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TRUSTS

Trusts and gift tax

The up-to-date situation about the application of the gift tax to the transfer of assets in favour of a trust.

It is common knowledge that trusts could be shaped in various manners in order to pursue different objectives and aims. These features make trusts a polymorphic instrument that create some issues in determining the relevant tax treatment. The Italian Tax Authorities (“ITA”) and the Italian courts have tried to identify the main guidelines regarding the indirect taxation applicable to the transfer of assets in favor of a trust. It has been clarified that such transfer shall be taxed by applying the inheritance and gift tax (the “Gift Tax”), being the transfer into the trust considered as a segregation of the transferred assets. The ITA, with the Guidelines n. 48 of 4 August 2007, have clarified that the Gift Tax is to be applied (i) at the time of the transfer deed and (ii) having regard to the relation existing between the settlor and the beneficiaries of the trust, disregarding the fact that transfer is formally executed in favor of the trustee.

The majority of the tax lower courts, however, diverged from the ITA guidelines, affirming that the transfer to the trustee shall be taxed by applying the registration tax at a fixed rate (which is minimal) and that the Gift Tax should be applied only upon the transfer from the trustee to the beneficiaries. The Italian Supreme Court has issued in 2016 and 2018 some decisions sharing the same position expressed by the tax lower courts (i.e. application of the Gift Tax only upon transfer of the assets from the trustee to the beneficiaries). However, in another decision issued in 2018 and stating on a so called “guarantee” trust, the Supreme Court seemed to take a position which partially differs from the previous ones and seems to tend for the taxation upon transfer of the assets to the trustee, as required by the ITA.

In any case, despite the wavering case law, the customary practice adopted by the large majority of the public notaries is favorable to the application of the Gift Tax upon transfer of the assets to the trustee. This practice, even if not perfectly consistent with the Gift Tax structure, has the great advantage of fixing the taxation at the beginning of the trust's life and make irrelevant any subsequent changes, if any, of the Gift Tax. Moreover, any distribution made by the trustee in favor of the beneficiaries would be tax-free, having already paid off taxes at the contribution of the assets.

START-UP AND SMEs

The 2019 Italian budget law has recently introduced special rules aiming at supporting start-ups and small & medium enterprises.

The Italian budget law for 2017 already introduced some tax incentives for Start-ups and small & medium enterprises (“SMEs”) and the recent budget law for 2019 has expanded such incentives.

In this respect, as from 2017 investing in start-ups grants the following tax incentives:

- an allowance from the Italian personal income tax (IRPEF) up to 30% of the invested amount, with a maximum threshold of EUR 1,000,000;
- a deduction from the Italian corporate income tax (IRES) up to 30% of the invested amount, with a maximum threshold of EUR 1,800,000.

In the 2019 budget law these amounts have been changed and, as consequence, the deductible amounts have been increased from 30% to 40%.

The new deductions and allowances will be applicable also for investments in the so-called “social” innovative start-ups and the ones who focus on energy. For the entities which are subject to the Italian corporate income tax, other than the innovative start-ups, annual deductions are further increased from 40% to 50% for the case of acquisitions of the 100% share capital of innovative start-ups, on condition that the participation is held for at least 3 years.

All the above-mentioned increases in tax incentives will become effective only upon authorization of the EU Commission.

PRIVATE INSURANCE

Qualification of the unit-linked policies and the demographic risk

Italian Supreme Court recently issued a decision regarding the qualification of unit-linked insurance policies.

On March 5th 2019, the Italian Supreme Court issued the decision N. 6319 regarding the so-called “*demographic risk*” for the legal qualification of the unit linked policies. Italian and EU case law have already treated this issue in various decisions, taking different positions: for example, the decision of the EU Court of Justice n. C-542/2016 of May 31st 2018 confirmed the insurance nature of the unit linked policies, in accordance with a previous decision issued in 2011 by the same Court of Justice (decision n. C-166/2011).

The Italian Supreme Court overturned the challenged decision, giving back the case to the Court of Appeal with the task of evaluating “*the entity of the insurance coverage*”, that, considering the mixed cause of this agreement, has to be analysed according to the following parameters: (i) the total amount of the premium paid by the policyholder; (ii) the time-frame; (iii) the type of investment.

On the basis of such parameters, the Court of Appeal shall evaluate if the entity of the coverage is appropriate in order to consider the demographic risk as effective: if the Court of Appeal will find out that the demographic risk is effectively incorporated, then it shall confirm the qualification of the contract as a life insurance policy. On the contrary, should the Court of Appeal find out that the demographic risk is formally mentioned but not effective, then it should infer that the contract is lacking of cause and thus it is null and void.

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