AIFI
Associazione Italiana del Private Equity, Venture Capital e Private Debt

fieldfisher

Tax and Legal Issues, January 2019

by Luca A. Pangrazzi, Matteo Poletti and Silvia Sofia (Fieldfisher)

Registration Tax: Requalification of share deals into asset deals: one year later, finally the end of the *vexata questio*

1. Introduction

One year ago, we talked about one of the most interesting changes introduced by the Italian Budget Law 2018: amendment of the art. 20 of PD 131/1986, which rules the criteria to be used to set the proper registration tax treatment applicable to the different deeds/agreements.

In summary, the above mentioned rule had stated that the registration tax is applied on the basis of the intrinsic nature of the (single) deed registered and legal effects pursued by the same agreement, regardless of any other elements not reported in the registered deed (for more details please refer to "*Registration Tax. Requalification of share deals in asset deals: solution to an eternal question*?" in AIFI - Tax and Legal Issues, January 2018).

This amendment was welcomed by the private equity sector as it limited Italian Tax Authority's (hereinafter "ITA") powers to unconditionally requalify share deals (subject to a fixed registration tax equal to Euro 200) into asset deals (subject to a proportional registration tax equal to 3% of the price paid). Due to several litigations aimed at re-qualifying share deals into asset deals started in recent years, in all deals structured with an asset deal (contribution in kind) followed by the share deal, the players and consultants usually negotiated specific clauses for the buyer in order to cover the tax risks that might potentially arise from the above mentioned requalification.

Even though such amendment represented an historical step forward for all the M&A sectors, last year we pointed out the existence of several doubts in relation to the potential retroactive application of such a rule for deeds registered before 1 January, 2018, hoping for an official clarification on the issue.

Finally, a clarification was made with the Italian Budget Law 2019, which definitively solved the *vexata questio*. Art. 1 par. 1084, in fact, states that the update to art. 20, introduced by the Italian Budget Law 2018, is retroactive, thus definitively settling any doubts also for the deeds filed before 1 January, 2018.

2. The old story of "Requalification of share deals into asset deals" also continued in 2018

Hope that the amendment introduced by the Italian Budget Law 2018 could have put an end to all tax litigations on this issue was short lived and was soon disregarded in the first months of 2018.

In fact, the Italian Legislator did not clarify if the rule introduced in 2018 was to have a retroactive application (as it seemed to, on the basis of the legislative *iter* of the Italian Budget Law 2018) also in relation to all the deeds registered before 1 January 2018. Such lack of clarity brought the Italian Supreme Court to debate rhetorically that such a rule had an innovative aspect that did not allow a retroactive application.

As a consequence, in the first months of 2018, the Italian Supreme Court decision n. 2007 issued on 26 January, 2018, confirmed that the amendments introduced by the Italian Budget Law 2018 was not to have a retroactive applicability and as consequence all deeds registered before January 1, 2018 should have been dealt with by considering the previous formulation of art. 20.

Such view was confirmed by several Supreme Court decisions during 2018 with judgments n. 2009, 4407, 4589, 4590, 8619 and 29804 by maintaining that the Italian Legislator had not clearly stated the retroactive application of the rule. As a consequence, all deeds registered before 1 January 2018, should have been taxed on the basis of their intrinsic nature and on the economic effects pursued by the parties with different (linked?) deeds subject to registration regardless of the *nomen iuris* or/and its legal form.

In the same way, ITA during the yearly convention arranged with the specialized press agreed with the above mentioned decisions by stating that the new version of art. 20 could not be applied retroactively. As a consequence, the first months of 2018 were characterized by a common view of ITA and the Italian Supreme Court in relation to the timing application of the new art. 20.

On the contrary, there were also some limited case laws treated by the Provincial Tax Court which stated that the new art. 20 must be applied retroactively, *de facto* contradicting the principle stated by the Supreme Court.

In addition, the point of view of ITA and the Italian Supreme Court was very much criticized especially by Assonime in Circular Letter n. 3/2018 published on 6 February 2018, and the Italian Public Notary National Committee in its Note 17-2018/T seems to agree with the retroactive application of the updated art. 20.

In view of this significant uncertainty, on 28 November 2018, the issue was discussed during the parliamentary session n. 5-00644. The publish reply stated that the new art. 20 should have been applied only to deeds registered starting from 1 January, 2018 by excluding any retroactive applicability. With great surprise, one month later, the Italian Budget Law 2019 fixed the Italian Supreme Court point of view by sustaining the retroactive application of art. 20.

3. Conclusions

On the basis of the clarification provided by the Italian Budget Law 2019 it is now clear that, on the one hand, the new version of art. 20 is definitely applicable also to deeds entered into before 1 January 2018, and, that all tax litigations initiated up to 31 December and still pending before the Courts should, as a consequence, be settled.

In conclusion, the curtain falls on one of the most debated tax issue of the last years consistently with what has already happened to other tax issues and with the aim of the Italian Legislator to allow greater certainty to this kind of transactions.

In general, this amendment of art. 20 is the latest in a long series of tax amendments involving investment funds transactions, and it was introduced also thanks to the support of AIFI in sensitizing the Italian legislator on critical issues concerning investment funds players.

For completeness sake, we point out that on 9 January, 2019, the Supreme Court published a decision that confirmed the previous view of art. 20. However, such decision was taken on October 2018, before the amendment was introduced by the Italian Budget Law 2019 and, therefore, it should be considered outdated in view of the “authentic interpretation” of art. 20.