CONVERSION OF DTAS INTO TAX CREDITS THROUGH DISPOSAL OF NON-PERFORMING RECEIVABLES: Q&A

The measures to support businesses during the Covid-19 epidemic include, under the specially enacted "Cura Italia" Decree, the option of transferring non-performing receivables and to obtain the right to convert into tax credits deferred tax assets (DTAs) deriving from tax losses and excess notional interest deduction (NID). The conversion into tax credits is allowed for an amount of DTAs not exceeding 20% of the face value of the transferred receivables, up to a maximum of Euro 2 billion of transferred receivables.

Q1: Who can benefit from this regime?
The regime is reserved for “companies”, indistinctly for every sector of activity.

Q2: What does the law define as qualifying receivables?
Receivables of any nature (financial and commercial) overdue by ninety days or more.

Q3: What transfers are relevant for the calculation of the DTAs eligible for conversion?
The relevant transfers are those made starting from the date when the Decree came into force, and therefore those transfers implemented between 17 March 2020 and 31 December 2020, for transferred receivables with a nominal value of up to EUR 2 billion.

Q4: Is the conversion precluded in case the seller cannot de-recognise the relevant receivables in the balance sheet?
It is reasonable to believe that the accounting treatment of the transfer should not interfere with the conversion, whose condition is a "transfer of receivables", which is a legal, rather than accounting, concept pursuant to the Italian civil code.
Accordingly, for the purposes of the conversion, transfers with recourse and transfers without recourse should both be relevant.

Q5: Which DTAs are eligible to be converted into tax credits?
The DTAs that can be converted into tax credits are DTAs, whether or not recorded in the financial statements, deriving from tax losses and excess NID that were generated until the financial year preceding the financial year

during which the Decree came into force; for example, for companies whose fiscal year coincides with the calendar year, unused tax losses and excess NID accrued as of 31 December 2019.

Q6: How is the amount of the DTAs eligible to be converted calculated?
The maximum amount of DTAs eligible for conversion is equal to the Italian corporate income tax (IRES) corresponding to the lower of: 20% of the face value of the receivables transferred on or before 31 December 2020 and the aggregate amount of tax losses excess NID accrued as of the end of the prior fiscal year. Therefore, in case of corporates, the maximum amount is EUR 96 million, while for taxpayers subject to IRES at the 27.5% rate (for example, banks), the maximum amount is EUR 110 million.
The net book value of the transferred receivables has no relevance for the purpose of this regime.

Q7: Are losses realised on the transferred receivables relevant for the purpose of this regime?
No, losses realised on the transfers that give rise to a right of conversion are not relevant. The losses will be deductible (or not deductible as the case may be) in accordance with the ordinary regime. The relevant datum is the face value of the transferred receivables, and not the impaired value of the receivables.

Q8: When will it be possible to use the tax credit deriving from the conversion of the DTA?
Given the aim of this provision of law, it is reasonable to believe that the tax credit can be used starting from the effective date of the transfer of the non-performing receivables, although wording in the provision (which may be the result of a mere typographical error) can lead one to believe that the possibility will be available starting from the year after the date of the transfer.

Q9: How can the tax credit deriving from the conversion of DTAs be used?
The tax credits deriving from the conversion of DTAs can be set-off without any cap, and therefore not subject to the EUR 700,000 annual cap; can be transferred; or can be the object of a refund request. In absence of any specific provisions on this, the tax payer should have the option of freely using all or any of the available methods to recover the credits: thus for example, the taxpayer could choose to set-off part of the tax credit, to transfer to a third party a specific amount, and to request a refund for the remaining portion.

Q10: What conditions apply to the conversion into tax credits?
The conversion is conditional upon the exercise of a specific option and to payment of a fee equal to 1.5% of the converted DTAs in relation to which taxes are deemed not to have been previously paid.

Q11: What would be the impact on the financial statements in case the DTAs converted were not recorded?
In case the DTAs converted where not recorded in the financial statements the impact should be the accrual of a gain in the profit and loss account.

Q12: Would the contingent asset deriving from the conversion of DTAs not recorded in the financial statements be subject to tax?

This aspects is not addressed under the Decree; however, such item of income should not be subject to tax in accordance with general principles.

Q13: How is the 1.5% fee calculated?
The legal framework governing the fee was created for other regimes and it is not entirely clear how it will apply in the context of this new regime. The official guidance provided is unclear, if not contradictory. It may be reasonable to deem that the fee will be due solely in relation to 2020 (and not until 2030) and only on the amount actually converted into tax credits. Nevertheless, the technical report accompanying the law appears to provide for payment of the fee until 2030. Such conclusion, however, would be in contrast with both the letter and the intent of the provision of law.

Q14: When is the fee due?
Unless further instructions are issued in the meantime, the deadline for payment of the fee should coincide with the deadline to pay income taxes for the 2020 fiscal year (i.e., 30 June 2021 for taxpayers whose fiscal year coincides with the calendar year).

Q15: is the fee tax deductible?
Yes, the fee is deductible for corporate income tax (IRES) and regional tax on business activities (IRAP) purposes.

Q16: For the purposes of paying the fee, is the calculation based on all the DTAs eligible for conversion or only on the DTAs that are actually converted?
Given the functioning of the regime and its time-limited scope, it is reasonable to believe that the fee should be paid only on the DTAs that are actually converted (i.e., and not on all eligible DTA) by virtue of transfers of receivables carried out on or before 31 December 2020.
For example, assuming transfers of non-performing receivables with a face value of EUR 1,000,000 and an aggregate of accrued tax losses and excess NID of EUR 200,000, the maximum amount eligible to be converted would be EUR 48,000 in tax credits. If the company were to opt to convert DTAs for a value of EUR 24,000 (thus using only EUR 100,000 of the tax losses and excess NID), the fee would be EUR 360 (i.e., 1.5% of 24,000).

Q17: Is this provision applicable only to the original transferor-creditor or also to companies that transfer receivables they had previously acquired?
In absence of contrary instructions in the provision of law, this regime is to be deemed applicable also in relation to the transfer of previously acquired receivables, provided that the same receivables have not yet been object of a transfer that has already benefited from the regime. If the receivables were acquired before the entry into force of this new provision of law, they should give rise to the right of conversion.

Q18: Can DTAs deriving from excess interest expenses be converted in tax credits?
The current provision does not allow for the DTAs relating to interest expenses carried-over under the interest barrier rule to be converted into tax credits.

Q19: In case of a company that is part of a tax group, are tax losses transferred to the tax group by the company that is transferring the

non-performing receivables included among the DTAs eligible for conversion?
The current wording of the provision does not appear to preclude this option. It seems reasonable to believe that, in the above circumstances, the existing tax losses of the company that transfers the receivables can be converted in tax credits, even if they have been transferred to the tax group but have not yet been used.

Q20: In case of a company that is part of a tax group, are the tax losses and excess NID of the tax group companies other than the company that transfers the non-performing receivables taken into account for the purposes of calculating the DTAs that are eligible to be converted in tax credits?
The current version of the provision makes reference to individual DTAs of the transferring company, therefore the above option currently appears to be precluded. For example, the DTAs relating to tax losses transferred to the tax group by a company ("Tax Group Company A"), which has not transferred the non-performing receivables to third parties, cannot reasonably be converted in tax credits, even where another company in the tax group ("Tax Group Company B") has transferred non-performing receivables to third parties but, not having generated DTA, cannot de facto take advantage of the instant regime.

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