

LAZIO ADMINISTRATIVE REGIONAL COURT AFFIRMS THAT TREMONTI AMBIENTE AND CONTO ENERGIA BENEFITS ARE CUMULATIVE

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IN A SIGNIFICANT RECENT DECISION FOR OPERATORS IN THE RENEWABLE ENERGY MARKET, AN ITALIAN COURT HAS DETERMINED THAT THE TAX BENEFITS AVAILABLE UNDER THE TREMONTI AMBIENTE CAN BE CLAIMED ALONGSIDE FEED-IN TARIFFS PAID UNDER THE III, IV AND V CONTO ENERGIA REGULATIONS.

In decision no. 6784 dated 29 May 2019, the Lazio Administrative Regional Court (“TAR Lazio”) granted an appeal against a Note issued by Gestore dei Servizi Energetici – GSE S.p.A (“GSE”), a state-owned company which promotes and supports renewable energy sources in Italy. The appeal was brought on behalf of 15 photovoltaic operators and members of the Italian Association of Consumers and Producers of Renewable Energy (A.C.E.P.E.R.) by Watson Farley & Williams as counsel.

"The GSE Note provided that tax relief available under the Tremonti Ambiente could not be combined with the feed-in tariffs available under the III, IV and V Conto Energia regulations."

In granting the appeal, the TAR Lazio declared null and void the Note of 22 November 2017 (the “GSE Note”)[1] by which GSE had insisted that, in order to continue to benefit from feed-in tariffs under the III, IV and V Conto Energia regulations, operators must waive tax benefits arising under the Tremonti Ambiente. This provides that income of small and medium-sized enterprises earmarked for environmental investments will not form part of the taxable income of such enterprise for income tax purposes, resulting in tax relief in the relevant period. GSE’s position was that the feed-in tariffs and the benefits under the Tremonti Ambiente could not both be claimed.

THE GSE NOTE

The GSE Note provided that tax relief available under the Tremonti Ambiente could not be combined with the feed-in tariffs available under the III, IV and V Conto Energia regulations. If operators wished to benefit from feed-in tariffs they therefore needed to inform the Italian Revenue Agency that they wished to waive the tax benefits under the Tremonti Ambiente within twelve months of the publication of the GSE Note and provide evidence of the waiver to the GSE. This deadline was subsequently extended to 31 December 2019, in part due to operational difficulties experienced by the relevant parties in returning amounts related to the waiver of the Tremonti Ambiente.

The GSE Note had a disruptive impact on photovoltaic operators. Many of them have benefitted from, and continue to benefit from, the tax relief arising under the Tremonti Ambiente, particularly following the coming into force of Article 19 of the V Conto Energia regulation. [2]

In support of its position, GSE noted that the Tremonti Ambiente can be claimed alongside feed-in tariffs under the I and II Conto Energia regulations [3], subject to a limit of 20% of the cost of investment, pursuant to express provisions on combination and in accordance with Article 19 of the V Conto Energia regulation. It was said that this suggested that the tax relief provided for in the Tremonti Ambiente could only be combined with feed-in tariffs if expressly provided for.

GSE also relied upon the fact that Article 5 of the III Conto Energia regulation establishes conditions for the combination of incentives with other public contributions, and exhaustively lists public contributions and benefits excluded from the prohibition on combination, but does not include the Tremonti Ambiente. Further, it was said that the Tremonti Ambiente is not subject to the derogation referred to in paragraph 4 of the III Conto Energia regulation which, in certain cases, means that it is not necessary to choose between benefits.

Similarly, referring to the IV and V Conto Energia regulations, it was said that the possibility of combining the tax benefits of the Tremonti Ambiente with the feed-in tariffs provided for in the respective ministerial decrees was precluded as the relevant decrees also exhaustively list public contributions and benefits excluded from the prohibition on combination, but did not include the Tremonti Ambiente.

ON BEHALF OF OUR CLIENTS,
WE LODGED AN
EXTRAORDINARY APPEAL
AGAINST THE GSE NOTE WITH
THE PRESIDENT OF THE ITALIAN
REPUBLIC, WHICH WAS THEN
BROUGHT BEFORE THE TAR
LAZIO.

THE APPEAL BROUGHT BY WFW AND THE DECISION OF THE TAR LAZIO.

On behalf of our clients, we lodged an extraordinary appeal against the GSE Note with the President of the Italian Republic [4], which was then brought before the TAR Lazio.

We contended that GSE's interpretation was in breach of the rules governing the combination of public incentives under the Conto Energia regulations, being contrary to Article 5, paragraph 4, of the III Conto Energia regulation, as also referred to in the IV Conto Energia regulation and the V Conto Energia regulation, and with Article 19. We argued that pursuant to Article 19 of the V Conto Energia regulation, all provisions referring to "combination" must be interpreted in the context of public incentives, including those granted through a call for tenders, and the Tremonti Ambiente.

The appeal was upheld by the TAR Lazio, which annulled the GSE Note, as well as the subsequent extension of the deadline for waiver.

The TAR Lazio acknowledged the detrimental impact of the GSE Note and clarified that the regulatory framework states that the benefits in question may be combined (including in relation to the Conto Energia regulations subsequent to the II Conto Energia regulation). GSE's position was not accepted by the court, in part due to the inclusion of the Tremonti Ambiente among the "public incentives" referred to by the Conto Energia regulations.

EFFECTS OF THE JUDGMENT

This judgment will have a significant impact on the Italian legal landscape, allowing a large number of operators to enjoy the benefits of the Tremonti Ambiente alongside the incentives referred to in the respective Conto Energia regulations. Since the GSE Note requiring operators to choose between the Tremonti Ambiente and the various incentives has been annulled, GSE must now follow the interpretation of the TAR Lazio in any future determination on the subject.

GSE may yet appeal the decision before the Council of State but, for the time being, the decision in support of the combination of benefits under the Tremonti Ambiente and the incentives under the under the III, IV and V Conto Energia regulations issued by the TAR Lazio results in a positive landscape for operators in the sector.

[1] And subsequent extension notice

[2] DM July 5, 2012

[3] Respectively, DM 28 July 2005 and DM 19 February 2007

[4] *Ricorso straordinario al Presidente della Repubblica*

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