



FISCAL ASPECTS OF INTELLECTUAL PROPERTY: THE ITALIAN TAX COMPLIANCE OF ART COLLECTING

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The taxation of art capital gains

The topic

Currently, intellectual property also represents the new frontier of the finance world. As a matter of fact, the latest economic crisis has led many investors to forget the usual proposal offered by traditional private banking and look for different ways to make and/or save money. In this context, the art market has provided them with new and interesting investment opportunities. As a result, art turnover has grown increasingly, along with all the related legal matters, such as the right qualification of the art collector from a fiscal point of view.

In fact, although art collecting is usually boosted by an aesthetic sense, it can be an expression of tax liability too, since starting and developing an art collection require a number of purchases, transfers and reinvestments. In order to identify the possible tax compliance reserved to

art collecting under Italian Law, it is necessary to establish how to consider the art work transfers by the art collector: are they only stockpiling or, on the contrary, real speculative operations?

The solution

To find the right answer, first of all you need to distinguish two main figures: on one side, there is the private art collector who is simply an art connoisseur and lover and acts according to the wish to develop his own collection. On the other side, there is the art dealer, who works professionally in the market to profit on art work sales.

As far as the Italian Legislator is concerned, private art collecting by a genuine collector for the love of art and not for profit, is generally not able to produce taxable income. At the same time, the private art collector cannot be considered as a VAT tax subject. Therefore, he need not to charge VAT with tax recovery to his buyer.

Quite the opposite for art dealers. Not only must the professional art merchant pay VAT tax on his sales- which is why he is supposed to register a VAT number and charge VAT with tax recovery to his clients- but he has to pay taxes on capital gains originating from the art trade, according to his legal status. In particular, his earnings- resulting from the art operations- could be included in the earned income or business income ex art. 55 of Presidential Decree n. 917/86 so called *T.U.I.R.*, with a different taxation.

Nonetheless, it is possible to identify a third figure between the private art collector and the professional art dealer that we could refer to as a «collector-dealer» who, even if he is not a professional and regular merchant, sometimes performs speculative transactions, to reinvest the related income for the improvement of his collection. In this case, the collector-dealer's earnings could be qualified as «different income», originating from an occasional business activity and as such is taxed ex art. 67, par. 1, lett. i, of *T.U.I.R.* Nevertheless, since the business activity is occasional, he cannot be subjected to VAT. In order to exclude that the art work sale is connected to an ongoing business activity, it is necessary to check certain significant indicators, such as the time passed between the purchase and the subsequent resale, the economic relevance and the continuance of the transaction, as well as the evident experience of the taxpayer in the art market.

The conclusion

Given the chaotic context, to sum up it's fundamental to ask for assistance from a tax expert who will be able to suggest the best way to manage the art collection and related intellectual property rights from a financial perspective.

The VAT treatment of art operations

The topic

Although the Art market has sharply grown, especially that of modern and contemporary art, its VAT treatment could negatively affect art operations, influencing the different phases of art collecting. As a matter of fact, apart from the sale of art works by private individuals outside a business activity- which are not subject to VAT- Italian Law submits all other art purchases to VAT. Specifically, with regards to acquisitions performed in the secondary market, where art galleries and auction houses are the protagonists. In order to provide insight into the real VAT impact on the art trade, it is necessary to consider two different case scenario: domestic art transactions and cross-border ones.

The solution

For domestic acquisitions, the point of departure in the analysis of VAT treatment is the Decree Law n. 41/1995, which introduced specific regulations regarding art, antiques and collectors' items, such as paintings, sculptures, stamps, tapestries and other objects which are at least a century old.

Depending on the situation, the acquisition of the art object can be subjected to the ordinary tax regime or, under the right conditions, to the special one called «margin tax regime». Although in both cases the rate is fixed at 22%, in the former the VAT is applied on the amount which represents the purchase price. In the latter regime, the VAT is not applied on the whole payment but only on the gross profit earned, that's to say, the difference between the sale price and the purchase price (potentially increased by addition costs and emendation costs. In case of a negative margin, VAT need not to be paid.

Therefore, the margin regime avoids a double taxation on objects where the retailer paid a price which included VAT that could not be written off.

The same regime can be used for art transactions carried out by auction houses, ex art. 40-bis of Decree Law n. 41/1995; however, in this case, VAT is applied on the payment which is the difference between the auction price and the price applied by the auction house to the client.

Nevertheless, if the art collector buys the art objects indicated in Decree Law n. 41/1995 directly from the artist or from his heirs, the ordinary regime applies in a reduce form and fixed at 10%, instead of the traditional one (22%).

With regards to cross-border acquisitions, it is necessary to distinguish between the event in which the Italian collector buys an art object from an EU State and the one in which the art work comes from a non EU State. In the former situation, if the seller has used the margin regime in the origin State, taxation will follow the rules of the State of origin. As a result, the VAT will be the one used in that State, without any additional charge in Italy, ex art. 37 of Decree Law n. 41/1995. Instead, if the margin regime was not used in the State of origin, the purchase made by an Italian art collector subjected to VAT will be considered an EU operation, under art. 38 of Decree Law n. 331/1993. In the latter case, when the art acquisition is made outside EU, the import into Italy of art objects is taxed with customs VAT, but is reduced to 10% which is, in any case, higher than the one applied in other EU States. As a consequence, the Italian art trade could be negatively affected by VAT taxation.

The conclusion

This short overview outlines the complexity of the issue, which requires an in-depth knowledge of the art taxation essentials, especially considering the strong impact that VAT can have on the total cost of an art deal. This is why art collectors should always ask tax experts for advice.