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Italian Tax Authorities clarify the tax treatment of perpetual, subordinated and equity-accounted bonds

With Ruling no. 291 of 31 August 2020 (“**Ruling**”), the Italian Tax Authorities (“**ITA**”) confirm that perpetual, equity-accounted and subordinated bonds qualify as debentures similar to bonds (*titoli similari alle obbligazioni*) for Italian tax purposes.

The Ruling concerns financial instruments with the following features:

- they are perpetual instruments, as the issuer shall reimburse the capital only in the event of the winding-up (or other similar events) of the issuer; the early repayment may be made by the issuer at its sole discretion or if certain events occur;
- subject to few exceptions, the payment of interest due at each maturity date may be deferred by the issuer at its sole discretion;
- they attribute to the relevant holders (“**Investors**”) the same rights that the Italian Civil Code ordinarily attributes to bondholders;
- in the event of dissolution, winding-up or insolvency of the issuer, the claims of the Investors are subordinated to the claims of all other creditors;
- from an accounting perspective, they are accounted as equity instruments in accordance with IAS 32 (§35).

To identify the tax treatment of financial instruments, ITA refer to the definition of “debentures similar to bonds” as provided by Italian tax laws, regardless of the relevant characterization (*qualificazione*) and classification (*classificazione*) adopted by the issuer for accounting purposes. Pursuant to Italian tax law, “debentures similar to bonds” are those instruments which (i) are issued in favor of a plurality of investors (*titoli di massa*), (ii) contain the unconditional obligation to repay the capital (with or without the payment of interest) and (iii) do not attribute to their holders either any rights of direct or indirect participation to the management of the issuer or any rights to control it. Based on that, ITA reach the conclusion that the financial instruments at stake qualify as “debentures similar to bonds” for Italian tax purposes since:

- a. they are *titoli di massa*, being issued in the same context, in a plurality of identical copies and in favor of a plurality of qualified Investors;
- b. although they are perpetual, they contain the unconditional repayment obligation in case of the winding-up (or other similar events) of the issuer;
- c. they do not attribute to the Investors either rights to participate to the management of the issuer or rights to control it; according to ITA, the fact that they are subordinated to the claims of all other creditors does not have any impact on the qualification at stake to the extent that they are not subordinated to the claims of the issuer’s shareholders.

In light of the above, from the Investors’ perspective, ITA confirm the eligibility of the financial instruments at stake for the so called *imposta sostitutiva* regime set forth under Legislative Decree no. 239 of 1 April 1996. The mentioned regime provides for, *inter alia*, an exemption from withholding tax on interest payable to certain qualified foreign investors. Finally, from the issuer’s perspective, ITA confirm the deductibility for corporate tax purposes of the relevant interest expenses.

The Ruling is in line with the Firm's opinion expressed in connection with several large issuances on the market which we have provided our advice on.

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