Controlled Realisation, a useful tool for corporate reorganisation

When an entrepreneur, in the case of Merger & Acquisition or generational handover operations, approaches corporate reorganization, the first question that arises is the tax burden he will have to face for the success of the operation.

In this news we will analyze the institution of controlled realization which, as we will see below, makes it possible to avoid the emergence of capital gains in the creation of a family or strategic Holding for other purposes.

The tax burden on the transfer of shares in a holding held by a natural person

What is the tax burden on the contribution of a natural person's shareholdings in a holding company?

To answer this question it is necessary to analyze the specific case, in fact there are situations in which it is possible not to bring out the capital gains and avoid paying taxes on them. As we will see later in the article, if you plan carefully and in time for the operation, it is possible not to pay taxes on capital gains deriving from the increase in the value of the company, just as it is possible to avoid inheritance or gift taxes.

In this article, we will deal with the conferment of equity investments in a holding company and the relative tax discipline in terms of capital gains, leaving the treatment of inheritance and gift taxes to the next articles.

For tax purposes, the transfer of a shareholding held by a natural person is considered equivalent to a transfer for consideration in which the consideration for the transfer is represented by a shareholding in the capital of the transferee company.

Therefore, the difference between the realizable value and the fiscally recognized cost of the contributed shareholding determines, for the transferor, a capital gain which must be subject to ordinary taxation.

In other words, what frequently happens is that the shareholdings subject to transfer have a tax value equal to the percentage of capital conferred at the time of incorporation and therefore lower than the economic value of the company which has grown over the years. Consequently, at the time of the contribution of the shares in the transferee company, the transferor finds itself having to pay taxes on the accrued capital gain.

However, as an exception to the general criterion outlined by art. 9 TUIR of the normal value, in some cases there is the possibility of applying the **"regime of controlled realization"** , which ***allows the capital gains not to emerge in the presence of certain conditions.***

The contribution of shareholdings through controlled realisation, governed by **art. 177 of the TUIR** , is also applicable to private individuals who are not entrepreneurs as provided for by the second paragraph.

Said article states that the shares or quotas received as a result of contributions in companies, which allow the transferee company to acquire control of a company pursuant to art. 2359, paragraph 1, n. 1), of the Italian Civil Code or increase the percentage of control are valued, for the purposes of determining the income of the transferor, on the basis of the corresponding share of the shareholders' equity items formed by the transferee company as a result of the transfer.

Paragraph 2-bis, of the same article of the TUIR, provides that when the transferee company does not acquire control of a company (pursuant to article 2359, paragraph 1, number 1, of the civil code) or increase the percentage of control, the controlled realization regime is in any case applicable if both of the following conditions are met:

- the shares conferred represent a percentage of voting rights exercisable in ordinary shareholders' meetings of more than 2% or 20% or a shareholding in the capital or assets of more than 5 or 25%, depending on whether the securities are traded on regulated markets or other shareholdings (for

contributions of shareholdings held in companies whose activity consists exclusively or prevalently in the acquisition of shareholdings, the above percentages refer to all indirectly owned companies which exercise a commercial enterprise, and are determined , in relation to the transferor, taking into account any reduction produced by the shareholding chain);

- the shareholdings are conferred in companies, existing or NewCo, wholly owned by the transferor.

Therefore, pursuant to art. 177 of the Tuir, if the conditions on control or connection are met (paragraph 2-bis), what determines the realizable value and therefore the presence of a capital gain or not is the accounting behavior of the transferee; in fact, if the shareholding is recorded at the tax value of the shareholding received, there will be no capital gain and therefore there will be no taxes to pay on the contribution.

An explanatory example

An example may be useful to better understand the usefulness of "controlled realization" in reorganization operations.

Let's assume that Mr. Rossi is the owner of Alfa Srl whose share capital is €10,000, this capital was conferred during the incorporation phase and there have been no other increases or decreases of the same, therefore the tax value corresponds to €10,000.

Following an appraisal, the economic value of the company and therefore of the investment was determined at €100,000.

Mr. Rossi wants to confer his shares (100% of CS), held as a natural person, in a Holding, for the purpose of a future generational handover.

As we have previously said, the emergence or otherwise of the capital gain which in this case would be present, since the economic value of the shareholding has increased from €10,000 to €100,000, will depend on how the contributed shareholding will be entered in the Holding's assets.

Hypothesis 1 registration at the tax value

ACTIVE		PASSIVE	
Participation in Alpha	€10,000	Share capital	€10,000

In the present hypothesis, since the shareholding is recorded at the same value as the tax value, there are no capital gains and therefore no taxes will have to be paid on them.

Hypothesis 2 entry at the economic value

ACTIVE		PASSIVE	
Participation in Alpha	€100,000	Share capital	€100,000

In this second hypothesis, as we can see, the equity investment was recorded in the financial statements of the Holding at the economic value (appraisal value) and therefore a capital gain of €90,000 emerges since the tax value we said was €10,000. In this case, a tax equal to 26% of the same capital gain will have to be paid on the capital gain and therefore €90,000 * 26% = €24,960.

Let's see how with the controlled realization regime it is possible to avoid the emergence of capital gains as long as the shareholdings remain within the scope of a business activity. Furthermore, in the event of a future sale of the shares transferred, it is possible to take advantage of the PEX (participation exemption), governed by art. 87 of the Tuir, according to which, the capital gain is exempt to an extent equal to 95% of the capital gain, therefore IRES will be paid on 5% of the capital gain.

In order to benefit from the PEX, the participations must have the following characteristics:

1. Classification in the category of financial fixed assets in the first balance sheet closed during the period of ownership of the shares.
2. Uninterrupted possession from the 1st day of the 12th month preceding that of the transfer.
3. Tax residence of the investee company in a territory without preferential taxation.
4. The investee companies must exercise a commercial type of business.

In the event of the sale of equity investments following the contribution referred to in paragraph 2-bis of art. 177 of the TUIR, the term referred to in the first point is extended to 60 months.

Artur Michal Moch

Chartered accountant

For any other information, please contact Rogai & Partners stp Srl

www.studiorogai.it