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MERGER AND ACQUISITION

Judgment No. 23641/2019 concerning the legal standing of a company following a merger by incorporation

The Italian Supreme Court stated that an incorporated company may not have a legal standing if it has been cancelled from the Companies Register, unless the other party bring a legal proceedings not being aware of the merger.

With regard to a merger by incorporation, the Italian Supreme Court in the judgment No. 23641 of 24 September 2019 stated the following general principles.

A merger by acquisition involves an amendment to the articles of association and does not constitute a simple extinction of the incorporated company (with the consequent succession of the acquiring company in all transmissible relationships).

The cancellation from the Companies Register of the incorporated company is a different event from the cancellation resulting from the cessation or termination of liquidation activities.

A company may continue to have legal standing if, during the proceedings, it is incorporated into (or merged with) another company.

Differently, in a post-merger situation, the incorporated company which has been cancelled from the Companies Register, will not be longer able to legal standing, but it shall be entitled to take part in a proceeding if the other party in the proceeding is acting against it, not being aware of the merger and the subsequent cancellation from the Companies Register. Indeed, it is different when the incorporated company first obtains the cancellation from the Companies Register and then wants to act directly in judgment, therefore involving a “*contra factum proprium*”.

TRUST

Judgment No. 22758/2019 concerning indirect taxation of a trust for charity purposes

The Italian Supreme Court stated that a charity trust is subject to the gift tax when the deed of transfer is signed if the trustee could immediately carry out the charity activities indicated in the deed of settlement.

With 12 judgments issued in 2019, the Italian Supreme Court has established that the gift tax is not applied at the time of the deed of transfer of a trust, but is applied at the time of the effective transfer of the assets to the final beneficiary(ies). Although in practice there are trusts set up for different purposes, the conclusion reached by the Supreme Court in these judgments is the same.

These judgments are in contrast to previous Supreme Court decisions and to the by the Italian tax authorities common practices, in which the gift tax is levied at the same time as the signing of the deed of transfer.

The recent judgment No. 22758 of 12 September 2019 of the Supreme Court (“**Judgement no. 22758**”) concerns again the question of the taxable event of a trust. In such a case, there was a charity trust set up in New Zealand with the transfer of a significant amount (*i.e.* about 4 million of Euros) to the trustee (a New Zealand company). Under the terms of the deed of settlement, the trustee could operate directly for the charity purposes. According to the Italian tax authorities opinion, the gift tax (at a 8% tax rate) was to be levied at the time of the deed of transfer. The assumption of the Italian tax authorities was considered correct by the Supreme Court, which specified that if the deed of settlement identifies a clear intention to carry out the transfer of assets to the beneficiaries of the trust and these beneficiaries are identifiable, the gift tax will be applied at the time of the transfer to the trustee. Conversely, the act is subject to a fixed registration fee. Thus, in our case, the charity trust is taxed at the time the deed of transfer is signed.

However, there are specific references in the text of the judgment to the previous decisions issued in 2019. The judgment at stake is not intended to contradict these previously judgments, but only to clarify them. Indeed, the Supreme Court has established that, in such a case, the gift tax should be levied at the time of the deed of transfer in accordance with the explicit provision that the trustee could immediately carry out the charity activities indicated in the deed of settlement.

In this respect, it is worth noting that this judgment does not have an impact on the clauses – often included in the deeds of settlement of the trust – which provide that, on a residual basis (in the case of the lack of all first beneficiaries), the final beneficiary(ies) should be identified in a charity. Indeed, such trusts cannot be qualified as trusts with a charity purpose.

In addition, it is curious that the case examined by the judgment at stake is comparable to the case discussed in the previous judgment of the Supreme Court No. 16699 of 21 June 2019 (“**Judgement No. 16699**”), having the same judges, but with opposed conclusions .

Judgment No. 16699 concerns a special purpose trust set up by transferring the funds necessary for the upgrading of Perugia Airport. In this case, the Supreme Court has confirmed the principle of non-application of the gift tax at the time of the signing of the deed of transfer.

In fact, the Supreme Court confirmed that in order to apply the gift tax, the effective transfer of the assets is necessary. They also stated that the signature of the deed of settlement or the deed of transfer are not a taxable event, but they are purely instrumental to implements the purposes of the trust. By contrast, is the attribution of the assets to the final beneficiaries to constitute a taxable event.

The principles affirmed in the Judgement No. 16699 are fully reported in the Judgment No. 22758, but with the different conclusion that the gift tax shall be levied at the time of the signing of the deed of transfer. Therefore, the Supreme Court, in the Judgment No. 22758, on the one hand, refers to the previous decisions and, on the other hand, reaches a substantially opposed conclusion.

To conclude, although the non-application of a gift tax at the moment of the signature of the deed of transfer is confirmed in the majority of recent decisions of the Supreme Court, the Judgment No. 22758 leaves a margin of uncertainty in relation to the effective applicability of this principle to charity trusts.

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