

GattiPavesiBianchiLudovici



FAMILIES, CHARITIES AND HNWIS

Trusts: would any “strange animal” be a “monster”?

A recent Supreme Court Case took a surprising position with respect to trusts. As in other cases, the conclusion might have been influenced by specific facts and circumstances and by a manifest tax goal pursued by the taxpayers. However, the legal arguments to support the judgement are quite shocking and show that in certain contexts trusts are still regarded as “strange animals”: but is this enough to make them “monsters”?

Facts

Taxpayers who purchase a residential abode in Italy must pay, depending on the status of the seller, either (i) proportional VAT or (ii) proportional registration, cadastral and mortgage taxes.

In both cases, the amount due is lower if the property so acquired represents the main abode of the purchaser and the latter declares not to have (i) another residential property in the same municipality or (ii) a property in any place in Italy for which has already taken benefit of reduced taxation.

In the case at stake, the purchaser did already have a property but (i) prior to the new purchase it was transferred to a trust and therefore (ii) the purchaser actually enjoyed from reduced taxation with respect to the new acquisition. It is not specified whether the trust was Italian resident or whether it was irrevocable and/or discretionary.

Tax authorities claimed additional taxes arguing that the transfer of the property to the trust was not enough to meet the conditions for the lower taxation with respect to the new purchase.

The Judgement

The Supreme Court confirmed the position of the tax authorities with arguments that do not fit with the very nature of trusts.

According to the Supreme Court, indeed, the transfer to the trust implies:

- with respect to the trustee, an attribution of property that this is merely formal;

- with respect to the beneficiaries, no transfer of the property until the trustee decides to distribute it;
- with respect to the settlor, not just a real transfer of the property but simply a “self-restriction” of the power to dispose of the relevant asset.

As the transfer to the trustee is merely “formal, instrumental and temporary”, the property cannot be deemed as having been actually transferred to anybody and therefore the “dispossession” by the settlor cannot be considered as met.

The Rationale of the Judgement

The Supreme Court based its judgement on the various Court cases regarding the applicability of gift tax to transfers to trusts. However, the underlying rationale is different:

- from a gift tax perspective what matters is that a property is transferred by a person to the benefit of another person who is ultimately liable to gift tax. As the trustee is not the actual owner of the assets transferred to the trust and the beneficiaries are not yet the owners of the same assets, in principle gift tax is not applied until the property remains in the trust;
- in the subject case, however, what matters is that the settlor is no longer the owner of the assets, which is normally the case where the trust is irrevocable and discretionary. Focusing on who is the “actual” owner and arguing that if there is no other “actual” owner the transfer has not taken place is manifestly wrong;
- similarly, it is difficult to understand how the transfer to the trust may be considered as a mere “self-restriction” of the ownership by the settlor especially in situations where the settlor has no authority to direct or influence the trustee or to claim back the ownership of the property. In this respect, from an income tax perspective, if certain conditions are met, the settlor would not be considered as the owner of the property transferred to the trust. There is no concept of “self-restriction” of powers for income tax purposes. The “self-restriction” concept would have led to consider the settlor as the owner of the Trust’s assets and underlying income.

Conclusions

The judgement shows that Courts still struggle in understanding the very nature of trusts. A lot has been done in this direction but the path towards full clarity unfortunately seems still long.

GATTI PAVESI BIANCHI LUDOVICI

Paolo Ludovici paolo.ludovici@gpblex.it

DISCLAIMER

This publication is provided by Gatti Pavesi Bianchi Ludovici studio legale associato and has been duly and professionally drafted. However, the information contained therein is not a legal advice and cannot be considered as such. Gatti Pavesi Bianchi Ludovici studio legale associato cannot accept any liability for the consequences of making use of this issue without a further cooperation and advice is taken.