ABSTRACT

This work was initiated in the aftermath of emanation art. 36 of D.L. 4 July 2006, n. 233 (converted with amendments by L. of August 4, 2006 n. 248), entitled "Recovery of tax base", which has re-established the non-deductibility of capital gains arising from the allocation of assets to shareholders, and it has been proposed in order to clarify the purpose of this legal framework in the light of general principles of taxation.

To do this - first of all - we proceeded to the examination of the tax treatment of unrealized gains and losses partrimoniali, showing how these income items have been gradually understood in a more complete and accurate way, with the maturing of legal experience in the field of taxation, up to the achievement of the current wording of the rule.

Secondly, we tried to disclose the meaning of "allocation of assets to shareholders" in order to understand, according to civil law, what can match this term, used in the tax field to indicate a condition capable of generating elements of income business, both positive and negative (gains and losses, to be precise); the examination of this issue has allowed to frame the allocation of goods to shareholders as instruments of fulfillment of social obligations, arising from events those are directly related to continuation of the life of society and, sometimes, even to its dissolution, in general, or limited to the social relationship, dependent upon the situation of the partner.

On this basis, at the same time, the allocation of assets to shareholders has been characterized as onerous, but the assumption - entirely theoretical and marginal – that the company decides to allocate assets to members of a spirit of liberality 's case; this assumption is not verifiable, for the author's opinion, in view of the subjective quality of the allocation recipient (partner), which would render any distribution to a single shareholder an infringement of the principle of equal treatment of members of the company; on the other hand, this assumption would be in conflict with the lucrative vocation of the collective entrepreneur.

In the last chapter, returning in the field of taxation, we examine concepts of onerousity and inherence, focusing especially on the latter, considered a cornerstone of the system, although it does not clearly set out - as happened in the past - in any norm; infact, the only general rule, governing the deductibility of negative items of income - if there is no express

provision ad hoc - is art. 109, paragraph 5 of T.U.I.R. in the last post-reform formulation, that indicate the relvance of negative components, if and insofar as they relate to activities or assets which generate income or which do not contribute as excluded from the taxable base.

In the case of allocations of assets to shareholders, the components that result from it have been, as seen, discriminated by the legislator, in the sense that, given the importance of capital gains to the formation of business income, the same fate has not been reserved for capital losses deriving from the same act of distribution.

Based on all these considerations, it seems that there is not a general negatove rule that contrast with the possible relevance of losses arising from allocations of assets to shareholders, allowing the deduction in the determination of business income; moreover, in order to ensure coherence to the sistem of taxation, normatively should be accorded to deduct these losses from business income.

Indeed assignments, although not directly related to production, however, participate, as an act of fulfillment of obligations, for the performance of corporate prosecution; anyway, if the reference to the activity should be construed more narrowly, capital gains and losses, arising from allocations to shareholders, however, have - as their object - goods forming part of the assets of the company, as seen above (Chapter I, para. 5.2) must all be qualified as "property related company"; there is no distinction - as in the case of the individual entrepreneur, for example – between the sphere of the person which exercises the productive activity and the sphere related to the performance of the company.

Neither objection on the need to avoid loss of tax base can be considered valid, as would appear from the norm that has most recently amended art. 101 T.U.I.R. (art. 36 D.L. n. 233/06), entitled "Recovery of tax base", because the criteria governing the determination of the quantum of capital gain (or loss) are not in any way dubious or uncertain, as the determination of these components of income derived from the comparison between the cost of goods (at the time of purchase) and the market value (at the time of assignments); this value, far from representing an uncertain parameter, is determined rigorously and, on the other hand, there is no reason to consider market value more or less certain and reliable, depending on the income component has a sign positive or negative.

From examination of the legislation and, especially, the evolution of regulation of gains and losses resulting from assignments to members had over time, we can assume that the

legislator has interpreted the allocation of assets to shareholders as being costless, like what happens when, for example, when the entrepreneur assigns goods to himself: the outcome of this examination is that assignments of goods to shareholders should be more properly traced within the framework the determination of business income, in a de jure condendo perspective.

Actually, however, there is no legal measures designed to bring the tax rules for capital gains and capital losses for the proper symmetry.