

TAXATION AND CORPORATE LAW • EXTRAORDINARY TRANSACTIONS

Business transfer and the PEX regime: new uncertainties in 2026 regarding reorganisations involving a newco

Between an AIDC Code of Conduct, a recent ruling by the Court of Cassation and a new stance from the Revenue Agency, the 'business transfer plus tax-exempt disposal of shareholdings' scheme must be handled with greater care. A summary of the three issues to consider before reorganising.

The 'spin-off' of a business into a newly formed company (the so-called 'newco'), followed by the disposal of the related shareholdings, is one of the most commonly used transactions in corporate reorganisations. The reason is well known: the business transfer is tax-neutral under Article 176 of the TUIR, and the subsequent sale of the shareholding may benefit from the *participation exemption* (PEX, Article 87 of the TUIR), which exempts 95% of the capital gain from taxation, leaving only 5% taxable.

However, during 2026, three developments – in legal doctrine, case law and practice – have emerged that redefine the safety margins of the transaction. We summarise them from an operational perspective.

1. The holding period: it is the company's seniority that counts, not that of individual assets

To apply the PEX, the shareholding must have been held for at least twelve months. When the shareholding arises from a tax-neutral business transfer, the length of ownership 'retroactively' applies to that of the transferred business (Article 176, paragraph 4, of the TUIR). In Practice Note No. 235 of 2026, the AIDC reiterated that what matters is the ownership of the business *as a whole*, without taking into account the circumstances of the individual assets comprising it. This position contrasts with a more restrictive approach taken by the Court of Cassation (Order No. 8235 of 2023), which instead emphasised the seniority of individual assets: an issue not to be underestimated when the business includes recently acquired assets.

2. The commercial nature of the newco: the start-up phase is not sufficient

The PEX requires the investee company to carry out an effective commercial activity. In judgment no. 14530 of 16 May 2026, the Court of Cassation clarified that the mere preparatory or *start-up* phase, if not yet concluded at the time of the transfer of shares, does not satisfy the commerciality requirement: without an activity already effectively underway, the capital gain remains fully taxable. The previous order No. 14800 of 2025 had specified, in broader terms, that a business property under construction does not in itself preclude commercial activity, provided that the business is subsequently actually carried out. In practice: it must be verified that, at the date of sale, the newco is already operating, and is not merely 'holding' the business.

3. The 'mixed' share: caution regarding proportional PEX

It is common practice to first set up the newco with initial capital and only subsequently increase its capital through the transfer of the business. In this way, the final shareholding consists of two parts: one 'arising' from the incorporation and one 'arising' from the transfer. Whilst the latter inherits the business's seniority and fixed-asset status, the former must be assessed independently. According to a recently adopted interpretation by the Italian Revenue Agency, the exemption should be applied on a

proportional basis, i.e. limited solely to the share meeting the requirements, with the consequence that part of the capital gain could be fully taxed. This interpretation is not yet established, but it is sufficient to warrant caution regarding the timing of transactions.

What to do in practice

- Assess whether to set up the newco and transfer the business **at the same time**, or with a minimum initial capital, to reduce the weight of the portion not eligible for relief.
- Ensure that, at the time of the transfer, the newco **is already effectively carrying out** business activities.
- Document the age and value of the various components of the shareholding.
- Correctly address anti-avoidance considerations: for the transfer of a business, Article 176 provides for an express exemption, but every transaction must nevertheless be supported by valid economic reasons.

Every reorganisation has its own specific characteristics and must be assessed on a case-by-case basis. Studio Bampo is available to analyse the most efficient and secure structure, ensuring compliance with all requirements set out in the legislation and the most recent case law.