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POSTED WORKERS AND WORKERS ON ASSIGNMENT ABROAD: A DIFFICULT COEXISTENCE

The Lawmaker aimed at providing an authoritative interpretation on the determination of income earned by posted workers and workers on assignment abroad, as governed by the TUIR (Italian consolidated law on income tax).

With the Tax Decree linked to the 2017 Budget Law, the Lawmaker finally removed the shadows from the two fundamental institutions for HR Managers. The reference in this sense is the authoritative interpretation given to posted workers and workers on assignment abroad by art. 7-quinquies of Law Decree no. 193/2016, converted into Law no. 225/2016, which attempted to highlight the specific elements of these institutions.

It seems strange but the definition itself and the correlated differences between a "posted worker" and a "worker on assignment abroad" have never been discussed by any Lawmaker, so much so that in order to operate in an unequivocal manner it was decided to only adopt indications already existing on the subject, i.e. those provided by the Tax Lawmaker.

"Posting" has always meant the temporary or provisional transfer, mandated by the employer, of an employee to a place other than their normal place of work. This mandate, an expression of the broadest governing power recognised under article 2086 of the Civil Code, allows posting one or more workers away from their normal workplace and provides for their return once they have fulfilled the working obligations of the posting. It follows directly that workers posted away from their normal workplace remain subject to the hierarchical, managerial and disciplinary power of the employer, i.e. nothing changes with regard to the worker's position inside the pre-existing organisation of work.

As mentioned above, the regulation of tax treatment of the posting institution is governed by paragraph 5 of article 51 of Presidential Decree no. 917/1986, which places limits on the taxability of the allowances to be paid by the employer to his employees. In fact, while the posting allowance recognised for the assignment away from the normal workplace is considered taxable income for the portion exceeding € 46.48 per day, or € 77.47 if the posting is abroad, net of travel and transport expenses, these limits are reduced by one third if the board or lodging are provided free of charge, or reduced by an additional one third if both benefits are reimbursed to the employees. In addition, if the employer reimburses the workers for any expenses incurred during the posting or transfer, provided that the worker provides appropriate supporting documents, e.g. invoices or tax receipts with the customer's identification data (so-called "reimbursement of expenses against receipts/invoices"), these amounts shall not be included in the employee's taxable income.

Likewise, the TUIR dedicates a special and different tax treatment to workers on assignment abroad: in accordance with article 51, paragraph 6, allowances and salary increases payable to workers contracted to perform their job in various different places, even if paid in a continuous manner, shall contribute to form 50% of the total income.

In order to get a legal definition of the worker "on assignment abroad", the Lawmaker made us wait thirty years and intervened with what can be termed as a "coup de theatre" that still causes some embarrassment, not only to workers.

In this regard, the Lawmaker recently intervened with the aforementioned art. 7-quinquies of Legislative Decree no. 193/2016, once again rehashing a previous address and thus establishing that workers falling within the category of workers on assignment abroad are those where the following conditions exist:

- the failure to indicate the predetermined workplace in the employment contract or letter;
- performance of a job that requires continuous mobility of the employee;
- payment to the employee, in relation to the job in various different places, of a fixed allowance or salary increase, attributed regardless of whether the employee has actually been posted away from his normal workplace and where he performs his job".

If even only one of the three mentioned elements – formal, substantial or material – is missing, then the treatment is the same as that provided for the posting allowances referred to in paragraph 5.

To use a euphemism, we can say that the rule is rather "strange":

- firstly, because of the contradiction of the literal wording of the regulation with the specific provision (i.e. Legislative Decree no. 152/97 which explicitly states that the Employer must indicate in the letter of employment, "the workplace; in the absence of a fixed or predominant workplace, indication that the worker will be employed in different locations, as well as the head office or domicile of the employer");
- secondly, because the regulation in question highlights an equally obvious operational contradiction, since if the company has more than one workplace and pays the worker a salary increase for each effective day of work performed in different places, then the worker can no longer be considered a "worker on assignment abroad" but could potentially be considered as "being posted" with the applicability of the tax regime for that institution.

Moreover, since the workplace is not indicated in the individual employment contract, it would not be easy to prove on a probative basis the actual location whereby it would be possible to immediately verify the integrability of the posting situation.

Circular 326/E of 23 December 1997 clarified the extent of paragraph 6 of the TUIR, meaning that all those workers who are entitled to an allowance must be subject to this provision. This does not specifically have to be linked to the posting but can be recognised by contract and for all paid days, without distinguishing whether the employee is actually working away from his normal workplace and where this workplace is located.

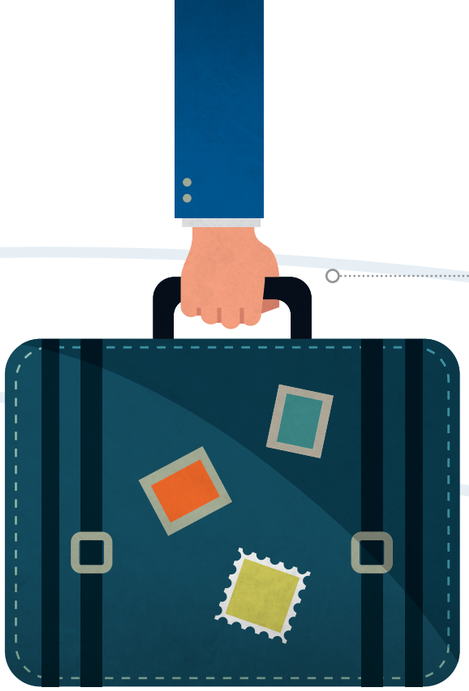
It is also useful to note that according to not very dated jurisprudence (2004), the rule on workers on assignment abroad does not necessarily require allowances and increases to be paid in a fixed and continuous manner in order to be operative, and this also regardless of the posting or its type. According to this interpretation, the reasoning for this regulation would come from the contractual obligation assumed by the employee to perform his job in various different places, away from his predetermined workplace.

Whereas other recent jurisprudence (2016) showed that in order to identify the applicable tax regime, the specific characteristics of the job should be evaluated if always performed in variable places and not instead the ways in which the remuneration is paid, even if paid on a continual basis: if this is not the case, the applicable tax and contribution regime would depend on the payment methods of the remuneration left to the discretion of the parties, which would become arbitrary.

The authoritative interpretation of Leg. Decree no. 193/16 therefore, certainly gives rise to more than one perplexity: it contradicts or at least appears to contradict a rule of the State (those mentioned above in Leg. Decree no. 152), which inter alia transposes a European Directive in foreseeing that it is not obligatory to disclose to the worker the place where he will predominantly perform his job.

We certainly cannot say that our Lawmaker is negligent, therefore, we can only assume that he did not re-read his drafts very carefully...

Could it simply be the fault of a missing adjective? We have to be fair and simple as our expert Lawmakers seem to be: is it possible that the Lawmaker only forgot to insert the word "precise" between "failure" and "indication of the workplace"?



POSTED WORKER

- *Performs his job in a place other than his normal workplace*
- *Allowances and reimbursement of expenses incurred during the posting are governed by article 51, paragraph 5 of the TUIR*

WORKER ON ASSIGNMENT ABROAD

ONLY IF THESE THREE CONDITIONS EXIST AT THE SAME TIME:

- *The pre-determined workplace is not specified in the employment contract*
- *Continuous mobility of the employee in the performance of his job*
- *Payment of a fixed salary increase or allowance*