 12 May 2020

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