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Global Tax Alert

Italy's Constitutional Court confirms amendments limiting the power of tax authorities to recast Registration Tax treatment of corporate transactions

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Executive summary

Italy's Constitutional Court (the Court), in decision n. 158 of 21 July 2020, ruled on a case referred by Italy's Supreme Court (pronunciation n. 23549 of 23 September 2019) regarding the constitutional compatibility of amendments on Article 20 of the Registration Tax Code (RTC), introduced by the 2018 and 2019 Budget Laws. Such amendments provide that Registration Tax should apply based on the type of deed to be registered without reference to any external interpretative elements. The Court confirmed the legitimacy of such amendments.

Detailed discussion

The Budget Law for fiscal year (FY) 2018 redefined the applicative boundaries of Article 20 of the RTC, i.e., the provision which regulates how deeds subject to registration in Italy should be interpreted for correct Registration Tax treatment. The Budget Law asserted that said article should be applied in a way that the tax treatment of any deeds should be identified based on the nature of each single document to be registered, and regardless of any external interpretative elements (e.g., the behaviors assumed by the parties) or the contents included in other legal transactions which might be linked to the one to be registered.

Building a better working world

The above change was enacted with the objective to address certain interpretative aspects related to Article 20, which in the past gave rise to numerous tax controversies. As an example, the tax authorities would typically re-characterize a business contribution (or a business demerger) in favor of a new company (NewCo), followed by the sale of the NewCo shares, into a straight sale of a business. Accordingly, a very significant Registration Tax would apply, generally at a 3% rate computed on the going concern's fair market value (including goodwill), as opposed to a negligible €200 for each step. The tax authorities' position resulted from their reliance on Article 20 as a way to broadly interpret the deeds subject to registration based on their "intrinsic nature" and "juridical effects," regardless of their legal title or apparent form. The Supreme Court commonly confirmed such position.

In this context, the provision introduced by the 2018 Budget Law legally defined the way Article 20 should apply, by mitigating the recasting power of the tax authorities. Additionally, the Budget Law for FY 2019 expressly qualified the 2018 Budget Law amendment as an "authentic interpretation" of the existing provision, thus with a retroactive effect.

However, Italy's Supreme Court, in a pronunciation dated 2 July 2019 (concerning a contribution of a going concern into a company followed by the disposal of the company's shares) asked the Italian Constitutional Court whether the amendments introduced by the 2018 and 2019 Budget Laws constituted a breach of the Italian constitutional principles (specifically, the "Principle of Equality" and "Ability to Pay").

The Court stated that the mentioned amendments do not breach any constitutional principle. According to the Court, the respective Budget Laws re-affirmed the historical nature of the Registration Tax as a "deed transfer tax," confirming that the correct treatment should be identified according to the nature of each single document to be registered regardless of any external interpretative elements. The Constitutional judges also affirmed that a different interpretation would be incompatible with a correct application of the Italian general anti-avoidance rule (Article 10-bis of Law 212, 2000) which, absent an abusive goal, allows taxpayers to freely carry out any type of corporate reorganizations.

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