

## The self-declared trust incurs the gift tax

The establishment of a "self-declared" trust immediately incurs gift tax at a rate of 8%. This is the principle established by the Court of Cassation with the order of February 24, 2015, no. 3735 (in conformity, see Cass. order of February 24, 2015, no. 3737; Cass. order of February 25, 2015, no. 3886), which clashes irreconcilably with the prevailing orientation of the tax jurisprudence of merit (see, among others, CTP Reggio Emilia no. 418/2/14; CTR Milano no. 73/15/12).

In the judgment under review, the Judges of Piazza Cavour, in examining the indirect tax treatment of the establishment of the trust, simply stated that "the act of establishing the trust, through which the settlor, in order to strengthen their own asset guarantee in favor of banking institutions, transfers immovable property of which they are the owner into the trust, appointing themselves as trustee, incurs gift tax at the rate of 8%", with the consequence that the tax is applied immediately and is not deferred to the moment when the trustee (administrator) will distribute the trust assets to the beneficiaries.

This is in consideration of what is provided for by art. 2, paragraph 47 of Legislative Decree no. 262 of 2006, according to which "a tax on successions and donations is established on the transfer of assets and rights by reason of death, by donation, or for free, and on the establishment of destination constraints, according to the provisions of the consolidated text of the provisions concerning the tax on successions and donations...". According to the Supreme Court, from this provision it would follow that "the tax is directly established, and in itself, on the establishment of constraints and not on the transfer of assets and rights due to the establishment of destination constraints, as, instead, happens for successions and donations, for which the causal link is expressly evoked".

The matter arose from the notification of a tax assessment notice for the recovery of gift tax at the rate of 8%, following the registration of the establishment of a self-declared trust, through which the settlor (disposer) transferred immovable property of which they were the owner into the trust, in order to strengthen their own asset guarantee in favor of some banking institutions. This act also provided that, upon achieving the main purpose, the potentially remaining fund would be destined to meet the needs of the settlor's family, and that, at the end of the trust, the ultimate beneficiary of the remaining assets would be the settlor themselves, if alive, or otherwise their legitimate heirs.

The first-instance judges rejected the taxpayer's appeal, while the second-instance judges upheld the appeal, stating that "as a result of the establishment of the trust," the taxpayer "did not benefit from any enrichment, as the segregation of assets was intended solely to provide a guarantee.

Consequently, it was considered that the tax prerequisite for gift tax, namely liberality, is not configured; nor is it foreseeable, by virtue of the establishment of the trust, any contributory capacity of the taxpayer, in the capacity of trustee."

The tax office therefore proposed an appeal for cassation for violation and false application of law of Article 2, paragraph 47 of Legislative Decree no. 262 of 2006, in relation to Article 360, paragraph 1, no. 3), of the Code of Civil Procedure, which was upheld by the Supreme Court, based on the consideration that the aforementioned Article 2, paragraph 47, establishes "the tax on the establishment of a destination restriction," and that it "... is a new tax, associated only by analogy with the gratuitous nature of liberal attributions, otherwise gratuitous and hereditary... but it retains peculiar and heterogeneous characteristics compared to those of the classic tax on successions and gifts." In other words, the judges highlight how the Legislature, in regulating the "new" gift tax, provided that it also applies "to the establishment of destination restrictions," thereby creating a new tax category, different from that relating to gifts or acts of gratuitous

nature, since, while the application of the gift tax on gifts and gratuitous acts implies the existence of a transfer, the application of the gift tax to destination restrictions does not depend on any transfer.

With regard to the tax prerequisite for destination restrictions, the Supreme Court instead affirmed that it is related to the "preparation of the program for functionalizing the right to pursue the desired objectives," and therefore identifies it in the economic utility pursued by the purpose of the trust. In summary, it seems to assert that the economic utility pursued by the trust "burdens" the ultimate beneficiary of the trust itself, can be realized even without a transfer, and, within these limits, can be subject to taxation.

As for the rate at which to apply the gift tax, the judges of legitimacy opt for the 8% rate, which would be imposed by its residual nature, unable to find any "beneficiary" in a relationship of kinship or affinity with the settlor (although the trust deed provided that the residue fund after the achievement of the trust's main purpose would be allocated to meet the needs of the settlor's family and that, at the end of the trust, the ultimate beneficiary would be the settlor himself or his heirs, if he were deceased).

The Court of Cassation, albeit with different arguments, seems to reach the same conclusions as the Tax Agency, which, in circular no. 3/2008, stated that "even in a self-declared trust, where the settlor takes on the role of trustee, the allocation of assets to the trust, even in the absence of formal transfer effects, must be subject to gift and inheritance tax." The solution reached by the judges of Piazza Cavour is irreconcilable with the prevailing orientation of the merit tax case law, which, reconstructing the institute of the trust as a "modal" donation or as a donation subject to a suspensive condition, argues that the establishment of the destination restriction should not be considered as a manifestation of contributory capacity, as the title of assets to the trustee would be provisional and temporary, would not increase its assets, and would be a mere "bridge situation" pending the final allocation of assets to the beneficiaries.

In light of the above, it is therefore evident how, according to the Supreme Court, the Legislature, by providing that the gift and inheritance tax applies to the establishment of a destination restriction, has unequivocally attracted within the scope of the norm all regulations capable of producing it, including the trust.

Author: Avv. Angelo Ginex

Source: [DirittoBancario.it](http://DirittoBancario.it)