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The transfer pricing implications of the Italian regional tax on productive activities

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Starting with the 2008 tax period (as a consequence of the abrogation of article 11-bis of legislative decree No 446/97) the taxable IRAP base is to be determined in accordance with the principle of direct derivation from financial statement results, whereas (in accordance with paragraph 2 of the above abrogated Art. 11-bis, for IRAP purposes) tax adjustments for IReS (corporate income tax, hereinafter) purposes, should have been taken into consideration, including, therefore, any asset items provided under article 110, paragraph 7 of the TUIR (Italian Income Tax Code, which sets forth Italian transfer pricing rules).

Separating the taxable IRAP base from the rules provided, for direct tax determination, caused the regulation under examination to become irrelevant for IRAP purposes, giving relevance instead to the amount earmarked under the profit and loss account for intercompany earnings.

It is nonetheless worth noting that, during audits, the tax authorities frequently deemed transfer pricing adjustments valid even for IRAP purposes.

In order to clarify the said interpretative doubt, the 2014 stability law (paragraph 281 of Law No 147/2013) extended such rules, retroactively, for the determination of the IRAP taxable base deriving from the application of the transfer pricing regime, also for tax periods subsequent to the one in progress as from December 31 2007.

However, the Provincial Tax Court of Reggio Emilia, through ruling No 510/03/14 of November 19 2014, established that the above new regulation will be strictly applicable as of 2014, while denying its retroactive effect, in view of its being a “child born of cash needs”, in addition to the fact that it is entirely detrimental to such principles contained in the Taxpayer’s Charter and, in particular, to article 1, paragraph 2 of law No 212/2000, which imposes an “authentic interpretation” qualification provision.

To further endorse the ruling, the judges referred to the Supreme Court’s most recent positions on the said issue.

In particular, with regard to the retroactive effects of the law, the Supreme Court’s ruling No 14798/2014 provided clarifications on the restrictions pertaining to the issuing of retroactive norms, also in connection with the afore-stated authentic interpretation, generally identifying such restrictions with the need to safeguard principles, rights and assets that are constitutionally relevant as they represent “imperative motivations of a general interest”.

In particular, the Provincial Tax Commission of Reggio Emilia concluded by asserting how the said norm "may only be deemed applicable in the future", or rather, for tax years subsequent to 2013, given that, if the norm were to be deemed applicable to tax years prior to 2014, it would "violate the constitutional principle of entrustment and of good faith in Tax Authorities-taxpayer relations" by having a bearing, without "imperative motivations of a general interest".

Therefore, the norm is to be construed, if its constitutional lawfulness is to be preserved, as if its applicability were provided strictly for tax years subsequent to 2013.

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