

## SECURITISATION WITHOUT SECURITIES: LOANS ARE NOT NOTES FOR TAX PURPOSES

### Introduction

This is a follow-up to [Square The Circle of April 2021](#) (*Securitisation Without Securities: New Funding Structures Available to Italian Securitisations*) and is written in light of certain clarifications recently issued by the Italian Tax Authority (the “**ITA**”).

In December 2020, the Italian Budget Law for 2021 introduced, in addition to the traditional asset-backed notes (the “**Notes**”), an alternative funding tool for Italian securitisation vehicles (the “**SPVs**”). Now SPVs may fund the acquisition of assets in securitisation transactions through the proceeds of *ad hoc* financings in the form of loans advanced by lenders authorised to grant loans in Italy (the “**Alternative Financings**”).

In Square The Circle of April 2021, as clear guidance was lacking in the newly enacted law, we contributed our first thoughts to the debate about which tax regime is applicable to Alternative Financings.

### Recent Tax Ruling

Ever since the enactment of the 2021 Italian Budget Law, no official direction has been provided on the tax regime applicable to Alternative Financings and no consensus has been reached by the operators as to whether Alternative Financings should benefit from the same tax regime applicable to the Notes or – as expressed in Square The Circle of April 2021 – they should fall within the scope of the tax regime applicable to loans generally.

In this uncertain environment, ITA has recently issued a tax ruling on the matter (Tax Ruling no. 571/2022 or the “**Tax Ruling**”).

The case considered by ITA is about a SPV which, in the context of a securitisation transaction carried out under article 7.2 of the Italian securitisation law<sup>1</sup> (*i.e.*, a so-called “real estate securitisation”), funded the acquisition of a real estate portfolio consisting of four commercial properties via the proceeds of a loan granted by the Italian branch of a French bank (the “**130 Loan**”, the “**Italian Branch**”, and the “**French Bank**”, respectively).

Thereafter, the Italian Branch started to syndicate the 130 Loan in the international loan market. At the time of the Tax Ruling, however, the syndication process was not completed and, therefore, the identity of the new lenders was unknown.

Under these circumstances, the SPV submitted to ITA a request for a tax ruling confirming that the 130 Loan would be subject to the same tax regime applicable to the Notes pursuant to the combined provisions of article 6 of the Italian securitisation law and the Italian Legislative Decree no. 239/1996 (the “**239 Regime**”).

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<sup>1</sup> Law no. 130 of 30 of April 1999.

In particular, under the 239 Regime, Notes held by non-Italian residents are exempted from the 26 per cent. substitute tax (*i.e. imposta sostitutiva*) on interest payments, provided that the holders of the Notes are the beneficial owners of the relevant income and are resident, for tax purposes, in a country which allows an adequate exchange of information with the Italian tax authorities (so-called “white list jurisdictions”).

However, ITA did not accept the proposal put forward by the SPV and the Tax Ruling ruled out the possibility that the 130 Loan (and, therefore, Alternative Financings in general) may benefit from the 239 Regime, irrespective of whether the relevant conditions are satisfied.

The Tax Ruling is in keeping with the position expressed in the April 2021 edition of Square The Circle. ITA maintained that the 130 Loan is subject to the tax regime generally applicable to loans and, therefore, to a 26 per cent. withholding tax (*ritenuta*) on interest payments made to non-Italian residents for tax purposes, unless the withholding exemption for medium-long term loans under article 26, paragraph 5-bis, of the Presidential Decree no. 600/1973, is applicable (the “**Withholding Exemption**”).

### **An Interesting Hint**

In order for a loan to benefit from the Withholding Exemption, the following conditions need to be satisfied:

- a) the loan has a maturity exceeding 18 months;
- b) the loan is granted by an authorised lender under Italian law;<sup>2</sup>
- c) the borrower qualifies as an “enterprise” (*impresa*) for tax purposes; and
- d) interest is paid to (and beneficially owned by) a “qualified” lender (including, *inter alios*, banks established in an EU Member State, EU permanent establishment of non-EU banks, non-Italian institutional investors established in a State or territory allowing for an adequate exchange of information with Italy, provided that they are subject to forms of regulatory supervision in their home countries).

However, in the case considered by the Tax Ruling, ITA was unable to reach a conclusion on the applicability of the Withholding Exemption given that the condition under d) above could not be verified since the syndication was not completed and the identity of the new lenders was still unknown.

One can argue that, based on the explanation in the Tax Ruling, the conditions under a), b) and c) were met. If this argument is correct, then the Tax Ruling is consequential in that it provides indirect confirmation that SPVs qualify as “enterprises” (*imprese*) for tax purposes, which has been a controversial issue for some time.

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<sup>2</sup> Under the Resolution of the Italian Tax Authority no. 76/2019, however, this conditions may be disappplied if the loan is granted to an Italian borrower that is directly or indirectly owned by the foreign lender.

### **Final Remarks**

In conclusion, the Tax Ruling has finally clarified that Alternative Financings are subject to the tax regime generally applicable to loans (as opposed to the 239 Regime).

Under the applicable tax regime, interest payments on Alternative Financing may still be exempt from Italian taxation but stricter conditions than those under the 239 Regime need to be met.

Finally, the Tax Ruling has touched, although incidentally, on whether or not SPVs qualify as enterprises (*imprese*) for tax purposes, and has arguably provided an affirmative view on this question.

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