

Directly impacted by the twofold company and tax reform of 2003, the institution of the withdrawal of a shareholder presents today numerous essential new elements that give it a highly different configuration with respect to the past, both in the rules of positive law and in the general principles it is subject to.

From a civil law standpoint, the institutional frame work of partnerships and companies of associative nature remains basically unchanged. Consequently, the dissolution of the partner's obligation does not bring forward noteworthy changes.

By contrast, as far as share capital companies are concerned, the matter is totally different. The object of a systematic and comprehensive review through the so called "Vietti Reform", they must be reconsidered in their new socio-economical perception pursued by the legislator, before than in the formal aspects of the single applicable rules.

Traditionally dealt with special concern because of the associated disuniting effects – especially with regards to the equity of the subsidiary company and to the reduced profit prospects of the interested company, the withdrawal of a partner represents the "litmus test" of the guidelines adopted by the legislator in order to balance out inevitably conflicting interests. On one hand, the interests of the company's majority aimed at a rapid and effective collective management amidst the changing needs of the market, on the other hand, the interests of the single investor – often a small saver – to react to the majority's decisions which may damage his/her investment or amend the terms existing at the time of his/her initial joining of the company. The consequence brought about by the new regulation is a sharp expansion of the self-determination of the articles of association and of the company regulations, which are in any case consistent with the legal system at large.

Therefore, within share capital companies, the institution of a shareholder's withdrawal appears deeply different with respect to the past, being certainly wider and strengthened in several general aspects of the greater independence of the articles of association, of the prospect of new and different possibilities of dissolution of the individual's relation, of the procedures to determine the value of the sharing with reference to its actual value and not to the mere accounting value.

More generally speaking, within the different concepts emerging from the general theories of company law, (therefore in terms of ideological reasons), the trend is to point out to a "recovery" of the contractual prospective that, however, does not debase the opposed so called majoritarian principle, but just aims at establishing a new balance between the two opposite ways of conceiving the breadth of the contractual freedom to be acknowledged within the state regulations.

Hence, the withdrawal from the company obligation in the post-reform positive law, sees the increase of the exit instruments conferred to the (minority), dissenting, abstained or absent shareholder - although to the detriment of the (alternative) voice instruments – considerably weakened and yet equally recognized by the regulations for the safeguard of his/her interests and on which, in the past, the legislator had instead focused so as to guarantee correct managerial balances.

Consequently, a shift of the balancing between the majority's powers and the minority's rights occur and is now increasingly entrusted to the negotiation between the parties. A radical change in the evaluation of the shareholder – no longer seen as the subject appointed to contribute to (and control) the management of the company he/she belongs to, and yet unable to shirk the contractual obligation, but rather a capitals investor to whom the reform now grants greater instruments - deterrent for the shareholders' groups representing the company's majority – that allow for negotiation on the particularly difficult management decisions. It is in fact clear that the possibility now accorded to the shareholder to leave the company, thus avoiding the choices conflicting with his/her interests, when these imply a heavy economic burden on the company and on those who remain – burden which is quantifiable in market values and not in the previously imposed and absolutely disadvantageous criterion of the accounting value of the sharing – translates into an important instrument of negotiation with the other shareholders and the company's majority.

The above is achieved by modifying - from an economic before than juridical perspective - the very function of the withdrawal institution, which is now moulded (in the regulatory plan) as an instrument to disinvest the capitals brought in the company, an alternative option to the transfer of the sharing in the market.

By contrast, the tax system is still unable to find in the positive law rules that regulate it neither a consistent and systematic framework, nor explanatory guidelines to follow in the attempt to associate the various cases through which a unitary framework can be accomplished. Different ways of taxation, and even different taxation levels, are devised according to the juridical plans through which the shareholder's liquidation is assessed: transfer by purchase (to shareholders, to third parties or to the company itself, when allowed), or sheer repayment. This last option resulting in the reduction of the equity or even of the share capital.

This is the final point of a precise (or inevitable?) legislative choice that focuses more on the reduction of any tax arbitrages connected to the use of the "new" institution of withdrawal arising from the company reform, than on the goal of unifying the various cases through which the shareholder's withdrawal occurs.

Different taxation modalities are therefore applied in the current situation both on the outgoing shareholder – in connection to any surplus value realized on the fiscally assessed value of his/her sharing, and on the company interested in the dissolution of the individual's obligation.

Among other factors that complicate matters, are the new dispositions on the profits from share that now tend to differentiate the tax treatment on grounds of the receiver's nature, and the new regulations introduced by the so called "corrective measures" of 2005 which, within the unitary quantification of the "value difference" from withdrawal, now provide that the receiver break up the share of surplus value arising from the repayment of capital reserves with respect to the tax value of the sharing, and the share (which is taxable, but as a "dividend") that instead refers to the repayment of "profit" reserves.

A complex maze of dispositions, an intricate tangle of regulations that eventually leads to deal with the issue on an almost case-by-case basis, and above all, turns it into a difficult matter to understand and an from various viewpoints, an extremely complex issue.