

Supreme Court, Judgment No. 8805 of 3 April 2024

- ✓ With the judgment under comment, the Supreme Court provides important clarifications to operators in the photovoltaic field regarding the conditions under which a transfer of a business rather than a transfer of individual assets is verified.
- ✓ In particular, according to the Supreme Court, the transfer of the “Autorizzazione Unica” for the construction and operation of a photovoltaic plant within the municipal territory, issued by the relevant province, together with (i) the availability of surface rights to certain lands for the construction and operation of the plant, (ii) the project for the realization, development, and operation of the photovoltaic plant, and (iii) the right to connect the photovoltaic plant to the national power transmission grid, does not constitute a transfer of a business (exempt from VAT and subject to proportional registration tax) but a transfer of individual assets (subject to VAT). This because, as represented by the transferor during the dispute, it was requested a burdensome integration by the buyer for the operation of the plant, who would have had to provide for the installation of photovoltaic panels and inverters. The aforementioned assets and relationships could therefore not have any aptitude, not even potential, for the exercise of entrepreneurial activity.
- ✓ The Supreme Court reaches this conclusion after referring to some EU Court of Justice judgments - according to which, to have a transfer of a business (or of a part of a business), it is necessary that the transferred assets are sufficient to allow the continuation of an autonomous economic activity, and particularly important is the nature of the economic activity to be continued - and of the same Court, according to which there is a transfer of a business if the object of the transfer consists of assets suitable, as a whole and in their interdependence, for the exercise of the business, while it is excluded in the case of a transfer of an administrative authorization or of a building that requires substantial work and lacks all the facilities (heating, electrical, etc.).
- ✓ Therefore, in the case at hand, there is a transfer of individual assets since “it is not possible to ascertain under what terms a company existed without the same (essential) technical components which, instrumental to the pursuit of the productive purpose for which the organization of business factors is postulated, must necessarily characterize the enterprise for the production of electricity (for the operation of the photovoltaic plant)”.

