



Recent Constitutional Court's judgement increases certainty in the application of registration tax

On 21 July 2020 the Italian Constitutional Court issued its judgement No. 158/2020 on the compatibility with the constitutional principles of ability to pay and equality of Article 20 of the registration tax code (hereinafter "Article 20"), as amended in 2017, which deals with the interpretation (and the consequent taxation) of deeds lodged with the tax offices in order to pay the registration tax.

Before the amendment, Article 20 had been consistently construed by the tax authorities as requiring the registration tax to be applied based on the economic effects attained by the combination of the deeds lodged and of any other connected deed, rather than on the juridical effects stemming from the deeds lodged taken in isolation. In particular, under this interpretation, tax authorities had constantly recharacterized – for registration tax purposes – the contribution in kind of a business to a company, followed by the sale to a third party of the shares received in exchange for the contribution, as a direct sale of the business to the third party, the latter being subject to a significantly heavier registration tax than the one that would apply to the former. Indeed, while in the case of business contribution and sale of shares – taken in isolation – a fixed registration tax of Euro 200 would apply, in the case of the sale of a business a 3% proportional registration tax on the market value of the business would be due. Although scholars had generally criticised that tax authorities' practice, the Italian Supreme Court had upheld it in the vast majority of its decisions.

Thus, in 2017 Article 20 was amended in order to clarify that registration tax must be applied based on the juridical effects of the deeds lodged, taken in isolation, i.e. without considering the economic effects stemming from their connection with other deeds (in 2018 a specific provision was passed by the Parliament stating that the 2017 amendment had to be regarded as a clarification of the true meaning of Article 20).

Against this background, the Italian Supreme Court (order No. 23549/2019) referred a question to the Constitutional Court arguing that the amended Article 20 breached the principles of ability to pay and equality, as set forth in Articles 53 and 3 of the Constitution.

With its judgement No. 158/2020 the Constitutional Court dismissed the arguments put forward by the Supreme Court and held Article 20, as amended in 2017, compatible with Articles 3 and 53 of the Constitution. In particular, it confirmed that:

- registration tax must be applied to the deeds lodged with the tax office without taking into account their connection with other deeds, as well as any other element extraneous to the text of the deeds;
- registration tax must be applied based on the juridical effects of the deeds;
- tax authorities may take into account (i) elements extraneous to the text of the deeds and (ii) the economic effects stemming from the connection between the deeds lodged and other deeds only to tackle tax avoidance schemes under the Italian general anti-avoidance rule (Article 10-bis of legislative decree No. 212/2000, hereinafter "the Italian GAAR").

In a nutshell, the Constitutional Court's judgement confirms the following takeaways:

- Article 20, as amended in 2017, is retroactively applicable, also in pending judicial proceedings;
- legal certainty in the application of registration tax increases significantly since, as a general rule, deeds must be construed in isolation from other connected deeds and taxed according to their juridical effects;
- the Italian GAAR remains applicable to counteract avoidance schemes; however, that GAAR (i) enhances the protection of the taxpayers' rights, as it provides for significant procedural safeguards and (ii) limits the rooms for the tax authorities to challenge the lower registra-

tion tax stemming from the contractual arrangements chosen by the taxpayer, as it explicitly recognizes the right for the taxpayer to select the less heavily taxed arrangement, where the legal system provides for alternative arrangements subject to different tax burdens.

For the sake of completeness, another proceeding dealing with Article 20 is currently pending before the Constitutional Court (order No. 62/2019 of the Tax Court of Bologna). It is, however, expected that the Court shall confirm the principles held in judgement No. 158/2020

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