



TTN CONFERENCE ROME 2013

Taxation of Italian Securitizations

Giovanni Leoni

Orrick Herrington & Sutcliffe, Milan, Italy

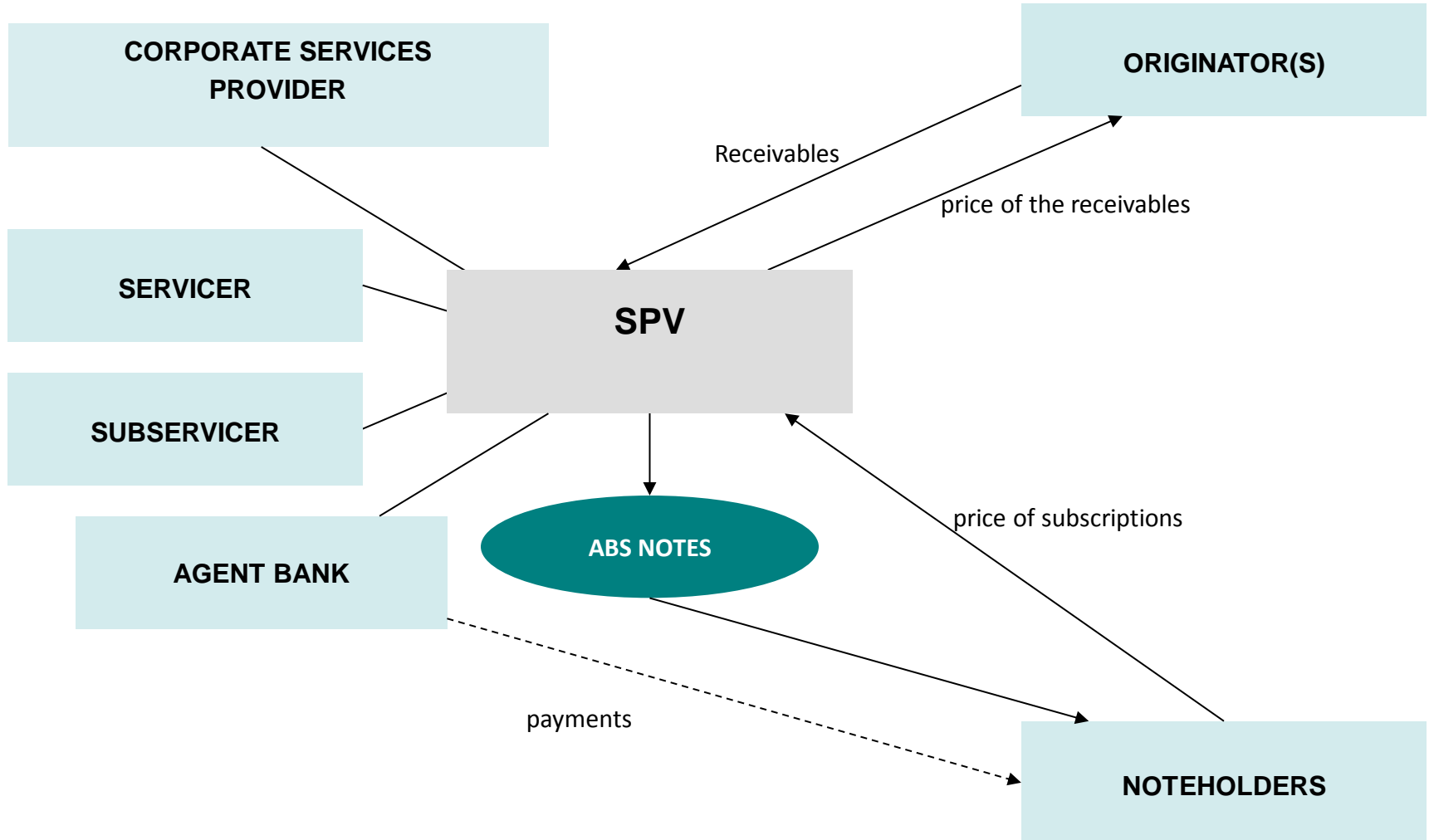
gleoni@orrick.com



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STRUCTURE OF A SECURITIZATION TRANSACTION IN ITALY

THE SECURITIZATION TRANSACTION WAS INTRODUCED IN THE ITALIAN JURISDICTION IN 1999 WHEN LAW N° 130 OF APRIL 30, 1999 WAS APPROVED.

ACCORDING TO LAW 130:

- AN ORIGINATOR OF HOMOGENEOUS ASSETS (WHICH HAVE TO BE MONETARY CLAIMS) SELLS SUCH PORTFOLIO TO A SPECIAL PURPOSE VEHICLE (“SPV”) ESTABLISHED UNDER LAW 130 AND HAVING SECURITIZATION TRANSACTIONS AS ITS EXCLUSIVE BUSINESS.
- UNDERLYING ASSETS CAN BE MONETARY CLAIMS ARISING FROM RESIDENTIAL MORTGAGES; LEASING RECEIVABLES; PERFORMING OR NON-PERFORMING LOANS.
- THE SPV ISSUES FIXED OR FLOATING RATE SECURITIES IN THE FORM OF DEBT (CALLED “ASSET BACKED SECURITIES” OR “ABS” NOTES).
- ABS NOTES CAN BE OFFERED TO PROFESSIONAL AND/OR NON-PROFESSIONAL INVESTORS AND IN GENERAL CAN CIRCULATE AMONG THE INVESTORS.



STRUCTURE OF A SECURITIZATION TRANSACTION IN ITALY

- AS THE SPV IS AN ORPHAN COMPANY THE MONEY PAID BY THE INVESTORS TO THE SPV TO SUBSCRIBE THE NOTES IS USED BY THE SPV TO PAY THE PRICE OF THE PORTFOLIO TO THE ORIGINATOR.
- THE FLOWS OF MONEY GENERATED BY THE COLLECTION OF THE MONETARY CLAIMS SHALL BE USED BY THE SPV EXCLUSIVELY TO FULFILL ITS OBLIGATIONS TO THE NOTEHOLDERS (PAYMENT OF CAPITAL AND INTEREST) AS WELL AS TO THE OTHER CREDITORS IN THE CONTEXT OF THE TRANSACTION.
- CLAIMS CONSITUTE SEGREGATED ASSETS OF THE SPV (ALSO IN RESPECT OF OTHER ASSETS OF THE SPV RELATING OTHER SECURITIZATIONS).
- THE NOTEHOLDERS WILL RECEIVE THE REIMBURSMENT OF CAPITAL AND THE PAYMENT OF THE RELATED INTEREST WHEN AND ONLY IF THE SPV HAS THE LIQUIDITY DERIVING FROM THE COLLECTION OF THE RECEIVABLES REPRESENTING THE UNDERLYING ASSETS.
- SINCE 2007, THE MAJORITY OF THE ABS OF ITALIAN SECURITIZATION TRANSACTIONS HAVING BANKS AS ORIGINATORS HAVE BEEN SELF RETAINED BY THE ORIGINATORS AND USED AS COLLATERAL IN REFINANCING OPERATIONS.
- IN 2013, A PUBLIC TRANSACTION HAS BEEN FINALIZED BY AN ITALIAN BANK FOR AROUND 1 BILLION EUROS AND DIFFERENT SERIES OF ABS NOTES HAVE BEEN PURCHASED BY FOREIGNERS INVESTORS.



TAX TREATMENT OF THE TRANSFER OF CLAIMS

AS FAR AS CORPORATE INCOME TAX IS CONCERNED, THE TRANSFER OF CLAIMS IN THE CONTEXT OF A SECURITIZATION TRANSACTION IS SUBJECT TO THE ORDINARY TAX REGIME APPLICABLE TO CAPITAL GAINS AND/OR LOSSES.

AS FAR AS VAT IS CONCERNED, TRANSFER OF CLAIMS FALLS WITHIN THE SCOPE OF VAT IF IT CAN BE CHARACTERIZED AS A SUPPLY OF SERVICES RENDERED BY THE PURCHASER.

IN THIS RESPECT, A TRANSFER OF CLAIMS CAN BE QUALIFIED AS A SUPPLY OF SERVICES FOR VAT PURPOSES IN THE EVENT AND TO THE EXTENT THAT (I) IT HAS A FINANCIAL PURPOSE (ARTICLE 3, PARAGRAPH 2, ITEM 3) OF PRESIDENTIAL DECREE N° 633 OF 26 OCTOBER 1972); (II) IT IS CARRIED OUT FOR A CONSIDERATION PURSUANT TO ARTICLE 3, PARAGRAPH 1 OF PRESIDENTIAL DECREE N° 633/1972. IN SUCH A CASE THE TRANSFER OF CLAIMS IS SUBJECT TO VAT AT THE ZERO PER CENT RATE (VAT-EXEMPT TRANSACTION).

THE FINANCIAL PURPOSE OF THE SECURITIZATION TRANSACTION HAS NEVER BEEN CHALLENGED AND ITS EXISTENCE DOES NOT SEEM TO BE AN ISSUE.



TAX TREATMENT OF THE TRANSFER OF CLAIMS

AS FAR AS THE TRANSFER OF CLAIMS FOR A CONSIDERATION IS CONCERNED, ACCORDING TO THE EU COURT OF JUSTICE AND ITALIAN TAX AUTHORITY:

➤ THE REMUNERATION OF THE TRANSFER OF CLAIMS CAN BE REPRESENTED BY THE DISCOUNT ON THE FACE VALUE OF THE PORTFOLIO (FACE VALUE = 100; PRICE PAID BY THE PURCHASER = 95) AS WELL AS BY ANY COMMISSION PAID BY THE ORIGINATOR WITH THE PURPOSE OF REMUNERATING THE PURCHASER FOR THE PAYMENT IN ADVANCE MADE BEFORE THE EXPIRATION OF THE CLAIMS (AGENZIA DELLE ENTRATE RESOLUTION N° 32 OF 2011; EU CASE C-305/2001);

➤ WITH SPECIFIC REFERENCE TO NON-PERFORMING CLAIMS, THE COURT OF JUSTICE HAS ALSO SPECIFIED THAT *“AN OPERATOR WHO, AT HIS OWN RISK, PURCHASES DEFAULTED DEBTS AT A PRICE BELOW THEIR FACE VALUE DOES NOT EFFECT A SUPPLY OF SERVICES FOR CONSIDERATION AND DOES NOT CARRY OUT AN ECONOMIC ACTIVITY FALLING WITHIN THE SCOPE OF THAT DIRECTIVE WHEN THE DIFFERENCE BETWEEN THE FACE VALUE OF THOSE DEBTS AND THEIR PURCHASE PRICE REFLECTS THE ACTUAL ECONOMIC VALUE OF THE DEBTS AT THE TIME OF THEIR ASSIGNMENT”* (EU CASE C-93/2010);

➤ IF THE TRANSACTION DOES NOT FALL WITHIN THE SCOPE OF VAT, REGISTRATION TAX OF 0.5% IS APPLICABLE IF THE TRANSFER OF CLAIMS IS EXECUTED IN ITALY BY PRIVATE OR NOTARIZED DEED. NORMALLY ALL THE TRANSACTION DOCUMENTS OF THE SECURITIZATION TRANSACTION ARE EXECUTED OUTSIDE OF ITALY OR BY EXCHANGE OF CORRESPONDENCE.



TAX TREATMENT OF THE SPV (SPECIAL PURPOSE VEHICLE)

- A. AN SPV IS AN ORDINARY TAX PAYER IN ITALY FOR CORPORATE INCOME TAX;
- B. AS A CONSEQUENCE, IT HAS THE OBLIGATION TO FILE A TAX RETURN, TO APPLY WITHHOLDING TAX, ETC.;
- C. NEVERTHELESS, NO CORPORATE INCOME TAX IS DUE BY THE SPV DURING THE SECURITIZATION TRANSACTION BECAUSE THE FLOWS OF INCOME DERIVING FROM THE PORTFOLIO ARE NOT LEGALLY AVAILABLE TO THE SPV (ON THE BASIS OF THE SECURITIZATION LAW THE SPV HAS THE OBLIGATION TO APPLY ALL AMOUNTS AVAILABLE TO IT AND DERIVING FROM THE PORTFOLIO OF RECEIVABLES EXCLUSIVELY IN ORDER TO FULFILL ITS OBLIGATIONS TO THE NOTEHOLDERS AS WELL AS TO THE OTHER ISSUER CREDITORS IN THE CONTEXT OF THE TRANSACTION).
- D. ACCORDINGLY, ONLY AT THE END OF THE SECURITIZATION TRANSACTION, ONCE THE OBLIGATIONS TO ALL CREDITORS OF THE SEGREGATED ASSETS HAVE BEEN DISCHARGED, MAY THE RESIDUAL ECONOMIC RESULTS, IF ANY, BECOME ATTRIBUTABLE TO THE SPV AND AS SUCH BE INCLUDED IN ITS TAXABLE INCOME FOR ITALIAN INCOME TAX PURPOSES (IRES WITH THE RATE OF 27.5%);



TAX TREATMENT OF THE NOTES ISSUED BY THE SPV

TWO ISSUES ARISE CONSIDERING THE TAX TREATMENT OF THE ABS NOTES: (I) THE TAX TREATMENT APPLICABLE TO INTEREST PAID BY THE ABS NOTES; (II) THE TAX TREATMENT OF CAPITAL GAINS DERIVING FROM A SALE WITH A CONSIDERATION OF THE NOTES.

AS FAR AS THE TAX TREATMENT OF INTEREST IS CONCERNED, IT FOLLOWS THE TAX REGIME APPLICABLE IN ITALY TO BONDS ISSUED BY:

1. BANKS;

2. LISTED COMPANIES; AS WELL AS BY

3. OTHER COMPANIES (DIFFERENT FROM BANKS OR LISTED COMPANIES) WHICH HAVE ISSUED BONDS TRADED ON REGULATED MARKETS (THIS LATTER CATEGORY OF BONDS IS ALSO KNOWN IN ITALY AS “MINI BONDS”); AND

4. SPV OF SECURITIZATION UNDER LAW 130.

THE TAX REGIME OF INTERESTS DEPENDS ON THE NOTEHOLDERS STATUS:

A. IF THE NOTEHOLDER IS AN ITALIAN INDIVIDUAL OR AN ITALIAN NON-COMMERCIAL ENTITY, INTEREST PAYMENTS RELATING TO ABS NOTES ARE SUBJECT TO A FINAL TAX, REFERRED TO AS *IMPOST SOSTITUTIVA*, WITHHELD WITH THE RATE OF 20% (12.5% UNTILL DECEMBER 31ST, 2011);



TAX TREATMENT OF THE NOTES ISSUED BY THE SPV

- B. IF THE NOTEHOLDER IS AN ITALIAN COMPANY OR A PERMANENT ESTABLISHMENT IN ITALY OF A FOREIGN CORPORATION, PAYMENTS OF INTEREST WILL NOT BE SUBJECT TO *IMPOSTA SOSTITUITIVA* BUT MUST BE INCLUDED IN THE RELEVANT NOTEHOLDER TAXABLE INCOME BASE FOR *IRES* (ITALIAN CORPORATE INCOME TAX LEVIED AT THE RATE OF 27.5%);
- C. IF THE NOTEHOLDER IS A NON-ITALIAN RESIDENT, WITHOUT A PE IN ITALY TO WHICH THE NOTES ARE EFFECTIVELY CONNECTED, INTEREST PAYMENTS RELATING TO THE ABS NOTES ARE EXEMPT FROM THE 20% *IMPOSTA SOSTITUTIVA* PROVIDED THAT THE NOTEHOLDER:
- IS RESIDENT IN A WHITE-LISTED COUNTRY (A LIST IS PROVIDED BY MINISTERIAL DECREE DATED SEPTEMBER 4, 1996);
 - IS THE BENEFICIAL OWNER OF THE INTEREST PAYMENTS (AND IS NOT ACTING AS NOMINEE, AGENT OR SIMILAR);
 - DEPOSITS THE ABS NOTES WITH AN AUTHORIZED INTERMEDIARY AND FILES WITH THE RELEVANT DEPOSITORY A DECLARATION STATING INTER ALIA THAT THE NOTEHOLDER IS ELIGIBLE FOR THE EXEMPTION.

ADDITIONAL EXEMPTIONS MAY APPLY TO SPECIFIC CATEGORIES OF NON-ITALIAN RESIDENTS (INTERNATIONAL ORGANIZATIONS CREATED PURSUANT TO INTERNATIONAL TREATIES; CENTRAL BANKS).



TAX TREATMENT OF THE NOTES ISSUED BY THE SPV

IF THE NON-RESIDENT NOTEHOLDER IS NOT ELIGIBLE FOR THE EXEMPTION, INTEREST WILL BE SUBJECT TO THE ITALIAN WITHHOLDING TAX AT THE RATE OF 20% OR AT THE REDUCED RATE PROVIDED BY ANY APPLICABLE DOUBLE TAX TREATY.

AS FAR AS THE TAX TREATMENT OF CAPITAL GAINS REALIZED FROM THE SALE OR TRANSFER WITH CONSIDERATION OF THE ABS NOTES IS CONCERNED, THE FOLLOWING CRITERIA APPLY:

A. IF THE NOTEHOLDER IS AN ITALIAN INDIVIDUAL OR A ITALIAN NON-COMMERCIAL ENTITY, CAPITAL GAINS ARE SUBJECT TO A FINAL TAX, REFERRED TO AS *IMPOSTA SOSTITUIVA*, WITHHELD AT SOURCE WITH THE RATE OF 20% (12.5% UNTILL DECEMBER 31ST, 2011);

B. IF THE NOTEHOLDER IS AN ITALIAN COMPANY OR A PERMANENT ESTABLISHMENT IN ITALY OF A FOREIGN CORPORATION AND THE ABS NOTES ARE DEPOSITED WITH AN AUTHORIZED INTERMEDIARY, PAYMENTS OF INTEREST WILL NOT BE SUBJECT TO *IMPOSTA SOSTITUIVA* BUT MUST BE INCLUDED IN THE RELAVANT NOTEHOLDER TAXABLE INCOME BASE FOR *IRES* (ITALIAN CORPORATE INCOME TAX LEVIED AT THE RATE OF 27.5%);



TAX TREATMENT OF THE NOTES ISSUED BY THE SPV

C.SOME PECULIARITIES ARE TO BE NOTED IN CASE OF NON-ITALIAN RESIDENT NOTEHOLDERS, WITHOUT A PE IN ITALY TO WHICH THE NOTES ARE EFFECTIVELY CONNECTED:

- CAPITAL GAINS ARE EXEMPT FROM TAXATION IN ITALY IF THE NOTES ARE LISTED ON A REGULATED MARKET IN ITALY OR ABROAD (ARTICLE 23 OF ITALIAN PREIDENTIAL DECREE NO. 917 OF 1986) EVEN IF THE NOTEHOLDER IS RESIDENT IN A BLACK LISTED COUNTRY;
- IF THE NOTES ARE NOT LISTED ON A REGULATED MARKET, EXEMPTION FROM *IMPOSTA SOSTITUTIVA* APPLIES IF THE NOTEHOLDER IS RESIDENT IN A WHITE LISTED COUNTRY (SEE MINISTERIAL DECREE DATED SEPTEMBER 4, 1996);
- ADDITIONAL EXEMPTIONS APPLY TO CENTRAL BANKS AND INTERNATIONAL ORGANIZATIONS;
- EXEMPTIONS APPLY ALSO TO NON-RESIDENT NOTEHOLDERS THAT MAY BENEFIT FROM A DOUBLE TAXATION TREATY WITH ITALY, PROVIDED THAT CAPITAL GAINS ARE TAXED ONLY IN THE COUNTRY WHERE THE RECIPIENT IS RESIDENT FOR TAX PURPOSES.



CROSS BORDER SECURITIZATION TRANSACTION – A RECENT INTERPRETATION OF THE ITALIAN TAX AUTHORITY

THE QUESTION THAT WAS ADDRESSED TO THE ITALIAN TAX AUTHORITY WAS ABOUT THE ITALIAN TAX TREATMENT APPLICABLE TO NOTES OF SECURITIZATION ISSUED BY A SPV ESTABLISHED UNDER LUXEMBOURG LAW AND HELD BY ITALIAN INVESTORS.

ACCORDING TO THE ITALIAN TAX AUTHORITY (RESOLUTION N° 53 OF 2011), IF THE ABS NOTES ISSUED BY THE LUXEMBOURG SPV HAVE THE SAME OR SIMILAR CHARACTERISTICS AS THE ITALIAN ABS NOTES, THE RELEVANT PROCEEDS ARE SUBJECT TO THE SAME TAX TREATMENT APPLICABLE TO THE ITALIAN ABS NOTES HELD BY ITALIAN INVESTORS. OTHERWISE, THE ABS NOTES ISSUED BY THE LUXEMBOURG SPV CAN BE QUALIFIED AS ATYPICAL SECURITIES AND SUBJECT TO THE RELATED PROVISIONS.

THIS APPROACH HAD RELEVANT CONSEQUENCES UNDER THE PROVISIONS IN FORCE IN 2011, WHEN THE RULING WAS ISSUED, BECAUSE THE TAX TREATMENT OF BONDS AND ATYPICAL SECURITIES WAS VERY DIFFERENT FOR INDIVIDUALS: BONDS (INCLUDING ABS NOTES) WERE SUBJECT TO AN *IMPOSTA SOSTITUTIVA* OF 12.5%; ATYPICAL SECURITIES WERE SUBJECT TO 27% WITHHOLDING TAX.

SINCE JANUARY 1ST, 2012, THE TAX TREATMENT OF BONDS AND ATYPICAL SECURITIES HAS BEEN EQUALIZED: BOTH THESE INSTRUMENTS ARE SUBJECT TO THE TAX RATE OF 20% IF THE INVESTOR IS AN INDIVIDUAL.



A DIRECT SALE VS. A SECURITIZATION TRANSACTION

WE CAN ASSUME TO HAVE:

- AN ITALIAN ORIGINATOR;
- A PORTFOLIO OF MONETARY CLAIMS HAVING A FACE VALUE OF 100;
- A FOREIGN INVESTOR INTERESTED IN PURCHASING THE PORTFOLIO WITH A DISCOUNT (PRICE TO BE PAID TO PURCHASE THE PORTFOLIO = 95) IN ORDER TO GAIN ON THE DIFFERENCE BETWEEN THE PRICE PAID TO THE ORIGINATOR AND THE AMOUNTS COLLECTED FROM THE PORTFOLIO.

IN CASE OF A DIRECT SALE OF THE PORTFOLIO FROM THE ITALIAN ORIGINATOR TO THE FOREIGN INVESTORS:

- SOME SCHOLARS SAY THAT THE DISCOUNT GRANTED TO THE PURCHASER CAN BE QUALIFIED AS INTEREST AND, THEREFORE, SUBJECT TO ITALIAN WITHHOLDING TAX (AT THE RATE OF 20%);
- ITALIAN WITHHOLDING TAX (20%) WOULD BE APPLICABLE ALSO TO INTEREST DUE ON THE LOAN ACCRUED AND TO BE PAID BY THE ITALIAN OBLIGORS TO THE FOREIGN INVESTOR THAT HAS PURCHASED THE PORTFOLIO.

SOMETIMES A DIFFERENT STRUCTURE HAS BEEN SET UP IN ORDER TO AVOID ANY ITALIAN WITHHOLDING TAX:

- A FIRST SALE FROM THE ITALIAN ORIGINATOR TO ANOTHER ITALIAN COMPANY OR TO A PE IN ITALY OF A FOREIGN INVESTOR (FIRST PURCHASER);



A DIRECT SALE VS. A SECURITIZATION TRANSACTION

- A SECOND SALE FROM THE FIRST PURCHASER TO THE FOREIGN INVESTOR WHICH HAS A MINIMUM INTEREST IN THE FIRST PURCHASER SUFFICIENT TO FULFILL THE CONDITIONS OF THE EU DIRECTIVE TO EXEMPT INTEREST;
- IN THE FIRST SALE THE DISCOUNT IS NOT SUBJECT TO ANY WITHHOLDING IN ITALY;
- IN THE SECOND SALE THE DISCOUNT IS NOT SUBJECT TO ANY WITHHOLDING PROVIDED THAT THE DIRECTIVE IS APPLICABLE.

AS AN ALTERNATIVE IT CAN ALSO BE CONSIDERED TO SET UP A SECURITIZATION TRANSACTION (ASSUMING THAT THE CONDITIONS TO DO IT UNDER THE ITALIAN LAW ARE FULFILLED):

- THE REMUNERATION OF THE FOREIGN INVESTOR WOULD BE REPRESENTED BY INTEREST ON ABS NOTES TO BE PAID BY THE ITALIAN SPV;
- NO WITHHOLDING TAX IS APPLICABLE ON INTEREST PROVIDED THAT THE NOTEHOLDER IS RESIDENT IN A WHITE-LISTED COUNTRY.

A PE IN ITALY OF THE FOREIGN INVESTOR HAS TO BE CAREFULLY MANAGED.