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Registration Tax. Requalification of share deals in asset deals: solution to an eternal question?

1. Introduction

One of the most interesting changes introduced by the Italian Budget Law 2018 is the amendment of art. 20 of Presidential Decree 131/1986, which establish the criteria to be used to set the proper registration tax treatment applicable to the different deeds.

As better explained below, the new formulation probably has closed definitely the *vexata questio* related to the possibility of the Italian Tax Authority (hereinafter also "**ITA**") to re-qualify a share deal into an asset deal by referring to the "interpretive aim" provided by art. 20 of Presidential Decree 131/1986.

Those two types of transactions (share deals and asset deals), in fact, have two different tax treatments from a registration tax perspective. As a general rule, the transfer of shares or quotas (share deal) is subject to a fixed registration tax equal to € 200, while the transfer of a business unit (asset deal) is subject to a proportional registration tax equal to 3%, increased to 9% in case of transfer of real estate.

On the basis of such principle[1], in recent years, ITA has usually challenged a significant number of transactions, from a register tax point of view, by (i) ignoring the legal form of the transaction, (ii) re-qualifying it as an asset deal and (iii) applying a 3% registration tax (instead of € 200), based on the general concept of "substance-over-form" provided by art. 20 of PD 131/86.

In some cases, ITA has also challenged the related tax penalties equal to 120% of the unpaid proportional registration tax. The significant amount of the potential tax liability related to this issue, especially with reference to high price deals, represented in a few cases a potential deal breaker.

This innovation provided by the Budget Law 2018 is of great interest also for the private equity sector, due to the fact that, in recent years, consultants involved in such transactions usually provided specific clauses for the buyer in order to cover the above mentioned tax risks, by fixing the risk of re-qualification of the deed for the seller or, in some transactions, by paying directly the proportional registration tax at the closing date.

In the last few months, even AIFI has paid particular attention on the above mentioned issue and together with Fieldfisher has performed an analysis on the most recent judgements issued by the Italian Supreme Court in order to update its affiliates on this important area.

2. The rule in force until December 31 2017 and ITA approach

The previous version of art. 20, applicable until December 31 2017, stated that the registration tax was to be applied on the basis of the intrinsic nature and the legal effects pursued by the deeds subject to registration, regardless of the legal name or/and the legal form.

[1] i.e. the "interpretive aim" provided by art. 20 of Presidential Decree 131/1986

The mentioned formulation triggered several interpretative doubts in relation to the actual aims pursued by the tax rule in question and to the possibility to link more than one deed registered in order to re-qualify the intrinsic nature and the legal effects pursued by the parties.

Taking advantage of this lack of clarity, ITA in recent years has started several litigations aimed at re-qualifying share deals into asset deals and challenging the 3% registration tax instead of the fixed amount of Euro 200.

In this respect ITA used to have a very strictly approach and deeply scrutinized that kind of transaction and, in some cases, challenged also the related tax penalties equal to 120% of the registration tax.

It should also be noted that, the mentioned tax litigations were related mainly to sale of stake preceded by a contribution of assets to be sold, but, in several cases, ITA has also challenged the proportional registration tax even in cases of the sale of the entire stake not preceded by any contribution of assets.

Initially, ITA had challenged those transactions by arguing the violation of a general anti-abuse principle. However, after the clarifications provided by several Supreme Court judgments, ITA started to requalify share deals into asset deals on the basis of the "interpretative nature" of the deed, as apparently required by the previous formulation of art. 20 of Presidential Decree 131/1986 (*i.e.* economic effects vs legal effects) without applying the general anti-abuse principle.

In fact (in ITA's view), the acquisition of 100% of shares, especially if preceded by a contribution of a business unit in the entity acquired, reached the same economic effects of the direct acquisition of the business unit. On the basis of these same economic results, ITA had considered the whole transactions as a sale of business units subject to a 3% proportional registration tax.

3. The Supreme Court's view

Despite the fact that the position of ITA was very criticized by scholars and the specialized press (arguing that the previous formulation of art. 20 required checking the legal effects of the deed and without considering the economic effects reached by the transactions), the Italian Supreme Court very often aligned its decisions to ITA's views.

A recent analysis performed by AIFI in partnership with Fieldfisher has shown that, in recent years, there have been only few isolated rulings issued by the Italian Supreme Court which have denied the re-qualification as promoted by ITA. To make matters worse, the mentioned judgments were criticized by the same Supreme Court in other and more recent rulings.

The scenario till December 31 2017, therefore, was characterized by a common view by ITA and the Italian Supreme Court in relation to the possibility of re-qualifying "share deals" into "asset deals" on the basis of the interpretative rule according to art. 20 of Presidential Decree 131/1986.

4. The amendment introduced by the Italian Budget Law 2018

In view of this significant uncertainty, the Italian Legislator introduced in the Italian Budget Law 2018 a very important amendment on the scope of art. 20 of Presidential Decree 131/1986.

The current version of art. 20, in fact, provides that the registration tax shall be applied on the basis of the intrinsic nature of the (single) deed registered and legal effects pursued by the same agreement, and regardless of any other elements not reported in the registered deed.

From a tax perspective, the above-mentioned amendment may have closed the *vexata questio* in hand and finally clarified the proper application of the registration tax by limiting ITA's powers to unconditionally requalify share deals into asset deals.

In particular, the legal dossier issued by the Italian Government to the new art. 20 of Presidential Decree 131/1986 states that "*a sale of a business unit (asset deal) may not be compared to a 100% sale of quotas or shares (share deal)*".

The main purpose of the Italian Tax Legislator was aimed at clarifying the real scope of art. 20 and grant a higher certainty to that kind of transaction.

5. New rule and old interpretative issues

Even if the new rules may have solved several doubts, in the first days of 2018, scholars started a debate in order to understand if the new rules might have a retroactive application to deeds signed before December 31 2017. In this respect, some authors tried to argue that the new rules should also be applicable to past transactions.

In order to solve this question, from our perspective, it is important to understand the legislative *iter* that has led to the current version of this tax rule. In this respect, the legal dossier issued by the Italian Government provided additional clarifications on the aims of the new rules and its time of application.

As a matter of fact, the above mentioned dossier has clarified that the new rules are not retroactive. Therefore, all tax litigations currently pending before the Court should be treated by considering the previous formulation of art. 20 of Presidential Decree 131/1986.

According to the clarifications provided by the above-mentioned legal dossier of the Italian Government, the Italian Supreme Court judgement n. 2007 issued on January 26 2018, confirmed that the amendments introduced by the Italian Budget Law 2018 are not retroactive and, therefore, all deeds registered before December 31 2017 shall be treated by taking into account the previous formulation of art. 20.

On the contrary, the Provincial Tax Court of Reggio Emilia on January 31 2018 filed the judgment n. 4/2018 stating that the new art. 20 must be applied retroactively (contradicting the principle previously stated by the Supreme Court only a few days before).

ITA expressed its point of view on February 1 2018 during the yearly convention organized with the specialized press, by clarifying that the new version of art. 20 could not be applied retroactively. Given the above, it will be interesting to check the evolution of the Supreme Court judgements on this matter.