

# Newsletter

## Pharma, Healthcare and Life Sciences

The Italian Tax Authority clarifies the Tax Regime Applicable to an asset purchase relating to a pharmaceutical product

### I. Summary and take-away

In private ruling No. 151 of 23 March 2022 (the “**Ruling**”), the Italian Tax Authority provided guidelines on direct and indirect taxes applicable to an asset purchase relating to a pharmaceutical product from Alpha to Beta (respectively, the “**Purchaser**” and the “**Seller**”, jointly the “**Companies**”).

The Italian Tax Authority considered the aforementioned transaction as a sale of a business, subject to an *ad valorem* registration tax. Also, the capital gain, if any, will be taxable for corporate tax purposes and may be spread over five years if the asset has been held for at least three years; on the other hand, the capital gain will not be taxable for regional income tax purposes.

The Ruling seems in line with past guidelines; however, we note that some critical issues may arise in case of *cross-border* transfers and mismatches between jurisdictions in relation to the definition of business.

### II. Background and question to the Tax Authority

Alpha operates in the pharmaceutical sector and intends to purchase from Beta certain assets which do not constitute a business in the hands of the Seller: (i) the trademark “Gamma” relating to a certain pharmaceutical product, (ii) the marketing authorization of such product, (iii) the supporting dossier and (iv) the inventory at the time of sale.

The sale of these assets will be governed by an *Asset Purchase Agreement*.

The Companies asked whether the transaction constitutes a sale of a business or a sale of separate assets for direct and indirect tax purposes.

### III. The Italian Tax Authority’s position

At the outset, the Italian Tax Authority examined whether the assets at stake may be qualified as a business.

In this context, the Italian Tax Authority recalled that, for a business to exist, there must be an organization, capable to carry out certain business activity.

Also, the Tax Authority made reference to the Supreme Court case-law, which denied the need of a transfer of all assets of a certain business, insofar – in order to reach the threshold of “business” – suffices a degree of organization of assets, which is suitable for the exercise of a business, potentially through a subsequent integration (though not significant) by the seller.

In this context, the Italian Tax Authority considered the assets at stake to constitute a business, due to their functional organization.

And this conclusion held true, despite the different composition and nature of the assets covered by the previous ruling No. 574 of 10 December 2020 (where a sale of a business was found as well), as summarized in the table below:

Ruling No. 574 of 2020	Ruling No. 151 of 2022
<ul style="list-style-type: none"> <li>✓ Sales of trademark</li> <li>✓ Marketing Authorization</li> <li>✓ Inventory</li> <li>✗ Internet domains</li> <li>✗ Ownership of molecules</li> <li>✗ Tech transfer</li> </ul>	<ul style="list-style-type: none"> <li>✓ Sales of trademark</li> <li>✓ Marketing Authorization</li> <li>✓ Inventory</li> <li>✗ Dossier</li> </ul>

Consequently, the agreement for the transfer of the assets will be subject to an *ad valorem* registration tax.

For corporate tax purposes, the capital gain, if any, will be taxable and, if the business has been held for at least three years, the gain may be spread over five tax periods; on the other hand, the capital gain will not be taxable for regional corporate tax purposes.

### IV. Final remarks

The conclusions reached by the Italian Tax Authority seem in line with previous guidelines.

Nonetheless, it should be noted that the qualification as a business of assets relating to a pharmaceutical product may raise issues in case of *cross-border* transactions, where mismatches between jurisdictions may be found.

In particular, it may happen that the transfer of a certain asset may be qualified (i) as a transfer of a single asset (thus relevant for VAT purposes) by the State of the purchaser and (ii) as a part of a business (and therefore subject to an *ad valorem* registration tax) by the State of the seller, or vice versa. And this may be due not only to the fact that a different threshold to identify a business applies, but also occur when, for instance, the existence of

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a business does not depend on the organization of assets in the hands of the seller, but in the hands of the purchaser following the purchase of single assets from different sellers.

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