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ITALIAN COMPANY LAW

PARTNERSHIP IN ITALY - ASSOCIAZIONE IN PARTECIPAZIONE

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Nowadays inside national and international economy cooperation agreements by companies are very relevant, especially for the constitution of common resources in the fields of supply, logistics, production, distribution and research. All these kind of agreements can be finalized with partnership agreements by international partners.

The Associazione in Partecipazione (partnership) is an agreement with which the associating partner confers to another partner, called associated partner, the participation to profits and losses, or only to the profits, of its enterprise, or of one or more transactions he has dealt, towards the consideration of a certain contribution of the associated (art. 2549 c.c.).

The legal relation deriving from the partnership agreement differs by a corporate relation of a company agreement; in fact, with a company agreement the partners constitute a corporate entity, distinct by the natural persons, with financial autonomy and its proper legal personality, instead in a partnership agreement there is not a legal personality. So that, the link between the partners can't be set above third persons, in fact, third persons deal only with the associating partner who takes on a commitment with them only personally and not in the name of the partnership; therefore, the

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relations with the associating partner and the associated one have only internal relevance for both of them.

Under a partnership agreement the companies complete each other their financial, economics and technical aptitudes increasing the successful possibilities and, meanwhile, reducing the risks of the venture.

The partnership is mostly used by the SME for the flexibility it offers compared with others forms of management of a company. Normally one of the associated company, called leading company, take on the management of the partnership. The partnership agreements can pertain to one or more deal or the transactions of an administrative period, but, in any case the partnerships have temporary duration.

The Associazione in Partecipazione agreement is ruled by the articles 2549 – 2554 of the civil code which regulate the partnership with a natural person (associated partner) and an employer (associating partner) where normally the financial contribution of the associated is prevailing.

There is not any provision concerning the form of the agreement of the partnership, but, in any case, is essential that the relations of the partners must be proved by written documents, at least by a letter, or by some copies of it exchanged by the involved subjects.

The written document constituting the partnership has, at least, to represent the value of the share of the participation in the partnership, the type and the terms of the conferment, the rate of interest eventually to be paid in connection with the share, the rate of participation in the income and the allocation of it in case of losses and in the case of profits, the powers of the associating partner and those of the associated one, the duration of the agreement, the applicable law and the competent jurisdiction.

The associated partner, unless contrary pact, concurs to the losses in the same measure in which he participates to the profits. In such case the losses that the associated partner endures cannot ever exceed the value of its contribution (Sentence Cass. n° 2598/1964).

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In case the share of profits is not determined in the agreement, it must, however, be quantified in proportion to the value of the contribution of the associated partner with reference to, the values of the enterprise or the transaction, regarding which the partnership was agreed (Sentence Cass. n° 1476/1982).

Except a contrary pact, associating partner cannot attribute participation, for the same venture or for the same transaction, without the consent of the previous associated (art. 2550 c.c.).

The title and the conduction of the enterprise or the transaction belong only to the associating partner, who is the only entitled subject to entertain relationships with the third parties and to take on the relating responsibility (art. 2551, 2° par. c.c.).

According to the Corte of Cassazione (Sentence Cass. n° 4911/1999) is possible the consignment of the management, or part of it, to the associated partner, if the associated partner has got the powers to manage from the partnership and carries out its own activity within the limits of the entrusted powers.

The associated partner is entitled to exercise several rights, such as: to be informed on the business course; to control the enterprise or the accomplishment of the transaction for which the partnership has been constituted; to the annual financial statement of the management or to the rendering of account of the single transaction.

The partnership has not a minimal term of duration for the validity of the agreement, such as, it is, therefore, admitted the said agreement to be with limited or unlimited duration, unless, the possibility of each of the parties to exercise the right to recess.

The legacy and merit digest considers being applicable to the partnership agreement the discipline of the art. 1453 c.c. and following articles, on the resolution of contracts with performances on both of the parties for default.

If a dispute arises by the associating partner and the associated one the competent jurisdiction will be the Giudice del Lavoro (the court competent only for labour cases)

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(as per art. 409, 3° par. c.p.c.[Processual Civil Code]), being excluded the possibility of arbitration for the composition of the disputes in virtue of a specific clause eventually stated by the parties (Sentence Cass. n° 6206/1992).

The new labour law, Decreto Legislativo n° 276/2003 (Legge Biagi), has introduced the task of certification for the new types of working contracts and for those that has been modified by the said reform: these certification will be released by a proper commission instituted at the Direzione Provinciale del Lavoro (a branch of the Minister of Welfare that has own seats in every province) to the aim to prevent some disputes by employers and employees.

Such certification has been extended also to the partnership agreements.

Indeed, the art. 86, 2° par. of the Decreto Legislativo n° 276/2003 states that if, in the case of partnership agreements, the associated partner is not effectively involved in the participation of the partnership and if he is not paid with an adapted compensation for his contribution, he will be entitled to obtain such compensation as stated by the economic and normative provision in conformity of the applicable enforced discipline stated for the subordinate employees of a correspondent position that perform his job in a similar sector.

In every case it is not permit that the contribution of the associated partner be considered as a performance of working activity of an employee, because, if so, it will be considered as an evasion of the labour laws.

The provision in the partnership agreement of profit of minimal entity in favour of the associated partner will be considered as a rate of subordinate work.

The contribution of the associated partner can consist in a working performance that could be qualified exclusively as an independent job or as an agreement on professional basis, but it never could be as a subordinate job.

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So, under the digest, it must be considered the implementing modalities of the relationship elapsed between the associating partner and the associated one in order to verify if it had the characteristics of a partnership or those of an employee job.

In case the relationship turns out lacking of the effective participation of the associated partner and of the relating compensation in favour of who has performed his own working activity, it will be considered as existing a subordinated job relationship with consequent application of the abovementioned fines stated by the law.

The art. 43 of the Decreto Legge n° 269/2003 states that since 1° January 2004 has been instituted at Istituto Nazionale Previdenza Sociale (INPS) (the public entity competent for social security) an appropriate separated register to which the associated partners of a partnership agreement, whose contribution comprises only of working performance, have mandatory to register if they are not entered in others rolls. In such case, the social contribution to be paid to INPS is charged to the associated partner for 45% and for 55% to the associating one. This task is not mandatory for the associated partners whose contribution consists in financing or when it is mixed (financing and working performance).

For the recording to the separated register of INPS is necessary to pay an amount of social contribution equal to 17.50% or 18.50% of the total income, under the stage of income, if the associated partner is a retired worker. For the associated partner who are not retired the contribution for social security is equal to 18% or 19%, under the stage of income, comprehensive of a share of 0.50% needed to finance the social performances, such as: indemnity of maternity, contribution in favour of the families and the hospitalization of the associated partner.

In cases of dissolution of the partnership agreement the associated partner has: to arrange the statement of the management until the date of the dissolution of the agreement; to correspond to the associated partner the profits due to him on the base of the same statement and eventually the profits due by previous statements not liquidated; to give back to the associate the contribution he paid, if it was agreed in

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the contract; to deposit in favour of the associate an amount eventually agreed for the resolution.

Such as the associated partner will receive an amount of money comprehensive of the restitution of the contribution he conferred – if it was previously agreed – and of the profits he has not yet perceived, and, eventually, of the amount previously agreed for the resolution cases.

The profits of the participation of the associated partner are taxable in two ways depending on the contribution. In fact, the contribution supplied by the associated partner can be an amount of money, or the grant or the enjoyment of the possession of a good, or it can consist in the performance of a work or a service and can have as object whether movables or immovable assets.

The assessment of the kind of the contribution of the associated partner determines the ways of taxation of the profits.

Such as: 1) the taxable amount is 40% of the total amount of them, in case that the value of the contribution is qualified; 2) the taxable amount correspond to the total amount of paid profits, if the contribution is not qualified.

On these profits is levied, at the moment of the grant of them, a withholding tax of 12.5% on the amount of them.

Under the fiscal levy on contracts of partnership qualified by contribution of asset, or asset and work, regulated by the art. 109, par. 9, lett. b), of the Testo Unico Imposte sui Redditi (TUIR), is settled that the associating partner cannot deduct the remuneration due to the associated partner, and, for the same reason, the profits and other amount, eventually, due for cases of recession or resolution are not deducible too.

Such as the profits of the associating partner are taxable like the profits of a corporate.