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The taxation of 'intangible' innovation: the Patent Box in Europe and the Italian case

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Abstract: "Patent Box" is a term for the application of a lower corporate tax rate to the income derived from the ownership of patents. This tax subsidy instrument has been introduced in several countries since 2000. This paper, through a comparative analysis, compares the Patent Box adopted in three different European jurisdictions, which are distinguished by the particular attractiveness of their tax systems, and then focuses on the peculiar case of the Italian Patent Box. Art. 6, D.L. of 21 October 2021, n. 146, in fact, introduces the new discipline of the Patent Box, a preferential taxation mechanism of income from the direct and indirect use of certain intangible assets which, only two months later, has already undergone further and important changes by art. 1, comma 10, of L. 30 December 2021, n. 234: this disruption requires considering the causes of the legislative intervention and, therefore, the structure of a tax promotion mechanism that has already received relevant consideration in the OECD.

1. Introduction

In a socio-economic context characterised by increasing globalisation and digitalisation in which the role of intangibles in value creation is becoming more and more central, IP regimes are becoming strategically important.

In modern economies, intangible property, consisting of intangible assets, is of decisive importance for business development. Intangibles, like

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tangible assets, have a capital content, differing from the latter in their high profitability and their intrinsic mobility, which leads individual legal systems to set up facilitative regimes in this specific business area.

In fact, it is the same states that, in an attempt to adapt their economies and legislations to the globalisation phenomenon, set up regimes that are attractive to taxpayers engaged in particular economic activities (e.g. the creation, development and sale of intangible assets) and to foreign income. Such measures, on the one hand, foster the phenomenon of tax arbitrage, on the other hand, they lead companies (mostly multinationals) to exploit the related opportunities by devising and implementing aggressive tax planning schemes, which, while not directly violating the tax rules of the various states, run counter to their underlying spirit.

The problems relating to the growing proliferation of sophisticated tax planning practices have also been the subject of study and in-depth analysis within the OECD: the Organisation for Economic Cooperation and Development has in fact been engaged for some time in a capillary work of rewriting the rules and principles of international taxation in which the frequent tendency of States to support companies with measures that are only apparently neutral is to be found. The international community has long been questioning the limits of harmful tax competition and the phenomenon of the erosion of tax bases, on which, in just a few years, an unexpected and positive convergence of efforts has been created under the auspices of the BEPS project.

The study of Patent Box inevitably intersects with the complex phenomenon of tax competition between states. Developed in the second half of the 20th century and then consolidated in the century in which we live, tax competition between States expresses a structure of international relations in which the tax lever is used as a tool to attract capital and the economic activities of, mostly, multinational companies. In this context, countries tend to apply facilitative tax regimes capable of 'convincing' economic operators to locate their productive initiatives in the territory of the State, compensating for the lower revenue by increasing other factors such as labour employment, the development of consumption, etc.

The apparent neutrality of these practices implemented by states collides with their increasingly frequent distorted use in relation to normal market logic. Thus, the notion of 'unfair tax competition' between States - harmful

tax competition - was developed, involving certain unfair tax practices and specific symptoms of 'harmfulness' such as excessively low tax rates, tax measures that lack transparency, and the lack of effective exchange of information between financial administrations. In 1998, the OECD, aware of the need for a joint effort, approved the document "Harmful Tax Competition: an emerging issue", in which it formulated recommendations aimed at outlining general principles for combating the spread of harmful tax regimes and practices.

At the same time, in the European legal system, the issue of harmful tax competition takes on its own specific relevance: with the adoption of the Code of Conduct on corporate taxation, tax practices are identified that are deemed incompatible with the general principles expressed in the Treaties, and that are capable of affecting the free competition of the market by altering its proper functioning. More precisely, the objective pursued by the Code of Conduct consists in contrasting tax practices that result in such substantial advantages that they lead to a level of taxation significantly lower than the level generally applied in the country concerned[1].

In light of the above, the subject of this research is a brief comparative analysis of the Patent Box regimes existing in three different jurisdictions (the United Kingdom, the Netherlands and Luxembourg) which are distinguished by the particular attractiveness of their tax systems. In this context, it should be noted that the United Kingdom is no longer a member state of the European Union as of 31 December 2020 (after Brexit), becoming a third Country. However, the centrality assumed by the relevant regime cannot be overlooked for the purposes of this analysis. This investigation also shows how the European Union looks to a common reference model only in the face of the eminently political (soft law) commitments

[1] The topic of harmful tax competition as market distortion has, for some time now, been at the centre of European and international debate. Many scholars, however, consider the phenomenon of harmful tax competition to be the root cause of (ever-growing) economic inequalities, in Italy as well as in Europe. There is therefore a need to direct the action of Member States against the most obvious tax distortions, not only with a view to market protection but also to the protection of social rights. On this topic see Franco Gallo, *Il futuro non è un vicolo cieco. Lo stato tra globalizzazione, decentramento ed economia digitale* (Palermo: Sellerio, 2019), 1–152; Antonio Perrone, *Tax competition e giustizia sociale nell'Unione Europea* (Milano: CEDAM, 2019), 1–191.

undertaken by Italy and Europe at the international level. The second part of the paper deals with the analysis of the Italian Patent Box which has, with Article 6, Law Decree No. 146 of 21 October 2021, undergone far-reaching changes, ranging from the substantial to the procedural dimension of the institute: this disruption requires considering the causes of the legislative intervention and, therefore, on the structure of a tax promotion mechanism that has already received relevant consideration in the OECD.

2. The Patent Box in Europe: a comparative perspective

In the face of the hoped-for approximation of the laws of the Member States under Article 115 TFEU, the states retain considerable scope for tax sovereignty, in potential competition with each other.

A comparison of European legislations aimed at attracting intangibles held abroad and, at the same time, incentivising the relocation of domestic ones, leads to awareness of the current state of relations, indirect taxation, between the EU Member States.

A "Patent Box" is a term for the application of a lower corporate tax rate to the income derived from the ownership of patents. This tax subsidy instrument has been introduced in a number of countries since 2000. The following table shows the complex and disjointed situation that exists in Europe: there is, in fact, no general model of a facilitative regime on intellectual and industrial property applicable in the Member States of the European Union. It is therefore evident that there are profound differences between the different regimes, which essentially concern the extent of the benefit, the manner in which the relief is granted, and the objective scope of application.

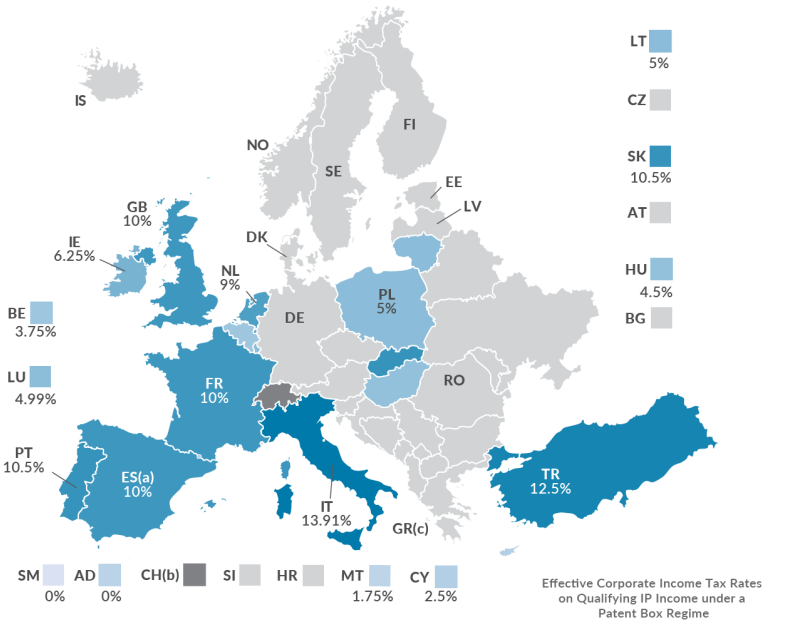
In the following, we will examine the most significant European facilitative regimes concerning the income proceeds from the exploitation of certain intangible assets: the benefits under consideration, in fact, incentivise the so-called 'risk to success[2]'. by focusing on the output, i.e. the activity

[2] See William J. Baumol, Sue Anne Batey Blackman, Edward N. Wolff, *Productivity and American Leadership: the long way* (Cambridge: MIT Press Ltd, 1991), 1–408, in which the authors formulated a proposal on how to use tax breaks to incentivise companies to innovate. The argument was based on a simple, if seemingly counterintuitive assumption: it is certainly more effective to increase the risk premium, and thus the innovator's profits, than to reduce risk by reducing the cost of investment. And this benefits the entire economy.

of exploiting the intangible. In other words, these facilitative measures do not only stimulate the creative phase in the strict sense of the intangible asset considered *„but also that of efficient functionalisation that translates into the use of the intangible asset created and, therefore, in the production of other goods or services, according to an efficientistic logic that rewards successful intangibles*[3]*".*

Patent Box Regimes in Europe

Effective Corporate Income Tax Rates on Qualifying IP Income under a Patent Box Regime, as of July 2021



Notes: Andorra, Malta, and San Marino also have patent boxes but cannot be depicted in this map due to their country size.

(a) The two Spanish regions "Basque Country" and "Navarra" have separate patent boxes.

(b) Switzerland's patent box regime operates at the cantonal level. As a result, effective tax rates differ.

(c) Greece has a three-year exemption for profits from the sale of self-manufactured goods based on an internationally recognized patent.

Source: Sources: OECD, "Corporate Tax Statistics: Intellectual Property Regimes;" Bloomberg Tax, "Country Guide;" PwC, "Worldwide Tax Summaries;" and EY, "Worldwide R&D Incentives Reference Guide 2021."

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[3] See Silvia Giorgi, *I beni immateriali nel sistema del reddito d'impresa* (Torino, Giappichelli, 2020): 369 – 370.

2.1. The UK Patent Box

The Patent Box regime was introduced in the UK in 2013 and, today is regulated in the Corporate Tax Act (CTA), Part8A. HM Revenue and Customs ('HMRC'), the non-ministerial government department in the UK that is primarily responsible for the collection of taxes in the UK, the administration of certain regulatory regimes and the payment of certain forms of government grants, has adopted guidelines on the application of the Patent Box contained in the Corporate Intangibles Research and Development Manual[4].

The tax incentive for intangible assets in force in England allows British companies to have a lower rate of taxation, 10% to be exact, compared to 19% as the corporate tax rate.

From a subjective point of view, companies owning the eligible patent or holding the exclusive license on the same intangible asset ('qualifying IP rights') are eligible; also are eligible companies that can demonstrate their active participation in the development of the invention and that has taken an active role in the innovation process (be a 'qualifying company') or in its application, in relation to the costs, time and effort expended, or by the value or impact of the contribution ('relevant IP profits')[5]

As is well known, following the reference standard defined by the OECD in Action 5 of the BEPS, the United Kingdom and Germany, on 11 November 2014, proposed the modification of the original version of the FHTP, with the adoption of the 'modified nexus approach': this differs from the 'classic' nexus approach due to the possibility granted to states to include in the calculation a flat-rate uplift that allows the costs of acquiring intangible assets and the costs of outsourcing research and development activities to be taken into account in the calculation. The traditional model proposed by the OECD, in fact, did not allow for the costs of outsourcing research and development functions within the corporate group to be considered and also excluded from the calculation of the relief those costs of acquiring

4 UK Government, HM Revenue & Customs, HMRC internal manual, "Corporate Intangibles Research and Development Manual", accessed March 11, 2016, https://library.croneri.co.uk/irm/cird.

5 On this subject, see Raul-Angelo Papotti, "The UK Patent Box," in *Patent Box,* ed. Maurizio Dallocchio, Raul-Angelo Papotti, Luca Pieroni (Milano: Digital Print Service, 2016), 171–172.

intangible assets that were not, in fact, attributable to research and development activities carried out by the taxpayer, but rather to the company transferring the intangible asset. The changes proposed and accepted with the publication of the OECD Report "Action 5: Agreement on Modified Nexus Approach for IP Regimes[6]" are to be considered in line with the fundamental freedoms of the European Union, which prohibit indiscriminate territorial tax incentives for research.

Receipts from the sale of products or services incorporating the patented invention, royalties, capital gains, as well as income derived from the infringement of industrial property rights in connection with the patented invention are among the income eligible for relief.

Despite the expected attractiveness of a preferential tax regime such as the British one, which taxes income from the exploitation of intangibles at a much lower tax rate than that applied in other legal systems, the Patent Box has not had the spread that was probably expected. According to the report accompanying the regulations governing the Patent Box, in fact, "it is estimated that approximately 650 companies claim the relief annually[7]": the preferential regime mainly invests in multinational companies, making it unattractive for small and medium-sized enterprises.

An emblematic example in UK is, in fact, the pharmaceutical giant Glaxo Smith Kline, which, using the Patent Box, has invested over £500 million in new plants, contributing to the creation of thousands of new jobs.

However, as mentioned in the introduction, the future scenarios of the UK Patent Box may, because of Brexit, change. In fact, although the Patent Box regime is incorporated within national legislation, the restrictions imposed by the European Commission on tax relief are also known (e.g. the type of relief available to SMEs is based on the EU definition of 'SME' and R&D relief for SMEs falls under EU state aid rules). It, therefore,

6 OECD/G20, *Base Erosion and Profit Shifting Project*, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*, accessed February 20, 2015,https://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf.

7 UK Government, Policy papers, "Corporation Tax: Patent Box - compliance with new international rules," accessed December 9, 2015, https://www.gov.uk/government/publications/corporation-tax-patent-box-compliance-with-new-international-rules/corporation-tax-patent-box-compliance-with-new-international-rules.

seems possible that many restrictions will be lifted following the UK's official exit from the European single market.

2.2. The Dutch Innovation Box

In the Netherlands, the Patent Box regime, the so-called Innovation Box, was introduced in 2007. Initially, the benefit was limited only to income from self-generated patents: these profits benefited from the reduced rate of 10%, later reduced to 5%. This is a considerable reduction if one considers the standard corporate tax rate in the Netherlands of 25%.

The scheme has been amended several times: the objective scope of application includes any intangible asset, with the exception of logos and trademarks.

However, only those entities in possession of patents declared to the Netherlands Patent Centre ("Agentschap NL OctroOICentrum") and research and development activities specifically recognised by means of a ministerial certificate may benefit from the relief.

Intangibles developed directly by the taxpayer are eligible for the preferential regime: in the event of an outsourcing research and development activities to unrelated third parties, the taxpayer does not forfeit the benefit if he proves that the risks and expenses are borne by him.

Taxable income includes that deriving from the sale or licensing of the asset, as well as 'implicit' income, i.e., for example, income due to savings resulting from the technological improvement of the production process. In order to simplify the procedure for identifying the same implicit components, an adversarial procedure with the tax authorities is provided in order to determine the share of income actually attributable to the innovation.

The Dutch Patent Box regime was from many sides regarded as particularly attractive compared to that adopted by its European 'brothers'; yet, it was never in the crosshairs of the European Commission, unlike the Luxembourg regime of the same name.

2.3. The Luxembourg Box

Luxembourg introduced its Patent Box in 2007, with Article 50bis of the loi del l'impot sur le revenue: in its original formulation, it consisted of the exemption of 80% of net income from qualified intangible assets. For

this reason, the Luxembourg scheme has been accused of having granted State aid.

It should be noted that the benefit in question was granted both in the case of 'self-production' of the intangible asset as well as in the case of purchase, as no further research and development activity was required of the advantaged party. The only limitation was found in the impossibility of using the Patent Box in the case of purchase of the intangible from subsidiaries or affiliates.

The rules delimiting the subjective scope of the application were clear: the benefit was attributed to resident entities and to permanent establishments of non-resident entities, provided that they held the ownership 'from a substantial point of view': the tax authorities have clarified this by distinguishing between 'legal ownership' and 'economic ownership'. If the two ownerships were not in the sphere of the same taxpayer, the relief measure would accrue to the holder of the 'economic' ownership.

Regarding the objective scope of application, not only patents, granted and/or in the process of being granted, were considered eligible for relief, but all intellectual property rights without any differentiation, including marketing intangibles and even image rights.

The application spectrum of the Luxembourg regime was extremely broad and indefinite: it is therefore not surprising that the national government chose in 2016 to repeal Article 50-bis. Consequently, a Patent Box was devised in line with OECD guidelines, limited to patentable inventions only, and entered into force as of 2018.

3. The Patent Box in Italy

The Patent Box[8] was immediately considered an innovative institution in the panorama of Italian tax relief[9]. It is an optional system of facilitated

[8] Albert De Luca and Joanne Hausch, "Policy forum: Patent Box regimes – a vehicle for innovation and sustainable economic growth," *Canadian Tax Journal/Revue Fiscal Canadienne*, vol. 65, no. 1(2017): 6514; *"Patent Boxes, otherwise known as innovation Boxes, intellectual property Boxes, and knowledge development Boxes, are designed to attract and retain companies operating patent-based businesses. They were pioneered by Ireland in the early 1970s and were key in attracting multinational companies to that country."*

[9] For an overview on the subject see Maurizio Dallocchio, Raul-Angelo Papotti, Luca Pieroni, *Patent Box Aspetti legali e benefici fiscali, ottimizzazione gestionale, patrimoniale*

taxation of business income deriving from the use and exploitation of certain intangible assets, lasting five years, renewable and irrevocable. It takes the form of an income tax reduction to a variable extent (from 50 to 100 percent) depending on whether the company intends to exploit a specific intellectual property or to sell it.

The use of the Italian Patent Box entails, first of all, an isolated treatment of the assets and liabilities attributable to intellectual property: it affects the calculation of the taxable base separately from other income, and with criteria specifically dedicated to them.

The international studies in the OECD on the subject are, therefore, the reference model for the implementation of the Italian discipline of the Patent Box, which implements peculiar tax principles, such as the nexus approach and substantial activity[10], relatively unknown to the domestic legal tradition, but evidently to be understood as external limits to the discipline of the concessionary institution.

In fact, only those who carry out an actual economic activity in the territory of the State that is substantiated by the maintenance, enhancement and development of the intangible asset can benefit from the tax relief in question: there must therefore be a 'substantial link' between the research and development activities, the intangible assets and the taxable income referable to them. The requirement of substantiality makes it possible to exclude from the benefits companies dedicated to the mere exploitation of intangibles, in the absence of an actual underlying research and development activity [11]:"*It is not the amount of expenditures that acts as a direct*

e finanziaria (Milano: EGEA, 2016), 50; Marco Greggi, "Patent Box (diritto tributario)," *Digesto Discipline Privatistiche (Sezione Commerciale),* (2017): 284; Silvia Giorgi, *I beni immateriali nel sistema del reddito d'impresa* (Torino, Giappichelli, 2020), 361.

10 On this topic see Robert J. Danon, "Tax incentives on research and development (R&D)," *Cahiers de Droit Fiscal International*: *The Hague, International Fiscal Association*, vol. 100a (2015): 17– 56.; Esperanza Buitrago Diaz, "Patent Boxes and the erosion of trust and in governance," *International Journal of Public Law and Policy*, vol. 6, no. 3 (October, 2019): 270–304.

11 See Paolo Arginelli, Francesco Pedaccini, "Prime riflessioni sul regime italiano di Patent Box in chiave comparata alla luce dei lavori OECD in materia di contrasto alle pratiche fiscali dannose," *Rivista di Diritto Tributario* (2014): 160; Caterina Manfredi Clarke, "Concorrenza fiscale e Patent Box: il caso italiano," *Diritto e Pratica Tributaria Internazionale* (2021): 500.

proxy for the amount of activities. It is instead the proportion of expenditures directly related to development activities that demonstrates real value added by the taxpayers and acts as a proxy for how much substantial activity the taxpayer undertook" [12].

The tax relief must therefore be directed to taxable income deriving from activities concretely exercised by the taxpayer and the scope of the benefit, as specified by the report, is not correlated to the absolute amount of the relevant expenses, but rather to the proportion of the costs directly related to the intangible asset. In other words, the portion of income eligible for italian tax on the income of physical persons (so called IRPEF)[13] or italian corporate income tax (so called IRES)[14], as well as for Italian regional tax on productive activities (so called IRAP)[15], must be carefully identified, making use of the indications contained in Article 9, paragraphs 2 to 5, of the Ministerial Decree of 28 November 2017 (hereinafter the 'Implementing Decree').

This share is derived from the product of the income attributable to the direct or indirect use of the intangible and the so-called 'nexus ratio', i.e., the ratio between the costs directly relating to the intangible asset (so-called qualified costs) and the 'total costs' incurred by the taxpayer for research and development activities, which will be discussed below. It should be noted that the costs to be considered for the calculation of the nexus ratio are those "relevant for tax purposes". meaning those costs incurred

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12 OECD/G20, *Base Erosion and Profit Shifting Project*, 25.

13 It's a direct, personal, progressive income tax and is the architrave of the Italian tax system. See Augusto Fantozzi and Franco Paparella, *Lezioni di diritto tributario dell'impresa* (Milano, CEDAM, 2019), 27; Antonio F. Uricchio, *Manuale di diritto tributario* (Bari: CACUCCI, 2020), 151.

14 It's a complementary tax to IRPEF. IRPEF and IRES, in fact, affect the same wealth of differenttaxpayers and have an apparatus of principles and rules common to both taxes, which are called general. Franco Paparella and Augusto Fantozzi, *Lezioni di diritto tributario* (Milano: CEDAM, 2021), 85.

15 It was introduced into the Italian legal system in 1996 to implement the reform of business taxation and represented an innovative way of taxing businesses. IRAP is a decentralised (regional) tax, levied exclusively on production, with a very broad tax base, a relatively low ordinary tax rate and has replaced a wide range of taxes levied on businesses and professionals. On this subject, see, Giuseppe Melis, *Manuale di diritto tributario* (Torino, GIAPPICHELLI, 2020), 813.

during the reference period, regardless of the tax regime and accounting treatment[16]. In particular, the qualified costs to be indicated in the numerator are the expenses relating to the research and development activity carried out directly by the taxpayer and/or outsourced; to quantify the costs to be indicated in the denominator, on the other hand, it is necessary to add to the former the additional costs for research and development activities outsourced to related parties and those, if any, for the acquisition of the intangible asset (including the cost incurred to obtain it by means of a licence).

The result of this ratio can finally be increased by an amount, defined as the up-lift, corresponding to the difference between the value of the denominator and that of the numerator, in any case within the limit of 30% of the latter.

Having thus determined the ratio that leads to the identification of the 'nexus ratio', one finally arrives at the quantification of the tax benefit under review, which consists of the exclusion from the overall income of the enterprise of 50% of the product between the nexus ratio itself and the portion of income that the enterprise derives precisely from the direct or indirect use of the intangible.

The nexus approach principle tends, therefore, to penalise taxpayers who outsource research and development activities within the corporate group, while rewarding, on the contrary, those who perform the same

[16] Through agreements with universities and research institutes or similar bodies, as well as by companies, including innovative start-ups, not belonging to the same group. See the OECD/G20, *Base Erosion and Profit Shifting Project*, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*: 5, consistent with the OECD indications according to which: *"Qualifying expenditures will be included in the nexus calculation at the time they are incurred, regardless of their treatment for accounting or other tax purposes. In other words, expenditures that are not fully deductible in the year in which they were incurred because they are capitalised will still be included in full in the nexus ratio starting in the year in which they were incurred"*, *Action 5 - Final Report* 2015, cit., 27. The legal criterion for identifying the accrual basis is represented in our system by Article 109 TUIR, which constitutes, as specified by the Agenzia delle Entrate in Circular No. 11/E, *'a criterion applicable regardless of whether the beneficiary applies the same rule for the determination of its taxable income for income tax purposes. Accordingly, even entities that prepare their financial statements in accordance with international accounting standards must allocate costs to the individual taxable periods in accordance with the rules set forth in Article 109 of the TUIR'*.

activities on their own or outsource them to third parties. Similarly, the application of this principle does not allow the expenses incurred by the taxpayer for the acquisition of the intangible asset to be included in the qualified costs, as they are not directly linked to the maintenance and development of the intangible: *"[…] only the expenditures incurred for improving the IP asset after it was acquired should be treated as qualifying expenditures. […] Acquisition costs (or, in the case of licensing, royalties or license fees) are a proxy for overall expenditures incurred prior to acquisition"*[17].

The principle of the nexus approach was therefore deemed the most suitable criterion to counter the often-artificial relocation of taxable profits, while at the same time ensuring their uniform treatment in accordance with internationally agreed methodologies.

3.1. Attempts at simplification: the new preferential tax regime becomes front-end

As mentioned in the introduction, Article 6 of Decree No. 146/2021, is dedicated to new regulation of the Patent Box which, just two months later, has already undergone further important changes by Article 1, paragraph 10, of Law No. 234 of 30 December 2021. According to the current wording, in fact, business income holders can opt for a new facilitative regime that provides for a 110% increase of the deductible costs incurred for research and development activities of intangibles 'used directly or indirectly in the performance of their business activities': the intangibles considered are software protected by copyright, industrial patents, designs and models.

The option exercised by the enterprise has a duration of five tax periods, is irrevocable, renewable and is valid for both IRES and IRAP taxation. The regime applies to options exercised with respect to the tax period current on the date of entry into force of this decree and to subsequent tax periods.

To benefit from the tax relief, the taxpayer will have to 'indicate the information necessary to determine the increase by means of appropriate documentation', which will have to be prepared in accordance with the provisions of a specific order of the Director of the Revenue Agency. Also in this hypothesis, as already noted in the self-determination mechanism of

[17] OECD/G20, *Base Erosion and Profit Shifting Project*, 30.

the old Patent Box, failure to produce such documentation during the preliminary investigation will result in the imposition of the penalties ordinarily provided for unfaithful declarations.

These further innovations call for some reflections.

First of all, the object of the relief has changed, given that paragraph 4 of the aforementioned Article 6 considers as "eligible for relief" only the activities aimed at "the creation and development of the assets referred to in paragraph 3"; otherwise, Article 8, Ministerial Decree of 28 November 2017 (the so-called "Patent Box" decree) also included the activities aimed at "increasing the value" of the assets considered, in line with the original *voluntas legislatoris* to encourage the maintenance or relocation of intangible assets in Italy. This approach was consistent with the OECD Report of Action 5 of the BEPS, according to which it is not the numbers of expenses that represent the actual activity carried out by the taxpayer, but the proportion between those directly related to the development of the asset and the value added produced by the taxpayer that can actually demonstrate the substantial activity carried out to develop the asset.

Moreover, the new regime excludes from the benefit the *„processes, formulas and information relating to experiences acquired in the industrial, commercial or scientific field that are legally protectable*" - so-called know-how; this exclusion could penalise, on closer inspection, certain Made in Italy sectors, such as those of fashion or mechanics, endowed with highly recognisable know-how even if characterised by production innovations that are not always patentable.

Not included in the facilitating discipline are trademarks, already excluded from the "old" benefit by Article 56, paragraph 1, letter a) of Decree-Law no. 50/2017, in accordance with the standards shared at the OECD in the context of Action 5 of the BEPS: as a result of this change, the Italian Patent Box - as specified in the OECD Harmful Tax Practices - 2017 Progress Report on Preferential Regimes - can no longer be classified as potentially 'harmful', except for the grandfathering period during which taxpayers already admitted to the non-compliant regime were able to benefit from the tax exemption of income deriving from the exploitation of trademarks for a maximum period of five years (i.e. until 30 June 2021).

The specificities of trademarks, in fact, make elusive the connection between subsidised profits and research and development activities properly

incurred for the creative phase of the asset, and this is not compatible with the characteristics of the nexus approach.

It is also of great interest to know the type of research and development activities required to benefit from the new facilitating measure, including the expenses deemed eligible for aid in the case of trademarks. To this end, the implementing measure issued by the Director of the Revenue Agency must clearly indicate the characteristics that the expenses must possess in order to be covered by the new regime, so as to avoid the significant interpretative criticalities that have already emerged with respect to the R&D tax credit since its establishment[18].

In this regard, with respect to the repeal of paragraph 9 of Article 6, Decree-Law No. 146/2021, by the Budget Law of 2022, it should be noted that taxpayers who decide to opt for the new super-deduction will also be able to benefit cumulatively and for the entire duration of the option from the R&D tax credit in relation to the same costs with an increased deduction.

This requirement of the legislator is consistent with the new paragraph 10-bis, Article 6, Decree-Law No. 146/2021, introduced by the Budget Law 2022, according to which, *,if in one or more tax periods the expenses (referred to in paragraphs 3 and 4) are incurred with a view to the creation of one or more intangible fixed assets falling within those indicated in paragraph 3, the taxpayer may benefit from the 110% increase of these expenses*

[18] Despite the documentary burden required of the taxpayer, the correct use of the tax credit presents many application difficulties. In fact, the most critical issue encountered by companies concerns the identification of the activities eligible for tax relief, both from a qualitative and quantitative point of view, given the lack of an unambiguous qualification of the operations falling within the innovation process. The interpretative uncertainties highlighted expose applicants for the tax benefit to the risk of inspections certifying an eventual undue use of the tax credit 'for failure to comply with the conditions required': the Revenue Agency, in such a situation, will recover the relevant amount, plus interest and penalties in accordance with the law, without prejudice to any civil, criminal and administrative liabilities borne by the beneficiary company. On this subject, see Ivo Caraccioli, "Problemi interpretativi e applicativi dei reati di "indebita compensazione," *Il Fisco* (2018): 2961; Massimo Basilavecchia, "Il trattamento sanzionatorio dell'indebita compensazione," *Corriere Tributario* (2018): 2155; Filippo M. Pietrosanti, "Aspetti critici del regime sanzionatorio del credito d'imposta ricerca e sviluppo alla luce della perdurante distinzione tra credito inesistente e credito non spettante", in *Ricerca e sviluppo quali fattori di crescita e di promozione per le imprese*, ed. Andrea Quattrocchi and Pietro Boria (Napoli, Jovene, 2020), 215.

starting from the tax period in which the intangible fixed asset obtains an industrial patent title. The 110% mark-up may not be applied to expenses incurred before the eighth tax period to the one in which the fixed asset obtains an industrial patent right".

A recapture mechanism is thus introduced on an octennial basis that allows the unused benefit to be recovered exclusively in relation to R&D expenditure that, *ex post*, gave rise to an intangible asset: a similar device appears to be consistent with the old Patent Box, as it aims to incentivise and facilitate R&D activity in a different phase of development from the strictly 'start-up' phase, the privileged sphere of intervention of the R&D bonus[19].

The new Patent Box can therefore be availed of as of the tax period in which the industrial property right relating to the developed intangible is obtained.

The last issue to be addressed concerns the singular transitional regime: according to the current paragraph 10, art. 6, Decree Law 146 (as amended by the Budget Law 2022), the options provided for by art. 1, paragraphs 37 to 45 of Law no. 190 of 2014 and art. 4 of Decree Law 34/2019 are no longer exercisable. In other words, from the 2021 tax period, it is no longer possible to exercise the options for the Patent Box and the "self-liquidation" regime.

Subjects who have exercised or are exercising the Patent Box options relating to tax periods prior to the current one as of the date of entry into force of Decree-Law No. 146/2021 may choose, as an alternative to the opted regime, to adhere to the new Patent Box upon notice to be sent in accordance with the procedures established by the Revenue Agency. Excluded from this possibility are those who have filed an application for access to the procedure under Article 31-ter of Presidential Decree No. 600/1973, or filed an application for renewal, and have signed a prior agreement with the Revenue Agency at the conclusion of such procedures, as well as those persons who have adhered to the 'self-liquidation' regime under

[19] On the already asserted need for a coordinated reinforcement of what can (at present, could) be considered an 'organic system of public aid for research', please refer to Lucrezia V. Caramia, "Innovazione industriale e sostenibilità ambientale: alla scoperta del Patent Box," in *Circular Economy and Environmental Taxation*, ed. Antonio F. Uricchio and Gianluca Selicato, (Bari, CACUCCI, 2020), 288.

Article 4, Decree-Law No. 34/2019, converted with amendments by Law No. 58/2019.

4. Conclusion

Pulling the thread of the argument, the new relief seems to consider only the 'start-up' costs of innovation, in the manner of a front-end relief measure emptied of its original ratio.

The original Italian Patent Box, in fact, aimed not only to promote investment in research and development activities, but also to encourage the retention or reallocation in Italy of intangible assets otherwise held abroad, and also to hinder the artificial placement of intangible assets developed in Italy at low-tax foreign facilities.

The 'old' measure, therefore, did not aim to incentivise the incurrence of costs to a particularly significant extent, but pursued the main purpose of ensuring the coincidence between the person incurring such costs and the person benefiting from the income derived from them. This approach was in perfect harmony with the indications provided by the OECD in Action 5, in the context of the oft-mentioned BEPS Project.

Nor can certain perplexities be overlooked with regard to a potential breach of the taxpayer's legitimate expectations or, at the very least, of the expectation of legal stability, owing to a sudden repeal of an advantage projected over several years and which has certainly conditioned the investments and strategies of numerous companies that must now come to terms with the changed legal framework.

Ultimately, the Italian tax legislature, after seven years since the entry into force of a facility that was in line with international guidelines and that was beginning to produce important results, has fallen back on the national dimension of tax credits, thus espousing new priorities that favour the 'acceleration' of investments and the immediate use of tax reliefs. But not only does this approach seem to favour a short-term vision, not necessarily conducive to innovation and development: what is more, it loses focus, in the new arrangements, on the extremely delicate issue of harmful tax competition, which since 2015 has been at the centre of international policies aimed at developing models and tools to combat the erosion of tax bases.

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