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# Tax regulation of "innovative" start-up companies within the Italian legal system: an overview

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## 1. Introduction: the regulatory framework and its evolution.

Articles 25 through 32 of Law Decree n. 179 of 2012 – the so-called "*2.0 growth decree*"[1] – introduced, "*for the first time ever in the Italian legislation, a consistent legal framework for start-up companies*"[2].

In the legislator's view[3], the new regulation aims at encouraging the creation and development of new "*innovative*" companies[4], granting them several advantages under different points of view (tax facilitations, simplifications for company law purposes, greater flexibility of employment

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[1] Law Decree n. 179 of October the 18th, 2012, Section 9, converted into Law n. 221 of December the 17, 2012; hereinafter, briefly, the "*Decree*".

[2] Explanatory Memorandum to art. 25, Law Decree no. 179/2012.

[3] The regulation draws much of its inspiration from the "*Restart, Italia!*" report by the "Start-up task force" of the Ministry for Economic Development, published on September the 13th, 2012. (http://www.sviluppoeconomico.gov.it/images/stories/documenti/rapporto-startup-2012.pdf).

[4] Art. 25, § 1 of the Decree states that the provisions under Section 9 "*are meant to promote the sustainable growth, the technological development, new entrepreneurship and employment, especially of the youth, with reference to innovative startups as hereinafter defined*", and to contribute "*to the development of a new business culture, to the creation of a more innovation-oriented overall context, as well as to promote greater social mobility and to attract towards Italy talented individuals, innovative companies and investment capitals from abroad*".

contracts, etc.)[5].

Some modifications to the Decree were recently introduced by art. 9, § 16 of Law Decree n. 76 of June the 28th, 2013 ("*extraordinary measures in order to promote employment, especially of youth*"), which, in the substance, simplifies some of the requirements that a startup company must possess in order to qualify as an "*innovative*" one.

In brief, Section 9 of the Decree deals with the following aspects:

a. definition of "*innovative start-up company*" and statement of the requirements to qualify as such[6];
b. facilitations for the purpose of company law;
c. tax incentives to the investment in start-up companies;
d. tax reliefs on the remuneration of employees by means of financial instruments issued by the start-up companies;
e. facilitations in connection to the tax regulation of "shell companies";
f. tax credit for the employment of highly qualified staff and facilitations for the purpose of employment contracts;
g. funding of innovative start-ups (including crowdfunding processes);
h. bankruptcy and insolvency procedures.

This paper, after outlining the notion of "*innovative start-up*" under the Decree, is aimed at providing a concise overview of the legal framework currently in force, focusing on the tax issues (i.e. letters c. to f. above).

On this subject, it has to be forthwith stated that no specific relief is allowed in favor of innovative start-ups as far as the taxation of their income is concerned: both for IRES (corporate tax) and IRAP (local tax on business activities) purposes, start-up companies remain in fact fully subject to taxation under ordinary rules, just as any other limited company[7] – i.e., their taxable base is determined according to the general principles of the Italian Tax Act, no additional or distinctive tax deductions or allowances apply, nor more favorable tax rates are awarded.

## 2. Innovative start-ups: definition and requirements.

[5] Section 9 of the Decree also supplies a regulation for "*certified incubators of innovative start-up companies*"; however, such subject is beyond the scope of this paper and will not be specifically discussed.

[6] A specific category of "*innovative start-ups with social vocation*" is also defined, including companies exclusively operating in the sectors of health, social assistance, education, environment protection, promotion of the cultural heritage, social tourism, etc.

[7] The only actual exception being their (temporary) exemption from the "shell companies" regulation.

The Decree devotes § 2 and 3 of art. 25 to the definition of "*innovative start-up companies*" as well as to stating the requirements they must be in possession of, in order to legally qualify as such – and, therefore, in order to benefit from the facilitations under the Decree.

First of all, an innovative start-up is defined as a company incorporated under the legal form:

a. either of "*Società per Azioni*" ("*S.p.A.*", public limited company), of "*Società a Responsabilità Limitata*" ("*S.R.L.*", private limited company), of "*Società in Accomandita per Azioni*" ("*S.A.p.A.*", publicly traded partnership) or of "*Società Cooperativa*" (Cooperative Society), as defined by the Italian Civil Code;
b. or of *Societas Europaea*, as defined by the E.U. Council Regulations no. 2157 of 2001 ("*Statute for a European Company*") and no. 1435 of 2003 ("*Statute for a European Cooperative Society (SCE)*").

Partnerships and sole proprietorships are, therefore, radically excluded from the possible qualification as innovative start-ups[8].

In addition, companies under letter a above must be "*incorporated under Italian laws*". According to art. 25 of Law no. 218 of May the 25th, 1995[9], a company is subject to the law of the State in whose territory its process of incorporation has been perfected; as a consequence, a company whose statutory registered office is located in Italy, and whose articles of incorporation are registered at the Italian Business Registry territorially in charge, shall be deemed as "*incorporated under Italian laws*"[10]. As for companies under letter b, they must be "*resident in Italy*" (under the Italian Tax Code currently in force[11], a company is an Italian resident if either its registered office, or the seat of its administration, or the main object of its activities are located in Italy during most of the financial year).

Furthermore, the shares of an innovative start-up must not be listed neither in regulated markets, nor on MTFs[12]; on the other hand, according to

[8] This may find its reason, according to scholars, in the recent introduction of the "simplified" types of private limited companies, which allow to combine the benefit of limited liability with capital contributions of extremely moderate amount (M. MALTONI, P. SPADA, "*L'impresa start up innovativa costituita in società a responsabilità limitata*", February the 27th, 2013, www.cavererespondere.it).

[9] "*Reform of the Italian system of International Private Law*".

[10] Further details on the subject are provided by ASSONIME in its Circular Letter no. 11 of May the 6th, 2013 - "*L'impresa start up innovativa*", pages 8-9; G. FERRANTI, "*La detassazione degli investimenti nelle start-up innovative*", Corriere Tributario, no. 42/2012, page 3234.

[11] Decree no. 917 of December the 22nd, 1986, art. no. 73

scholars, innovative start-ups are allowed to have their debt securities listed[13].

Provided that the conditions above are met, the qualification of a company as an innovative start-up additionally presupposes the fulfillment:

1. of a number of cumulative requirements (i.e., all of them must be met at the same time); and
2. of at least one among several alternate requirements (i.e., the possession of one of them is deemed as sufficient).

Generally speaking, the age, nationality, residence or domicile of the founders and investors is not relevant[14].

### *2.1. Cumulative requirements*[15].

a. The Decree, in its original text, required the majority of shares (and of voting rights) to be owned by natural persons at the time of the company's incorporation and during the following 24 months. Said requisite was recently suppressed by Law Decree n. 76/2013; therefore, at the present time no restraints any longer exist with reference to the ownership of shares – i.e., even if all shares are be owned by legal persons, the company can qualify as an innovative start-up (provided, of course, that the other requirements are met).
b. The company must be incorporated, and carry out business activities, since no longer than 48 months (as stated in deeper detail in the following pages, the qualification as innovative start-up – as well as the right to benefit from the related facilitations – has a temporary nature, and cannot exceed 4 years from the date of incorporation).
c. The "*main seat of the company's business and interests*" must be situated in Italy (this patently shows close relation with the requirement that the company must be "*incorporated under Italian laws*", and have its statutory registered office in Italy).

   No specific definition of such "main seat" is provided in the Italian legal

[12] "*Multilateral Trading Facilities*", introduced within the MIFID E.U. Directive (no. 2004/39/EC), and defined as "*trading venues alternative to bi-lateral regulated markets*", whose activity "*is reserved to investment firms, banks and market management companies*" (http://www.consob.it/mainen/markets/Multilateral_Trading_Facilities/index.html).

[13] M. MALTONI, P. SPADA, "*L'impresa start up innovativa*", cit.

[14] A. VERNA, L. GAMBINI, "*The new regulation on 'innovative' start-ups in Italy*", I.B.A. European Regional Forum Newsletter, May 2013.

[15] Article 25, § 2, letters a) trough g).

system. Nevertheless, jurisprudence as well as scholars have come to define a well-established notion of "*sede effettiva*" ("*actual seat*"), which identifies with the place where the management and administration of the company occur, and where its managers and director take their decisions[16] (and may therefore not be coincident with the company's registered office, although they are assumed to correspond unless it is proved that the actual seat is located elsewhere)[17].

d. The company's "*value of production*"[18] must not exceed € 5 million. The compliance with this requirement must be verified "*starting from the company's second year of activity*"; the formulation of the rule does not clarify whether the compliance check must be carried out at the closure of the company's second financial year (which may mean less than 24 months since its establishment, as the first financial year following incorporation usually has a shorter duration than the full calendar year) or at the closure of the second full year of activity. Scholars deem this second option to be preferable, under both the literal and the substantial points of view[19].

e. The company distributes no dividends, nor has it distributed any since the day of its incorporation. This condition is required in order to ensure that the company is seriously devoted to strengthening its own equity and support its own growth through self-financing.

f. The company's sole or predominant object must be "*the development, production and sale of innovative goods or services, bearing high technological value*".

No further indication is provided, in order to identify the goods and services which comply with such requisite; nonetheless, the prevailing opinion among scholars is that the wording of the Decree must be interpreted in a very broad manner, meaning that (a) the possible fields of activity of an innovative start-up cannot, in the abstract, be limited to

[16] Among the most recent judgments on this subject, see Corte di Cassazione, no. 6886 of May the 6th, 2012; no. 14676 of August the 28th, 2012; no. 23200 of December the 17th, 2012.

[17] In the E.U. legal context, the Council Regulation no. 1346/2000 of May the 29th, 2000 on insolvency proceedings introduced the notion of "*Centre Of Main Interests*" (COMI), stating that "*the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*".

[18] Such value coincides with the total of section A of the company's profit and loss account, as drawn up in compliance with art. 2425 of the Italian Civil Code. The value of production mainly includes the revenues from sales and services as well as other revenues and income.

[19] ASSONIME, Circular Letter no. 11 /2013, page 13.

specific sectors, since, potentially, highly innovative goods and services can be developed within any of them, even the most traditional ones; and (b) that reference should be made to all economic activity which may originate new products or services, as well as new methods to produce, distribute and use them[20].

Neither it can be forgotten that the formulation of the company's main object, as resulting from the articles of association, is in most cases very concise, thus making it unlikely that it may contain a detailed identification of said innovative goods and services.

g. The company cannot stem from a merger or a demerger[21], nor can it originate from a transfer of business or of a business branch[22]; in order to be entitled to the benefits and facilitations for the innovative start-ups, the regulation requires companies to actually embody new business initiatives[23].

### *2.2. Alternate requirements[24].*

In addition to the "cumulative" requirements above, a company must fulfill at least one out of the three following requisites, in order to demonstrate its actually innovative nature.

1. Research and development expenses must equal at least 15%[25] of the highest amount between (a) the value of production and (b) the costs of production[26]. In order to identify the amount of said "research and development expenses", reference must be made to the Italian GAAP which

[20] ASSONIME, Circular Letter no. 11 /2013, page 13; ALBERTI P., TOSCO F., VITALE R., "*Disciplina di favore per le start-up innovative*", Schede di aggiornamento Eutekne, no. 1/2013; E. PUCCI, L. SCAPPINI, "*Le start-up innovative: caratteristiche e agevolazioni*", Il Fisco, no. 41/2012, page 6651.

[21] "*Fusione*" and "*scissione*", respectively under art. 2501 and 2506 of the Italian Civil Code.

[22] "*Cessione di azienda*" or "*cessione di ramo di azienda*".

[23] For the same reason, although not expressly mentioned by art. 25, the opinion prevails that an innovative startup cannot originate from the conversion of the legal form of an existing company ("*trasformazione di società*" under art. 2498 through 2500-nonies of the Italian Civil Code).

[24] Article 25, § 2, letter h).

[25] Under the original text of the Decree, the threshold was set at 20%; it was lowered to 15% by Law Decree n. 76/2013.

[26] The "*costs of production*" equal the total amount of section B of the company's profit and loss account as drawn up in accordance to art. 2425 of the the Italian Civil Code. During the first year of the company's activity, as long as no approved financial statements exist, a statement signed by the company's legal representative can be used in order to state the amount of "value" and "costs of production".

regulates the subject[27].

According to OIC 24, three categories can be distinguished within the context of R&D expenses:

a. costs for basic research;
b. costs for applied research;
c. development costs.

Basic research is defined as the set of "*studies, experiments, surveys and research that does not have a precisely defined purpose, but which are in condition to provide a general benefit to the company*", increasing its knowledge base. The costs for basic research cannot be amortized, as their nature is that of ordinary, recurring operational activities; rather, they must be entered into the profit and loss account, in compliance with the accrual principle.

Applied research, aimed at a specific product or a specific production process, consists in the combined studies, experiments, surveys and investigations which directly refer to the possibility (and profitability) to accomplish given projects. Development can, instead, be defined as the application of the results of previous research activities (or of knowledge otherwise acquired) to "*a production program of goods, materials, tools, processes, systems and new or substantially improved services*", in view of their utilization for commercial purposes.

The expenses for applied research and development can be capitalized, under OIC 24, provided that some conditions are met, which generally pertain to the recognition of their future "usefulness" or "profitability". In detail, the amortization of said costs if allowed if, at the same time:

a. they refer to a clearly defined product or process;
b. they are identifiable and measurable;
c. the project to which they pertain is feasible;
d. they can be recovered through the future revenues (and cash flows) that will be originated by the exploitation of the project[28].

[27] See OIC 24, approved on May the 30th, 2005; the document can be freely downloaded from the OIC website (http://www.fondazioneoic.eu). According to art. 2426 of the Italian Civil Code, research and development expenses can be capitalized – i.e. entered in the financial statements as amortizable assets – with the consent of the Board of Statutory Auditors, and must be amortized over a period not exceeding 5 years. See also S. GUIDANTONI, "*Le start up innovative e la definizione di costi di ricerca e sviluppo*", Il Fisco, no. 14/2013, page 2072.

[28] OIC 24 points out several examples of amortizable R&D costs, such as, where applicable:

- salaries, wages and other costs for staff engaged in R&D activities;
- the cost for materials and services used in R&D;
- depreciation of plant and equipment, insofar as said assets are deployed in R&D activities;

In addition, art. 25 of the Decree states that, for the specific purposes of the innovative start-ups regulation, the following are to be deemed as R&D expenses, too:

a. costs for pre-competitive and competitive development, such as experimentation, prototyping and development of business plans;
b. costs for incubation services provided by certified incubators;
c. gross costs of staff (as well as of advisors) employed in R&D activities, including shareholders and directors;
d. legal fees and costs incurred for the registration and protection of intellectual property rights, licenses and terms of use.

On the other hand, in no case the costs for the purchase or lease of real estate can be qualified as R&D expenses for the purpose of the Decree.

2. As an alternative[29], the company can prove its innovative nature – by virtue of the attributes or academic qualifications of its employees or "*collaborators in any capacity*"[30] – if:

a. at least one third of the "*workforce*" is made up of personnel:
   i. either in possession of a Ph.D., or who is currently taking a Ph.D. at an Italian or foreign University;
   ii. or in possession of a University degree, and who has been carrying out, since at least three years, certified research activities at public or private research institutions, in Italy or abroad;
b. at least two thirds of the "*workforce*" is made up of personnel in possession of a master degree ("*laurea magistrale*") according to Decree no. 270 of October the 22nd, 2004[31].

The interpretation of the present requirement gave rise to some difficulties, since the text makes use of non-technical terms (such as "*workforce*" – "*forza lavoro*" in Italian) which do not possess a specific legal meaning; similarly, it is unclear which extent must exactly be attributed to the notion of "*employees or collaborators in any capacity*".

According to qualified scholars, despite the literal reference to "*employees or collaborators*", the factual reality of start-ups must be taken

– other costs, such as amortization of patents and licenses, insofar as they are used in R&D activities;
– indirect costs for R&D, other than general and administrative expenses.

[29] Art. 25, § 2, letter h), number 2.

[30] "*Collaboratori a qualunque titolo*" in the Italian text.

[31] The alternative requirement under letter b. was not included in the original text of the Decree, and was recently added by Law Decree no. 76/2013.

into account, in which, most often, the company's directors themselves are directly and actively involved in the operational activities of the innovative processes. Therefore, in order to quantify the "*workforce*" and verify whether the 1/3 or 2/3 thresholds are met or exceeded, the directors of the company must be taken into account as well[32], meaning that they must count both in the denominator (overall workforce) and in the numerator ("qualified" employees or collaborators)[33].

3. Based on the third possible alternative, the company can qualify as an innovative start-up if it is the owner or licensee of at least one patent for:

a. industrial or biotechnological inventions;
b. a topography of semiconductor products;
c. new plant varieties;
d. original software, under the condition that it is registered at the Italian "*Public Register for Computer Programs*"[34];

provided that such patent(s) are "*directly related to the corporate purpose and to the business activity*".

The provision under letter d. was not included in the Decree's original text[35], which led several scholars to raise some questions of interpretation. In particular, according to the Italian laws in force, the safeguard of original software falls within the same legal context of copyright on literary and artistic works[36], rather than in the one of industrial patents; therefore, in the absence of a specific provision – as was until the approval of Law Decree no. 76/2013 – the doubt would persist that a company being the owner or licensee of copyrights on software might not legally qualify as an innovative start-up, regardless of the actual content or purpose of such software ad of its possibly innovative nature[37].

[32] ASSONIME, Circular Letter no. 11 /2013, page 16.

[33] Taking this approach one step further, it may well be argued that not only the directors should be counted in the "workforce", but also those shareholders who – despite being neither members of the company's administrative body, neither employees of the company – actually perform working activities within the start-up (this at least with reference to those shareholders which are registered as "working partners" for social security purposes at INPS – Italian Institute for Social Security).

[34] The register is operated by SIAE ("*Società Italiana Autori ed Editori*"), a "*multi-purpose public society*" which manages licenses in order to "*facilitate the payment of royalties by the users and to protect the authors' works*" (see http://www.siae.it/index.asp).

[35] It was added, as well, by Law Decree no. 76/2013.

[36] Legislative Decree no. 518 of December the 29th, 1992.

[37] ASSONIME, Circular Letter no. 11 /2013, page 15.

## 3. "Temporary" nature of the "facilitated regime" for start-ups. Other accomplishments.

In principle, the special regulation for innovative start-ups can be applied during 4 years from the date of the company's incorporation[38]. As the regulation aims at "*creating functional system conditions for the birth and consolidation of this type of corporate enterprises (...), it therefore does not accompany the company for its entire life, but only for a phase of predetermined duration, which has been deemed appropriate by the legislature for the purpose*"[39].

Specific provisions exist for companies which had already been established on the date of conversion of the Decree into Law, which took place on December the 19th, 2012[40]. In detail:

a. for newly established start-ups (incorporated after December the 19th, 2012), the regime actually lasts for 4 years since their formation;
b. for companies which had already been established on December the 19th, 2012, the actual duration of the "facilitated regime" is different depending on when the start-up was incorporated:
    1. if the company was formed less than 2 years before the entry in force of the Decree (October the 20th, 2012), the regulation will apply for 4 years starting from October the 20th, 2012;
    2. if it was formed more than 2 but less than 3 years before the entry in force of the Decree, the regulation will apply for 3 years starting from October the 20th, 2012;
    3. finally, if it was formed more than 3 but less than 4 years before the entry in force of the Decree, the regulation will apply for 2 years starting from October the 20th, 2012.

No facilitations are allowed to companies incorporated more than 4 years earlier than October the 20th, 2012.

Pursuant to art. 31, § 4 of the Decree, once 4 years have elapsed from the date of incorporation – or from the different applicable date, according to

[38] As already stated, the start-up must carry out business activities since no longer than 48 months.

[39] ASSONIME, Circular Letter no. 11 /2013, page 16; G. MANZI, "*Start-up ed incubatori certificati: il nuovo status per l'imprenditorialità innovativa*", Bilancio e reddito d'impresa, no. 5/2013, page 49.

[40] Art. 25, § 3.

letter b above – the rules of Section 9 shall cease to apply[41].

In order to benefit from the regulations under the Decree, start-up companies must register in a specific section of the Business Registry[42]; such registration explicates constitutive effectiveness in order to the legal qualification as a innovative start-up. For the purpose, the company's legal representative must file[43]:

1. a self-certification stating that the company is in possession of all the requirements under the Decree[44];
2. an application for the registration in the special section of the Business Registry (additional, for both newly incorporated and existing companies, to the customary and compulsory enrollment in the ordinary section of the Registry)[45].

According to art. 25, § 3, the documentation above had to be filed, by the companies already in existence, "*within 60 days from the conversion of the Decree into law*" (i.e. within February the 17th, 2013); the Ministry of Economic Development made it clear[46] that such deadline does not have peremptory nature, so that a late application will not prevent the start-up from being registered in the special section (of course, the reliefs and facilitations will not apply until the registration is complete).

The obligation exists to update the information provided at least every six

[41] Since art. 25, § 3 refers on one side to "*the date of conversion into law*" (December the 19th) and, on the other, to "*the date of entry in force*" of the Decree (October the 20th), some doubts have been raised with reference to the duration of the special regulation for companies whose incorporation took place in between said dates. Some scholars (ALBERTI, TOSCO, VITALE, "*Disciplina di favore per le start-up innovative*", cit.) argue that such companies should benefit from the regulations under Section 9 during 4 years (letter b.1 above).

[42] B. WEISZ, "*Start up innovative: come iscriversi al Registro Imprese*", January the 3rd, 2013, www.pmi.it; G. ANDREANI, A. TUBELLI, "*Misure di favore per nascita e sviluppo di start-up innovative e incubatori certificati*", Corriere Tributario, no. 3/2013, page 254; A. BUSANI, "*Via alla registrazione delle start-up*", Il Sole 24 Ore, January the 3rd, 2013.

[43] The Ministry for Economic Development and the Italian Chambers of Commerce (which actually manage the Business Registry) issued a "*Guide to administrative accomplishments*" for innovative start-ups, which is periodically updated and can be freely downloaded from the Ministry's website at the following link:
http://www.sviluppoeconomico.gov.it/images/stories/documenti/Guida_startup.pdf
Further details can be found on the websites of each of the Chambers of Commerce; e.g., for the Chamber of Commerce of Turin: http://www.to.camcom.it/Page/t08/view_html?idp=15047.

[44] A fac-simile of such self-declaration can be found in the "Guide" mentioned above.

[45] The application and self-certification are filed through the Business Registry's online system. Among the manifold information to be provided, some deserve to be recalled, such as: a brief but circumstantial description of the company's activity, including the R&D activities and expenses; indication of academic qualifications and professional experience of the shareholders and staff; indication of the existence of relationships with certified business incubators, institutional and professional investors, universities and research centers; list of patents owned or held under license; list of shareholders (transparent with respect to trusts, holding companies, fiduciary companies, etc.); full copy of the last approved yearly financial statements of the company.

[46] Notice no. 2660 on February the 11th, 2013.

months; furthermore, the company shall file a new self-declaration within 30 days from the approval of the financial statements of each financial year (and, in any case, within 6 months from the previous financial year closure), in order to certify that they still possess the requirements pursuant to the Decree.

In case of loss of the requirements (or in the event of failure to file the documentation above), within the following 60 days the company is deleted automatically from the special section (of course, the registration to the ordinary section of the Registry persists).

## 4. Tax incentives to the investment in start-up companies.

In order to promote the establishment and development of innovative start-ups, art. 29 of the Decree allows specific tax reliefs in favor of individuals and legal persons investing in such companies in the years 2013, 2014 and 2015, so to increase their attractiveness. In detail:

- a 19% allowance for the purpose of IRPEF (income tax for individuals);
- a 20% deduction[47] from the taxable income for the purpose of IRES (corporate tax);

both applied to the amount invested in innovative start-ups.

The effectiveness of said provisions is subject to the authorization of the European Commission[48], which is still pending at the date of this paper; moreover, within 60 days from the entry in force of the Decree, an instrumental decree on the subject should have been issued by the Ministry of Economics and Finance, which has not been approved yet.

The investment can be made directly by the taxpayer (be it an individual or a company), or through investment funds or other institutions which primarily invest in innovative start-ups[49].

As for individuals, the benefit is granted to all IRPEF subjects, regardless of their residence in Italy for tax purposes[50]; some limitations are provided with reference to the features of the investment:

1. the relief is allowed only on investments made in 2013, 2014 and 2015;

[47] The percentages are respectively augmented to 25% and 27% for start-ups operating in the energy sector and for start-ups with "*social vocation*".

[48] Under art. 108 of the "*Treaty on the functioning of the European Union*".

[49] Investment funds and other investment firms are, instead, not allowed to benefit from the reliefs under art. 29.

[50] According to art. 2 of the Italian Tax Act, non-residents are subject to IRPEF only with reference to the income produce in the territory of the State, whilst a "worldwide taxation" principle applies to residents.

2. the relief is granted on a maximum invested amount[51] of € 500,000 (meaning a maximum allowance of € 95,000[52]);
3. the investment must be kept by the taxpayer for at least 2 years; in case of sale of the investment before said term, the benefit ceases retroactively, so that the taxpayer must refund the allowance to the Tax Administration[53].

For legal persons, the 20% deduction is allowed to all IRES subjects, again regardless of their residence in Italy for tax purposes[54]; in this case:

1. as above, the relief is allowed only on investments made in 2013, 2014 and 2015;
2. the deduction is granted on a maximum overall invested amount of € 1,800,000 (meaning a maximum benefit of € 495,000 for companies applying the standard IRES rate of 27,5%);
3. as above, the investment must be kept for at least 2 years.

Since the relief for legal persons consists in a deduction from the taxable base, in some cases it may well lead, depending on its amount, to a loss for corporate tax purposes, which can be carried forward according to the ordinary provisions under the Italian Tax Code[55]; on the other hand, said relief should have no effect for the purpose of IRAP tax (local tax on business/productive activities)[56]. According to scholars, the same statement made by the Italian Revenue Service in the Circular Letter no. 44/E of October the 29th, 2009 should be applicable to the incentive in question, according to which the relief cannot be qualified, for tax purposes, as a capital grant (therefore not contributing to the formation of the taxable income)[57].

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[51] Overall amount through the years 2013, 2014 and 2015.

[52] For some examples, see F. GAGLIARDI, "*Le agevolazioni fiscali per le start-up*", Pratica fiscale e professionale, no. 41/2012, page 44; A, MASTROBERTI, "*Deduzioni e detrazioni per investimenti nelle start-up*", Pratica fiscale e professionale, no. 24/2013, page 20.

[53] The reimbursement of interests shall also be due, but no penalty shall apply; according to scholars (F. FALCONI, G. MARIANETTI, "*Agevolazioni per la forza lavoro e incentivi agli investimenti per le start-up innovative*", Corriere Tributario, no. 43/2012, page 3341), this choice is due to the awareness that an early divestment is not necessarily be the result of fraudulent or illegal purposes, but may depend on other objective reasons.

[54] Pursuant to art. 73 of the Italian Tax Act, Italian resident limited companies, as well as non-resident companies and trusts. Innovative start-ups are excluded from the subjects which can benefit from the relief – i.e., if Company X, an innovative start-up, invests in Company Y, an innovative start-up itself, no deduction shall be granted to Company X.

[55] The same was explicitly allowed, in the past, with reference to similar tax reliefs, such as the "bonus for capitalization" and "Tremonti-bis" incentive to investments, both under art. 5 of Law Decree no. 78 of 2009.

[56] ASSONIME, Circular Letter no. 11 /2013, page 73.

[57] G. FERRANTI, "*La detassazione degli investimenti nelle start-up innovative*", cit.

As for the exact identification of the investments which entitle to benefit from the relief, art. 29 literally refers to the amount invested in the "*share capital*" of one or more innovative start-ups; this may lead to deem the relief to be allowed only in reference to those capital contributions which are made in connection to a formal resolution of share capital increase. Besides, in commenting the regulation of the already mentioned "capitalization bonus", which contained a similar wording, the Italian Revenue Service stated that, despite the literal formulation, the deduction had to be allowed in relation to all forms of capital contribution which actually increase the company's equity[58], including "sinking funds" (which do not contemplate a repayment obligation), as well as the unconditional waiver of the right to reimbursement of loans made by the shareholders in favor of the company. Therefore, it is reasonable to reach the same conclusion also for the purpose of the Decree[59].

In the mentioned Circular Letter no. 53/E of 2009, the Revenue Service underlined that, in the absence of formal resolutions of share capital increase, the need to limit the benefit only to "*actual increases of equity*" implied that the relief could be granted only with reference to capital contributions which have been actually paid to the company within the end of the financial year; again, it is reasonable that the same should apply also to the deduction under art. 29 of the Decree[60].

On the other hand, the circumstance that express reference is made to the "*amount invested*" leads to conclude that no benefit can be granted for contributions in kind[61].

## 5. Tax reliefs on the remuneration of employees and directors.

In order to promote the fidelity of directors and employees of innovative start-ups, as stated in the Explanatory Memorandum, the Decree provides a tax relief system for staff incentive programs based on the attribution of financial instruments, consisting, in brief, in the substantial tax (and social

[58] Circular Letter no. 53/E of December the 21st, 2009, § 2.1.

[59] This interpretation is shared by G. FERRANTI, "*La detassazione degli investimenti nelle start-up innovative*", cit.

[60] As for formally resolved capital increases, Circular Letter no. 53/E of 2009 (§ 2.2) stated that such increases can be deemed to have been "perfected" once the shareholders' resolution has been recorded at the Business Registry. See also E. PUCCI, L. SCAPPINI, "*D.L. 18 ottobre 2012, n. 179 – Le start up innovative: caratteristiche e agevolazioni*", Il Fisco, no. 41/2012, page 6651; G. FERRANTI, "*Investimenti reali per il bonus start up*", Il Sole 24 Ore, Norme e Tributi, October the 29th, 2012.

[61] ASSONIME, Circular Letter no. 11 /2013.

security) exemption of such incentives.

In detail, under article 27 of the Decree the assignment to directors, employees and collaborators of:

- financial instruments; or
- all other right or incentive implying the attribution of financial instruments, securities or similar assets; or
- subscription rights for the purchase of such financial instruments;

does not originate any taxable income from employment, for the purpose of IRPEF (income tax for individuals), nor does it have any relevance for the purpose of social security charges.

According to the Explanatory Memorandum, the relief extends to all form of attribution – whether in return for payment or free of charge – of shares, stocks, equity instruments or "participating securities"[62], including the direct assignment of financial instruments, the attribution of the right to subscribe or purchase financial instruments, as well as the promise to assign financial instruments in the future ("*Restricted Stock Units*"[63]).

The exemption is effective with reference to the income arising from financial instruments assigned, or options and rights granted and exercised, after the date of conversion of the Decree into law (December the 20th, 2013) – and, of course, before the expiry of the 4-year (or shorter, where applicable) term under art. 25 and 31 of the Decree, given the temporary nature of the facilitations for innovative start-ups[64].

The possible beneficiaries of the reliefs above are identified as follows:

1. directors of the company;
2. employees of the company, including fixed-term or part-time workers;
3. "*collaborators*"[65], i.e. all other subjects whose income is legally assimilated to employment income by the Italian Tax Code[66].

"*Collaborators*" which legally qualify as "*self-employed workers*" pursuant to art. 53 of the Italian Tax Code cannot, therefore, benefit from the

[62] "*Strumenti finanziari partecipativi*" as defined by art. 2346 of the Italian Civil Code.

[63] RSUs are defined as incentive programs in which "*the employee does not receive the stock immediately, but instead receives it according to a vesting plan and distribution schedule after achieving required performance milestones or upon remaining with the employer for a particular length of time*" (http://www.investopedia.com/terms/r/restricted-stock-unit.asp).

[64] In other words, shares issued by a newly incorporated innovative start-up more than 4 years after its establishment will grant no exemption to their assignees.

[65] "*Collaboratori continuativi*" in the Italian text; according to the Explanatory Memorandum, "*project workers*" are included.

[66] Art. 50, Decree no. 917 of December the 22nd, 1986.

tax facilitations in question.

The relief can be assimilated, under several profiles, to the one provided by art. 51, § 2, letter g of the Italian Tax Code, which, in turn, allows a tax exemption for shares assigned to employees under given conditions[67], but several substantial differences exist; in detail, under art. 27 of the Decree:

- the financial instruments can be discretionally assigned to individual directors, employees or collaborators, whereas under art. 51 requires the assignment to be made in favor of all employees (or of given categories of employees);
- as stated above, the "*financial instruments*" that can be assigned include different kinds of assets, whereas art. 51 only refers to shares or stocks;
- no limitation is imposed with reference to the value of the assigned financial instruments, whereas under art. 51 the exemption is allowed up to a maximum amount of € 2,065,83.

The relief is subject to the compliance with several restrictions[68]:

1. the exemption only applies to financial instruments issued by the start-up which employs the beneficiaries, or by companies "*directly controlled*"[69] by the start-up[70];
2. an anti-avoidance clause is provided, according to which the relief is granted under the condition that the financial instruments are not bought back:
   a. by the start-up which employs the beneficiaries;
   b. by the company issuing the financial instruments;
   c. by any other subject directly controlling, or directly controlled by, the same entity which controls the start-up.

In the event of a transfer of said financial instruments in breach of the anti-avoidance rule, the previously exempted income from employment becomes subject to taxation in the (financial) year in which the sale takes place. According to the Explanatory Memorandum, the amount of taxable

[67] F. FALCONI, G. MARIANETTI, "*Agevolazioni per la forza lavoro e incentivi agli investimenti per le start-up innovative*", cit.; G. ANDREANI, A. TUBELLI – "*Apporti di opere e servizi a favore di «start up» innovative e incubatori certificati*", Corriere Tributario, no. 24/2013, page 1903.

[68] For some examples, see F. GAGLIARDI, "*Le agevolazioni fiscali per le start-up*", cit.

[69] As no further specification is provided on the subject, it can be argued that, for the definition of "*direct control*", reference must be made to art. 2359 of the Italian Civil Code.

[70] Under this point of view, the regulation under the Decree is stricter than the one mentioned above, pursuant to art. 51 of the Italian Tax Code; the latter, in fact, grants the exemption also to shares issued by "*entities directly or indirectly controlling the employing company, or directly controlled by it, or controlled by the same entity which controls the employing company*".

income shall be determined based on "*the value that the financial instruments had at the time of assignment*", not on their value at the time of their transfer.

Since no deadline is provided for the effectiveness of the anti-avoidance rule[71], the taxation as income from employment will take place even if the financial instruments are sold (to one of the entities under no. 2 above) when the 4-year term under art. 25 and 31 of the Decree has already expired[72]. On the other hand, in the event of transfer of the instruments to subjects other than those under no. 2 above, no taxation as income from employment will ever occur (even in case of sale of the instruments immediately after their assignment).

As far as the taxation of capital gains is concerned, the sale of the financial instruments in question is subject to the ordinary rules under the Italian Tax Code, as expressly stated by art. 27, § 5 of the Decree; therefore, the taxable base for this purpose will be equal to the difference between (a) the price of sale of the financial instruments and (b) their recognized cost for tax purposes, under art. 68 of the Italian Tax Code[73].

Finally, a specific rule is provided, under art. 27, § 4, in order to grant innovative start-ups with easier access to highly qualified professional and consulting services ("*work for equity*"[74]). For such purpose, the value of shares, stocks or equity instruments issued by innovative start-ups in return:

- of the contribution of services (including professional ones), or
- of the contribution of receivables originated by the provision of services in favor of the innovative start-up itself;

do not participate, at the time of their issuance, to the formation of the overall income of the contributor, notwithstanding the provisions of art. 9 of the Italian Tax Code[75].

## 6. Tax credit for the employment of highly qualified staff.

[71] On the other hand, art. 51 of the Italian Tax Code allows the exemption under the condition that the shares are not sold before 3 years from the assignment.

[72] ASSONIME, Circular Letter no. 11 /2013, page 65.

[73] See also: G. PALUMBO – "*Stock option: la nuova disciplina fiscale*", Rivista della Scuola Superiore dell'Economia e delle Finanze (http://rivista.ssef.it/); F. FALCONI, G. MARIANETTI, "*Agevolazioni per la forza lavoro e incentivi agli investimenti per le start-up innovative*", cit.

[74] See also the "*Restart, Italia!*" report, section 8.

[75] According to the Explanatory Memorandum, the same tax exemption principle is applicable as the one specified in the Italian Revenue Service in its Circular Letter no. 10 of March the 16th, 2005, which can be extended to the contribution of receivables.

Law-Decree no. 83 of June the 22nd, 2012, introduced a tax credit in favor of all businesses (regardless of their legal form, size or economic sector of activity) which enter into new open-ended employment contracts with highly qualified staff[76], i.e.:

- staff which obtained a Ph.D. at an Italian University or at a legally recognized foreign University;
- staff which obtained a University degree ("*laurea magistrale*") in technical or scientific disciplines, employed for R&D activities.

The tax credit equals to 35% of the cost incurred for the recruitment, with a maximum limit of € 200,000 per year per company, and can be exclusively used for the payment of taxes and social contributions[77].

At present, the tax credit is not actually usable yet, since an implemental decree still has to be issued in order to define its operational procedures[78].

Article 27-bis of the Decree allows some facilitations in favor of innovative start-ups, in order to make use of said tax credit; in detail:

a. innovative start-ups can hire highly qualified staff also through apprenticeship contracts, in addition to ordinary employment contracts;
b. unlike other companies, no formal "certification" (to be issued by the Statutory Board of Auditors or by a Certified Auditor) is required in order to benefit from the credit;
c. the application to be filed in order to benefit from the credit can be drawn up in a simplified form;
d. the tax credit is allowed to innovative start-ups in priority compared to other companies.

## 7. Innovative start-ups and "*shell companies*" regulation.

Pursuant to art. 30, § 1 and 2 of Law no. 724 of 1994, a company is deemed as "*non-operative*" (or as a "*shell*" or "*dormant company*") when the overall amount of its revenues, as recorded in the profit and loss

[76] P. ALBERTI, "*Assunzioni di laureati, oggetto del bonus le lauree in ambito tecnico-scientifico*", Il Quotidiano del Commercialista, June the 28th, 2012.

[77] Through compensation according to art. 17 of Legislative Decree n. 241 of 1997; it has no relevance for the purpose of the ordinary annual limit on compensations according to art. 1, § 53 of Law no. 244 of 2007, and is not part of the taxable base neither for corporate tax (IRES) nor for local taxes (IRAP).

[78] Among which, the application to be filed to the Tax Administration in order to benefit from the tax credit (P. MENEGHETTI, L. MIELE, "*Start up innovative con bonus preferenziale*", Il Sole 24 Ore, December the 24th, 2012; G. ANDREANI, A. TUBELLI, "*Misure di favore per nascita e sviluppo di start-up innovative e incubatori certificati*", cit.; P. ALBERTI, "*Incentivi fiscali in stand-by per le start up innovative*", Il Quotidiano del Commercialista, October the 27th, 2012).

account, is lower than the "reference revenue" determined through the application of specific coefficients of presumptive profitability to the value of the fixed assets (and of other assets) as entered into the active section of the balance sheet.

The same qualification as "*non-operative*" entities was recently extended[79] to companies which show a condition of "*systematic loss*", that is:

- companies which realized a loss, for corporate tax purposes, in each of the 3 previous financial years; or
- companies which realized a loss in 2 out of the 3 previous financial years, and a positive taxable income in the remaining one, yet whose amount was lower than the presumptive one, as determined through the application of the coefficients under Law no. 724 of 1994.

In order to avoid the application of the "*non-operative*" regulation, a company can file an application to the Revenue Service, stating the reasons which prevented it from realizing an adequate amount of revenues and/or of income[80].

When an entity qualifies as "*non-operative*", several negative consequences arise under the fiscal point of view; in brief:

- the taxable income, for IRES and IRAP purposes, is assumed to be (at least) equal to the presumptive one, as determined according to Law no. 724 of 1994, regardless of the income resulting from the profit and loss account;
- starting from the financial year 2012, a 10,5% increase of the ordinary IRES tax rate is applied (the overall IRES rate then becoming 38% instead of 27,5%);
- severe constraints also become applicable to the carry-forward of tax losses and of VAT credits.

Article 26, § 4 of the Decree states that innovative start-ups are not subject to such "*shell companies*" regulation. Generally, in fact, innovative start-ups obtain, during their early years, low revenues and even lower taxable incomes, as a result of the structural need to preventively perform costly R&D activities – so that they would most probably qualify as "non-operative", and should therefore systematically file applications to the Tax

[79] Law-Decree no. 138 of 2011, art. 2, §s 36-X through 36-XII.

[80] The Revenue Service can, of course, reject the application if the alleged reasons are deemed not to be sufficient.

Authorities in order to be exempted from its consequences.

In all cases, after the expiry of the four-years (or shorter, when applicable) deadline according to art. 25 and 31, the special regulations under Section 9 of the Decree cease to be applied; therefore, once such term has expired, innovative start-ups will revert to the ordinary application of the "*shell companies*" rules.

## 8. Other reliefs and facilitations for innovative start-ups (hints).

Pursuant to art. 26, § 8 of the Decree, innovative start-ups are exempt from the payment:

- of stamp duty ("*imposta di registro*") and other administrative charges ("*diritti di segreteria*") on the accomplishments for the purpose of the Business Registry;
- of the annual fee ("*diritto annuale*"), levied by the Chambers of Commerce, for the enrollment in the Business Registry.

Both reliefs are granted on a temporary base, as they cease once the 4-years (or shorter, if applicable) term under art. 25 and 31 of the Decree has elapsed.

The analysis of the further facilitations under Section 9 of the Decree, concisely pointed out in § 1 above, is far beyond the scope of this paper; a few brief hints are provided hereinafter:

- in the event of losses which cause a diminution of the share capital for more than 1/3 of its amount, the term for reducing such losses under the 1/3 threshold is extended to the second following financial year (whereas the ordinary regulations under the Italian Civil Code impose the term of the following financial year);
- in the event of losses which cause the reduction of the share capital under its minimum legal amount, the shareholders are entitled to defer all resolutions on the subject to the closure of the following financial year (whereas the ordinary regulations under the Italian Civil Code require such resolution to be passed "*urgently and without delay*");
- innovative start-ups incorporated as private limited companies("*S.R.L.*") are allowed, by way of derogation from the ordinary regulations under the Italian Civil Code, to create "*special categories*" of shares with different rights, to offer their shares in subscription to the public, and to

perform "*transactions on their own shares*", if the latter are connected to staff incentive plans[81];

- when signing fixed-term employment contracts, innovative start-ups are exempt from several of the limitations provided by the ordinary regulations on the subject[82];
- salaries and wages for the employees of innovative start-ups may include, in addition to a fixed amount, a variable component in relation to the company's profitability or efficiency, to the employee's productivity or to different parameters agreed between the parties, including the assignment of financial instruments issued by the company;
- innovative start-ups are allowed to raise funds by making use of dedicated "*crowdfunding web portals*"[83];
- innovative start-ups are granted free access, as well as under simplified conditions and accomplishments, to the intervention of the "*Central Guarantee Fund*" ("*Fondo centrale di garanzia*"), and are entitled to make use of the services provided by the "*Agency for internationalization of Italian Companies*" and by "*Desk Italia*" (help desk for the attraction of foreign investments);
- innovative start-ups are exempt from the application of the ordinary bankruptcy procedures under Decree no. 267 of 1942; instead, they are "exclusively" subject to the "*procedures for the settlement of over-indebtedness crisis*" pursuant to Law no. 3 of 2012[84].

S. BATTAGLIA, *Tax regulation of "innovative" start-up companies within the Italian legal system: an overview*, 4 Businessjus 36 -- (2013)

[81] See G. ANDREANI, A. TUBELLI, "*Semplificazioni in arrivo per start-up innovative e incubatori certificati*", Corriere Tributario, no. 42/2012, page 3225.

[82] On the subject: A. CASOTTI, M. R. GHEIDO, "*L'assunzione a termine nelle start-up*", Pratica fiscale e professionale, no. 41/2012, page 47; C. RICIPUTI, "*Agevolazioni in materia di lavoro per le start-up innovative*", Cooperative e Consorzi, n. 12/2012, page 19; B. WEISZ, "*Start-up innovative: contratto e agevolazioni fiscali 2013*", December the 14th, 2012, www.pmi.it; R. BRAGA, "*Costituzione e requisiti qualificanti della start-up innovativa*", Azienda e Fisco, no. 2/2013, page 18.

[83] See M. BEAN, "*Misure per la nascita e lo sviluppo di imprese start-up innovative*", Pratica fiscale e professionale, no. 41/2012, page 37; and, again, G. ANDREANI, A. TUBELLI, "*Semplificazioni in arrivo per start-up innovative e incubatori certificati*", cit.

[84] R. FRISCOLANTI, B. PAGAMICI, "*Start up innovative: requisiti ed agevolazioni fiscali*", Cooperative e Consorzi, no. 12/2012, page 11.