

Newsalert

Tax Department

The Italian Constitutional Court confirms the constitutional legitimacy of the new Article 20 of Presidential Decree No. 131 of 26 April 1986 (registration tax) and of the Article 1, para. 1084, of the 2019 Budget Law

In decision No. 39, filed on 16 March 2021 ("**Decision 2021**"), the Italian Constitutional Court, just a few months after the well-known decision No. 158 of 22 July 2020 ("**Decision 2020**"), has returned to rule on the constitutional legitimacy of Article 20 of Presidential Decree No. 131 of 26 April 1986 ("**TUR**"), based on the wording resulting from the amendments brought by Article 1, para. 87, letter a) of Law No. 205 of 27 December 2017 ("**2018 Budget Law**") and Article 1, para. 1084 of Law No. 145 of 30 December 2018 ("**2019 Budget Law**").

Article 1, para. 87, letter a) of the 2018 Budget Law amended Article 20 TUR, which currently provides as follows: "*Registration tax is applied according to the inherent nature and legal effects of the deed submitted for registration, even if the title or apparent form does not correspond to it, on the basis of the elements inferable from the deed itself, regardless of extratextual elements and related deeds, except as provided for in subsequent articles*".

In turn, Article 1, para. 1084, of the 2019 Budget Law, by following the same line of reasoning clearly set forth by the Explanatory and Technical Notes to the 2018 Budget Law, specified that "*Article 1, par. 87, letter a) of Law No. 205 of 27 December 2017, constitutes authentic interpretation of Article 20, par. 1, of Presidential Decree No. 131 of 26 April 1986*", thus applying retrospectively and to pending litigation proceedings.

In the case at stake, the Provincial Tax Court of Bologna, by way of Order of 13 November 2019 (reg. ord. No. 62 of 2020), issued in the context of a jurisdictional proceeding concerning the annulment of different liquidation notices that levied proportional registration tax as a consequence of the requalification as a direct

sale of business of various transactions encompassing the contribution of a business into a Newco, followed by the disposal of the Newco's shareholdings, referred to the Italian Constitutional Court questions regarding:

- a) the potential conflict of Articles 3 and 53 of the Italian Constitution with Article 20 TUR, as resulting from the amendments set forth by 2018 Budget Law, to the extent that, when applying the registration tax, it should be solely taken into account "*the elements inferable from the deed itself, regardless of extratextual elements and related deeds, except as provided for in subsequent articles*";
- b) in the second instance, the potential conflict of Articles 3, 24, 81, 97, 101, 102 and 108 of the Italian Constitution with Article 1, para. 1084, of the 2019 Budget Law, by virtue of which Article 1, para. 87, letter a), of the Budget Law 2019 "*constitutes an authentic interpretation*" of Article 20 TUR.

In Decision 2021, the Italian Constitutional Court:

- (i) has manifestly declared as groundless the questions regarding the issues of constitutional legitimacy of Article 20 TUR, in relation to Articles 3 and 53 of the Italian Constitution, as they are not supported by arguments other than those set out in the Order of the Italian Supreme Court, Fifth Civil Section, No. 23549 of 23 September 2019 (declared as groundless by the same Italian Constitutional Court with Decision 2020);
- (ii) has deemed unacceptable the issues raised in relation to Articles 24, 81, 97, 101, 102, 108 and 24, as they are generic, unjustified or otherwise perplexingly formulated;
- (iii) has deemed groundless the question concerning Article 1, para. 1084, of the 2019 Budget Law, in relation to Article 3 of the Italian Constitution.

With reference to point *sub* (iii), the Italian Constitutional Court has stated that, for the purposes of assessing constitutional legitimacy, the innovative or interpretative nature of the provision qualifying as an authentic interpretation (with retroactive effect) is not relevant, since it is necessary to take into account the fact that retroactivity is adequately justified in terms of reasonableness and does not conflict with other values and/or interests that are constitutionally protected.

In this regard, the Italian Constitutional Court, by resuming the arguments developed in Decision 2020, reiterated that the amendments brought to Article 20 TUR had the effect of "*leading the mentioned Art. 20 back to its original scope, where the interpretation, in line with the peculiarities of tax law, is limited to the legal effects of the act submitted for registration*". On the other hand, the Italian Constitutional Court restated that a different interpretation of Article 20 TUR,

“would entail an arbitrary and illogical interpretation of the provisions at hand and would cause inconsistencies in the tax system, in light of the enactment of a general anti avoidance rule through Art. 10-bis of Law No. 212 of 2000. Indeed, such interpretation would allow the Italian Tax authorities to apply an anti-avoidance rule without granting the taxpayer with the right to be heard and proving the existence of an undue tax advantage and the lack of economic substance, thus preventing the taxpayer from pursuing any legitimate tax planning (which is, on the contrary, undoubtedly admitted in the Italian and European Union tax system)”.

On this ground, having recognized the systematic nature of the amendments brought to Article 20, the Italian Constitutional Court, therefore, excluded any profile of unreasonableness in Article. 1, para. 1084, of the 2019 Budget Law.

With Decision 2021, it seems lawfulness to consider as definitively settled the issue of the retroactivity of the amendments brought to Article. 20 TUR.

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