THE TAX LIABILITIES OF THE TRANSFEREE OF A BUSINESS ARE LIMITED EVEN WITHOUT THE "CERTIFICATE"

by Paolo Serva

The (never ending) debate concerning the extent of the business transferee's tax liability pursuant to Article 14 of Italian Legislative Decree no. 472/1997 has been further expanded by a new interpretation recently issued by the Tax Court of First Instance of Rome (Judgment no. 13223/2022 filed on 24 November 2022).

The reference framework

Paragraph 1 of Article 14 of Italian Legislative Decree no. 472/1997 provides that the transferee of a business is jointly and severally liable for the taxes and penalties relating to the breaches committed by the transferor in the year in which the transfer took place and in the two preceding years, as well as for those already levied and contested in the same period (even if they relate to more recent infringements). The provision exempts the transferor from benefitting from prior enforcement and limits the purchaser's liability to the value of the transferred business.

The second paragraph places a further cap on the transferee's liability by limiting it to "the debt resulting, at the date of the transfer, from the records of the offices of the tax authorities and the bodies responsible for assessing the taxes under their remit".

The doctrinal and case law debate has developed around the real scope of this limitation, also in light of the subsequent third paragraph, which requires the tax authorities to issue a certificate concerning the existence of pending disputes and unsatisfied tax debts, thereby fully discharging the transferee in the event that this certificate does not set forth any liabilities.

According to an initial approach, limiting the transferee's liability to the debts resulting from the records of the tax authorities' offices on the date of the transfer (provided for in Article 14) would apply only provided that the transferee had requested the certificate (referred to in the third paragraph) prior to the date of the transfer.

From this standpoint, it would be a bonus scheme reserved only for 'diligent' taxpayers who have promptly taken steps to request the certificate.

Conversely, in the absence of the certificate, the transferee would be liable for infringement committed in the year in which the transfer took place and in the two preceding years, even if it is identified following the transfer (Supreme Court 5979/2014, 9219/2017 and 26480/2020).

The second (and opposing) approach is based on the reading of the first two paragraphs of Article 14 of Italian Legislative Decree no. 472/1997 in conjunction. It follows that, irrespective of the requirement of the certificate, the second paragraph clarifies the scope of the transferee's liability, meaning that the transferee shall be liable for the debts arising from the breaches contemplated by the first paragraph only if these have at least been ascertained on the effective date of the transfer (and, therefore, result - on the same date - from the records of the offices of the tax authorities).

On the contrary, only the transferor shall be liable for infringements ascertained at a later date, even though they refer to the year of the transfer and the two preceding years (see Court of Cassation no. 17264/2017, the Regional Tax Court of Florence in judgment no. 74/8/2019 and the Regional Tax Court of Emilia-Romagna in judgment no. 235/01/2021 have expressed the same view).

The judgment under discussion

With judgment no. 13223/2022, in relation to a case followed by our law firm, the Court of First Instance of Rome returned to the vexata quaestio [troubled question], affirming that the failure to request the certificate cannot lead to an extension of the transferee's liability that goes beyond the limits established by the combined provisions of the first two paragraphs of Article 14, but only prevents the purchaser of the business from benefiting from the immediate discharging effects that would derive from a 'clean' tax certificate.

The Court therefore ruled out that the limitation of the joint and several liability in respect to the debt resulting - at the date of the transfer - from the records of the tax authorities' offices is reserved only for the transferee who has previously requested the certificate, since this reading would essentially lead to a penalty being applied for the failure to request the certificate, which would be in clear conflict with the favourable rationale of the rule.

Otherwise, it would place on the transferee a burden of requesting the certificate that is wholly incompatible with the mere option which is granted to him by the third paragraph for the purpose of obtaining early discharge or, at the very least, to have prior knowledge of the transferor's tax position.

The considerations of the judges of the Court of Rome are accepted in full, since the text and spirit of the provision by no means render the limitation of the transferee's liability provided for in the second paragraph subject to the request for the certificate.

In this viewpoint, the records of the tax authorities play a role that overlaps conceptually with that played by the books in the context of Article 2560, para. 2 (Supreme Court no. 17264/2017), as they play a constructive role in the transferee's liability. Conversely, the certificate merely plays an informative role (since it is the instrument by means of which the transferee may become aware of the transferor's liabilities) as well as by possibly discharging them (if there are no liabilities pending).

The issue of tax liabilities in (different) acquisition structures

The correct reading provided by the Judgment under discussion confirms the advantages that characterise, from the point of view of the purchaser's tax liabilities, structures that provide for the transfer of the business instead of the purchase of shareholdings.

The share deal entails, as a natural consequence, the purchaser's liability for all the liabilities of the purchased company and is therefore normally accompanied by a preliminary due diligence activity and the resultant contractual remedies with respect to the risks identified.

These activities take place in the case of asset deals, but the Article 14 system and the option to apply for a certificate allow the risk factor of the transaction to be mitigated for the purchaser, thereby counterbalancing other factors that make transfers of shareholders more attractive from a tax perspective.

This is the case, for example, of the indirect taxation which is clearly lower in the case of a share deal (fixed registration tax amounting to EUR 200 plus the Tobin Tax of 0.2% applicable to shares but not to company quotas) compared to the alternative structure of the transfer of the company which is subject to a 3% registration tax (which rises to 9% for the real estate component), with all the well-known uncertainties concerning the assessment of the value of goodwill and real estate properties forming part of the business set of assets.

In addition to these considerations, there are the different direct tax regimes that entail (i) in the case of an asset deal, full taxation of the capital gains for the transferor and the acquisition of the business at 'revalued' tax values for the transferee, and (ii) in the case of a share deal, the tenuous taxation of the capital gains (95% exempt by meeting the requirements for participation exemption) and the preservation of 'historical' tax values for the transferee.

When evaluating alternative structures, the different tax impacts, including in terms of the transferee's liability, must be taken into account along with the management, corporate and business aspects.

Tax liabilities in multi-stage structures

The issue of the transferee's tax liabilities becomes even more important in structures aimed at transferring a business unit into a newly incorporated company and thereby transferring the latter to the purchaser.

The contribution of a business to a newco and the subsequent transfer of its quotas is often used for this purpose. Under this option, the contributee newco (and thus its purchaser) is liable for the tax liabilities of the transferor within the timeframe and quantity limits provided for in Article 14 of Italian Legislative Decree no. 472/1997 and may benefit from the advance protection granted by the certificate.

An alternative structure is the demerger with transfer to a newco of a business unit followed by the transfer to the purchaser of the shareholding in the newco. In this case, the newco, on the basis of the combined provisions of Article 173 of Italian Presidential Decree no. 917/1986 and Article 15 of Italian Legislative Decree no. 472/1997, is jointly and severally liable for the debts of the demerged company referring to the period prior to the demerger. In this regard, the Constitutional Court, in judgment no. 90/2018, declared the issue of constitutionality of the aforementioned provisions providing for the unlimited liability of the demerged company (as an exception to the provision of the Italian Civil Code) to be unfounded on account of the "special nature of the tax credits" claimed by the tax authorities.

In conclusion, in disregarding further comparative assessments between the two structures discussed herein, also with regard to possible abuse of law, the transferee's liability for tax liabilities related to past management is more limited under the contribution structure (instead of that of the demerger) prior to the transfer.

The foregoing considerations mean that careful attention should be paid when assessing the transferee's liability for the transferor's debts when devising investment structures.

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