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LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

SALE OF THE BUSINESS ASSETS OF A COMPANY IN ITALY: OVERVIEW OF THE MAIN CIVIL LAW & TAX STATUTORY REGULATIONS

Civil Code, Articles 2558 through 2560
L. 29.12.1990, nr. 428
D.Lgs. 18.12.1997, nr. 472
D.Lgs. nr. 9.1.2006, nr. 5

INTRODUCTION

Whenever a domestic sale of business assets does not involve the transferring of single goods pertaining to a business entity, rather a branch of the business of the business entity, or the assets of a business as a whole, then specific statutory regulations and norms of the Civil code apply to these latter sales.

It should be preliminary mentioned that, in order to structure a sale of the assets in compliance with the Italian statutory regulations, a written master agreement is necessary and the selling company has to draft an updated balance sheet relating to the assets that the company intends to convey.

A deed of sale by a public notary is mandatory. Civil code, Article 2556 sets forth that with reference to incorporated businesses, contracts having the transferring of the ownership or the enjoyment of the business as their object shall be evidenced in writing subject to the observance of the formalities that the Law sets forth for.

The public deed of sale has to be registered with the Companies' Register within thirty days from the date it was executed by the parties.

A written deed of sale is also necessary for the:

- Assignment of administrative licenses, granting etc., whenever feasible

- Carrying on of a rental contract or the entering of a new one

- Registration with the Companies' Register.

As well, a written deed of sale is required to the fiscal purposes.

SUCCESSION TO CONTRACTS

According to provision of Civil Code 2558 unless otherwise agreed, those who acquire a business succeed to contracts entered for the carrying out of the business unless they are of personal nature.

If there is just cause, the third contracting party can withdraw from the contract (Article 1373) within three months from the date of notice about the assignment, save in such case the liability of the seller. This provision is usually referred to the ongoing contracts.

Save for those of personal nature, the contracts relating to the transferred business are deemed assigned to the buyer as a whole, if there is not an

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expressed provision by the parties to the contrary.

The same provisions of law apply to a usufructuary or lessee for the duration of the usufruct or lease.

CLAIMS RELATING TO THE TRANFERRED BUSINESS

Civil code, article 2559 sets forth that the assignment of claims pertaining to a transferred business is effective against third persons, even without notice about it or acceptance by the debtor (see also Civil code, Articles 1264, 1265), from the time of registration of the assignment in the Companies' Register.

However, the assigned debtor is released if, in good faith, he pays the transferor.

The same provisions apply in case of usufruct of a business, if it extends to the claims pertaining to the business.

It is advisable to list the claims assigned in the deed of sale. In the absence of specific provision about it any claim pertaining to the transferred business is automatically assigned to the purchaser.

DEBT OF A TRANSFERRED BUSINESS, INCLUDING TAX DUES

Under provision of Article 2560, the seller is not released from debts incurred in the operation of a transferred business prior to the transfer, unless creditors consented to such release.

To be noticed that in case of sale of a commercial business the buyer is also liable for such debts, provided that they appear on the mandatory accounting books (See also Civil code, Articles 2212-2214).

Also, in accordance with provision of Article 1273, the acceptance by the creditor releases the original debtor only if this constituted an expressed condition of the stipulation or if the creditor expressly releases him. If the debtor is not released, he remains jointly and severally liable with the assignee.

It is advisable to list the debts assigned in the deed of sale.

As above mentioned the agreement of the creditor is necessary in order to assign the debts pertaining to the business sold.

Although tax liabilities remains primarily liabilities of the company (the seller), the buyer remains jointly liable for the dues relating to the income taxes on the purchased assets, regardless to the circumstance that such debts did not result from the accounting books or to the circumstance that the buyer was unaware about their existence.

Article 14 of Act nr. 472/1997 sets forth that liability of the buyer for taxes of the purchased concern is however limited up to the sale price amount and to tax dues pertaining to the year of purchase and of the two precedent years.

In addition, the tax Authority can advance claims against the seller only after those claims have been carried on against the seller and remained unsatisfied.

The above liability does not apply to the buyer for those taxes relating to the eventual gain realized by the seller, whenever they are treated to separate taxation (Resolution Ministry of Finance, 9.2.82, nr. 15/283).

Generally, in the contractual practice, a bank guarantee to the benefit of the buyer may be established in order to limit its own liability up to a certain amount.

The Law also provides that Certificates of the tax Authority may be requested to disclaim buyer's liability in connection with already filed tax returns.

EMPLOYMENT RELATIONSHIPS

Accordingly to provisions of Civil code, Articles 2558 and 2112 and with provision of Article 47, 3 par. of Act nr. 428/1990, the employment relationships continue with the buyer in case of sale of assets and the employees transferred preserve any of their rights and claims.

Seller and buyer are jointly and severally liable for the overall credits that the

employees transferred had at the time of the sale of assets.

The buyer has to apply the economical and regulatory treatment that the Collective Bargain Agreements (CCNL) and the eventual corporate agreements with the employees set forth at the time the sale took place and up to their expiration.

To be noticed that, in accordance with Article 19 of Act nr. 300/70, if the employees of the company are more than 15, the seller and the buyer must serve written notice to the representatives of the trade unions and of the respective labour associations about the prospective sale within 25 days at least before the date scheduled for the sale, with mention of the juridical and economical reasons underlying the sale of the business assets.

The transferral does not constitute itself reason for the termination of the employment relationship.

However, the seller may motivate a discharge with the need of reducing the workforce due to a decreasing in the business activity and due to the impossibility of useful employment.

Whenever the transferral regards companies or manufacturing units on which the CIPI has acknowledge a status of economical crisis (Act nr. 675/77, Article 2) or enterprises declared insolvent by the tribunal, Civil code, Article 2112 would not apply to those employees whose relationships continue with the buyer company, save that the agreement sets forth more favourable conditions.

In case of sale of the corporate goodwill including the workforce, it is advisable to enter a written agreement (so called: *verbale di conciliazione*) with the employees before the sale gets through.

TAX TREATMENT OF THE SALE OF BUSINESS

A registration tax in the amount of 3% on the market value of the transferred assets, plus goodwill, minus transferred liabilities is charged on a sale of business assets.

In case real estate property or agricultural land is concerned different tax rates would apply.

Although not mandatory, the tax Authority usually applies the following sample scheme for assessing the market value of the goodwill transferred on which the tax shall be levied:

COMPANY XY

Stated Corporate Gross Income
2005
1.000.000,00 A)
2004
2.000.000,00
2003
3.000.000,00
_____

6.000.000,00

Average 2003-2005
2.000.000,00 B)

Corporate Taxable Earnings
2005 400.000,00 C)

Profitability Ratio
2005 0,40 D=C)/A)

Goodwill 2005
2.400.000,00 C)*D)*3

The purchaser may ordinarily depreciate goodwill and fixed assets out of the purchase price and thus achieving a tax advantage, provided that the purchaser is a profitable business (up to 10% deductible per year).

PROHIBITION OF COMPETITION BY THE SELLING COMPANY

Provision of Civil code, Article 2557 sets forth that whoever transfers a business shall refrain, for a period of time of five years from the date the transfer took place, from starting a new enterprise which, due to its corporate object, location or other circumstances is likely to divert the customers pertaining to the transferred business. (See also Civil code, Articles 2125, 2229 and 2596)

An agreement to refrain from competition to a greater extent than the above mentioned is valid, provided that it

does not prevent the transferor from engaging in any business activity.
Such agreements cannot last anyhow more than five years from the date of the transfer. (See Articles 2125 and 2596)

According to Article 2557, whenever a longer term is contemplated in the agreement, or in case the term is not specified by the parties, the prohibition of competition is effective for a period of time of five years from the date of the business transfer.

It should be mentioned that in case of usufruct or lease of the business, the prohibition of competition is effective against the owner or lessor fro the entire term of the usufruct or of the lease.

SUBSEQUENT INSOLVENCY BY THE SELLING COMPANY

The purchaser has be informed by the selling company as to whether the selling company is or could be insolvent at the time the sale of the business assets takes place, and also if potential insolvency claims exists against the selling company.

The reason of this right to be informed is motivated by the circumstance that an actual or subsequent state of insolvency by the selling company could lead to the following consequences by operation of the law.

In fact, in accordance with provision of Article 67 of the Italian Bankruptcy Law there is a “suspicious period” within which the estate receiver may void or set-aside transactions carried out prior to the insolvency.

That period of time can be of one or two years prior to the declaration of bankruptcy, depending on the factual circumstances.

Article 64 of the Bankrupcty Law sets forth that all transactions for no consideration or at an undervalue are ineffective towards creditors if entered into by the bankrupt business during the two year period prior to the declaration of bankruptcy.

In addition Article 65 establishes that payments of receivables falling due on the day of the declaration of bankruptcy or thereafter are ineffective towards creditors, when made by the bankrupt during the 2-year period prior to bankruptcy.

In this connection, it is clear that the representation made by the selling company towards the purchaser in this respect is material indeed for this latter company.

Further, Article 67 sets forth that the following transactions may be set aside by the bankruptcy receiver, unless the other contracting party provides evidence that it was unaware about the insolvency of the debtor:

- Transactions at an undervalue (if performances rendered or obligations undertaken by the bankrupt were remarkably disproportionate against consideration provided by the other contracting party)

- Payments of receivables owing and payable, which has been effected by any means other than cash, if made in the 2 year period prior to declaration of bankruptcy

- Pledges and mortgages granted in the 2 year period prior to bankruptcy to secure past debt not yet owing and payable

- Pledges and mortgages granted in the 1 year period prior to bankruptcy to secure debts already owing and payable.

Whenever entered during the 1-year period prior to bankruptcy, the following transactions may also be set aside, provided that the bankruptcy receiver offers evidence that the other party was aware or should be aware about the insolvency by the debtor:

- The payments of debts fallen due
- The transactions for valuable consideration
- The transactions whereby security was granted to secure debt created at the same time.