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## Italian tax authorities clarify certain aspects of the Italian windfall tax for energy companies

On 23 June 2022, the Italian tax authorities published Circular letter no. 22/E/2022 (the “Circular”) providing clarifications regarding the windfall tax on energy companies, introduced in Italy by Law Decree no. 21 of 21 March 2022, (the “Decree 21”) converted with amendments by Law no. 51 of 20 May 2022 (“Law 51”) as subsequently amended.

### 1. Background

Decree 21 introduces a one-time 25% (initially 10%) “solidarity” tax surcharge (the “windfall tax”) applicable to entities carrying out one or more of the following activities in the Italian territory in FY 2022:

- a. production of electricity for subsequent sale and/or (ii) sale of electricity;
- b. production and/or sale of methane gas;
- c. extraction and/or sale of natural gas;
- d. production, distribution and trade of oil products; and
- e. import or purchase from other EU countries of electricity, methane gas, natural gas and oil products for subsequent resale<sup>1</sup>.

The windfall tax applies to the relevant entities that show an increase in net-sales reported for VAT purposes<sup>2</sup> of at least € 5,000,000 in the period 1 October 2021 to 30 April 2022 (initially set at 31 March 2022)<sup>3</sup>, compared to the same period of the previous year (i.e., 1 October 2020 to 30 April 2021 (initially set at 31 March 2021)), provided such increase is higher than 10%<sup>4</sup>. The tax base is represented by the net-sales increase.

The windfall tax is deductible neither from the corporate tax base – IRES - nor from the regional tax on productive activities – IRAP - one.

Payment terms are as follows (i) an advance payment of 40% of the tax due shall be paid by 30 June 2022, and (ii) the balance shall be paid by 30 November 2022<sup>5</sup>.

1 Companies which organize and manage platforms for the exchange of electricity, gas, green bonds and other fuels are not subject to the windfall tax.

2 Taxpayers shall consider the official data reported in the periodic VAT communications (*liquidazioni periodiche*, or LIPE).

3 If the balance of the period 1 October 2020 - 31 March 2021 is negative, the reference net-sales for this period shall be zero.

4 Special rules apply to VAT group members.

5 Article 37 of Decree 21 was amended before its conversion into law by article 55 of Law Decree no. 50 of 17 May 2022 (the “Decree 50”), which: (i) increased the rate of the windfall tax, bringing it to 25% (from the original 10%), (ii) extended the calculation period to 30 April 2021 and 30 April 2022 (i.e., the comparison shall be made based on the following periods (x) 1 October 2021 to 30 April 2022 vs (y) 1 October 2020 to 30 April 2021), and (iii) provided an advance payment to be made within 30 June 2022, with the balance being due within 30 November 2022. Although the provisions of Decree 50 amended article 37 of Decree 21, Law 51 – published after the publication of Decree 50) did not incorporate these amendments. It is unclear, to date, if Decree 50 should prevail on Law 51 (i.e., if the tax rate is actually increased to 25%, the time references for the comparison are changed, and the payment should be made in one or two instalments), or if Law 51, which was published afterwards and did not include the amendments made by Decree 50, shall be

According to the provision of the Director of the Italian revenue agency (*Provvedimento del Direttore dell'Agenzia delle Entrate*), published on 17 June 2022<sup>6</sup>, Prot. no. 221978/2022, the declaration of the windfall tax as well as possible refund claims must be made with the VAT return for the year 2022 – to be filed in 2023.

Entities subject to the windfall tax shall report to the Italian antitrust authority, monthly and until 31 December 2022, the average price for the purchase, production and sale of electricity, natural gas and methane gas as well as of oil products, relating of the previous month.

## 2. Clarifications provided for by Circular

### A. Subjective condition

Circular clarifies that the windfall tax:

- a. applies to all the relevant entities (whether established in Italy or not) carrying out, even residually or ancillary, any of the activities mentioned above. Said activities are broadly referenced by certain ATECO codes<sup>7</sup>;
- b. applies only to the extent that the relevant activity has been carried on during both the monitoring periods. As a consequence:
  - i) entities which started their operations after the end of the first monitoring period (i.e., after 30 April 2021) are not subject to the windfall tax; while
  - ii) entities which started their operations during the first monitoring period (i.e., between 1<sup>o</sup> October 2020 and 30 April 2021) are subject to the windfall tax. However, the calculation of the tax base shall be adjusted to consider only the increase in the net-sales of the second monitoring period which corresponds to the month/s of the first monitoring period during which the activities have been carried out. For example, entities which started operating as of 1 January 2021, must compare their net-sales data as resulting from the VAT communications (or from the VAT registers) considering that (i) the first monitoring period is 1 January 2021 - 30 April 2021 and (ii) the second monitoring period is 1 January 2022 – 30 April 2022.

Circular has also clarified the concept of “starting of the relevant activity”, which means the moment when the relevant entity has become subject to VAT, i.e., when the taxpayer has started operating, even if the operations are limited to activities of a preparatory nature aimed at setting the conditions to operate, and a VAT code has been issued for the relevant taxpayer.

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prevailing, with the effect of repealing the amendments made by Decree 50. However, since Decree 50 shall be converted into law within 60 days from its publication on the Official Gazette, the relevant taxpayers should consider applying the less favorable tax regime provided for by Decree 50 (25% tax on the increase realized until 30 April 2022 compared to the one realized within 3 April 2021 in two instalments), save the possibility to file a refund claim in case the amendments made with Decree 50 are not considered valid, or are repealed or amended, or if Decree 50 is not converted.

6 Full text of “*Provvedimento del Direttore dell'Agenzia delle Entrate*” (in Italian) available at this [link](#).

7 ATECO codes provide for an official classification of economic activities. The relevant ATECO codes indicated by the Italian tax authorities are the following; 06.20.00 (Natural gas extraction); 19.20.10 (Oil refineries); 19.20.20 (Preparation or blending of petroleum derivatives, excluding petrochemicals); 19.20.30 (Blending of liquefied petroleum gases (LPG) and their bottling); 19.20.90 (Manufacture of other refined petroleum products); 35.11.00 (Production of electricity); 35.14.00 (Electricity trading); 35.21.00 (Gas production); -35.23.00 (Pipeline-distributed gas trade); 46.71.00 (Wholesale trade in automotive petroleum products and lubricants, heating fuels); 47.30.00 (Retail trade in motor fuels).

## B. Tax base

Regarding the calculation of the windfall tax, Circular clarifies that:

- a. taxpayers reporting VAT operations on a quarterly basis (*LIPE trimestrali*) rather than on a monthly basis, shall refer to the VAT registers to identify the amounts of the relevant operations carried out during each of the months between April 2021 and April 2022;
- b. companies carrying out more than one activity must include their overall net-sales amount when calculating the tax base, with no possibility to apply a pro-rata method or exclude transactions which do not have anything in common with the target of the windfall tax. Indeed, the broad reference to the net-sales amount reported for VAT purposes includes revenues deriving from every possible operation subject to VAT, even if ancillary, non-recurring, or not included in the ATECO codes specified by Circular (like transfers of assets, including real estate assets and participations, financial and extraordinary transactions);
- c. the calculation of the relevant net-sales shall not include transactions which do not fall within the scope of application of VAT due to the lack of either of the three main VAT conditions (subjective, objective and territoriality conditions, notwithstanding the fact that the VAT communications include also transactions which are out of the scope of VAT due to the lack of the territoriality condition);
- d. in case of import-export of oil products, where the amount shown in the VAT communications of the active operations include the amount of the import duties<sup>8</sup>, there is no ground to neutralize the impact of such import duties. This leads to an increase of the relevant parameter on the revenue-side.

## C. VAT group

According to Circular in case of a VAT group the windfall tax is charged on each of the companies members to a VAT group, provided they exercise one or more of the relevant activities.

The computation of the tax base is however more complex since each intra VAT group transaction is relevant.

Compliance obligations are on the VAT group, which is also in charge of the periodic VAT communications. However, to calculate the amount of the windfall tax, each relevant entity must re-run the periodic communications that it would have made for the monitoring periods as if it were a self-standing VAT person (sort of “virtual” VAT periodic communications).

## 3. Considerations on the windfall tax

Market has heavily criticized the structure of the windfall tax. The main reservations focus on:

- 1) the selective nature of the windfall tax, targeting only companies operating in the energy sector;
- 2) the definition of the tax base, apparently deviating from the declared intention to tax the extra-margin derived by energy enterprises;
- 3) the retroactive applicability;
- 4) the non-deductibility of the windfall tax, which is contrary to the general principles regulating the computation of business income under Italian law;

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<sup>8</sup> Which are paid to the Italian State and re-charged to final clients.

- 5) possible breach of the constitutional principles concerning taxes, including in particular articles 3 and 53 of the Italian Constitution and the principles of proportionality and fiscal capacity (*proporzionalità* and *capacità contributiva*);
- 6) possible incompatibility of the windfall tax with certain EU regulations.

#### **4. How can we help?**

There are arguments to maintain that windfall tax (as currently devised) may breach several laws and principles including certain principles set forth by the Italian Constitution.

If the windfall tax is found to be contrary to the Italian Constitution, this could pave the way to refunds procedure. The most conservative way to plan a challenge of the windfall tax would be making the payment first and request a refund at a later stage. Italian tax law provides for a term of 48 months from the date of payment to submit a refund claim.

Depending on the number of claims, it cannot be excluded that amendments to the relevant laws will be introduced.

GOP has extensive knowledge of the energy industry and the intricacies of the tax regulations. Our multi-disciplinary team is available to provide advice and assistance with any activity related to the windfall tax, including the submission of refund claims, the management of the subsequent procedure, and the management of possible judiciary claims.

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