

# Tax measures emerging from the conversion into law of the "Growth Decree"

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On 22 June 2012 the Italian Government issued the Decree Law 82 (the "Growth Decree") containing a set of urgent measures to foster the economic growth and the competitiveness of Italian enterprises (see our June 2012 client briefing).

The Law 134 of 7 August 2012 converted the Growth Decree into law with some amendments.

This briefing summarises the most significant tax measures introduced under the Growth Decree, also considering the amendments introduced by the Law 134.

## Key issues

- Access of non-listed Companies to the Capital Markets
- Subordinated bonds as a new funding instrument
- Changes to the VAT regime for lease and sales of Real Property
- Deduction of losses on receivables made easier

## Access of non-listed Companies to the Capital Markets

Prior to the Growth Decree, bonds issued by non-listed companies were penalized by the former regime providing for more restrictions regarding deduction of the interest by the issuer and for less favourable taxation for non-resident investors (i.e. no exemption). The new provisions, instead, will allow:

1. foreign investors to benefit from the exemption from substitute tax (currently at 20%) on interest and other revenues arising from bonds and similar securities issued by non-listed companies, formerly provided by Legislative Decree No. 239/1996 solely for bonds issued by banks and listed companies. The condition in order to benefit from the exemption is that the bonds and similar securities are traded on regulated markets;
2. non-listed companies to deduct interest expenses on bonds (even not traded on regulated markets) in accordance with the legislation applicable to listed companies (i.e., up to 30% of EBITDA, as shown on the most recent approved financial statements), provided that the bonds are initially subscribed for by qualified investors that are not direct or indirect shareholders of the issuer. **Law 134 deleted any reference to securities similar to bonds; accordingly, interest expenses arising from the latter seem not to be included in the new provision.**

The new provisions will apply to bonds and similar securities issued from the date of effectiveness of the Growth Decree (i.e. 26 June 2012).

Further to the amendments provided by Law 134, issuers will not be required to communicate to the Italian tax authorities the data relating to their issues of bonds and similar securities that are not traded on regulated markets.

## Project Bonds

The tax regime of the project bonds, that **has not been amended by the Law 134**, will be the same as the government bonds and can be summarized as follows:

- the investors will be subject to a withholding tax at 12.5% (instead of 20%) and an exemption would apply to non-Italian investors resident, for tax purposes, in a country which allows for an adequate exchange of information with Italy;
- interest paid to investors will be deductible by the issuer under ordinary rules concerning the deduction of interest expenses (up to 30% of EBITDA, as shown in the most recently approved financial statements); previous restrictions applicable to non-listed companies will no longer apply;
- security of any type, from any type of guarantor, given at any time in relation to the bonds will be subject to a fixed stamp, mortgage and cadastral taxes of Euro 168, rather than the ordinary indirect taxes on security, and on subrogation, subordination, splits and cancellations.

However, the favourable tax regime described above will be applicable only for 3 years starting from the date of effectiveness of the Growth Decree (i.e. 26 June 2012).

Project bonds can also be issued to refinance previous liabilities (e.g. bridge financing) before their maturity date.

## Promissory notes (*cambiali finanziarie*)

The Growth Decree, as amended by Law 134, makes the tax regime applicable to promissory notes partially consistent with that applicable to corporate bonds. In particular, the Growth Decree provides that:

1. the exemption from substitute tax (currently at 20%) under Legislative Decree No. 239/1996 also applies on interest and other revenues arising from promissory notes issued by banks and listed companies. Further to the amendments introduced by the Law 134, **the promissory notes issued by entities other than the above are still subject to the less favourable taxation for non-resident investors (i.e. no exemption);**
2. interest expenses arising from promissory notes issued by non-listed companies will be deductible according to the same provisions provided for listed companies (i.e., up to 30% of EBITDA, as shown on the most recent approved financial statements), provided that the promissory notes are initially subscribed for by qualified investors that are not direct or indirect shareholders of the issuer.

## Subordinated bonds

The Growth Decree creates the subordinated bonds as a new type of financial instrument the term of which cannot be less than 36 months and whose remuneration for the holders will be a fixed yield and a variable yield linked to the issuer's financial results.

Prior to the Growth Decree, Art. 109 of the Income Tax Code did not allow an issuer to deduct money paid to holders of their financial instruments if the yield was linked to the issuer's financial results. Changing this approach, the Growth Decree **remained unchanged further to its conversion** and provides that if the terms and conditions of a security issue include a subordination clause and require the issuer not to distribute equity (other than profits for the period) for the entire life of the issue, the variable component of the yield paid can be deducted for corporate income tax purposes, in derogation of Art. 109 of the Income Tax Code.

However, to represent an effective opportunity for Italian enterprises to broaden their sources of financing it must be excluded the risk for the subordinated bonds to qualify as atypical securities. Furthermore, it must be guaranteed the application to the subordinated bonds of the more favourable tax regime under Legislative Decree No. 239/1996. In this respect, either a new intervention of the legislator or any clarification from the tax authorities would be helpful.

## Changes to the VAT regime for lease and sales of Real Property

As a general rule, transactions for the lease or sale of real property are subject to VAT, but exempt.

The Law 134 only provided a new exception in addition to the exceptions originally provided by the Growth Decree: **the sale of residential properties that qualify as social housing within the meaning of Ministerial Decree of 22 April 2008 (a "Social House") will be subject to VAT** at 21% (reduced to either 10% or 4% if certain conditions are met) provided that the seller has opted for the application of VAT in the relevant sale agreement.

Hence, the VAT regime of the real property, amended by the Growth Decree as converted by the Law 134, can be summarized as follows.

### Residential properties

Leases would be subject to VAT at 10% if:

- the lessor opts for the application of VAT in the relevant lease agreement; **and**
- either (i) the lessor is the construction company or the enterprise carrying out Qualifying Works; or (ii) the residential property qualifies as a Social House.

Sales would be subject to VAT at 21% (reduced to either 10% or 4% if certain conditions are met) if the property:

- is sold by the construction company or the enterprise carrying out Qualifying Works **and** either (i) the sale occurs within 5 years following completion of the construction or Qualifying Works; or (ii) the sale occurs after 5 years following completion of the construction or Qualifying Works and the construction company or the refurbishing company has opted for the application of VAT in the relevant sale agreement; or
- qualifies as a Social House.

If the construction company or the refurbishing company opt for the application of the VAT (because the sale occurs after 5 years following completion of the construction or Qualifying Works or because the property qualifies as a Social House), VAT is charged under the reverse charge mechanism.

### Commercial properties

Leases would be always subject to VAT at 21% provided that lessor opts for the application of VAT in the relevant lease agreement.

Sales would be subject to VAT at 21%:

- if the property is sold by either the construction company or the enterprise carrying out Qualifying Works within 5 years from the completion of the construction or the Qualifying Works; **or**
- if the seller has expressly opted for the application of VAT in the relevant deed of transfer.

If the seller opts for the application of VAT (either because the seller is not the construction company or the refurbishing company or because the sale occurs after 5 years following completion of the construction or Qualifying Works), VAT is charged under the reverse charge mechanism.

## Losses on Receivables

Prior to the Growth Decree, under Art. 101(5) of Income Tax Code, any loss arising from the transfer of receivables was deductible:

- if deriving from "*certain and precise elements*"; and
- in any event, if the debtor were subject to a bankruptcy procedure.

The Growth Decree clarifies that also losses on receivables arising from restructuring plans pursuant to Art. 182-*bis* of the Italian Bankruptcy Law are deductible.

Furthermore, **Law 134 codifies consolidated practice by the Italian tax authorities by introducing certain irrebuttable presumptions to deem that *certain and precise elements* exist.** In particular, the *certain and precise elements* will be deemed to exist in the following cases:

1. when (i) the receivable is not higher than € 2.500, or € 5.000 for the companies under Art. 27(10) of Decree Law 185/2008 (*imprese di più rilevante dimensione*); and (ii) a period of 6 month from its due date has elapsed;
2. once the relevant right has expired;
3. for IAS adopters, when the receivable has been cancelled from the relevant financial statements.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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