Even the Supreme Court makes mistakes sometimes

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By: Carlotta Benigni

In a recent case concerning registration tax and particularly the interpretation of article 20 of Registration Tax Act, the Italian Supreme Court gave a surprise judgment that may well create confusion and uncertainty, as well as frustrating the Government's attempts to attract foreign investment.

Article 20 provides that "registration tax is applied according to the intrinsic nature and the legal effects of the deeds registered, even if they do not match the title or apparent form of the deeds".

In a number of previous decisions, the Supreme Court had agreed with the tax authorities, applying registration tax to the deed that triggered the highest tax liability. One of the most common challenges in this regard was related to the contribution of a going concern into a NewCo followed by the sale of the quotas of that NewCo. This transaction is subject to registration tax at the fixed amount of EUR 200, while the sale of a going concern would be subject to proportional registration tax. Italian tax authorities tend to disregard the two separate transactions (contribution and sale of quotas), arguing that the true nature of the transaction is, in fact, the transfer of the going concern, and on this basis they apply the higher proportional taxation.

The Italian Supreme Court has pointed out in many previous decisions that, on the basis of article 20 of the Registration Tax Act, for the purpose of the interpretation of one or more deeds, "it must give prominence to the real and overall cause of the economic transaction, compared to the forms of the individual legal transactions" and of particular regard is "the interest actually pursued by the contracting parties, even if executed by means of a

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plurality of non-contextual deeds".

A Supreme Court judgment of last December extended these principles further, effectively ruling out the possibility that "the sale of 100% of the shares of a company has the same economic function of the sale of the going concern. Both these contracts tend in fact to realize the legal effect of transferring the powers of enjoyment and disposal of the going concern by a group of subjects to another entity or group of entities."

Consequently, in the Supreme Court's opinion, "the sale agreement concerning 100% of the shares in a company is comparable, for registration tax purposes, to the transfer of the going concern, without it being necessary for the tax authorities to prove the elusive intent during the proceeding" (as would be the case under general anti-abuse laws). As a consequence, instead of fixed registration tax at EUR 200, the transfer should be subject to proportional registration tax (with rates ranging from 3% to 9%, depending on the assets held by the going concern). Furthermore, the Supreme Court stated that Italian tax authorities do not even have to prove intent.

This recent judgment recalled another judgment published in 2009, which also concerned the re-qualification of the transfer of shares into a going concern. However, the 2009 judgment was related to the transfer of the participation into a partnership, while December's judgment dealt specifically with the transfer of quotas.

The principles stated by the Supreme Court have also been applied by some of the regional tax courts throughout the year.

However, it seems that this decision (and others) were based on an incorrect interpretation of the law, for a number of reasons. But more importantly, even though the Supreme Court only gave judgment in this case in December, it is based on the old legislation on the abuse of law. A new law (article 10-bis of Law 27 July 2000, no. 212) came into force on 1 January 2016. Under this provision, a transaction can be challenged and disregarded by the Italian tax authorities as an elusive transaction only if:

- The relevant transaction does not have an economic justification
- There is an undue tax advantage, and
- The transaction is essentially aimed at obtaining such undue tax advantage.

The taxpayer is now expressly granted the freedom to choose between different transactions, each with different tax liabilities, with the possibility of choosing whichever option leaves it liable to less tax. Since the new law came into force, the older decisions of the courts based on an (incorrect) interpretation of article 20 of the Registration Tax Code, are no longer relevant for transactions entered into after 1 January 2016.

The Supreme Court approach is certainly not consistent with the current law. Of course, it is difficult to deny that the substance of every sale of a company is the business that company conducts. However, not accepting the parties' choice to transfer the shares of a company rather than the business itself, would mean share deals being treated in the same way as asset deals in any case in which the parties transfer 100 per cent of the shares in a company. This would constitute a fundamental change in tax law which cannot be introduced by the courts, but requires the intervention of the legislator (as has happened in Germany and Belgium, for example).

It is to be hoped that the Italian tax authorities will seek clarification of the exact scope of application of article 20 of the Registration Tax Act, possibly they could do so in the imminent Official Position, commenting on the introduction of the new article 10-bis as a general anti avoidance rule. This rule reflects the start of a new relationship between the Italian Government and tax authorities with the taxpayer, and it is not for the Supreme Court to derail that.

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AUTHORS

Carlotta Benigni
Tax Director
Milan | T: +39 02 806181

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