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Conversion of DTAs into tax credit

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Focus on...

Art. 55 of *Cura Italia* decree

It is possible to convert into tax credit those DTAs (Deferred Tax Assets), even if not registered in the financial statements, which are referred to some specific tax assets, for an amount that is proportionate to the value of non-performing receivables transferred to third parties (Art. 55 of Law Decree no. 55/2020, so-called *Cura Italia* decree).

DTAs converted into tax credit, leading to evident financial benefits, can be (without any amount limitation):

- offset against other taxes and contributions in F24 forms;
- transferred in compliance with art. 43-bis or 43-ter of Presidential Decree no. 602/1973;
- claimed for refund.

Such DTAs can be converted only if non-performing receivables due from defaulting parties are transferred for valuable consideration, by 31 December 2020. For the purposes related to the regulation at issue, default occurs when payment is outstanding for over 90 days after the relevant due date.

The regulation is expressly aimed at incentivizing the transfer of non-performing receivables that companies have accrued over the last years, even due to the financial crisis, in order to support them also from a liquidity perspective to deal with the current economic uncertain situation.

DTAs that can be converted are those referred to:

- tax losses that can be carried forward but that have not yet been used to reduce taxable income pursuant to art. 84 of TUIR;
- ACE surplus that have not been used due to insufficiency of the taxable income, nor used as tax credit for IRAP purposes.

The most relevant update compared to previous similar regulations is that the conversion is allowed also for DTAs that are not registered in the financial statements, due to – for example – failure to comply with the so-called probability test required under accounting standards. In fact, DTAs can be registered in the financial statements if there are tax assets for which it is probable that taxable income will arise in the future, so to allow using such tax assets to reduce taxable income. Therefore, this regulation now grants this benefit regardless of the registration in the accounts.

Subjective scope

There are no subjective limits to benefit from the conversion if the requirements provided are met. Therefore, all companies having any legal form, of any size, and carrying out any activity can benefit from it.

The only limit concerns the need to ascertain the absence of following conditions:

- bankruptcy status or risk of bankruptcy, pursuant to art. 17 of legislative decree dated 16 November 2015, no. 180;
- insolvency status pursuant to art. 5 of royal decree dated 16 March 1942, no. 267 or to art. 2, para. 1, letter b) of legislative decree dated 12 January 2019, no. 14 (so-called code of business crisis and insolvency).

AObjective scope

The event that makes the conversion possible is the transfer of non-performing receivables. These are receivables for which there is a default, i.e. when payment has been outstanding for over 90 days after the due date (para. 5).

All receivables can be transferred, regardless of their nature (e.g. commercial or financial) and of the core business activity carried out (according to the supplementary report to the law decree).

Transfers to entities related by control relationships pursuant to art. 2359 of the Italian Civil Code and to "sister" companies that are subsidiary – even indirectly – of the same parent company are excluded.

The regulation generically refers to art. 2359 of the Italian Civil Code, so the concept of "control" is meant at a broad level (de jure control, de facto control, contractual control).

A limit is provided, concerning the amount of receivables that can be transferred: receivables can be transferred within the maximum face value of 2 billion Euros, to be calculated considering all receivables transferred by 31 December 2020 from companies related by control relationships and by companies that are subsidiaries – also indirectly – by the same parent company.

Moreover, tax losses and ACE surplus can be considered for conversion into tax credit for a maximum amount equal to 20% of the face value of transferred receivables.

Further application aspects

Once the conversion is completed, tax assets that generated the conversion (tax losses and ACE surplus) cannot be used for the amount corresponding to that of converted DTAs. This is in order to avoid a double benefit in relation to the same assets.

In order to get the benefit under analysis, an option pursuant to art. 11, para. 1 of law decree no. 59/2016 must be exerted.

The option must be exerted within the closure of the fiscal year that is current at the date on which receivables are transferred (2021 for companies whose fiscal year corresponds to the solar year).

Therefore, it seems that tax credit can be used starting from 2021 (at least, for companies whose FY matches the solar year), although the supplementary technical relation could suggest a different interpretation, providing an "earlier" effective date: in fact, the financial effect of the conversion is totally attributed to FY 2020.

Subsequently, clarifications are awaited on this issue.

Lastly, it is specified that tax credit will have to be indicated in the tax return and will not contribute to the taxable income for the purposes of the business income, and of the regional tax on production activities (IRAP).

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