ITR WORLD TAX

Massimo Foschi of Studio Biscozzi Nobili & Partners deals with the main tax feature of the divisions by spin off (“scissioni con scorporo”)

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Divisions are tax-neutral (non-recognized) transactions under Italian tax law, that do not give rise to taxable gains or deductible losses on the assets of the companies involved, including inventory and goodwill, irrespective of whether these gains or losses are booked in the financial statements required by article 2506-ter of the Italian Civil Code.

Tax attributes and obligations of the divided company are transferred to the receiving companies in proportion to the value of the assets they have received. In the case of partial divisions, the divided company retains tax attributes and duties in proportion to the value of the assets it has maintained. However, all rights and obligations attached to specific assets (e.g. depreciation) are taken up by the company that receives such assets (article 173(4) of CTA).

Divisions by spin off

Legislative Decree 192/2024 regulated the tax aspects of division by spin-off referred to in Article 2506.1 of the Civil Code (“*scissioni con scorporo*”), introducing new paragraph 15-ter of Article 173 of CTA. Said operation triggers economic effects like those of a contribution in kind, where the share capital increase of the receiving company is attributed to the divided company and not to the shareholders of the latter.

The transaction remains a tax-neutral operation as “ordinary” divisions, even in the case of the transfers of assets that do not constitute a going concern (unlike a contribution in kind, where neutrality applies only to going concerns).

Some provisions of art. 173 CTA are not applicable in the case at hand, namely paragraph three, since the share capital of the receiving company is assigned to the divided entity and not to its shareholders; paragraph seven, since backdating of the partial division is not allowed; paragraph nine, concerning the treatment applicable to net equity reserves is subject to specific regulations, and paragraph ten, because in the case of a division in favor of a newly established beneficiary, there are no limitations on the carrying forward of previous years' tax losses.

As already mentioned, divisions by spin-off are tax neutral transactions, so that the participation in the receiving company issued to the divided company inherits the tax value, and the holding period of the transferred assets. Similarly, assets and liabilities object of the division assume in the hands of the receiving company the tax value and seniority of the transferring company.

Specific provisions are applicable in case of divisions by spin off:

> a) the participations received by the divided company further to the transfer of a going concern are considered to be recorded as financial fixed assets in the financial statements in which the assets and liabilities of the going concern were recorded, and this would simplify the application of the participation exemption regime of art. 87 of CTA in case of subsequent disposal of the equity interest;
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> b) division by spin off of participations that meet the requirements of art. 87 of CTA for the purposes of the application of the participation exemption regime in the hands of the divided company would trigger that the participation received by the divided company are also entitled to the participation exemption regime since are considered as accounted for as long-term investments (fixed assets) retaining the period of possession of the participations object of the division;
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> c) assets, activities and liabilities that do not constitute a going concern and shareholdings that do not meet the requirements set out in letters c) (residence in countries or territories that do not have a privileged tax regime) and d) (exercise of a commercial activity) of art. 87 CTA would trigger that the participation received by the divided company is entitled to the participation exemption regime only when requirements set forth by said provisions are actually verified.

The divided company keeps the tax composition of its net equity unchanged, including the reserves subject to tax deferral for which there is no obligation of reconstitution by the receiving company, whose increase of accounting net equity qualifies as a capital reserve for tax purposes.

For the purposes of Article 10-bis of Law No. 212 of July 27, 2000, a division by spin off of a going concern and the subsequent sale of the equity participation received is never considered a transaction in the purposes of the e abuse of law provisions.

The new legislation also regulates two important issues on which the Tax Agency practice (in accordance with the provisions regulating contributions in kind) took a rigid stance in the past:

> - art. 173, par 15-ter, lett. g), states that if the divided company is not resident and the division concerns its permanent establishment in Italy, the assignment to the divided company of the participations in the receiving entity does not involve any taxation, regardless of the maintenance in Italy of a permanent establishment of the divided company in whose assets these participations are included.

-art. 173, par 15-ter, lett. b), which expressly provides for the possibility of transferring the tax value of a goodwill booked by the divided company to the receiving one.

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