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Transfer of company shares and waiver of option rights: tax profiles, risks, and opportunities

Analysis of issues related to the transfer of shares at nominal value and the free waiver of option rights in light of the most recent case law

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Abstract: *This article analyzes two corporate transactions frequently used in professional practice: the transfer of shares at nominal value and the free waiver of option rights in the event of a capital increase. Although both cases are generally lawful, they present tax risk profiles that require careful prior assessment. The analysis is based on current legislation (TUIR), ministerial practice, and the most recent case law of the Court of Cassation.*

1. Introduction and regulatory framework

In professional practice, one may find oneself managing corporate restructuring operations involving the transfer of shareholdings between shareholders or the entry of new parties into the share capital. Two particularly common instruments are: (i) the transfer of shares at nominal value, often used for intra-family transfers or corporate reorganizations; (ii) the free waiver of option rights, used to facilitate the entry of new shareholders through a capital increase.

The regulatory framework for capital gains from the transfer of shareholdings is contained in Articles 67 and 68 of the TUIR (Presidential Decree No. 917 of December 22, 1986). In particular, Article 68, paragraph 6, establishes that the taxable capital gain consists of the "*difference between the consideration received or the sum or value of the assets reimbursed and the cost or purchase value subject to taxation*." The crucial element is the explicit reference to the "**consideration received**" and not to the normal or market value of the shareholding.

2. The sale of shares at nominal value

2.1 The general principle: relevance of the actual consideration

The tax law (Article 68 of the TUIR) explicitly refers to the "consideration" received by the transferor, without any reference to the normal value of the shareholding. The normal value, defined in Article 9 of the TUIR, is only relevant in specific cases expressly provided for by law (transfers with consideration in kind, contributions, allocation for purposes unrelated to the business).

It follows that, in principle, the transfer of a shareholding at a price equal to its nominal value (or in any case lower than its market value) **does not in itself generate** a **taxable capital gain**, given that capital gains are calculated on the consideration actually received and not on presumed or theoretical values.

2.2 Case law developments: the Agency's powers of assessment

The Supreme Court has intervened several times on this sensitive issue, outlining the limits within which the tax authorities can challenge the declared consideration.

Main rulings of the Supreme Court:

Judgment	Established principle
Cass. No. 3290/2012	There is no legal presumption of conformity between the consideration received and the normal value. However, the assessment of the normal value may be used to support a simple presumption.
Cass. No. 23498/2016	An "abnormal" difference between the nominal value and the real value is capable of characterizing the taxpayer's conduct as unreasonable and forming the basis for a presumptive assessment.
Cass. No. 16366/2020	The reference to normal market value may constitute a general anti-avoidance clause, preventing the taxpayer from obtaining tax advantages through the distorted use of legal instruments.
Cass. No. 35685/2023	A sale at a symbolic price is not void if the purchaser assumes related obligations (e.g., corporate debts). Only a "purely apparent" price can determine nullity due to lack of cause.

An examination of case law shows that the Revenue Agency **cannot automatically replace** the declared consideration with the normal value of the shareholding. However, in the event of an "abnormal" discrepancy between the declared price and the actual value, it may establish a presumptive assessment, which must be supported by *serious, precise, and consistent presumptions* pursuant to Article 2729 of the Italian Civil Code.

2.3 Risk factors and warning signs

The National Council of Notaries, in Study No. 852-2014/T, identified the main factors that increase the risk of assessment:

• **Parties involved:** transfers between family members or partners in the same company are traditionally subject to greater scrutiny by the authorities (see Ministry of Finance Note 5/11/1999 ref. 185903);

• **Activities carried out by the company:** real estate companies with significant unrealized capital gains present greater risks than operating companies;

• **History of the company:** newly established companies with limited net assets are less exposed;

• **Type of company:** in partnerships, the tax value of the share takes into account imputed income and distributed profits, leading to possible misalignments;

• **Subsequent transactions:** particular attention should be paid when the sale is followed shortly thereafter by another sale at a significantly higher price (see Cass. No. 15520/2002).

⚠ OPERATIONAL FOCUS

Sale at nominal value is not in itself unlawful, but requires adequate economic justification. It is advisable to document the reasons for the choice in advance (e.g., latent liabilities, statutory restrictions, shareholders' agreements, family reorganization needs) and to keep evidence of the methods of payment of the consideration (bank transfers, checks).

3. Free waiver of the right of option

3.1 Civil law aspects

The option right, governed by Article 2441 of the Italian Civil Code for joint-stock companies and referred to for limited liability companies by Article 2481-bis of the Italian Civil Code, gives shareholders the right to subscribe proportionally to newly issued shares or quotas in the event of paid capital increases. This right may be **transferred** for **consideration** or **waived free of charge**.

Waiver does not automatically result in the transfer of the right to other shareholders, but entails non-acceptance of the subscription offer. Unsubscribed shares revert to the directors, who may offer them to third parties or to shareholders who intend to exercise their right of preemption on the unsubscribed shares.

3.2 Tax treatment of free waiver

This issue was addressed by the Ministry of Finance in Ministerial Circular No. 98 of May 17, 2000 (§ 7.2.1), which is still the fundamental reference today.

According to the Ministry:

• **The free waiver** of the right of option "***does not constitute a taxable event***," given that Article 81 [now 67], paragraph 1, letters c) and c-ter) of the TUIR refer to transfers for consideration;

• **The taxpayer must prove** that it is a free waiver of the option right "and not a transfer for consideration of the option right, nor the exercise of the option and subsequent transfer for consideration."

This approach was confirmed by the Lombardy Regional Revenue Agency (Note No. 44933/96), according to which the waiver of the option right "has no tax implications in the case described above, whereas the conditions for taxation under the rules on miscellaneous income (...) are met at the time of the transfer of the shareholdings."

3.3 Distinction between free waiver and indirect donation

One important aspect concerns the potential classification of the waiver as **an indirect donation**, with consequent liability for inheritance and gift tax.

The Court of Venice has specified that the waiver of the right to subscribe **does not constitute an act of generosity** because: (i) the waiving party pursues its own interest (to free itself from any risk capital outlays); (ii) the beneficiary also pursues the company's interest in capitalization. The transaction is therefore characterized by *causa societatis* and not by *causa donandi*.

The Court of Cassation (a position also confirmed in 2024) reiterated that the enrichment of the shareholder who subscribes to the waived shares does not derive exclusively from the waiver of others, but from his or her independent decision to subscribe, thus negating the requirement *of animus donandi*.

✓ OPERATIONAL SUMMARY

The free waiver of the option right, if not accompanied by the subsequent transfer of the shares, does not generate any tax effect for the waiving party. The risk of reclassification as an indirect donation is limited by established case law, which recognizes the causa societatis of the transaction.

4. Comparison between the two cases

Profile	Transfer at par value	Waiver of option
Direct tax effect	Capital gain calculated on the actual consideration	No tax effect (if free of charge)
Risk of assessment	Medium-high in the event of abnormal deviation	Low if not followed by transfer
Gift tax	Possible reclassification as negotium mixtum cum donatione	Excluded for prevailing causa societatis
Burden of proof	On the tax authorities (serious, precise, consistent presumptions)	On the taxpayer (prove gratuitousness)

5. Conclusions and operational recommendations

In light of the analysis carried out, the following operational conclusions can be drawn:

1. Transfer at nominal value: the transaction is tax neutral if the declared consideration corresponds to that actually received. However, in the event of a significant deviation from the normal value, it is advisable to: (i) document the economic reasons for the choice; (ii) keep evidence of cash flows; (iii) assess the timing with respect to any subsequent transactions.

2. Waiver of option rights: the transaction has no tax effect on the waiving party, provided that it is effectively free of charge and not followed by a transfer of the shares for consideration. It is advisable to formalize the waiver in writing and document the underlying corporate reasons.

3. Preliminary assessment: in both cases, a preliminary analysis is essential, taking into account the parties involved, the company's activities, its financial position, and any previous or planned transactions.

4. Revaluation of shareholdings: with the 2025 Budget Law (Law 207/2024), the possibility of revaluing shareholdings has become "fully operational" with a rate of 18% (or 21% following the forthcoming entry into force of the 2026 Budget Law). This option can be considered as an alternative or in combination with the transactions described above.