CERADI Centro di Ricerca per il Diritto d'Impresa

Eucotax Wintercourse 2018

"Challenges to Tax Autonomy in an Era of Conflicting Political Goals"

Enrica Core
Valentina Di Marcantonio
Andrea Franchella
Francescopaolo Lauro

Coordinamento della ricerca: Giuseppe Giangrande, Alessio Persiani, Federico Rasi

Direzione della ricerca: Giuseppe Melis ed Eugenio Ruggiero

Maggio 2018

Il presente lavoro nasce dallo Eucotax Wintercourse, al quale l'Università Luiss Guido Carli partecipa sin dal 1995.

Si tratta di un progetto di cooperazione nell'attività di ricerca in materia di diritto tributario (*European Universities COoperating on TAXes*), al quale partecipano, oltre all'Università LUISS Guido Carli, prestigiose università europee ed americane, tra cui *Georgetown University*, *Handelshögskolan i Stockholm*, *Katholieke Universiteit Leuven*, *Universitat de Barcelona*, *Universitat de València*, *Universität Osnabrück*, *Universiteit van Tilburg*, *Université Paris 1 Panthéon – Sorbonne*, *University of Edimburgh*, *Wirtschaftsuniversität Wien*, *Corvinus University of Budapest Uniwersytet Łódzki* e *Uniwersytet Warszawski.*

Ne forma oggetto, con cadenza annuale, un argomento di studio di carattere generale, che viene suddiviso in sei *subtopics*, per ciascuno dei quali viene elaborato un questionario. Gli studenti delle singole Università rispondono ai questionari dall'angolo visuale del proprio Stato di appartenenza, per poi confrontarsi nel corso di una settimana di lavori comuni con i colleghi delle altre Università. Si perviene così ad un documento conclusivo unitario, nel quale gli studenti evidenziano per ciascun argomento i profili generali, le risposte normative o giurisprudenziali fornite nei diversi Stati, gli elementi critici emersi a seguito dell'indagine comparata e le relative proposte di soluzione, anche in vista di una possibile armonizzazione della disciplina normativa a livello comunitario.

Ha formato oggetto dell'ultima edizione del Wintercourse – tenutosi presso l'Università di Edimburgo dal 19 al 25 aprile 2018 – il tema "*Challenges to Tax Autonomy in an Era of Conflicting Political Goals*", così articolato:

1. "*Tax autonomy and allocation of tax jurisdiction between the central state and subnational levels*";
2. "*Tax autonomy and limits to incorporation of tax incentives and subsidies in domestic systems and treaties*";
3. "*Tax autonomy and exit taxation and CFC rules under the Anti-Tax Avoidance Directives*;"
4. "*Tax autonomy and hybrid mismatches, reversed hybrid mismatches, and tax residency mismatches under the Anti-Tax Avoidance Directives*";
5. "*Tax autonomy and non-discrimination rules*";
6. "*Tax autonomy and the administration of tax law*";

I lavori della delegazione italiana – che in questo documento si presentano – sono stati redatti da: Valentina Di Marcantonio (subtopic 3); Francescopaolo Lauro (subtopic 4); Andrea Franchella (subtopic 5); Enrica Core (subtopic 6).

L'Avv. Giuseppe Giangrande, l'Avv. Alessio Persiani, il Prof. Federico Rasi hanno assistito gli studenti nella preparazione dei lavori e nella successiva discussione presso l'Università di Edimburgo.

I lavori sono stati diretti dal Prof. Giuseppe Melis e dal Dott. Eugenio Ruggiero.

ELENCO DEI CONTRIBUTI

1. TAX AUTONOMY AND EXIT TAXATION AND CFC RULES UNDER THE ANTI-TAX AVOIDANCE DIRECTIVES
2. TAX AUTONOMY AND HYBRID MISMATCHES, REVERSED HYBRID MISMATCHES, AND TAX RESIDENCY MISMATCHES UNDER THE ANTI-TAX AVOIDANCE DIRECTIVES
3. TAX AUTONOMY AND NON-DISCRIMINATION RULES
4. TAX AUTONOMY AND THE ADMINISTRATION OF TAX LAW

EUCOTAX Wintercourse 2018

Edinburgh

University LUISS Guido Carli

Rome

Department of Law

Challenges to Tax Autonomy in an Era of Conflicting Political Goals

Tax autonomy, exit taxation and CFC rules under the Anti-Tax Avoidance Directives

Valentina Di Marcantonio

Table of contents

1. Introduction

1.1. The emigration of companies

1.1.1 Juridical aspects

In general, the juridical aspects of the emigration of companies can be regulated in different ways according to whether a State adheres to the so called "incorporation doctrine" or to the so called "real seat doctrine".

In the first case, the transfer of legal seat is allowed and consists in an amendment of the Articles of Association; according to such theory, companies are free to transfer their legal seat abroad without having to wind-up, since they are deemed to be connected only to the State where they are incorporated.

In the second case, companies are regulated by the law of the State where the central management is situated; that means that the emigration of national entities often incurs in a winding-up and the company is forced to set up a re-establishment[1].

As for the Italian legislation, if a company moves its legal seat abroad, in the absence of specific conventional provisions, the following connection rules apply, in accordance with Art. 25 of the Law no. 218/1995:

- the company is regulated under the law of the State where the incorporation procedure was completed. Italian law is applicable in any case, if the place of management or the main business purpose of the company is situated in Italy;
- the transfer of legal seat is effective if it complies with the law of the home State and of the destination State; that means that the transfer, in itself, is legitimate but it is necessary to consider if it is allowed under the legislation of the other State concerned.

The continuity of the legal personality of the transferred company is only allowed if the transfer is permitted in both States. As a matter of fact, some

[1] PELLECCHIA M., *Il trasferimento di residenza in Italia*, in Rass. trib., n. 6 of November – December 2015, pag. 1410.

legislations do not allow a national company to move abroad and impose the dissolution or winding-up of the company[2].

On balance, the transfer abroad of an Italian company neither determines automatically its dissolution, with the contextual setting-up of a new legal person in the destination State, nor it automatically determines the continuity of the legal personality of the company, since it is subject to the verification of such continuity under the legislation of the other State concerned[3].

1.1.2 Tax aspects: the exit taxation

In Italy, the provision regulating the exit tax was enacted well before the adoption of the so called Anti-Tax Avoidance Directive[4], when the Legislative Decree no. 41/1995 introduced Art. 20-bis in the Presidential Decree n. 917/1986 (here in after referred "Income Tax Code"). Currently, the exit tax is regulated under Art. 166 of the same Income Tax Code.

Given that the practical and application aspects of the exit tax will be discussed below (see chapter 2), in this paragraph it seems appropriate to highlight its *ratio*. As specified in the governmental report, the aim of the provision introducing the exit tax was to make sure that the income produced in Italy (represented by the capital gains accrued but not realized in Italy) was subject to Italy's taxing power, regardless of the elusive intent of the taxpayer[5].

However, the nature of the above mentioned provision is discussed.

Before the introduction of an exit tax, it has been[6] argued that the capital gains arising in case of transfer of residence abroad should fall within the scope of application of the general rule according to which the capital gains occurred during the exercise of a business activity should be taxed before they "exit" such activity[7]. Other scholars[8] argue that the provision regulating the exit tax has an

---

[2] VOLPICELLA E., *Il trasferimento della sede della società tra diritto nazionale e giurisprudenza della Corte di Giustizia europea*, in Il Fisco, n. 6 del 2012, pag. 1-849.
[3] TURRI C., *Trasferimento di sede all'estero di una società: profili civilistici e fiscali*, in Dir. prat. Trib. n. 2 del 2017, pag. 408.
[4] Directive 2016/1164/EU.
[5] See AVOLIO D., CAPITTA F., *La tassazione di plusvalenze latenti in caso di trasferimento all'estero*, in Corr. trib., n. 20 del 2004, pag. 1592.
[6] MICCINESI M., *Le plusvalenze d'impresa*, Milano, 1993, pag. 160 e following pages.
[7] See Art. 86 of the Income Tax Code, which states that capital gains are included in taxable income for corporate income tax purposes if they are realized by a sale; realized as indemnities

anti-avoidance function and aims at preventing that persons exercising a business activity move their residence to a State with a favorable tax regime in relation to the capital gains arising from the sale of the assets (as well as in relation to the profits and the other positive elements included in the tax base). Such interpretation seems to be confirmed by the fact that the introduction of an exit tax is provided for under the Anti-Tax Avoidance Directive. Moreover, the *ratio* of the exit tax does not coincide perfectly with the above mentioned general rule, since it does not refer to the exit of the assets from the business activity but to the their exit from Italy's taxing power[9].

1.2 The "Controlled Foreign Companies"

In Italy, the CFC legislation was introduced with the Law no. 342/2000.

In those years, the Governments of several States focused on the introduction of the tax rules aimed at counteracting those operations whose only objective was to erode the tax base through the localization of highly-profitable mobile activities (such as financial activities) in States with a favorable tax regime.

At European Community (now European Union) level, the Code of Conduct adopted by the Council of the European Union and the representatives of the Governments of the Member States in 1997 stated that the adoption of the anti-abuse provisions or countermeasures "*plays a fundamental role in counteracting tax avoidance and evasion*".

At OECD level, the report titled "*Harmful Tax Competition: an Emerging Global Issue*" of 1998 mentioned the CFC regime as one of the possible measures designed to combat the harmful tax competition. Such proposal was transposed in Italy with the above mentioned Law no. 342/2000, which introduced Art. 127-bis in the Income Tax Code.

Currently, the Italian CFC regime is regulated under Art. 167 of the Income Tax Code.

---

for property loss or damage, including insurance payments; assigned to the shareholders or used for purposes other than business purposes (Article 86(1) of the TUIR).

[8] FICARI V., *Trasferimento della sede all'estero, continuità della destinazione imprenditoriale e contrarietà al trattato CE dell'"exit tax" sulle plusvalenze latenti*, in Rass. trib., 2004, pag. 2152.

[9] On the debate on the function of the exit tax see SALLUSTIO C., *Il trasferimento della sede e della residenza fiscal all'estero e dall'estero in Italia*, in Riv. Dir. Trib., fasc. 3, 2014, pag. 353.

2. Exit taxation

2.1 Exit taxation under Art. 166 of the Italian Tax Code

2.1.1 Types of income covered

According to Art. 166 of the Income Tax Code, if "a person" exercising a business activity transfers its residence abroad and is no longer resident in Italy for income tax purposes, its assets are deemed to be sold at their "normal value"[10], unless they are attributed to a permanent establishment located in Italy. The same rule is applied if the assets are subsequently exported from the permanent establishment located in the Italian territory. In any case, capital gains related to permanent establishments located abroad are deemed to be sold at their normal value. Tax-deferred reserves and provisions in the financial statement of the last financial year preceding the transfer are taxable in case they are not reinstated in the first balance sheet of the permanent establishment[11].

To better understand the scope of application of the exit tax it is necessary to analyze its application assumptions.

As for the subjective requirement, the above mentioned provision clarifies that the exit tax only applies to "persons exercising a business activity"; such expression includes not only companies but also partnerships and natural persons.

As for the natural persons, it is necessary to verify that they exercise a "business activity", whose definition is provided for by Art. 55 of the Income Tax Code[12]. According to such provision, the "business activity" consists in conduct of commercial enterprise[13], which comprises the following activities:

a) the habitual (even where not exclusive) conduct of the commercial activities mentioned in Article 2195 of the Civil Code, which are: the production of goods or services; intermediary activities regarding the transfer of property; activities connected with transportation by land, sea or air; banking or insurance activities; activities auxiliary to those mentioned above;

---

[10] The "normal value" corresponds, in principle, to the market value of goods and services. For a precise definition see paragraph 2.1.3.

[11] Art. 166, para. 2 of the Income Tax Code.

[12] On the need for a uniform notion of "*business activity*" see F. AMATUCCI, *Identificazione dell'attività di impresa ai fini fiscali in ambito comunitario*, in Riv. dir. trib., fasc. 10, 2009, pag. 781, who highlights that a definition of "business activity" common to the Member States of the UE would favor the exercise of the freedom of establishment.

[13] Art. 55 of the Income Tax Code.

b) activities relating to the raising of animals and to the processing, alteration or sale of agricultural and livestock products if certain limits are exceeded;

c) income derived from activities organized in the form of an enterprise to offer services not falling under Article 2195 of the Civil Code, except those organized mainly with the taxpayer and members of his family;

d) income derived from the exploitation of mines, quarries, peat bogs, salt beds, lakes, ponds and other internal waters.

In case of legal persons, Italian tax law generally provides for a "presumption" of business activity, which regards companies[14], commercial entities and some partnerships[15].

2.1.2 The scope of application of the exit tax

Italian tax law provides for a number of cases in which the exit tax is applied.

Firstly, the exit tax is levied in case a person transfers its residence abroad. In this case, an exit tax is applied when the following conditions occur:

a) a person transfers its residence abroad (from a juridical point of view);

b) the person moving abroad is no longer deemed to be resident in Italy for income tax purposes;

c) the assets are not attributed to a permanent establishment located in Italy[16].

In order to better understand the scope of application of Art. 166, it appears appropriate to define the notion of "fiscal residence", whose determination varies according to whether it is referred to a natural or to a legal person.

In the first case, a person is deemed to be resident in Italy for tax purposes if, alternatively: he/she is registered in the civil registry of resident population; has

---

[14] More precisely, the "presumption" regards the following types of companies: joint-stock companies, limited liability companies, partnerships limited by shares, cooperatives, mutual insurance companies, European companies (EU Regulation no. 2157/2001) and European cooperative companies (EU Regulation no. 1435/2003); see Art. 73 and Art. 81 of the Income Tax Code.

[15] General partnerships and limited partnerships; see Art. 6 of the Income Tax Code.

[16] STESURI A., GRAMMATICO F., *Il trasferimento della sede all'estero alla luce della riforma fiscale*, in il fisco n. 44 del 29 novembre 2004, pag. 1-7454.

in Italy his or her domicile; has in Italy his/her residence[17]. Each of these conditions must exist for most of the tax period, which coincides with the calendar year.

In the second case, a person is considered resident if it has its legal seat, place of effective management or business purpose in Italy for most of the tax period, which generally coincides with the company's financial year.

As stated above, for the exit tax to be levied it is necessary that the transfer of residence is completed from a juridical point of view and that the person is no longer deemed to be resident in Italy for tax purposes. The two conditions do not necessarily coincide. For example, a company may transfer its legal seat abroad without moving its main business purpose or its place of management; in this case, the exit tax would not be levied, because the person is still resident in Italy for tax purposes. The exit tax is not due if the transfer abroad is "fictitious", i.e. if the company is formally moved abroad but is still resident in Italy for tax purposes, in accordance with Art. 73(5-bis) of the Income Tax Code[18][19].

The "objective" requirement of the exit tax has been interpreted in different ways[20]. According to a first argument, it is met when each of the connecting factors is transferred abroad[21]; that means that the person is no longer resident in Italy when none of those factors occurs for most of the tax period. Other scholars[22]argue that the requirement is fulfilled when the person is no longer

[17] According to art. 43 of the Italian Civil Code, domicile is the "*main centre of one's affairs and interests* ", whereas residence is "*the place of habitual abode*".
[18]According to Art. 73(5-bis) of the Income Tax Code, a foreign company is deemed to be resident in Italy, unless proof to the contrary is provided, if it controls an Italian company in accordance with Art. 2359 of the Civil Code and, alternatively: is directly or indirectly controlled by an Italian resident person (company or individual); is managed by a management board or other governing body composed for the majority of Italian resident persons (GALLI C., *Italy - Corporate Taxation*, in *IBFD Database - Country analyses*, 2013).
[19] RIGATO C., LAZZARATO G., *Exit Tax e D.lgs. n. 147/2015*, in IlSole24Ore of 8 March 2016.
[20] MICHELUTTI R., PRAMPOLINI A., *Oggetto, presupposto e momento impositivo della exit tax*, in Corr. trib., n. 45 del 2013, pag. 3559.
[21] NUSSI M., *Trasferimento della sede e mutamento della residenza "fiscale": spunti in tema di stabile organizzazione e regime dei beni di impresa*, in Rass. trib., 1996, pag. 1354.
[22] ZIZZO G., *Il trasferimento della sede all'estero*, in AA. VV. (a cura di SACCHETTO C. e ALEMANNO L), Materiali di diritto tributario internazionale, Milano, 2002, pages 210 and 211, who distinguishes according to whether the transfer occurs in the first or in the second part of the tax period. In the first case, the person ceases to be a tax resident since the beginning of the tax period and the capital gains are to be computed on the 1° January. In the second case, the person is still considered to be a tax resident in the tax period when the transfer abroad occurs, since the status of resident only ceases from the subsequent tax period; therefore, the capital gains subject to the exit tax should be computed on the 1° January of the tax period following the transfer.

resident in Italy for tax purposes; that means that if a person transfers its residence abroad in the second part of a certain tax period, it will be deemed to be still resident in Italy in that period and that the resident status will (only) cease from the subsequent tax period[23]. Adhering to the first thesis or to the second one is relevant for the computation of the exit tax, as discussed in paragraph 2.1.4.

The exit tax is not levied if the assets are attributed to a permanent establishment located in Italy. Such exclusion is due to two main reasons: first of all, the assets are still taxable in Italy, since they are connected to a permanent establishment whose income is taxable in Italy in accordance with Art. 23 of the Income Tax Code; secondly, if the exit tax was levied, the assets would be subject to a double taxation, since they would be included in the tax base of the permanent establishment, which, as aforesaid, is taxable in Italy in accordance with Art. 23 of the Income Tax Code[24]. For the same reasons, the exit tax is applied when the assets previously attributed to a permanent establishment located in Italy are subsequently exported from it.

Secondly, Italian tax law provides for the application of an exit tax also in case the transfer of residence is achieved through business restructurings, such as contributions of businesses, mergers and demergers. More precisely, the assets pertaining to a business or to a business branch in relation to which a business restructuring was carried out are deemed to be sold at normal value, if they are not attributed to a permanent establishment located in Italy[25]. Some scholars suggest that the taxpayer asks the opinion of the Tax Authorities in relation to the configurability of a permanent establishment before carrying out the transaction, through the international ruling procedure regulated under Law Decree no. 145/2013[26].

[23] It's due to the fact that Italian tax law does not adopt the *split year* system for residence purposes.
[24] DI CESARE F., *Il trasferimento della sede della società all'estero*, in Riv. dottori comm., fasc. 2, 2009, pag. 291.
[25] See the Resolution of the Revenue Agency n. 21/E of 27 January 2009 on the need for a permanent establishment in Italy.
[26] TOMBESI G., DRAGONETTI A., *Tassazione all'uscita (Exit tax): i dubbi interpretativi ancora irrisolti*, in Il fisco, n. 15 del 2015, pag. 1-1463.

The same rule applies if the assets previously attributed to a permanent establishment are subsequently exported from it[27]. According to Art. 179, para 6 of the Income Tax Code, the provisions regarding the suspension of the exit tax are applied also in case the transaction involves States of the EEA. Since Art. 179, para. 6 expressively recalls the rules concerning the suspension of the exit tax, which are to be interpreted in the sense that they also apply to the transfer of a permanent establishment, some scholars[28] believe that the scope of application of such provision should also include the transfer of a permanent establishment located in a Member State of the EU in favor of a person situated in a Member State of the EU; that solution would be in line with the case law of the Court of Justice of the European Union[29].

As for the taxable assets, it is argued[30] that they should be identified with the assets pertaining to the business in accordance with Art. 65 of the Income Tax Code. Art. 166 of the Income Tax Code neither regulates expressly the tax regime of intangible assets, such as know-how, nor takes into account the goodwill value. According to a first interpretation,[31] only those values that are shown in the account records, which do not include the goodwill value, should be deemed to be sold at normal value; consequently, the eventual capital gains related to the goodwill would not be deemed to be sold at normal value. Others[32] believe that the scope of application of Art. 166 of the Income Tax Code should be extended to goodwill value as well, also considered that the aim of the above mentioned

---

[27] Art. 179 of the Income Tax Code.

[28] FORT G., *Il regime della exit tax si applica ai conferimenti di stabile organizzazione estera*, in Corr. trib., n. 6 del 2018, pag. 432.

[29] See the decision of the Court of Justice of the European Union C-292/16, which stated that *"article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident, first, provides for the immediate taxation of the capital gains resulting from the transfer and, second, does not allow deferred collection of the tax, whereas in an equivalent national situation such capital gains are not taxed until the disposal of the transferred assets, in so far as that legislation does not allow the deferred collection of the tax".*

[30] VOLPICELLA E., *Il trasferimento della sede della società tra diritto nazionale e giurisprudenza della Corte di Giustizia europea*, cit.

[31] See, among others, FIORENTINI S., *Effetti del trasferimento all'estero della sede sociale*, in Corr. trib., 1995, pag. 1669.

[32] See, among others, MELIS G., *Trasferimento della residenza fiscale e imposizione sui redditi*, Milano, 2009, pag. 513-514; FICARI V., *Trasferimento della sede all'estero, continuità della destinazione imprenditoriale e contrarietà al Trattato dell'exit tax sulle plusvalenze latenti*, in Rass. trib., 2004, p. 2157.

Art. 166 is to tax the income produced in Italy and the gains related to the goodwill are part of such income. In order to eliminate doubts and possible tax avoidance, Italian Tax Authorities clarified[33] that also intangible assets are subject to exit taxation, since they pertain to the business. Although the specific case analyzed by the Revenue Agency regarded client lists and know-how, some authors believe that the goodwill value should be included as well[34].

A particular issue regards the tax position of the members of the company whose residence is transferred abroad. On this point, Art. 166 of the Income Tax Code specifies that mere transfer of residence does not determine the taxation of the members of the transferred company; these persons will therefore receive dividends related to a participation in a non-resident company. Such provision has to be analyzed considering that the Legislative Decree no. 344/2003 introduced the exemption system, in place of the tax credit system. Before such modification, the members of the company transferred abroad were subject to a worse tax treatment than the members of resident companies, since the tax credit was not granted in relation to dividends distributed by non-resident companies[35]. According to the current legislation, the members of the transferred company will receive dividends that will be subject to a tax treatment similar to the one provided for dividends distributed by resident companies, under Artt. 44 and 89 of the Income Tax Code, with the potential levy of the withholding tax provided under Art. 27, para 4 of the Presidential Decree no. 600/1973[36].

Some scholars[37] distinguish according to whether the member is resident or not in Italy and according to the type of income owned. More particularly, if the member of the company is a tax resident, capital gains should be taxable

[33] See the Resolution of the Revenue Agency n. 124/E of the 7 November 2006.
[34] VOLPICELLA E., *Il trasferimento della sede della società tra diritto nazionale e giurisprudenza della Corte di Giustizia europea*, cit., who highlights that, otherwise it could happen that right after the transfer of residence abroad the business is sold and the capital gain related to the goodwill value is taxed in the foreign State, even though such gain was achieved in Italy; DI CESARE F., *Il trasferimento della sede della società all'estero*, cit.
[35] The application of a different tax treatment represented a restriction of the freedom to transfer a company's resident abroad. The incompatibility of the tax credit system with the EU law was the main reason why the Italian legislator introduced the exemption system in place of the tax credit system.
[36] MELIS G., *Trasferimento della residenza fiscale e imposizione sui redditi*, cit. 507.
[37] TOMBESI G., DRAGONETTI A., *Tassazione all'uscita (Exit tax): I dubbi interpretativi ancora irrisolti*, cit.

exclusively in Italy, in accordance with Art. 13 of the OECD Model Tax Convention, whereas dividends may be taxable both in Italy and in the source State, in accordance with Art. 10 of the OECD Model Tax Convention. If the member of the company transferred abroad is not a tax resident, Italy has no taxation rights, since none of the connecting factors provided for by Art. 23 of the Income Tax Code occurs; in this case, it has been assumed that Italy could levy an exit tax on non-resident members as well.

2.1.3 The deferral of the "exit tax"

In the *National Grid Indus case* (C-371/10), the Court of Justice of the European Union stated that the levying of an exit tax on the capital gains realized before the transfer of residence is not, in itself, incompatible with art. 49 of the Treaty on the Functioning of the European Union (here in after referred "TFEU"), regarding the exercise of the freedom of establishment. Nevertheless, such provision precludes the "*immediate recovery of tax on unrealized capital gains*". In order for the exit tax to be in line with the TFEU, it is therefore necessary that its levying is deferred until the capital gains are actually realized[38].

Following such decision of the Court of Justice of the European Union, and after the start of an infringement procedure in accordance with art. 285 TFEU (2010/4141), art. 166 of the Income Tax Code was amended by Law Decree 24 January 2012, no. 1[39], which introduced paras. 2-*quater* and 2-*quinquies*.

According to the current version of art. 166 of the Income Tax Code, if a person transfers its residence to Member States of the UE or to States of the European Economic Area (here in after called "EEA") indicated in the decree issued by the Ministry of Economy and Finance in accordance with art. 168-bis of the Income Tax Code[40] and with which Italy reached an agreement on mutual assistance for the recovery of tax claims similar to the one regulated under Directive 2010/24/EU, the taxpayer may opt for the suspension of the payment of the exit tax until the latent capital gains are effectively realized. The exit tax can also be suspended when the person exercising a business activity transfers the

[38] MIELE L., MIELE M., *Legittima la "exit tax" solo se a riscossione differita*, in Corr. trib., n. 2 del 2012, pag. 113.
[39] D.L. 24th January 2012, n.1 was implemented by L. 24th March 2012, n. 27.
[40] The provision refers to Decree indicating the States and the territories that guarantee an adequate exchange of information. Art. 168-bis was repealed by the Legislative Decree n. 147/2015.

permanent establishment that it had maintained on the Italian territory to a Member State of the EU or to a State of the EEA. The overall capital gain is computed on the basis of the normal value of the assets pertaining to the business, if they are not attributed to a permanent establishment located in Italy, and is determined by summing up the capital gains and the capital losses related to the assets transferred abroad; such gains and losses are computed on the bases of the difference between their normal value and their unamortized cost[41]. The capital gain also includes the goodwill value, computed on the basis of the amount that would be agreed between independent enterprises[42].

Such provision also applies when a non-resident person exercising a business activity transfers all or part of the assets connected to a permanent establishment and relating to a business or to a business branch to a Member State of the EU or to a State of the EEA[43]. Such provision became necessary after the decision of the Court of Justice of the European Union in the *European Commission vs. Portuguese Republic*[44] case and is aimed at preventing a tax discrimination between residents and non-residents; as a matter of fact, without such provision non-residents would have been taxed immediately in case of transfer abroad of the assets connected to a permanent establishment located in Italy.

The suspension regime was also extended to the transfer of residence achieved through a business restructuring, such as contributions of assets, mergers and demergers, if the residence of the company resulting from such operations is established in a Member State of the EU or in a State of the EEA. The extension of the suspension of the exit tax to business restructurings eliminates the

---

[41] GALASSI C., MIELE L., *Disciplinate le modalità di differimento della riscossione della "exit tax"*, in Corr. trib. n. 33 del 2013, pag. 2598.
[42] Art. 1 of the Ministerial Decree issued on 2 July 2014.
[43] Art. 11, para. 3, of the Legislative Decree n. 147/2015.
[44] Case C-38/10; in this case, the CJEU stated that "*by adopting and maintaining in force Articles 76 A and 76 B of the Corporation Tax Code (Código do Imposto sobre o Rendimento das Pessoas Colectivas), which are applicable in the case of transfer, by a Portuguese company, of its registered office and its effective management to another Member State or in the case of transfer, by a company not resident in Portugal, of some or all of the assets attached to a Portuguese permanent establishment from Portugal to another Member State, and which prescribe the immediate taxation of unrealized capital gains relating to the assets concerned but not of unrealized capital gains resulting from purely national operations, the Portuguese Republic has failed to fulfill its obligations under Article 49 TFEU*" (www.curia.eu).

distortions arising from the existence of different tax regimes based upon the circumstance that the transfer abroad is achieved through a the transfer of residence or through a business restructuring[45]. Moreover, such extension is due to the need to prevent artificial arrangements aimed at achieving the benefit of the suspension (also) in case of extraordinary transactions[46].

The provision regarding the suspension of the exit tax was originally implemented with the Ministerial Decree issued on 2 August 2013and, subsequently, with the Ministerial Decree issued on 2 July 2014 (here in after "the Decree"), which partially modified the previous regulation. The conditions and the procedure for the exercise of the option for the suspension are regulated under the Decision of the Director of the Revenue Agency of 10 July 2014.

The taxpayer can opt for the suspension of the exit tax by submitting a communication to the office of the Revenue Agency that is competent for the territory concerned; the submission must be made within the term for the payment in full of the income tax related to the last period of residence in Italy[47]. As well as submitting the communication, the taxpayer must establish and maintain the information indicated in Art. 2 of the above mentioned Decision. In case of partnerships, the communication must be submitted by each of the partners to the office competent on the basis of the fiscal domicile of the partnership. Each partner is subject to the payment obligations and to the eventual provision of guarantees[48].

As regards the subjective requirement, the option for the suspension may be exercised by persons "exercising a business activity". According to some scholars[49], such expression includes not only those who exercise an actual business activity but also those whose business activity is presumed by the law on the basis of their legal nature (the reference is to companies and commercial entities).

---

[45] SPINIELLO S., BISOGNO M., *Exit tax estesa a operazioni straordinarie e trasferimento di rami di stabili organizzazioni*, in il fisco, n. 39 del 2015, pag. 1-3740.
[46] TURRI C., *Trasferimento di sede all'estero di una società: profili civilistici e fiscali*, cit.
[47] Art. 1 of the Decision of the Director of the Agency Revenue of 10 July 2014.
[48] See point 7 of the Decision.
[49] PIAZZA M., VALSECCHI M., *Exit tax: questioni ancora aperte dopo l'emanazione delle norme attuative*, in il fisco, n. 40 del 2014, pag. 1-3943.

As for the "objective" scope of application of the deferral, the Decree specifies that the taxpayer can opt for the suspension of the levy in relation to the overall capital gain and not in relation to the single assets pertaining to the business[50].

The exit tax cannot be suspended in relation to the following items of income: the higher and lower values of assets referred to in Art. 85 of the Income Tax Code, that are those assets whose production or whose trade represents the business purpose, raw materials, semi-finished products, stocks, shares and financial instruments other than long-term financial investments; tax-deferred reserves referred to in Art. 166, para. 2[51], of the Income Tax Code, in case they are not reinstated in the first balance sheet of the permanent establishment; the other positive and negative elements that are included in the taxable income of the last period of residence in Italy, which are not related to the transferred assets and whose deduction or taxation was deferred in accordance with the provisions of the Income Tax Code.

The suspended tax must be paid by the taxpayer when one of the following conditions arises:

a) for depreciable assets and rights, intangibles and goodwill included, in relation to the financial year in which the residual shares of depreciation, which would have been deductable in the ordinary determination of the taxable income, occur[52], irrespective of their allocation to income statement. As for financial instruments, derivatives included, other than those regulated by Art. 1(6)(b), the higher value is divided into equal amounts according to their residual term.

---

[50] The previous Decree allowed the taxpayer to opt for the suspension in relation to single assets of its business.

[51] Para. 2 of Art. 166 refers to the tax-deferred reserves and provisions in the financial statement of the last financial year preceding the transfer are taxable in case they are not reinstated in the first balance sheet of the permanent establishment.

[52] Some scholars highlight that the scope of application of this provision should also include those assets which did not pertain to the business when it was resident in Italy and which arose following the transfer abroad. For example, the goodwill value arising from the transfer abroad is depreciable in eighteen years, therefore the capital gain related to it would be taxed for one eighteenth in each of the first nine years and, for the residual amount, in just one payment at the end of the tenth year (see G. SALVI, *Novità e aspetti applicative dell'exit tax*, in Bilancio e Reddito d'Impresa n. 5 del 2015, pag. 14).

b) for the shares and financial instruments similar to stocks, other than those referred to in Art. 85 of the Income Tax Code, in the exercise in which dividends and capital reserves are distributed;

c) for each of the above mentioned elements and for the other assets that are not subject to depreciation, in the exercise in which they are deemed to be realized in accordance with the provisions of the Income Tax code.

In any case, after ten years from the transfer of residence abroad the capital gains are deemed to be realized[53].

On balance, if one of the aforesaid events occurs or after ten years from the transfer the suspension regime ceases and the suspended tax, increased by the interest computed in accordance with Art. 20 of the Legislative Decree n. 241/1997[54], is due within the term provided for the payment of the income tax[55].

On the basis of the information available, the Revenue Agency may render the suspension of the exit tax conditional on the provision of adequate guarantees, in case there is a serious and tangible danger to the recovery of tax[56]. The amount of the guarantee is so determined that it, added to the net assets, is equal to the tax due[57]. The guarantee is not due when the person transferring abroad did not have any losses in the three financial years preceding the transfer, if the last balance sheets shows an amount of net assets equal, at least, to 120% of the suspended tax[58]. In case of merger or demerger which determines the transfer of assets in relation to which the person opted for the suspension of the exit tax within 30 days from when the transaction is carried out, the company resulting from the merger or from the demerger or the beneficiary has to provide a statement

[53] The time limit of ten years was introduced by the Decree of 2 July 2014 in order to provide more certainty to the tax claim.

[54] According to Art. 20 of Legislative Decree n. 241/1997 the interest rate is the one provided for by Art. 9 of the Presidential Decree n. 602/1973, i.e. 5%, increased by one percentage point.

[55] TURRI C., *Trasferimento di sede all'estero di una società: profili civilistici e fiscali*, cit.

[56] Point 5 of the Decision of the Director of the Revenue Agency. Previously, the Decree issued in 2013 required the taxpayer to provide guarantees proportionate to the amount of the suspended tax, unless such amount did not exceed certain thresholds, in accordance with EU's principle of proportionality, in relation to the objective pursued (see GALASSI C., MIELE L., *Disciplinate le modalità di differimento della riscossione della "exit tax"*, in Corr. trib. n. 33 del 2013, pag. 2598).

[57] See point.5.2 of the Decision.

[58] See point 5.5 of the Decision.

certifying the continuing validity of the guarantee, or has to provide a new guarantee[59].

The Decree also provides for some cases of "disqualification", i.e. some cases in which the taxpayer "loses" its right to the suspension of the levy. More particularly, the suspended tax has to be paid if[60]:

- the residence is transferred to an extra-EU or extra-EEA State;
- an insolvency proceeding or a winding-up proceeding is started or in case of extinction of the person exercising a business activity;
- the business was transferred to a person resident in an extra-UE or extra-EEA State following a contribution, a merger or a demerger.

Further cases of disqualification are indicated the Decision of the Director of the Revenue Agency, according to which the taxpayer "loses" the benefit of the suspension[61]:

- in case the guarantee is not provided or is not renewed;
- in case the guarantee disappears, in the absence of the authorization of the Office competent for the territory concerned or of the conditions regarding the provision of the guarantee;
- in case the taxpayer doe not submit the return referred to in point 3.1, if the taxpayer opted for the suspension;
- in case the taxpayer does not establish and maintain the documentation referred to in point 2.1;
- in case the taxpayer does not reply to the questionnaire referred to in point 2.2.;
- in case the taxpayer does not communicate the change of address, in accordance with point 2.1 let. g);
- in case the taxpayer does not pay an installment or a share of the amount due, except the cases of voluntary correction provided for by the law.

If the person moving abroad opts for the suspension of the levy, it will be subject to fiscal surveillance. More particularly, it will have to submit annually a tax return, filling in the sections regarding the capital gain related to the assets

---

[59] See point 5.6 of the Decision.
[60] See Art. 1(8) of the Decree.
[61] See point 6 of the Decision.

transferred abroad. It will have to specify the amount of the capital gain that is still suspended, the amount of tax that is still due and the amount of the net assets appearing in the last balance sheet. Such tax return must be filled even though no tax is due and the amount of the suspended exit tax must be indicated. In case of mergers, demergers and contributions of businesses occurred after the transfer of residence, such obligations must be fulfilled by the company resulting from the merger, by the beneficiary or by the transferee[62]. In case of partnerships, the above mentioned obligations must be fulfilled by the partnership itself and consist in the indication of the amount of the realized capital gain[63].

2.1.4 The division into installments of the exit tax

Persons exercising a business activity, which/who decide to transfer their residence to Member States of the EU or to States of the EEA, indicated in the decree issued by the Ministry of Economy and Finance in accordance with Art. 168-bis of the Income Tax Code and with which Italy reached an agreement on mutual assistance for the recovery of tax claims similar to the one regulated under Directive 2010/24/EU, may also opt for the division of the exit tax into installments[64].

The option for the payment in installment is subject to rules similar to those provided for the suspension regime.

As regards the subjective requirement, the option for the division into installments may be exercised by persons "exercising a business activity". According to some scholars[65], such expression includes not only those who exercise an actual business activity but also those whose business activity is presumed by the law on the basis of their legal nature (the reference is to companies and commercial entities).

The division into installments is only allowed for the overall capital gain and cannot be opted for in relation to the single assets of the business.

The taxpayer is not allowed to divide the exit tax into installments in relation to the same items of income excluded from the suspension regime, that

[62] See point 3 of the Decision.
[63] See point 7 of the Decision.
[64] Art. 1 of the Decree.
[65] PIAZZA M., VALSECCHI M., *Exit tax: questioni ancora aperte dopo l'emanazione delle norme attuative*, in il fisco, n. 40 del 2014, pag. 1-3943.

are[66]: the higher and lower values of assets referred to in Art. 85 of the Income Tax Code, that are those assets whose production or whose trade represents the business purpose, raw materials, semi-finished products, stocks, shares and financial instruments other than long-term financial investments; tax-deferred reserves referred to in Art. 166, para. 2[67], of the Income Tax Code, in case they are not reinstated in the first balance sheet of the permanent establishment; the other positive and negative elements that are included in the taxable income of the last period of residence in Italy, which are not related to the transferred assets and whose deduction or taxation was deferred in accordance with the provisions of the Income Tax Code.

If the taxpayer exercises this option, the exit tax must be paid in six annual installments of equal amount and the obligations connected to the fiscal surveillance expire[68].

The taxpayer loses its right to the payment of the exit tax in installments and has to pay the residual amount of tax within the term provided for the next payment, if one of the following events occur:

- the residence is transferred to an extra-EU or extra-EEA State;
- an insolvency proceeding or a winding-up proceeding is started or in case of extinction of the person exercising a business activity;
- the business was transferred to a person resident in an extra-EU or extra-EEA following a contribution, a merger or a demerger.

Further cases of disqualification are indicated the Decision of the Director of the Revenue Agency, according to which the taxpayer "loses" the benefit of the payment in installments[69]:

- in case the guaranteed is not provided or is not renewed;
- in case the guarantee disappears, in the absence of the authorization of the Office competent for the territory concerned or of the conditions regarding the provision of the guarantee;

---

[66] Art. 1, para. 2, of the Decree.
[67] Para. 2 of Art. 166 refers to the tax-deferred reserves and provisions in the financial statement of the last financial year preceding the transfer are taxable in case they are not reinstated in the first balance sheet of the permanent establishment.
[68] Art. 1, para. 7, of the Decree.
[69] See point 6 of the Decision.

- in case the taxpayer doe not submit the return referred to in point 3.1, if the taxpayer opted for the suspension;
- in case the taxpayer does not establish and maintain the documentation referred to in point 2.1;
- in case the taxpayer does not reply to the questionnaire referred to in point 2.2.;
- in case the taxpayer does not communicate the change of address, in accordance with point 2.1 let. g);
- in case the taxpayer does not pay an installment or a share of the amount due, except the cases of voluntary correction provided for by the law.

If the taxpayer opts for the payment in installments, it may be required by the Tax Authorities to provide adequate guarantee, if there is a serious and tangible danger to the recovery of tax[70]. The same rules regarding the suspension regime are applied, therefore the guarantee is not due when the person transferring abroad did not have any losses in the three financial years preceding the transfer, if the last balance sheets shows an amount of net assets equal, at least, to 120% of the suspended tax[71]. Moreover, in case of merger or demerger which determines the transfer of assets in relation to which the person opted for the suspension of the exit tax within 30 days from when the transaction is carried out, the company resulting from the merger or from the demerger or the beneficiary has to provide a statement certifying the continuing validity of the guarantee, or has to provide a new guarantee[72].

2.1.5 The computation of the "exit tax"

The assets of the person transferring its residence abroad are deemed to be sold at their "normal value". The definition of "normal value", that corresponds in principle to the definition of "arm's length price" ,is provided for by Art. 9 of the Income Tax Code, according to which the "*normal value is the average price or*

[70] Point 5 of the Decision of the Director of the Revenue Agency. Previously, the Decree issued in 2013 required the taxpayer to provide guarantees proportionate to the amount of the suspended tax, unless such amount did not exceed certain thresholds, in accordance with EU's principle of proportionality in relation to the objective pursued (see C. GALASSI, L. MIELE, *Disciplinate le modalità di differimento della riscossione della "exit tax"*, in Corr. trib. n. 33 del 2013, pag. 2598).
[71] See point 5.5 of the Decision.
[72] See point 5.6 of the Decision.

consideration paid for goods and services of the same or similar type, in free market conditions and at the same level of commerce, and at the time and place at which the goods and services were purchased or performed (or, if no such criterion is available, at the time and place nearest thereto)[73].

Since the assets of the person transferring its residence are deemed to be sold at their normal value, the gains deriving from the transfer of assets are immediately taxable on the basis of the difference between such value, calculated at the time of transfer, and their tax book value.

As stated in paragraph 2.1.1., for the computation of the capital gain subject to exit tax it is important to determine when the objective requirement, represented by the transfer abroad, is considered to be fulfilled. Some authors argue that the identification of the assets and the computation of the exit tax should occur when the transfer is completed from a juridical point of view, i.e. when the last of the three connecting factors is moved abroad; others believe that either the identification of the assets and the computation of the exit tax should be made on 1° January of the tax period from which the person is no longer resident in Italy for income tax purposes[74].

On this point, the Decree[75] establishes that "*the exit tax on the capital gain arising from the transfer is determined definitively at the end of the last tax period in which the person is resident in Italy*, *without computing the capital gains and the capital losses occurred after the transfer*"[76].

The losses sustained by the taxpayer until the tax period preceding the one in which the transfer abroad was completed, not offset with the income produced until such period, can be deducted from the income attributed to the permanent establishment located in Italy in accordance with Art. 84 and within the limits mentioned in Art. 181 of the Income Tax Code.

The Decree specifies that the losses occurred in previous financial years are primarily set off the income produced during the last period of residence in Italy,

---

[73]GALLI C., *Italy-Individual Taxation*, in *IBFD Database- Country analyses*, 2013.
[74]The need to refer to the 1 January of the subsequent tax year is due to the fact that Italian tax law does not adopt the so called "split year" system.
[75] Art. 1, para. 3, of the Decree.
[76] SALVI G., *Novità e aspetti applicativi dell'exit tax*, in Bilancio e Reddito d'Impresa, n. 5 del 2015, pag. 14; see also Circular Assonime n. 33 of 17 December 2014.

included the elements mentioned in para. 2. Any excess loss, together with the eventual loss incurred in that tax period, is deducted from the capital gain arising from the transfer abroad. Any losses (eventually) remaining after the above mentioned operations can be deducted from the income attributed to the permanent establishment located in Italy, in accordance with Art. 166, para. 2-bis, of the Income Tax Code.

The type of tax and the tax rate vary according to the nature of the person transferring its or his resident abroad.

In case it is a company, the capital gains are subject the Corporate Income Tax, with a tax rate of 24% .

In case in it a natural person, the capital gains are subject to Individual Income tax, with a possible separate taxation operating in accordance with Art. 17 (g) and (l) of the Income Tax Code. More precisely, according to Art. 17 (g), the individual income tax is applied separately "*on capital gains, including the value of goodwill, realized upon the transfer for consideration of a business owned for more than 5 years, and income received as a result of the liquidation, including through receivership and similar proceedings, of commercial enterprises in business for longer than 5 years*"; Therefore, if the transfer abroad is carried out by a natural person exercising a business activity, the capital gain is included in his tax base, but he can opt for a separate taxation if he's been exercising such activity for more than five years; in case the transfer is carried out by a partnership, the capital gain is a taxable income for the partners, if the investment has been held for more than five years[77].

A similar rule applies in relation to "*income included in sums attributed to (or in the normal value of assets assigned to) partners of a general and limited partnership resident in Italy in the event of their withdrawal or exclusion, or upon reduction of capital, or to the heirs on the death of a partner, and income imputed to partners as the result of liquidation, including through receivership or similar proceedings, of such partnership, if the time between the formation of the partnership and the communication of the withdrawal or exclusion, the resolution*

[77] Art. 166 and art. 17 of the Income Tax Code.

for the reduction of capital, the death of the partner or the start of liquidation is more than 5 years", in accordance with Art. 17(l).

The provision does not specify which moment has to be taken into account for the determination of the five-year period. Even though different solutions can be provided, it seems appropriate to refer to the moment when the legal seat is deemed to be transferred abroad, in accordance with the private international law of the States concerned[78].

If the taxpayer opts for the suspension or for the division into installments of the exit tax, it will have to pay interest too. Such interest is computed in accordance with Art. 20 of the Legislative Decree n. 241/1997, on the basis of the tax suspended or divided into installments[79].

2.1.6 Mechanisms to prevent double taxation

The transfer of residence abroad and the application of exit taxes may give rise to double taxation issues.

First of all, the transfer of residence abroad may determine a double taxation when both States concerned tax their residents on a worldwide basis and in the whole tax period, which is not "interrupted" by the transfer.

This kind of double taxation can be eliminated through particular provisions, such as Art. 4 of the Double Tax Convention between Italy and Switzerland[80] and Art. 3 of the Protocol to the Double Tax Convention between Italy and Germany[81], which regulate the transfer of residence of natural persons in

[78] MELIS G., *Trasferimento della residenza fiscale e imposizione sui redditi*, Milano, 2009, pag. 510.

[79] Art. 1 of the Decree; according to Art. 20 of Legislative Decree n. 241/1997 the interest rate is the one provided for by Art. 9 of the Presidential Decree n. 602/1973, i.e. 5%, increased by one percentage point.

[80] More precisely, such provision states that "*in the case of individuals who have definitely transferred their residence from one Contracting State to the other Contracting State, tax liability insofar as it depends on residence shall end in the first-mentioned State as of the day on which the transfer of residence is completed. In the other State, tax liability shall, insofar as it depends on residence, begin at the same point in time*".

[81] In accordance with this provision, "*if an individual is deemed a resident of a Contracting State in the sense of Article 4 for only part of the year and a resident of the other Contracting State for the remainder of that year (change of residence), his tax liability in the first-mentioned State, as far as it is determined by his residence, shall cease at the end of the day on which the change of residence takes place. His tax liability in the other State, as far as it is determined by his residence, shall begin on the day following that of the change of residence*".

accordance with the "split year" method. Such provisions prevent the individual from being subject to taxation in both States for the whole tax period.

Secondly, capital gains may be subject to double taxation when the assets which they are related to are valued by the State of destination and by the State of origin on the basis of different criteria (normal value and historical cost), if no tax credit is granted to the taxpayer. In this case, scholars[82] argue that the double taxation could be avoided, if each State took into account the normal value of the assets pertaining to the business moved to their territory. Such solution would be in line with the CJEU case law according to which the capital gains should be taxed in the State where they occur[83], which means that the State of destination should consider the normal value and not the historical cost of the assets (otherwise it would tax capital gains occurred in another State)[84]. In other words, the problem of double taxation arises when the two States concerned determine the value of the transferred assets on the basis of different criteria (the normal value cost and the historical cost), if the State of destination does not provide for a tax credit in relation to the tax paid in the State of origin.

Double taxation can be eliminated or reduced through a series of instruments that are provided for by Italian tax law in relation to exit taxation, which are:

---

[82]See, among others, NUSSI M., *Trasferimento della sede e mutamento della residenza "fiscale": spunti in tema di stabile organizzazione e regime dei beni d'impresa*, cit.; SILVESTRI A., *Il regime tributario delle operazioni di riorganizzazione transazionale in ambito Cee*, in Riv. Dir. Fin. 1996, I, p. 490; MELIS G., *Trasferimento della residenza fiscale e imposizione sui redditi,* cit.
[83] See C-371/10, *National Grid Indus*, in relation to which the Court stated that "*the transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer (see, to that effect, Case C-374/04 Test Claimants in Class IV of the ACT Group Litigation [2006] ECR I-11673, paragraph 59). The Court has thus held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country (see N, paragraph 46). Such a measure is intended to prevent situations capable of jeopardizing the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States (see Marks & Spencer, paragraph 46; Oy AA, paragraph 54; and Case C-311/08 SGI [2010] ECR I-487, paragraph 60)"*.
[84] DE SANTIS D., *L'exit tax: aspetti di doppia imposizione internazionale irrisolti*, in il fisco, n. 40 del 2013, pag. 1-6202.

- the *"step-up" system*. Art. 166-*bis* of the Income Tax Code[85] states that if a person exercising a business activity moves its residence to Italy, the fiscal value of the transferred assets is determined at normal value, in accordance with Art. 9 of the Income Tax Code (see above)[86];
- the "*notional" tax credit*. As stated above, "*in any case*" the capital gains related to the foreign permanent establishments are deemed to be realized on a normal value basis. Such rule, whose aim is to preserve the taxation power of the residence State when the person moves its residence abroad, needs to be coordinated with the rules aimed at preventing double taxation and with the European principles. As a matter of fact, the aforesaid capital gains may be subject to taxation either in Italy and in the State where the taxpayer moves its residence and in the State where the permanent establishment is located[87].

The so called notional tax credit is regulated under Art. 179, para. 3, of the Income Tax Code. According to such provision, the capital gains related to the permanent establishment are taxable on the basis of the normal value that would have been determined by the member State in which the permanent establishment is located[88] and the tax credit consists in the deduction from the tax due of the tax that such member State would have levied without Directive n. 90/434/EC;

- the *Advance Pricing Agreements*. Italian Tax Authorities and the persons moving their residence to or from Italy can reach "advance agreements", which are instruments aimed at promoting cooperation between the tax administration and the taxpayers[89]. More precisely, Art. 31-*ter* of the Presidential Decree n.

[85] Such provision was introduced with the Legislative Decree n. 147/2015; on the opportunity for the State of destination to accept the market value as the starting value of the asset for tax purposes see the "COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE - *Exit taxation and the need for co-ordination of Member States' tax policies",* (COM(2006) 825 final).

[86] On the application of the normal value criterion see PELLECCHIA M., *Trasferimento di residenza in Italia: lettura estensiva della disciplina da parte dell'Agenzia delle entrate*, in il fisco, n. 37 del 2016, pag. 1-3560;see also the Resolution of the Revenue Agency n. 69/E of 5 August 2016.

[87] GALASSI C., SAVI M., *Exit tax: stabili organizzazioni estere e notional tax credit, in Fiscalità e commercio internazionale*, n. 8-9 del 2013.

[88] SALLUSTIO C., *Il c.d. notional tax credit previsto dall'art. 179, comma 3, del T.u.i.r. Profili di diritto tributario italiano e comunitario*, in Rass. trib. n. 4 del 2011, pag. 966.

[89] GIGLIO MORO V., PEVERELLI M., "*Tax compliance": la nuova disciplina degli accordi preventivi dopo l'abrogazione del "ruling internazionale*", in Fiscalità e Commercio internazionale", n. 5 del 2016 pag. 44.

600/1973 regulates a series of "*advance agreements for enterprises with international businesses*"[90], including the enterprises transferring their residence abroad (Art. 166 of the Income Tax Code) or to Italy (Art. 166-*bis* of the Income Tax Code). According to such provision, enterprises with international business may define in advance the "entry values" and the "exit values" of their assets, in case they move from or to Italy. As for the temporal scope of application of the advance agreements, Art. 31-*ter* specifies that they are legally binding in the tax period in which they are reached and in the subsequent four tax periods, unless changes of factual or juridical circumstances occur. Nevertheless, if they are stipulated after other agreements reached with foreign Tax Authorities through the procedures regulated by Double Tax Conventions, the above mentioned agreements are binding for the parties from the previous tax periods, not prior to the tax period during which the request for the APA was presented to the competent office of the Revenue Agency. A copy of the advance agreement is submitted to the Tax Authorities of the States in which the enterprises with which the transactions are carried out reside or are established, in accordance with the EU legislation. Since the advance agreements regulated under Art. 31-*ter* are reached between the taxpayers and (only) the Italian tax administration, they are unilateral agreements; that means that the risk of double taxation is not completely eliminated but is just reduced.

2.2 Exit taxation and Double Tax Conventions

As for the relationship between exit taxation and Double Tax Conventions, it has been argued[91] that such conventions are incapable of eliminating double taxation at the moment of the transfer abroad[92], as well as of allocating taxation rights on the capital gains occurred before the transfer of residence[93];moreover,they neither prevent a contracting State from levying exit

[90] For a more precise definition of "enterprises with international businesses" see the Decision of the Revenue Agency with Protocol n. 2016/42295.

[91] MELIS G., *Profili sistematici del "trasferimento" della residenza fiscal delle società*, cit.

[92] Art. 13 of the Double Tax Convention allocates the rights to tax the capital gains arising from the sale of the assets, whereas the exit tax is levied before such sale is carried out.

[93] It has to be considered, among other factors, that the double taxation occurs in two different tax periods, since the State of origin taxes the capital gains in the tax period in which the residence is transferred abroad, whereas the State of destination taxes the capital gains arising from the sale of the assets.

taxes nor provide the taxpayer with the right to get a tax credit or to have its assets valued with the same criterion, in the absence of express provisions.

However, double tax treaties may also "safeguard" the application of taxes on the gains earned by a person who has transferred his residence abroad. An example of such provisions is represented by Art. 13 of the Double Tax Convention between Italy and Sweden, which states that a Contracting State may tax, according to its own legislation, "*any gain from the alienation of shares in a company the main assets of which consist of immovable property situated in that Contracting State, provided the alienator is an individual resident of the other Contracting State, who: a) is a national of the first-mentioned Contracting State; b) has been resident in the first-mentioned Contracting State during any part of a five-year period immediately preceding the alienation; and c) at the time of the alienation alone or together with a closely related person had a decisive influence on the company*".

The above mentioned provision regards the capital gains arising from the sale of participations held by an individual in a company whose main assets are represented by immovable property located in a Contracting State (e.g. Italy); if the person, who is resident in the other Contracting State (e.g. Sweden) at the time of the sale, has Italian nationality, has been resident in Italy during the five years preceding the alienation and at the time of the alienation has a decisive influence on the company the above mentioned capital gains are taxable in Italy.

2.3 The Italian exit tax in relation to the Anti-Tax Avoidance Directive

The exit tax regulated under Italian tax law substantially complies with the Directive 2016/1164/EU, even if there are some differences, which can be summarized as follows:

- the exit tax provided for by Art. 166 of the Italian Income Tax Code does not apply to the transfers of assets from the head office to the permanent establishment located in another State;
- Directive 2016/1164/EU provides for cases in which the tax deferral is immediately discontinued that are not provided for under Italian tax law, such as

the disposal of the transferred assets or of the business carried out by the permanent establishment of the taxpayer;

- Italian tax law provides for cases of "disqualification" that are not provided for under Directive 2016/1164/EU, such as the failure to provide or renew the guarantee requested by the Tax Authority, the disappearance of the guarantee in the absence of the authorization of the Office competent for the territory concerned or of the conditions regarding the provision of the guarantee; the failure to submit the return referred to in point 3.1 of the Decision, if the taxpayer opted for the suspension; the failure to establish and maintain the documentation referred to in point 2.1 of the Decision; the failure to reply to the questionnaire referred to in point 2.2 of the Decision; the failure to communicate the change of address, in accordance with point 2.1 let. g);
- Italian tax law provides the taxpayer with the chance to divide the exit tax into six annual installments, whereas the Directive gives the taxpayer the right to defer the payment of the exit tax by paying it in installments in "*over five years*";
- according to Italian tax law, the payment of the exit tax can be suspended until the end of the tax depreciation period or until the distribution of dividends or capital reserves.

Art. 1 of the Law n. 163/2017 provides for the implementation of Directive 1164/2016/EU; one of the characteristics of the new exit tax will be the division into installments of the tax over a five-year period[94].

The aforesaid differences between Italian Tax Law and the Anti-Avoidance Directive may result in the need to adapt the Italian legislation to the European Directive, in the part where the Italian rules do not guarantee a sufficient level of protection for the internal market and a sufficient level of coordination with the legislations of the other member States, considered that the measures provided for by the Directive do not exceed what is necessary in order to achieve its main objective, represented by the improvement of the "*resilience of the internal market as a whole against cross-border tax avoidance practices*".

On the other hand, it is important to bear in mind that the Directive does not preclude the application of "*domestic or agreement-based provisions aimed at*

[94] FORT G., Il *regime della exit tax si applica ai conferimenti di stabile organizzazione estera*, cit.

safeguarding a higher level of protection for domestic corporate tax bases"[95], which means, for example, that the provisions of the Italian tax law that introduce cases of disqualification not provided for under Anti-Avoidance Directive may be considered compatible with the EU legislation.

3. The CFC regime

3.1 The CFC regime under Art. 167 of the Italian Tax Code

Generally, according to Italian tax law persons resident in Italy for tax purposes are liable to tax on a worldwide basis and the eventual double taxation, due to the taxes paid abroad in relation to the same items of income, is eliminated through a tax credit, regulated under Art. 165 of the Income Tax Code. If the income derives from participations held in a foreign company, it is not taxed until the dividends are distributed.

However, Italian tax law also provides for a special regime, the CFC regime, which is aimed at preventing the deferral of taxation in Italy in relation to items of income that are subject to a low level of taxation in the State where the distributing company is located[96]. This fiscal regime, which has an anti-avoidance function,is an exception to the general rule according to which dividends are taxed on a cash basis.

The CFC regime is regulated under Art. 167 of the Income Tax Code. According to such provision, the CFC regime applies when a resident person directly or indirectly controls another enterprise, company or entity that is resident or is located in States with a privileged tax regime. When the CFC regime is applied, the profits made by the controlled company are attributed to the resident person proportionally to its share of participation and regardless of the effective distribution of dividends. The CFC regime determines the imputation to a person resident in Italy of income produced abroad. in accordance with a transparent system. From this point of view, the CFC regime is similar to the worldwide consolidation; differently from the consolidation regime, which is an optional

[95] Art. 3 of Directive 2016/1164/EU.
[96] CORASANITI G., *Le società controllate estere e le disposizioni antiabuso nel T.U.I.R.*, in Corr. trib., n. 43 del 2008, pag. 3501.

regime that can be adopted by groups of companies, CFC rules have an anti-avoidance function and must be mandatorily applied[97].

As for the subjective requirement, the CFC rules apply to resident persons, including: natural persons; simple partnerships; general partnership; limited partnerships; joint-stock companies; limited liability companies; partnerships limited by shares; cooperatives; mutual insurance companies; European companies and European cooperative companies; entities whose exclusive or main business purpose is the exercise of a business activity; entities whose exclusive or main business purpose is not the exercise of a business activity.

3.1.1 Definition of "Controlled Foreign Company"

As aforesaid, the CFC rules apply when a person resident in Italy controls another company, enterprise or entity that is resident or located in a State or in a territory with a favorable tax regime, other than the Member States of the European Union or than the States of the EEA with which Italy reached an agreement that guarantees a sufficient exchange of information.

In order to understand the scope of application of the provision regarding the CFC rules, it is therefore necessary to define either the concept of "entity", the concept of "control" and the notion of "State or territory with a privileged tax regime".

As for the first one, the Revenue Agency specified[98] that the term "entity" refers to any foreign legal entity other than companies and enterprises; it is not required that the entity carries on a business activity, since foreign companies and non-commercial entities are included in the scope of application of the CFC rules too[99].

However, such expression does not include those foreign entities that, considered their operative characteristics, deriving from the law that regulates them and on the basis of which they are set up:

a) are participated by a number of unrelated investors;

b) investment policies determined by criteria and regulations subject to the control of supervisory authorities;

[97] TESAURO F., *Istituzioni di diritto tributario*, Parte speciale, 2012, pag. 171.

[98] See the Circular of the Revenue Agency n. 23/E of 26 May 2011.

[99] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.

c) are managed by subjects that carry on such activities professionally and independently from the participants.

As regards the notion of "control", Art. 167, para. 3 of the Income Tax Code clears that the notion of "control" is the same as the one provided for by Art. 2359 of the civil code, according to which a position of control occurs when a company has most of the voting shares in the shareholders' meetings of another company or has enough voting shares to influence the shareholders' meetings of the other company. The control can also derive from contractual relationships between the companies and can be exercised through trust companies or through third persons.

The criteria referred to in Art. 2359 of the civil code are also applied in case of persons other than companies and the situation existing at the end of the financial year of the foreign controlled company is taken into account.

As regards the definition of "State with a privileged tax regime", Art. 167, para. 4 specifies that such condition occurs when the nominal level of taxation is lesser by 50% than the level of taxation provided for by Italian tax law.

Generally, according to para. 1 of Art. 167, the CFC regime applies when the foreign company is located in a State that has a favorable level of taxation and that is not a Member State of the EU or a State of the EEA with which Italy reached an agreement that guarantees a sufficient exchange of information.

However, following an amendment made with the Law Decree n. 78/09, the CFC regime may also apply when the controlled company is located in States or territories other than those indicated in para. 1, or in a Member State or in a State of the EEA with which Italy reached an agreement that guarantees a sufficient exchange of information, if all of the following conditions occur[100]:

- the controlled company is subject to an effective level of taxation that is lesser by more than 50% than the level of taxation to which they would by subject if they were resident in Italy[101].

[100] Art. 167, para. 8-bis of the Income Tax Code.

[101] The computation of the "virtual" domestic tax is made on the basis of the financial statement of the controlled company, prepared in accordance with the rules of the State where it is located; if the financial statement is prepared in accordance with the international accounting standards, the resident member of the company has to determine the income of the controlled company according to the provisions regarding the persons that adopt such international accounting standards (for

- they receive profits deriving for more than 50% from the management, from the holding or from the investment in participations, credits and other financial activities, from the assignment or licensing of intangible rights related to industrial, artistic or literary property and from the rendering of services (financial services included) to persons directly or indirectly controlling the non-resident company or entity, controlled by it or subject to the control of the same company that controls the non-resident company or entity.

The extension of the scope of application of the CFC regime, which is in line with the indications from the European Commission[102], aims at allowing the application of such regime regardless of the territory where the company is located and, in fact, also in case of companies resident in Member States of the EU[103].

As regards the first of the two above mentioned conditions, the Revenue Agency specified[104] that in determining the foreign tax rate it is possible to consider the eventual withholding taxes applied by the State where the CFC is located, on the condition that such withholding taxes are not refunded or refundable. If the financial statement of the controlled foreign company shows a loss, it is necessary to compare the current taxes due in the foreign State with the taxes virtually due in Italy. In this case, if the foreign tax rate is equal to zero, because the company has suffered a loss, but the Italian tax rate would be positive because the income has to be increased in accordance with the Italian tax law, the condition provided for under Art. (8-bis)(a), must be deemed to occur; on the contrary, if the foreign tax rate is positive and the domestic tax rate is equal to zero such condition does not occur and the CFC regime does not apply. The gain or the loss to be considered in determining the tax rate is the gain or the loss resulting from the financial statement prepared in accordance with the accounting rules adopted by the foreign company. If the IAS/IFRS principles are applied, the

---

further information on how the effective foreign tax and the virtual domestic tax have to be determined see the Decision of the Director of the Revenue Agency of 16 September 2016).

[102] See the COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE COM(2007) 785 final, "*The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries*".

[103] MIELE L., Estensione *del regime di trasparenza anche alle CFC non localizzate in Paesi "Black list"* in Corr. trib., n. 30 del 2009, pag. 2435.

[104] See the circular of the Revenue Agency n. 23/E of 26 May 2011.

income of the foreign company virtually taxable in Italy is determined in accordance with the rules regarding the IAS adopters; if the financial statement of the foreign company is prepared in accordance with other rules, the income of the foreign company virtually taxable in Italy has to be computed according to the rules provided for non IAS/IFRS adopters[105].

If the person resident in Italy controls a company that is non located in a tax have but has a permanent establishment that is located in a tax haven, the CFC rules are applied to the income produced in the tax haven by the permanent establishment, unless such income is integrally subject to ordinary taxation in the State where the controlled company is located.

It is important to point out that the concept of "privileged tax regime" can be referred not only to a whole State but also to a territory of a State. As a matter of fact, the provisions regulating the CFC regime also apply when a foreign controlled company or entity is resident in a State that does not have, in general, a favorable level of taxation but is located in a territory of such State that has a privileged tax regime. Moreover, even in the absence of an express provision, it has been argued that the CFC regime should also apply when the foreign State provides persons operating in certain commercial sectors with a favorable fiscal treatment[106].

3.1.2 Types of income covered

In general, the CFC rules can be structured in two different ways: in accordance with the so called *transactional approach*, which is based on the type of income, or in accordance with the so called *jurisdictional approach*, which is based on the localization of the controlled foreign company. Anyway, both approaches tend to reach similar results, through the exemption of certain locations, if the transactional approach is adopted, or through the exemption of certain forms of income, if the jurisdictional approach is adopted[107].

---

[105] See the circular of the Revenue Agency n. 23/E of 26 May 2011.

[106] VASAPOLLI G., VASAPOLLI A., I *soggetti obbligati alla dichiarazione dei redditi secondo le "CFC" rules*, in Corr. trib., n. 42 del 2002, pag. 3812; see also the Ministerial Circular n. 207/E of 16 November 2000.

[107] On the difference between the two approaches see the OECD Report titled "*Controlled Foreign Company Legislation"*, Paris, 1996.

As for the Italian CFC regime, since its introduction in 2000 it has been based on the *jurisdictional approach*, as resulting from the reference to the States or territories with a privileged tax regime and from the absence of any references to the types of income produced by the controlled foreign company[108]. In this last respect, Art. 167 of the Income Tax Code only states that "*the income*" earned by the controlled company is imputed to the person resident in Italy, including therefore all types of income produced by the controlled foreign company in its scope of application.

The *jurisdictional approach* is moderated by the provision of certain cases of exemption, the "safe harbors", which will be discussed in the following paragraph.

3.1.3 The Safe harbors

The CFC regime does not apply if the resident taxpayer proves, alternatively, that[109]:

- the non-resident company or entity carries on an effective commercial or industrial activity, as its main business purpose, on the market of the State or territory where it is located; as regards banking, financial and insurance activities such requirement is deemed to be met when most of the sources, of the uses or of the profits arise from the State or from the territory where it is located. However, such provision is not applied if the profits of the non-resident company or entity derive for more than 50% from the management, the holding or from the investment in participations, credits or other financial activities, from the sale or the licensing of intangible rights related to industrial, artistic or literary property, from the rendering of services (financial services included) to persons that control the non-resident company or entity, are controlled by it or are controlled by the same company that controls the non-resident company or entity[110];
- the holding of participations does not determine the localization of the income in States or territory with a privileged tax regime, i.e. States or territories

[108] DEZZANI L., GAZZO M., *CFC Legislation: luci ed ombre della nuova proposta legislativa. Prime riflessioni*, in il fisco, n. 38 del 2000, pag. 1-11528.
[109] Art. 167, para. 5, let. a), of the Income Tax code.
[110] Art. 167, para. 5-bis, of the Income Tax Code.

where the level of taxation is lesser by 50% than the level of taxation provided for by Italian tax law.

As regards the first of the above mentioned safe harbors, some doubts were raised in relation to the reference to the "*market of the State or territory*"[111].

On this point, the Revenue Agency[112] specified that in order to demonstrate the connection of the non-resident company or entity with "*market of the State or territory*" it may not be sufficient to prove the existence of an adequate organizational structure. The expression "*market of the State or territory*" generally refers, alternatively, to the sale market or to the supply market; therefore, the fact that the controlled foreign company or entity does not act on the local sale or supply market may be an indicator showing that such company or entity does not carry on an effective commercial or industrial activity. Moreover, the connection with the local market needs to be relevant, which means it has to regard more than the 50% of the sales or of the purchases.

As regards the second safe harbor, the taxpayer is required to demonstrate that the tax burden is equal to at least the 50% of the amount of taxes that it would have paid if the controlled company had been resident in Italy. For the purposes of such demonstration, it is first necessary to calculate the effective foreign tax rate, which is determined on the basis of the ratio between the amount of taxes paid by the controlled foreign company on its income (included the taxes paid in a State other than the one where in CFC is located), and the pre-tax profit. Secondly, the foreign tax rate has to be compared with the Italian nominal tax rate, computed by summing the tax rate of the corporate income tax and the tax rate of the regional tax on productive activity. If such comparison shows that the foreign tax rate is higher than the 50% of the domestic tax rate, the safe harbor is deemed to occur. If the foreign tax rate is lower, it can be compared with the virtual domestic tax rate, i.e. with the level of taxation that would have been applied if the company had been resident in Italy; if the foreign tax rate is higher than the 50% of the virtual domestic tax rate, the safe harbor is deemed to occur and the CFC regime does not apply[113].

---

[111] MIELE L., *Le esimenti per il regime CFC*, in Corr. trib. n. 42 del 2010, pag. 3449.
[112] See the Circular of the Revenue Agency n. 51/E of 6 October 2010.
[113] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.

3.1.4 Issues related to the burden of proof

Art. 167 of the Income Tax Code specifies that it is for the resident taxpayer to demonstrate the existence of a safe harbour, so that the CFC are not applied.

As regards the second of the two safe harbours provided for by Art. 167(5), i.e. the one regarding the non-localization of the income in States with a favourable tax regime, the Revenue Agency cleared that the provision[114] precluding the applicability of such safe harbour to passive income and infra-group services, does not represent an irrebuttable presumption, since it only strengthens the burden of proof on the taxpayer. As a matter of fact, in order to obtain the non-applicability of the CFC regime, the taxpayer has to demonstrate both the existence of the conditions of the first safe harbour (effective commercial or industrial nature of the activity carried on by the non-resident company or entity) and the absence of any avoidance purposes aimed to divert profits to States with a favourable tax legislation[115].

In order to provide evidence of the existence of the safe harbours, the taxpayer may use the ruling procedure regulated under Art. 11(1)(b), of Law n. 212/2000. According to such provision, the taxpayer may ask for the opinion of the Tax Authorities in relation to the existence of the elements required by Italian tax law for the adoption of specific tax regimes. The Tax Authorities have to reply within 120 days from the request. The written reply is binding for the Tax Authorities, limited to the issue contained in the request, whereas the silence of the Tax Authorities amounts to acceptance of the solution proposed by the taxpayer. Any acts contrary to the written or silent reply are void. According to the case law[116], the taxpayer cannot challenge the negative reply before the Tax Commission, since it does not affect the juridical and financial position of the taxpayer.

As aforesaid, the taxpayer “may” use the ruling procedure in order to demonstrate the conditions which make the CFC regime not applicable. Before the provision was amended by the Legislative Decree n. 147/2015, the taxpayer was obliged to use to ruling procedure. Following such modification, the ruling

---

[114] Art. 167(5-bis) of the Income Tax Code.
[115] See the Circular of the Revenue Agency n. 51/E of 6 October 2010.
[116] See the decision of the Regional Tax Commission of Rome, Sez. I, n. 6252/2017.

procedure, once mandatory, has become optional and the optional nature of the ruling procedure aimed at demonstrating the non-applicability of the CFC rules is in line with the function of each ruling procedure, which represents a right and not a burden for the taxpayer[117]. As a consequence of this amendment, the taxpayer can choose whether to provide evidence of the existence of the safe harbours in advance, through the ruling procedure, or subsequently, during the eventual assessment procedure. As a matter of fact, the Tax Authorities, before issuing a notice of assessment, has to provide the taxpayer with the chance to demonstrate the existence of the conditions for the non-applicability of the CFC rules, within 90 days. If the Tax Authorities deem the elements provided by the taxpayer inadequate to demonstrate the non-applicability of the CFC regime, they have to give reasons for such decision in the notice of assessment. The existence of the safe harbours does not have to be proved during the assessment procedures if the taxpayer obtained a positive opinion from the Tax Authorities through the ruling procedure, even if the Authorities can check the completeness and truthfulness of the information and of the evidence provided during the ruling procedure.

As aforesaid, Art. 167, para. 8-bis of the Income Tax Code states that the CFC rules may also apply when the controlled company or entity is located in States or territory other than those mentioned in para. 1 and even when the company or entity is located in a Member State of the European Union or in a State of the EEA, if certain conditions occur. However, this provision does not apply if the taxpayer proves that the localization abroad does not represent an artificial arrangement aimed at achieving an undue tax advantage. For this purpose, the taxpayer may use the above mentioned ruling procedure, regulated under Art. 11 of Law n. 212/2000. If the taxpayer opted for the "Cooperative compliance" regime[118], such procedure can be started regardless of the existence of the conditions referred to in a) and b) of para. 8-bis of Art. 167.

117 ALBANO G., MARANI M., *Nuove CFC senza obbligo di interpello preventivo*, in Corr. trib., n. 23 del 2015, pag. 1773.

118 The "Cooperative compliance" regime is a particular regime introduced with the Legislative Decree n. 128/2015, which is based on the cooperation between the taxpayer and the Tax Authorities. The taxpayer which opt for such regime are obliged to notify the Revenue Agency the fiscal risks and the operations which may be part of an aggressive tax planning, but obtain several benefits in exchange for their cooperation (see MELIS G., *Lezioni di diritto tributario*, Torino, Giappichelli, 2017, page 265 and following pages).

According to the case law[119], if the taxpayer resident in Italy sales the participations held in the foreign company before the end of the financial year, the CFC regime cannot be applied if the Tax Authorities do not prove that the participations were bought back by the taxpayer, so that the existence of a fictitious intervention can be presumed.

3.1.5 Mechanisms to avoid double taxation

The application of the CFC rules may give rise to double taxation, both at international and at national level.

The problem of the international double taxation arises when the income of the CFC is taxed both in the State where it is produced, i.e. in the State where the CFC is located, and in Italy, where it is attributed to the person controlling it. In order to prevent such form of double taxation, Art. 167(6) states that the tax paid abroad can be deducted from the tax due in Italy on the income determined in accordance with the rules concerning business income, as discussed above; international double taxation is therefore eliminated through a tax credit system, granted in relation to the foreign tax. As for the definition of "foreign tax", even if the Explanatory Report to the D.M. n. 429/2001 refers to the distortion that would occur if no tax credit was granted to the tax payer for the tax paid by the CFC in the State where it is located, scholars argue that such credit has to be granted regardless of the State where the foreign tax is paid. In other words, the tax credit is not limited to the tax paid in the State where the CFC is located but is extended to the taxes paid in other States, where the income of the CFC is deemed to be produced in accordance with the criteria mentioned in Art. 165 of the Income Tax Code[120].

A particular mechanism aimed at preventing international double taxation is represented by the "indirect tax credit", whose characteristics can be summarized as follows[121]:

- it is a particular form of the foreign tax credit regulated under Art. 165 of the Income Tax Code, with the result that the rules contained in such provision are

[119] See the decision of the Provincial Tax Commission of Milan, Sez. II, n. 303/2013.

[120] ROLLE G., *Disciplina delle società controllate estere e imposte pagate in Stati diversi da quello di residenza*, in il fisco, n. 5 del 2016, pag. 1-446.

[121] MASTROBERTI R., *Credito indiretto anche in caso di interposizione di una CFC*, in Pra. Fisc. Prof. N. 4 del 2017, pag. 14.

applicable to the indirect tax credit, which is granted up to the amount of the Italian gross tax;

- the foreign tax, in relation to which the indirect tax credit is granted, ispaid by a person other than the beneficiary of such credit;
- the "*per country limitation*" rule can be applied, so that the deduction is granted separately for each State;
- the amount of the credit has to be included in the determination of the total income and has to be determined on the basis of the credit theoretically (and not effectively) due to the taxpayer.

In relation to this kind of tax credit, the Revenue Agency specified[122] that it is also granted to the resident taxpayer when it controls a CFC through another company whose income is attributed to the resident person in accordance with the CFC rules. More in particular, the indirect tax credit is granted to the resident person in relation to the foreign tax paid by the CFC located in a State with a favourable tax regime, if it is proved that such CFC carries on a real economic activity on the local market; in this case, the tax credit is deducted from the income of the intermediate company, whose income is attributed to the resident person in accordance with the CFC rules.

As for the domestic double taxation, it may occur when the dividends distributed by the CFC, whose income was already taxed in accordance with the transparency system, are subsequently included in the tax base of the resident company receiving them.

In order to avoid this form of double taxation, Art. 167 (7) of the Income Tax Code provides that the dividends in any form distributed by the CFC do not contribute to the computation of the income of the resident person up to the amount of the income taxed through the transparency mechanism, even in the previous financial years. The tax paid on these dividends can be deducted from the Italian net tax, up to the amount of the tax paid on the income attributed to the resident person, decreased by the deductions related to the tax paid abroad by the CFC (see above). If the resident persons receives the dividends through a non-resident person, such provision is applied to the dividends distributed by the non-

[122] See the Resolution of the Revenue Agency n. 108/E of 24 November 2016.

resident person that is directly participated by the resident person; for this purpose, such dividends are first deemed to be formed of profits achieved by the company, enterprise or entity located in the State with a privileged tax regime[123].

The dividends already taxed through the transparency system are not subject to taxation, irrespective of whether the amount of the taxable income is higher or lower than the distributed profits following its increase or decrease due to the Italian tax law[124].

This provision raised some doubts in relation to those dividends that are distributed by the CFC but are only partially attributed to the resident person with the transparency mechanism. In other words, some doubts have been raised in relation to the tax regime of the dividends distributed by the CFC and exceeding the income of CFC already imputed to the resident person controlling it through the transparency system.

3.1.6 Reporting requirements

Following the amendment that made the ruling procedure optional, and for the purposes of fiscal surveillance, the resident member of the CFC has to fulfil a reporting obligation.

More in particular, in case the taxpayer did not request the non-applicability of the CFC regime or in case the taxpayer made such request but received a negative opinion from the Tax Authorities, he/it has to indicate the participations held in enterprises, companies or other entities that are located in States or territories with a privileged tax regime, as defined above, other than the Member States of the European Union or States of the EEA with which Italy reached an agreement that guarantees a sufficient exchange of information, in the tax return. The same reporting obligation exists when the participations are held in enterprises, companies or entities located in States or territories other than those mentioned above, or even in Member States of the European Union or States of the EEA with which Italy reached an agreement that guarantees a sufficient

[123] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.

[124] According to the Italian legislation, the taxable income is determined on the basis of the profit and loss account result, which has to be increased or decreased in accordance with specific fiscal rules; therefore, following such increase or decrease, the taxable income could result higher or lower that the profits distributed by the CFC.

exchange of information, if the conditions provided for by Art. 167 (8-bis) and discussed in paragraph 3.1.2 occur.

If a resident person controls more than one enterprise, company or entity, it has to indicate each of the participations, whereas if it does not receive dividends, due to particular contractual relationships, it does not have to indicate the foreign participations in the tax return.

In the control is held indirectly, only the holding company has to fulfil the reporting obligation, whereas there is no obligation on the sub-holding.

The taxpayer has to provide a series of information in the section "FC" of the tax return. Such information include: if the situation is regulated under Art. 167(1) or under Art. 167(8-bis) of the Income Tax Code; if the taxpayer requested the opinion of the Tax Authorities; which of the two safe harbours occur; etc.

If the resident taxpayer fills in the section of the tax return regarding the existence of safe harbours, it only has to indicate the gains or the losses occurred in the financial year or in the management period of the non-resident company, without the income of the CFC being recalculated in accordance with the rules applicable to resident persons that own business income[125]. On this point, the interpretation of the Tax Authorities is in line with the principles of cooperation and good faith that characterize the relationship between the taxpayer and the Tax Authorities and aims at balancing the effectiveness of administrative action with the burdens placed on the taxpayer[126].

3.1.7 The computation of the CFC income

According to the current version of Art. 167(6) of the Income Tax Code, the income produced by the non-resident company or entity and attributed to the resident person controlling it is determined in accordance with the rules which regulate the computation of business income, except for the provision that allows the taxpayer to divide certain capital gains into installments[127]. Such provision,

[125] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.
[126] CROATTO M., ARIEMME V., *Identificazione dei Paesi a fiscalità privilegiata, CFCrules e obblighi dichiarativi,* in il fisco, n. 34 del 2016, pag. 1-3263.
[127] Art. 86(4) of the Income Tax Code states that "*the realized capital gains, other than those mentioned in Art. 87, computed in accordance with para. 2 contribute to the determination of the income of the financial year in which they occur for their entire amount or, if the goods to which they relate were held for at least three years or one year for professional sport companies, by choice of the taxpayer, in equal shares in the same financial year and in the subsequent ones, but*

which was amended by the Legislative Decree n. 147/2015, makes sure that the income of the CFC is computed in accordance with the same rules that are applied for the determination of the income produced in Italy[128].

Since the income of the CFC has to be determined on the basis of the rules regulating the computation of business income, every provision concerning such type of income have to be applied; these provisions include both rules that are "negative", such as those concerning the non-operating companies, and rules that are "positive", such as those providing for tax advantages, for the taxpayer[129].

A particular type of tax incentive is represented by the *Aid to Economic Growth* ("Aiuto alla Crescita Economica"), that is a measure introduced to encourage business capitalization through the deduction of the notional return of equity increases; such tax incentive can be taken into account for the computation of the income of the CFC[130].

Instead, the rules concerning the statistics-based tax assessment cannot be applied, first because such assessment procedure is used to determine the profits and not the income of the person exercising a business activity and, secondly, because it would be difficult to use such procedure in relation to foreign enterprises[131].

Since the provision refers to the "business income", it does not clear if the applicable rules vary according to the legal nature of the CFC or not. In the first case, the income should be determined according to the rules regulating the business income of natural persons, if the CFC is a partnership, and according to the rules regulating the business income of persons subject to corporate income tax, in if the CFC is a company; in the second case, the rules concerning the business income of persons subject to corporate income tax should always be applicable. On this point, the Revenue Agency specified that the rules concerning

---

not beyond the fourth (...)." Such provision is not applied to the determination of the income of the CFC.

[128] See the Explanatory Report on the Legislative Decree n. 147/2015.

[129] MIELE L., RAMAGLIONI V., *"CFC rules" più aderenti alle "best practices" internazionali*, in Corr. trib. n. 38 del 2015, pag. 3873.

[130] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.

[131] See the Circular of the Revenue Agency n. 35/E of 4 August 2016; it seems appropriate to point out that the statistics-based tax assessment procedure is going to be substituted by the "indicators of economic reliability", in accordance with the Law Decree n. 193/2016.

the business income of natural persons can never be applied, regardless of the legal nature of the CFC[132].

Once computed the tax base, it is necessary to determine the applicable tax rate. According to Art. 167(6) of the Income Tax Code, the income attributed to the controlled foreign company or entity and determined in accordance with the rules regarding the business income is subject to the average tax rate applied to the tax base of the resident taxpayer; in any case, such tax rate cannot be lesser than the ordinary tax rate of the corporate income tax. On this point, the Revenue Agency specified that the income of the CFC is subject to the tax rate of the resident member, increased by the eventual additional taxes (like, for example, in case it is a bank); if the member is a natural person, the average tax rate has to be determined. The tax rate applied to the income of the CFC must not be lower than the tax rate of the corporate income tax, which is 24%; such rule aims at limiting the possible effects deriving from the application of provisions introducing tax advantages in terms of reduced tax rates[133].

However, if the controlled foreign company is a non-operating company, a 10,5% corporate income tax surcharge can be applied, in accordance with the regulation of the non-operating companies contained in Art. 30 of the Law n. 724/1994. For this purpose, it is necessary to compare the income attributed to the CFC with the minimum level of profitability provided for by the above mentioned Law; if the income of the CFC is lower than the aforesaid level of profitability, the tax surcharge is applied[134][135].

3.1.8 *De minimis* provisions

No *de minimis* exceptions to the CFC regime are provided for under Italian tax law.

[132] See the Circular of the Revenue Agency n. 35/E of 4 August 2016.

[133] MASTROBERTI A., *Quale aliquota per I redditi della CFC se la controllante non è operativa*, in il fisco, n. 5 del 2012, pag. 1-658.

[134] The application of the rules regarding the non-operating companies derives from the applicability of all of the rules "regulating the business income" (including those that are not contained in the Income Tax Code), as stated in the current version of Art. 167(6); however, the Tax Authorities had already affirmed the applicability of such regulation in 2007, with the of the Revenue Agency n. 331/E of 16 November 2007.

[135] On the critical aspects of the applicability of the rules concerning the non-operating companies see MASTROBERTI A., *Quale aliquota per I redditi della CFC se la controllante non è operativa*, cit.

3.2 CFC rules and Double Tax Conventions

The issue regarding the compatibility of the CFC rules with the international tax treaties can be examined from two different points of view.

First of all, the relationship between the domestic rules and the provisions of the Double Tax Conventions regarding the taxation of enterprises needs to be analyzed, particular emphasis placed on Art. 7, para. 1[136] and Art. 10, para. 5[137] of the OECD Model Tax Convention, regulating, respectively, the taxation of business profits and the taxation of dividends.

Secondly, the anti-abuse function of Tax Treaties needs to be considered.

As for the first of the two above mentioned issues, some scholars[138] believe that CFC rules are not compatible with the double tax conventions, since they represent a particular tax regime that is less favorable for the taxpayer than the one regulated under Art. 7 of the Double Tax Conventions, which should prevail over the conflicting domestic rules. However, it has been observed[139] that the aforesaid provisions regulate different situations, since CFC rules apply to a resident person controlling a company or another entity located abroad, whereas the conventional provisions regulate the taxing power of a State in relation to the income produced by a non-resident person. Since the domestic rules and the conventional provisions regulate different situations, the problem of compatibility between domestic and conventional rules does not arise.

---

[136] Art. 7, para. 1 of the OECD Model Tax Convention states that "*profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State*".

[137] Art. 10, para. 5 of the OECD Model Tax Convention states that "*where a company, which is a resident of a contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State".*

[138] BALLANCIN A., *Osservazioni a margine di una sentenza di merito in tema di incompatibilità della disciplina CFC con le convenzioni internazionali contro le doppie imposizioni. Ulteriori riflessioni sul rapporto tra la novellata normative CFC ed il diritto comunitario*, in Riv. dir, trib. n. 3 del 2010, pag. 161 e ss; SACCHETTO C., PLEBANI S., *Compatibilità della legislazione CFC italiana con le norme convenzionali e con l'ordinamento comunitario*, in Dir. prat. trib. int. 2022, pag. 13, ss

[139] BRACCO P., *CFC legislation e trattati internazionali: le recenti integrazioni al commentario OCSE e il loro valore ermeneutico*, in Riv. dir. trib., fasc. 2, 2004, pag. 179.

Others[140] argue that the Double Tax Conventions are also aimed at preventing tax avoidance and tax evasion, as well as allocating the taxations rights between the contracting States. Under this approach, international tax treaties cannot be so interpreted as to reduce the taxation power of national States, whose integrity is safeguarded (also) through the introduction of specific anti-avoidance provisions.

According to the case law[141], the CFC regime can be considered compatible with the Double Tax Conventions on the basis of a series of arguments, such as Art. 31 of the Vienna Convention of 23 May 1969, according to which international tax treaties have to be interpreted "*in good faith*" and considering their "*object and purpose*", the beneficial owner clause and the consideration that the self-restraint of a national State arising from the conclusion of a Double Convention cannot turn into an abuse of the Convention itself and determine a double non–taxation, which is as regrettable as double taxation.

In some cases, Italy has solved to problem related to the antinomy between conventional provisions and domestic anti-avoidance rules by introducing an express exemption from the first; such exemption is justified by the need to prevent tax avoidance and tax evasion. An example of this kind of provisions is represented by Art. 25, para. 6of the Convention between Italy and the Republic of Uzbekistan, according to which "*however ,the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and tax avoidance*". Similar rules are provided for under Art. 25, para. 6 of the Convention between Italy and Georgia[142], Art. 24, para. 6 of the Convention between Italy and the Federal Democratic Republic of Ethiopia[143], Art. 25, para. 3 of the Convention between

---

[140] ZORZI G., *Compatibilità della normativa CFC con le convenzioni contro le doppie imposizioni Commento*, in Il Fisco, n. 6 del 2016, pag. 1-561, who recalls the Commentary to Art. 1 of the OECD Model Tax Convention, point 1 and points from 23 to 26; GAFFURI A.M., *La tassazione dei redditi di impresa prodotti all'estero – principi generali*, Milano, 2008, pagg. 282 e ss.

[141] Cass. civ. Sez. V, Sent. of 16 December 2015, n. 25281.

[142] According to this Article, "*the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and tax avoidance. This provision shall in any case include the limitations of the deduction of expenses and other negative elements deriving from transactions between enterprises of a Contracting State and enterprises situated in the other Contracting State".*

[143] According to this Article, "*the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and*

Italy and Ukraine[144], Art. 24, para. 6 of the Convention between Italy and the Sultanate of Oman[145] and Art. 24, para. 6 of the Convention between Italy and the United Arabic Emirates[146].

3.3 Italian CFC rules in relation to the Anti-Tax Avoidance Directive

Given that the Italian provisions regarding the CFC rules are substantially in line with Art. 7 and Art. 8 of the Anti-Tax Avoidance Directive, it is possible to identify some differences that can be summarized as follows:

- as for the notion of "control", Art. 167 of the Income Tax Code provides for more strict requirements than those mentioned in the Anti-Tax Avoidance Directive, since the Italian tax law also includes situations of *de-facto* control[147];
- as for the level of taxation required for the application of the CFC regime, the Anti-Tax Avoidance Directive provides for a *minimum* standard[148], that seems to be respected by Art. 167, para. 8-bis of the Italian Income Tax Code, which does not need to be amended in the part where it regards a foreign entity as a CFC on the basis of its effective level of taxation[149];

tax avoidance. This provision shall in any case include the limitations of the deduction of expenses and other negative elements deriving from transactions between enterprises of a Contracting State and enterprises situated in the other Contracting State".

[144] This provision states that "*however ,the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and tax avoidance".*

[145] According to this Article, "*the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and tax avoidance. This provision shall in any case include the limitations of the deduction of expenses and other negative elements deriving from transactions between enterprises of a Contracting State and enterprises situated in the other Contracting State".*

[146] This provision states that "*the provisions mentioned in the previous paragraphs of this Article will not limit the application of the domestic provisions for the prevention of fiscal evasion and tax avoidance".*

[147] See Art. 7, para.1, let. a of Directive 2016/1164/EU, according to which an entity can be regarded as a controlled foreign company when " *the taxpayer by itself, or together with its associated enterprises holds a direct or indirect participation of more than 50 percent of the voting rights, or owns directly or indirectly more than 50 percent of capital or is entitled to receive more than 50 percent of the profits of that entity*".

[148] According to Art. 7, para. 1, let. b) of Directive 1164/2016/EU, the CFC rules apply when "*the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the corporate tax that would have been charged on the entity or permanent establishment under the applicable corporate tax system in the Member State of the taxpayer and the actual corporate tax paid on its profits by the entity or permanent establishment".*

[149] PAPOTTI R.A., MOLINARI F., *La disciplina CFC alla prova della Direttiva anti-elusione dell'Unione Europea*, in Corr. trib., n. 34 del 2016, pag. 2609.

- as for the determination of the income attributed with the transparency system, Italian Tax Law establishes that is has to be determined in accordance with the Italian rules regulating the computation of business income. A similar rule is mentioned in Art. 8, para. 1 of Directive 2016/1164/EU[150], if point a) of Art. 7, para. 2 of the same Directive[151] applies; instead, if point b) of Art. 7, para. 2 of the Anti-Tax Avoidance Directive[152] applies, the income of the CFC is computed in accordance with the arm's length principle[153];
- according to the Directive[154], only certain types of non-distributed income[155] shall be included in the tax base of the resident person controlling the

[150] According to Art. 8(1) of Directive 2016/1164/EU, "*where point (a) of Article 7(2) applies, the income to be included in the tax base of the taxpayer shall be calculated in accordance with the rules of the corporate tax law of the Member State where the taxpayer is resident for tax purposes or situated. Losses of the entity or permanent establishment shall not be included in the tax base but may be carried forward, according to national law, and taken into account in subsequent tax periods*".

[151] According to such provision, "*where an entity or permanent establishment is treated as a controlled foreign company under paragraph 1, the Member State of the taxpayer shall include in the tax base: (a) the non-distributed income of the entity or the income of the permanent establishment which is derived from the following categories: (i) interest or any other income generated by financial assets; (ii) royalties or any other income generated from intellectual property; (iii) dividends and income from the disposal of shares; (iv) income from financial leasing; (v) income from insurance, banking and other financial activities; (vi) income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value. This point shall not apply where the controlled foreign company carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances. Where the controlled foreign company is resident or situated in a third country that is not party to the EEA Agreement, Member States may decide to refrain from applying the preceding subparagraph*".

[152] Point b) of Art. 7, para. 2 of Directive 2016/1164/EU states that the Member State of the taxpayer shall include in the tax base "*the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. For the purposes of this point, an arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or permanent establishment would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income*".

[153] According to Art. 8, para. 2 of Directive 2016/1164/EU, "*where point (b) of Article 7(2) applies, the income to be included in the tax base of the taxpayer shall be limited to amounts generated through assets and risks which are linked to significant people functions carried out by the controlling company. The attribution of controlled foreign company income shall be calculated in accordance with the arm's length principle*".

[154]See Art. 7(2)(a).

[155] More precisely, the provision of the Directive refers to the so called passive income, allowing the Member State of the taxpayer to include in the tax base: interest and other income derived from financial assets; royalties and other income derived from intellectual property; dividends and income derived from the disposal of shares; income from financial leasing; income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value.

CFC whereas Italian domestic law is based on a jurisdictional approach and does not limit the scope of application of the CFC rules to certain types of income. From this point of view Italian tax law could be so amended as to comply with Directive 1164/2016/EU, even if it has to be considered that such Directive only provides for a *minimum* standard and does not preclude the application of national provisions that guarantee a higher level of protection[156];

- as regards the prevention of double taxation, Italian tax law provides the resident taxpayer with a "double" tax credit, related both to the tax paid abroad by the CFC and to the dividends eventually distributed to the resident taxpayer; such provision should still be applied after the transposition of the Anti-Tax Avoidance Directive, which only states that the taxpayer can deduct from the tax due the tax paid by the entity or by the permanent establishment and that the tax credit is regulated under the national legislation[157];
- as regards the applicability of the CFC rules in case of companies or entities situated in a Member State of the European Union, Art. 167 (8-bis) of the Income Tax Code states that such rules apply in case of infra-group services, as well as in case of "passive income", unless the taxpayer proves that the location abroad of the CFC does not represent an artificial arrangement aimed at achieving an undue tax advantage. Some scholars[158] argue that such provision may be regarded as a limitation of the freedom of establishment contrary to the principle of proportionality and that the CFC rules should be applied in more "selective" cases than the infra-group services, such as the lack of assets or resources in the State of the CFC, as well as in case of "passive income"[159]. Indeed, such solution would be in line with the Anti-Tax Avoidance Directive, which regards the artificial arrangements as one of the conditions for the application of the CFC

[156] See Art. 3 of Directive 1164/2016/EU.
[157] See Art. 8, para. 7 of Directive 2016/1164/EU, according to which "*the Member State of the taxpayer shall allow a deduction of the tax paid by the entity or permanent establishment from the tax liability of the taxpayer in its state of tax residence or location. The deduction shall be calculated in accordance with national law*".
[158] BAGAROTTO E. M., *La disciplina in materia di controller foreign companies alla luce delle modifiche apportate dalla legge di stabilità 2016 e nell'attesa dell'attuazione della "Direttiva Anti-BEPS",* in Dir. Prat. Trib., n. 3 del 2017, pag. 954.
[159] It has to be considered that according to the case law of the Court of Justice of the European Union, the burden of proving the "artificial arrangement" should be on the Tax Authorities and the taxpayer should be allowed to provide proof of the contrary (See the decision of the CJUE C-330/07, *Jobra*).

rules and not as an exemption to such regime whose burden of proof is on the taxpayer;

- it has been argued[160] that the Italian tax law could have regulated in a more effective way the application requirements of the CFC regime and the exemptions to it. From this point of view, Directive 1164/2016/EU establishes that the CFC rules do not apply when the following circumstances occur: in relation to the income of the entity or to the income of the permanent establishment deriving from the categories mentioned in Art. 7, para. 2, let. a) of the Directive, when the controlled foreign company carries on *"a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances"*[161]; in relation to the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage, when certain limits are not exceeded[162]. In respect to such provisions, the Italian tax law seems to excessively extend the scope of application of the CFC rules, also considered that in relation to extra-EU and extra-EEA States the existence of an exchange of information is irrelevant;
- some scholars[163] wish that the transposition of Directive 1164/2016/EU[164] would reduce the administrative burden that the current regulation places on the taxpayer in terms of disclosure and reporting obligations, which may be regarded as an "*undue administrative burden*" as defined by the case law of the Court of

[160] BAGAROTTO E. M., *La disciplina in materia di controlled foreign companies alla luce delle modifiche apportate dalla legge di stabilità 2016 e nell'attesa dell'attuazione della "Direttiva Anti-BEPS",* cit.

[161] However, such provision may not apply if the controlled foreign company is resident or situated in a third country that is not party to the EEA Agreement, Member States may decide to refrain from applying the preceding subparagraph.

[162] More precisely, CFC rules are not applied to an entity or permanent establishment: (a) with accounting profits of no more than EUR 750.000 and non-trading income of no more than EUR 75.000; (b) of which the accounting profits amount to no more than 10 percent of its operating costs for the tax period (see Art. 7(4) of Directive 1164/2016/EU).

[163] MORRI S., GUARINO S., *CFC e libertà di stabilimento tra normativa italiana e garanzie europee*, in Corr. trib., n. 32 del 2016, pag. 2539.

[164] The transposition of the Anti-Tax Avoidance Directive is provided for in Art. 1 of the Law n. 163/2017.

Justice of the European Union[165], in contrast with the European principle of proportionality.

[165] See the decision of the Court of Justice of the European Union C-118/96, *Safir*.

BIBLIOGRAPHY

ALBANO G., MARANI M., *Nuove CFC senza obbligo di interpello preventivo*, in Corr. trib., n. 23 del 2015, pag. 1773.

AMATUCCI F., *Identificazione dell'attività di impresa ai fini fiscali in ambito comunitario*, in Riv. dir. trib., fasc. 10, 2009.

ASCOLI G., *Exit taxation: quadro sistematico della disciplina*, in Il fisco n. 21 del 26 maggio 2014, pag. 2033.

AVOLIO D., CAPITTA F., *La tassazione di plusvalenze latenti in caso di trasferimento all'estero*, in Corr. trib., n. 20 del 2004, pag. 1592.

BAGAROTTO E. M., *La disciplina in materia di controller foreign companies alla luce delle modifiche apportate dalla legge di stabilità 2016 e nell'attesa dell'attuazione della "Direttiva Anti-BEPS",* in Dir. Pra. Trib., n. 3 del 2017, pag. 954.

BALLANCIN A., *Osservazioni a margine di una sentenza di merito in tema di incompatibilità della disciplina CFC con le convenzioni internazionali contro le doppie imposizioni. Ulteriori riflessioni sul rapporto tra la novellata normative CFC ed il diritto comunitario*, in Riv. dir, trib. n. 3 del 2010.

BRACCO P., *CFC legislation e trattati internazionali: le recenti integrazioni al commentario OCSE e il loro valore ermeneutico*, in Riv. dir. trib., fasc. 2, 2004, pag. 179.

CORASANITI G., *Le società controllate estere e le disposizioni antiabuso nel T.U.I.R.*, in Corr. trib., n. 43 del 2008, pag. 3501.

CROATTO M., ARIEMME V., *Identificazione dei Paesi a fiscalità privilegiata, CFC rules e obblighi dichiarativi,* in il fisco, n. 34 del 2016, pag. 1-3263.

DE SANTIS D., *L'exit tax: aspetti di doppia imposizione internazionale tuttora irrisolti, in il fisco*, n. 40 del 4 novembre 2013, pag. 1-6202.

DEZZANI L., GAZZO M., CFC *Legislation: luci ed ombre della nuova proposta legislativa. Prime riflessioni*, in il fisco, n. 38 del 2000, pag. 1-11528.

DI CESARE F., *Il trasferimento della sede della società all'estero*, in Riv. dottori comm., fasc. 2, 2009, pag. 291.

FICARI V., *Trasferimento della sede all'estero, continuità della destinazione imprenditoriale e contrarietà al trattato CE dell'"exit tax" sulle plusvalenze latenti*, in Rass. trib., 2004, pag. 2152.

FIORENTINI S., *Effetti del trasferimento all'estero della sede sociale*, in Corr. trib., 1995, FORT G., Il *regime della exit tax si applica ai conferimenti di stabile organizzazione estera*, in Corr. trib., n. 6 del 2018, pag. 432.

GAFFURI A.M., *La tassazione dei redditi di impresa prodotti all'estero – principi generali*, Milano, 2008, pagg. 282 e ss.

GALASSI C., SAVI M., *Exit tax: stabili organizzazioni estere e notional tax credit, in Fiscalità e commercio internazionale*, n. 8-9 del 2013.

GALASSI C., MIELE L., *Disciplinate le modalità di differimento della riscossione della "exit tax"*, in Corr. trib. n. 33 del 2013, pag. 2598.

GALLI C., *Italy-Individual Taxation*, in *IBFD Database - Country analyses*, 2013.

GALLI C., *Italy- Corporate Taxation*, in *IBFD Database - Country analyses*, 2013.

GIGLIO MORO V., PEVERELLI M., "*Tax compliance": la nuova disciplina degli accordi preventivi dopo l'abrogazione del "ruling internazionale*", in Fiscalità e Commercio internazionale", n. 5 del 2016.

MASTROBERTI A., *Quale aliquota per I redditi della CFC se la controllante non è operativa*, in il fisco, n. 5 del 2012, pag. 1-658.

MASTROBERTI R., *Credito indiretto anche in caso di interposizione di una CFC*, in Pra. Fisc. Prof. N. 4 del 2017, pag. 14.

MELIS G., *Profili sistematici del "trasferimento" della residenza fiscale delle società*, in Diritto e pratica tributaria internazionale, 2004, p. 13-66.

MELIS G., *La residenza fiscale delle società nell'IRES*, in Corr. trib., n. 43/2008, pag. 3495 e ss.

MELIS G., *Lezioni di diritto tributario*, Torino, Giappichelli, 2017.

MELIS G., *Trasferimento della residenza fiscale e imposizione sui redditi*, 1999, pag. 579.

MIELE L., *Estensione del regime di trasparenza anche alle CFC non localizzate in Paesi "Black list"* in Corr. trib., n. 30 del 2009, pag. 2435.

MIELE L., *Le esimenti per il regime CFC*, in Corr. trib. n. 42 del 2010, pag. 3449.

MIELE L., MIELE M., *Legittima la "exit tax" solo se a riscossione differita*, in Corr. trib., n. 2 del 2012, pag. 113.

MIELE L., RAMAGLIONI V., *"CFC rules" più aderenti alle "best practices" internazionali*, in Corr. trib. n. 38 del 2015, pag. 3873.

MICHELUTTI R., PRAMPOLINI A., *Oggetto, presupposto e momento impositivo della exit tax*, in Corr. trib., n. 45 del 2013, pag. 3559.

MORRI S., GUARINO S., *CFC e libertà di stabilimento tra normativa italiana e garanzie europee*, in Corr. trib., n. 32 del 2016, pag. 2539.

NUSSI M., *Trasferimento della sede e mutamento della residenza "fiscale": spunti in tema di stabile organizzazione e regime dei beni di impresa*, in Rass. trib., 1996, pag. 1354.

PAPOTTI R.A., MOLINARI F., *La disciplina CFC alla prova della Direttiva anti-elusione dell'Unione Europea*, in Corr. trib., n. 34 del 2016, pag. 2609.

PARACCHI M., LONGO A., *Questioni in tema di trasferimento della residenza fiscale di una società da uno Stato membro dell'Unione Europea all'Italia*, in Rass. trib. n. 2 di marzo-aprile 2012, pag. 420.

PELLECCHIA M., *Trasferimento di residenza in Italia: lettura estensiva della disciplina da parte dell'Agenzia delle entrate*, in il fisco, n. 37 del 2016, pag. 1-3560.

PELLECCHIA M., *Il trasferimento di residenza in Italia*, in Rass. trib., n. 6 of November – December 2015, pag. 1410.

PIAZZA M., VALSECCHI M., *Exit tax: questioni ancora aperte dopo l'emanazione delle norme attuative*, in Il fisco, n. 40 del 27 ottobre 2014, pag. 3943.

ROLLE G., *Disciplina delle società controllate estere e imposte pagate in Stati diversi da quello di residenza*, in il fisco, n. 5 del 2016, pag. 1-446.

SACCHETTO C., PLEBANI S., *Compatibilità della legislazione CFC italiana con le norme convenzionali e con l'ordinamento comunitario*, in Dir. prat. trib. int. 2022, pag. 13, ss.

SALLUSTIO C., *Il c.d. notional tax credit previsto dall'art. 179, comma 3, del T.u.i.r. Profili di diritto tributario italiano e comunitario*, in Rass. trib. n. 4 del 2011, pag. 966.

SALVI G., *Novità e aspetti applicative dell'exit tax, in Bilancio e Reddito d'Impresa* n. 5 del 2015.

SPINIELLO S., BISOGNO M., *Exit tax estesa a operazioni straordinarie e trasferimento di rami di stabili organizzazioni*, in il fisco, n. 39 del 2015, pag. 1-3740.

STESURI A., GRAMMATICO F., *Il trasferimento della sede all'estero alla luce della riforma fiscale*, in il fisco n. 44 del 29 novembre 2004, pag. 1-7454.

TOMBESI G., DRAGONETTI A., *Tassazione all'uscita (Exit tax): I dubbi interpretativi ancora irrisolti*, in Il fisco, n. 15 del 2015, pag. 1-1463.

TURRI G., *Trasferimento di sede all'estero di una società: profili civilistici e fiscali*, in Dir. prat. trib. n. 2 del 2017, pag. 408.

VASAPOLLI G., VASAPOLLI A., *L'individuazione dei soggetti interessati alle "CFC rules*", in Corr. trib. n. 30 del 2002, pag. 2708.

VOLPICELLA E., *Il trasferimento della sede della società tra diritto nazionale e giurisprudenza della Corte di Giustizia europea*, in Il fisco, n. 6 del 6 febbraio 2012, pag. 1-849.

SALLUSTIO C., *Il trasferimento della sede della residenza fiscale all'estero e dall'estero in Italia. Profili sistematic*i, in Riv. dir. trib. 2014, pag. 353, fasc. 3.

SILVESTRI A., *Il regime tributario delle operazioni di riorganizzazione transazionale in ambito Cee*, in Riv. Dir. Fin. 1996, I, p. 490.

ZIZZO G., *Il trasferimento della sede all'estero*, in AA. VV. (a cura di SACCHETTO C. e ALEMANNO L.), Materiali di diritto tributario internazionale, Milano, 2002.

ZORZI G., *Compatibilità della normativa CFC con le convenzioni contro le doppie imposizioni Commento*, in Il Fisco, n. 6 del 2016, pag. 1-561.

EUCOTAX Wintercourse 2018

Edinburgh

University LUISS Guido Carli

Rome

Department of Law

Challenges to tax autonomy in an Era of conflicting political goals

Tax autonomy and hybrid mismatches, reverse hybrid mismatches and tax residency mismatches under the Anti –tax avoidance directive

Francescopaolo Lauro

Table of contents

2.3 Deductibility of corporates' distributed dividends: Business income tax

2.4 Taxation of interests

2.4.1 Interests income

2.4.2 Interest expenses

1. Italian Taxation law

In Italy, in order to define the person who is required to pay taxes, we have to take into consideration the rule of law[1], so it is by using this law that we can define who are the taxpayers. The fundamental requirement to submit the persons to taxation is to consider their income.

Art. 23 of the Italian constitution states this rule of law, thus following this statement, only the law grants this possibility for taxation[1].

This rule of law has a wide field of application, it states which sources of law may rule certain subjects, so this rule does not provide limits to other jurisdictions and in particular in the European Union.

The basic law as regards tax in Italy is certainly art. 53 Cost., that expresses the principle of ability to pay; this article states that the person is obliged to contribute to the public expenditure, proportionally to their capacity to contribute.

1.1 Income Tax

The aim of my analysis is to trace the differences between income taxation of natural person and legal person, since they are subject to different rules.

First of all it is necessary to clarify what has to be considered income under Italian Law.

There are three different theoretical definitions of income[2] :

1. the first approach is based on the conception of income as a product, so the revenue shall be due to a productive source in order to be considered as income;
2. the second one considers the income as a revenue, thus each form of revenue, will be considered an income;
3. the third theory ,instead, considers the income as the sum of the consumption, so the income shall be calculated referring to the potential

[1] P. RUSSO, G. FRANSOLI, L. CASTALDI, *Istituzioni di diritto tributario*, Milano, Giuffrè, 2014.
[2] F. TESAURO, *Istituzioni di diritto Tributario* 2-parte speciale, UTET, 2016, p.11 and ss.

consumptions and to the net changes occurred to its equity considering a time interval.

The Italian legislator had, since the very first time, accepted the first definition described, including also income gained on a regular basis and the one-time income. Thus, when talking about income, we should only refer to revenue coming from productive sources, since it comprehends also the results of the subject's work and increases in capital etc.

The current Italian income system is based on a reform occurred in 1971-1973; this reform provides a system in which there is IRPEF and IRES[3]. The first one is applicable to natural person and partnership,[4] IRES instead, is applicable to companies and non-resident partnerships[5].

IRPEF is aimed to tax, in a progressive way, the global income of natural person and partnership, but this aim is contrasted by tax advantage and exemption that gives taxpayers the possibility to erode the tax base.

IRES instead is aimed to tax, in a proportional way, companies and non-resident partnerships.

1. IRPEF and IRES

IRPEF and IRES are not considered as separated taxation, but they are different ways to apply the same tax. In fact, the law provides for the same requirements for both of them, as stated by art. 1 and art. 72 TUIR. Both of them state that the fundamental requirement are:

1) possession of income,

2) its expression in cash or in other types,

3) this income shall be comprehended into one of the categories provided by Art. 6 of TUIR.

[3] In 1973, this reform provided IRPEG that was amended into IRES in 2004.
[4] Artt. 5,73 and 74 TUIR
[5] Art. 73 TUIR

In regards to possession of income, the Italian legislator refers to art. 1140 of Italian Civil Code. In this case, it is necessary to give a wider definition of this possession that coincides with the possibility to exploit his income[6].

This rule establishes that in order to be subject to taxation on income it should only be owned, there is no need to produce it, as stated by real estate income. This makes the owner of a property/building subject to this taxation whether this property produces income or not. Nevertheless, generally speaking, those that are subject to taxation are the subjects who own the source of production of this income, with some relevant exemption, as stated by art.4, par. 1, art. 5, par. 4, TUIR, and art. 210 of Italian Civil Code.

We have already talked about what is considered income under Italian law, so we have to focus on the third condition and thus to describe which are the different kind of income provided by art. 6 TUIR: Real estate income, capital income, compensation of employees, self-employment income, business income and other incomes.

This exhaustive list permits us to tackle the fact that Italian law is characterized by the lack of a precise definition of income.

1.2.1 IRES and IRPEF requirements

In order to identify who are the taxpayers for income tax, both for IRES and IRPEF, we have to refer to art. 5 and 73 TUIR.

Partnership and other companies receive a different treatment; they are not subject to IRES. They produce their own income in an associated way. This income is referred to the partners, so the allowances they are granted and their personal income contribute to form their tax-base, on the basis of which the due taxes will be calculated.

Art. 5 is aimed to find the way in which this imposition should be done and also the subjects to which this rule is applicable.

---

[6] CEPPELLINI-LUGANO, Testo Unico delle Imposte sui Redditi, Gruppo24ore, 2016, p.628.

This rule called Pass-Through is the natural rule applicable to resident partnership (from now on just partnership), to family business, but also to the subjects indicated by art. 5, par. 3, let. a), b), c)[7]

This difference in taxation treatment between partnership and corporations could be justified focusing the analysis on Italian civil law. Thus it is the civil law that fixes which requirement is the basis of what we should assess, whether entities different from legal persons should be considered juridical persons. These requirements are:

1. the existence of an organization by which the business is carried on;
2. the institution's capital, a sign of autonomy, its ability to operate in conditions of independence compared to the subjects that compose it;[8]

Italian fiscal legislator had adapted these requirements in this way:

A. existence of an independent contact person for legal situations attributable to single-person paradigm;
B. the ability to elevate the same work on a task form fully and unambiguously directed to achieve a predetermined result[9].

Thus, the question is whether the eligibility of the tax liability could exist the same without a civil check on its capacity to be charged by juridical situations.[10] What is relevant in this case is the rule governing these entities. This is one of the aspects that certainly have been taken into consideration by the Italian legislator in defining this different model of taxation.

Nevertheless, tax law is an independent field of law, so it should not refer to civil law in deciding the subject to which impose taxation liability. In accordance to the

---

[7] For Income tax purposes:
a) societies of armament company shall be deemed to include general partnership or limited partnership companies according to whether they were made unanimously or by majority vote;
b) societies of the fact shall be deemed to include society in general or simple companies according to whether or not the purpose the exercise of commercial activities;
c) unincorporated associations formed between individuals for the exercise in a partnership of Arts and professions are treated as simple partnership, but the deed or writing referred to paragraph 2 may be made up to the presentation of income tax return of the Association

[8] R. RASCIO, *Studi in onore di Cesare Massimo Bianca,* Gli Enti, Milano, Giuffré, 2006

[9] L. CASTALDI, *soggettività tributaria*, p. 24.

[10]F. RASI, *La tassazione per trasparenza nelle società di capitali a ristretta base proprietaria,* p.12 F. RASI, *La tassazione per trasparenza nelle società di capitali a ristretta base proprietaria,* Cedam, 2012, p.12

principle of capacity to contribute it should, and in some case must, deviate from what civil law states. Taxation liability may be imposed to the subjects to which it is possible to refer the subjective requirement [11].

Partnership are so supplied with a minimum of civil subjectivity that could have them considered as independent taxpayers. They are considered as a "*synthetic expression of this community of partners"*[12]

In the corporation, instead, we cannot find this community of partners. In corporations, we find a different legal entity, which existence is enforced by the recognition of legal personality. Thus there is a situation of perfect alterity between shareholders and the corporation, this permits to place the liability on the company, instead of on the shareholders as it happens for partnership.

Applying Pass-through rule, the taxable income is computed in the hands of the partnership, but it is taxed in the hands of the partners in proportion to their entitled partnership's profits. In this way, it is possible to avoid the phenomenon of double imposition.

So, we can affirm that this rule constitutes a sort of exemption, since in this case, even if this income is produced by means of the partnership , it is computed in the hands of the partners so it is not subject to IRES. It contributes as well as the other incomes of the partners in forming their tax-bases and this incomes will be subject to IRPEF.

After we have talked about IRPEF taxpayers, we can now focus on IRES taxpayers.

Firstly, we have to start our analysis by reiterating that both IRPEF and IRES are characterized by the same requirements.[13] IRES is characterized by an additional element instead of IRPEF not even indicated by art. 73 TUIR.[14]This is due to the "attraction "of all the incomes produced by the company that becomes business

---

[11] F. RASI, La *tassazione per trasparenza nelle società di capitali a ristretta base proprietaria,* p.15.

[12] Cass., sent 24 July 1989 n. 3498; Cass sent.28 February 1998 n. 2252, the Court stated in both of them that:" *every person is a subject, but not every subject is a person".*

[13] Both art. 1 and art. 72 TUIR provide for the same requirements regarding IRPEF and IRES.

[14] Art. 72 TUIR just confirms what has been stated by art. 1 TUIR

income[15].Thus, the requirement is different. We do not have to refer to the possession of one of the incomes comprehended by art. 6 TUIR, but the requirement is the possession of business income.[16]

In order to identify which are IRES taxpayers we have to refer to art.73 TUIR, this gives us a list dividing the taxpayers in four different categories.

A. corporation (joint-stock companies, limited liabilities companies, limited partnership with a share-capital);
B. public or private resident entities, other than the companies, which have as their sole or main objective to carry on a commercial activity (s. c. commercial entities)
C. public or private resident entities, which sole or main objective is to carry on a non-commercial activity;(non-commercial entities)
D. non–resident corporations and each type of non-resident entities.
E. OICR[17].

For IRES purposes, the income of the organization is determined in different ways referring to companies and commercial entities, to non-commercial entities, to societies and entities whether they are resident or not.

Referring to subjects other than the company, in order to qualify this entity as commercial we should refer to its business objective; this requirement is satisfied when a commercial activity is carried out and this activity is also provided by its statutory objective or, in case, by its founding law. If there is a lack of the statute or the article of incorporation, this requirement could also be satisfied by demonstrating that the activity carried out has a prevalent commercial purpose.

In order to classify a subject other than natural persons as resident or non-resident we have to take into consideration art. 73, par. 3 TUIR that expresses the concept of residency.

1.3 Resident and non-resident entities.

[15] All-encompassing principle of business income
[16] Except non-commercial entities for which the rule provides the possession of income belonging to one of the categories of art. 6TUIR:
[17] This paragraph has been introduced by Decree-law 24 January 2012 n.1

Art 73 states which are the elements that must be taken into concern in carrying on this classification:

- location within the State of one of the following elements:[18]
- registered office,[19]
- head office,
- main object,
- the duration of the presence of such items for more than a half of the tax year (183 days).

The first criterion, according to the doctrine, is a formal criterion, so it will not be considered so relevant in identifying which is the proper fiscal residency of an entity. At the same time, the two other criteria, that are substantial criteria, they are considered equivalent[20].

What is very important for the businesses is the concept of fiscal residency, since depending on the linking criterion; these entities could be considered as resident in different jurisdictions, that would cause double-imposition problems. In order to solve any conflicts there are Conventions on double-imposition, in particular the s. c. *tie breaker rule* (art. 4,par. 2 and 3, OECD model), both of them provides for the criteria based on the place of effective management[21]

In defining a resident-entity, first we should refer to the article of incorporation, thus we can see whether this company has its registered office in Italy, and if it should be considered resident, we can take into account also art. 6 and 46 of Italian Civil Code, the last talking about the seat of the legal persons, it states that when the law makes some effects to be dependent on residency, we should consider in this case its seat coincident with its registered office, except the case in which it is different from the place of effective management. In that case, interested parties can consider the place of effective management as their seat.

[18] It is necessary to satisfy just one of the above-mentioned conditions in order to consider this entity as resident.
[19] Indicated by the article of incorporation as art. 2328 n. 2 Italian Civil Code.
[20]P.VALENTE, R. RIZZARDI, *Delocalizzazione, migrazione societaria e trasferimento di sede,* pag. 5 and ss*.*, IPSOA, May 2014.
[21] On double-residence, G. MAISTO, *Brevi riflessioni sul concetto di residenza fisale di società ed enti nel diritto interno e convenzionale,* Diritto e pratica tributaria, 1988, parte 1, p. 1358

As regard residency we cannot avoid mention this ruling by the Italian Cassation Court establishing that the reference to the registered office is based on economic and de facto elements since *"the state in the territory of which the registered office is identified is interested in making subject to taxation an entity that operates under its economic system; this criteria presents obvious limits from the fact that there could be a fictitious registered office not coincident with the effective one"*.[22]

If it has not the registered office in Italy or nothing regarding it has been stated, we should refer to other elements like the head office.

The concept of "head office "has always been problematic. It has always been interpreted in a more international way as the place in which the company is managed, referring to the place in which the key-decision regarding the life of the company are taken. This place generally coincides with the place in which the board of directors meeting are hosted, since this is the place in which the will of the entities is established.[23]

- According to the traditional definition of head office, it is where the administrative management is carried out, where the fundamental decisions are taken and where the strategic choices are taken. The doctrine has identified several indexes:
- residency of the directors,
- profession of the one who has charged of this role→ trust companies,
- Power to move the current accounts of the company.

In the above-mentioned ruling (n.7080/2012) it is stated that if an entity has its head office in Italy, it should be considered as resident even if it has its registered office or main object within another State. Fundamental is also the place in which control and directions are exercised, so the place in which the most important management decisions are taken.

[22] Cass., Sez. Pen., N. 7080, 2012 (Berry Towage and offshore-Servico de Transporte Maritimo, S.A.).

[23] Italian Cassation Court approved this arrangement, but it ends up by interpreting the concept of "head office" as "effective establishment" as witnessed by sent. Cass. Sez. trib. 2869/2013, and Cass. Sez. Trib. 24007/2013.

This criterion rapidly went into crisis due to the development of new transport techniques, but also new means of communication.[24] In fact, if the head office criteria leads us to take in consideration the directors, they could state that they have moved towards one or more foreign registered offices in order to vote to remove their registered office from Italy. Their will has formed in different places at the same moment, or by using Internet.

Actually some jurisdiction that adopted the" central management and control "criteria in order to contrast this behavior decided to widen the interpretation of the head office's concept referring to the place in which the company "really keeps house and does business". This is due to the fact that the more the company becomes bigger, the more the gap between the day to day management and the top management increases. Thus, the more the dimension increases the more the distance between the strategic choices and their implementation increases. Nevertheless, we cannot avoid referring who carries on, even by using proxies, the top management but also the importance of his power.

The problem became even heavier considering group of companies, since it is difficult to identify a foreign subsidiary that is truly independent from the parent company. Therefore, in this case, we have to say that there is a widespread situation in which the directors of the subsidiaries are deprived of their power and responsibilities by the director of the parent company. Therefore, the problem is to identify the limit of this deprivation led by the parent directors, limits beyond which the principle of attraction will operate. Therefore, it would consider the subsidiary company as a resident in the state in which the parent company is.

The main object is an item not often used in determining the residency of a company. This term has to be interpreted as the economic activity carried out in order to reach the social object. We do not have to refer to the place in which the social will of the company is formed, but we have to refer to the place in which this will would be implemented.

[24] G. MELIS, Lezioni di diritto tributario, GIAPPICHELLI, Torino, 2016.

The main object is "*the essential activity carried on to reach the objective established by law, statute or articles of incorporation"*[25].

This situation needs a fact-finding in order to solve some problem that may occur, in particular if this company operates in different states, even by using different branches. This is the situation we could find:

A. a company that tries to reach different objects in different States,
B. a company that tries to reach the same object in different States through different branches,
C. a company with one or more objects in different States through permanent establishment,
D. a company with a principal activity and others that are instrumental to the first.

In this case, the presence of a permanent establishment is both not necessary nor decisive. We should refer instead to the prevalence of an activity in a particular State measured taking into consideration quantitative factors[26], but also qualitative factors.

According to the Italian legislator, regarding resident entities (art. 73, par. 4 and 5 TUIR) the main or sole object is determined referring to the law, the statute or the article of incorporation if they exist and they are expressed in the form of official record or private agreement. In the lack of it, expressed in one of these forms, the main object could be identified referring to the activity actually carried out by the entity: the State in which this activity is actually carried out is the State of residency of this entity.

The tax authority has issued several circulars in which it gives us information regarding the transfer of the registered office abroad, in Circular n. 9/E17, January 2006, the tax authority established that in lack of convention rule it is art.25 of law 31 may 1995 n.218 to be applied. It provides linking criteria between our and

[25] Art. 73, par. 4 TUIR
[26] Such as pre-tax turnover, value of the assets and number of workers in a single state.

foreign jurisdictions[27], thus the transfer of the registered office is conditioned to the respect of rule provided by both jurisdiction.

It emerged that its legal continuity is subject to eligibility of the transfer.[28]

1.3.1 Shell corporations

Art. 35, par. 13 and 14 of Decree-law n. 223/2006 has integrated art. 73 by introducing par. 5-bis and 5-ter. According to par. 5-bis, the head office of an entity is considered as existent within the state if this entity own a controlling stake[29] into one of the subjects listed by art. 73, par. 1 let. A) and B) and if:

1. these subject are controlled, even indirectly, by resident entities,
2. their board of directors, or the equivalent organ, is composed for more than a half by resident directors.[30]

The Italian tax authority with C.M., n. 28/2006 stated that par. 5-bis and 5-ter by exempting itself from demonstrating the place of effective management in case of a huge number of important connection with the territory of the State established an antitax-avoidance rule aimed to tackle the phenomenon of the shell entities.

This rule enhances the substantial aspects of this circumstance instead of the formal one, according to the international principle named "*substance over form*".

The Italian Supreme Court with the ruling n. 2869/2013 established, on that point, that regarding shall entities; this phenomenon may be defined as *"the fictitious localization of an entity in another state with a lighter tax burden"*.

[27] "*Companies are governed by the rules of the state in which they have been constituted, Italian law is applicable also in the case in which the head office or the main object of this entity is within the state, this entity must then operate a sort of legal transformation so they can comply with our jurisdiction*."(par.1)
The transfer of the registered office will be effective only if it complies with the rules of both the jurisdictions: the state of origin and the state of transfer.

[28] Tax authority said that fiscal consequences of the transfer depend on whether the legal continuity is granted or not by art. 25 Law n. 218/1995.
So, if the transfer in Italy happens in situation of legal continuity, the tax-year will not be interrupted and this entity will be considered as resident if it has passed more than the half of the tax-year in Italy (183 days).
In case in which the transfer does not succeed, it will be declared ineffective so the company will be considered as a fresh incorporated company, it will start a new tax-year as a resident.
In the case of transfer from Italy we should refer again to its registered office during the tax-year, if it were in Italy for more than half of the tax-year ,(183 days) this company should be considered as a resident in Italy for the entire tax-year

[29] Under art. 2359 of Italian Civil Code.

[30] These requirements are alternatives.

This rule provides for two different definition of control, a passive definition and an active definition; the first ex par. 5-bis regards the possession of controlling stakes, so both the right to control and the de facto control are ruled out by this rule, even if they are both provided by art. 2359 Italian Civil Code.

The passive control, instead, could be exercised also in an indirect way, so it could be distinguished in: a) right to control, b) de facto control and even c) ex contractu, since this rule does not provide to take into consideration the participation.[31]

Paragraph 5-ter underlines that the check regarding these presumptive elements should be done at the end of the financial-year.

In the case in which the requirements for this residency presumption, fixed by art.73, par.5-bis, could not be satisfied, the burden of the proof will not lie on the taxpayer but it will lie on the tax authority.[32]

1.3.2 Commercial entities

The definition of an entity as commercial, together with its nature and its residency is relevant for the purpose of the classification made by art.73, par.1 TUIR on taxpayers.

The distinction between the subject in let a) and b) of the first paragraph is based on whether the entity is commercial or not. In particular, it is necessary to establish whether this entity has as its sole or main object to carryout a commercial activity. If so the subject shall be treated as a company and so it will be subject, for tax purposes, to the same rule regulating the subjects indicated in paragraph 1. If not, this entity could not be considered as a commercial entity and it would be subject to the pass-through rule.

In order to determine the object of this entity we should refer to "*the law, article of incorporation and statute, if they exist and are expressed in form of private agreement or official record*", in regarding the main/sole object we should instead

[31] Circ. ASSONIME n. 67/2007.
[32] Comm. Trib. Prov., Treviso, sent. 91/02/2012.

refer to" *the essential activity in order to fulfill which are the primary aims fixed by statute, article of incorporations or law*"[33].

The fundamental check-up in this case regard the activity carried out by this entity and to which it is preordained since it is instrumental to the pursuit and fulfillment of the interest to reach what it has established. Thus, this analysis is focused on identifying which is the activity that directly permit to reach the scopes for which it has been established (principal activity) and the activity that permits to reach them in an indirect way.[34]

This analysis takes place on the formal elements; the check-up on the activity that is actually carried out is subordinated to the analysis on the formal elements. Thus, what is relevant is just the nature whether it is commercial or not and it is irrelevant the fact that it is a no-profit organization.

After we have established what may be taken into account while applying par. 4 and 5 of art. 73 TUIR, it is necessary to check whether the activity we should refer to could be considered commercial or not. This check should be pursued referring to art. 55 TUIR either for the activity that is relevant for this purpose and for the economy of the management method.[35]

Referring to art. 143, par. 1 TUIR, we can now affirm that provisions of service that do not fall within the aim of art. 2195 of Italian Civil Code should be considered as commercial even if all the other requirements fixed by art. 143, par.1 will not be satisfied. That way, it could not carry out its typical function, which is to distinguish between the business carried out as a natural individual person and self-employment business. We can also affirm this to confirm the importance of the management method. It has been argued that this rule could only be targeted to not recognize as commercial some activities (that would have been subject to taxation) in relation to entities that are already considered as non-commercial.

[33] Art. 73, par.4 and 5 TUIR.

[34] G. MELIS, *Lezioni di diritto tributario,* p.642.

[35] This analysis must be completed referring to art. 143, par. 1TUIR that states: "*for the same entities we could not consider as commercial activity the provision of services not comprehended by art 2195 Italian Civil Code, that are carried out in conformity with the institutional scopes of this entity without specific organization and against payments not exceeding the cost of direct allocation.*

In addiction we have to say that there are some other elements that could affect the qualification of an entity as whether commercial or non-commercial, such elements could be sectoral legislation or the pursued target[36].

There are some exceptional cases in which it is the legislator that exclude the commercial nature of certain activities or that establishes some income that will not be subject to taxation.[37]

1.4 Different tax systems

After we have analyzed who are IRES and IREPF taxpayers, now we can refer to the different taxation systems.

The" classic system" is based on the idea by which the shareholders and the entity should remain separated not only as regard taxation assumption, but also in determining its taxation base. Thus, the income produced by the company are subject to taxation in the hand of the company[38] as soon as they are produced, but also the dividends, once they are distributed, they will contribute to form the tax-base of the shareholders.

Applying this system, corporate earnings are subject to taxation in the hands of the company, then they are distributed as dividends[39] and it will contribute to form the shareholder's tax-base. In the case in which the shareholders are companies, these dividends will not be subject to taxation in the hand of the shareholders that are companies, they will be exempt, they will contribute in forming the tax-base of the percipients of the dividends distributed by the companies that have received the dividends earlier, these are natural persons.[40]

[36] Art. 12, par.1 Legislative-Decree n.153/1999 states that banking's foundation will always be considered as non-commercial, even if they pursue their objectives by means of instrumental business toward their principle activity.

[37] Just to give some examples:

Art. 143, par.3 TUIR provides that funds from sporadic public fund-raiser or contributions to carry out, in an accreditation regime, activities that falls within the institutional social object of this entity.

Art. 148, par 1 :"*the activities carried out in favor of the members of the organization, with due regard for the institutional scope of the organization, are considered as non-commercial as well as the contribution made by the member does not contribute in forming this income."*

[38] Tax-rate at 40%

[39] Generally, dividends are subject to a withholding-tax

[40] G. MELIS, *lezioni di diritto tributario, p. 628*

In this case, we have to face a full double economic imposition, since these incomes are subject to taxation both in the hand of the company and, once they have been distributed, in the hand of the shareholders as IRPEF.

The “conduit system” is the exact opposite; it considers shareholders and the company as one. This system provides the elimination of the taxation of the corporation’s income and it provides for the taxation in the hand of the single shareholders. We have to specify that this taxation does not require dividends to be distributed. Corporations’ incomes are subject to taxation in the hands of the shareholders even if they are not distributed. In this case, we have to consider all the corporation earnings as distributed by attributing earnings to the shareholders in proportion to their participation in the capital.

This system permits to avoid phenomenon of economic double imposition although it is not so common. This is not Italian basic system regarding companies, but it is referring to partnership and it could be applied to companies on an optional basis, if they satisfy certain conditions

In Italy there are not any systems based on the taxation of the company avoiding to make the shareholders subject to taxation, due to the fact that this system is not suitable for personal taxes but for impersonal ones.[41]

Between the two above-mentioned systems, we can find the “partial integration system”. This system tries to integrate at a corporate level or at a shareholders level corporate taxation and shareholders taxation in order to avoid, or at least to reduce, double imposition phenomenon.

Regarding integration at a corporate level, this system is obtained by applying to retained profits a higher tax rate than the one applied to distributed profits (s. c. *split rate system)*.

In its extreme form, this system provides a tax-rate on distributed profits that is 0%. This result is obtained by granting the company the chance to obtain the deduction for the distributed profits that will not contribute in forming company’s tax-base (s. c. *dividends deduction system)*. The distributed profits will be, at the

[41] G. MELIS, *Lezioni di diritto tributario*, p.630.

end, subject to taxation since they will contribute to form the tax-base of the shareholders which receive them.

The integration at a shareholders level instead could be realized by subtracting from the tax due by the shareholders for the received dividends the entire tax o part of it that has already been paid by the company (s. c. *dividends credit system)*. The extreme case could lead to a situation in which the shareholder is granted a credit for the full amount of the due tax (s. c. *full imputation system")*. This case must not be confused with the "full integration system", in which all the profits earned by the company will contribute to form the tax rate of the single shareholders.

There also other kinds of partial imposition systems. One example could be the case in which the dividends, that have already been subject to taxation in the hands of the company, once they have been distributed, they will be grant a partial exemption and they will not contribute in their entire amount to form the tax base. It is possible to avoid double imposition, so the more the shareholders will be granted the exemption the more this system will be likely to avoid double taxation.

If the percipient is not a natural person but another company in this case there will be a total exemption not a partial one (or almost total, in case there is the possibility to obtain the full deduction of the costs to face in order to manage the participation).

After these necessary premises, we can just focus on what is the Italian Income tax system.

We have to start from Legislative –Decree n. 344/2003 that introduced IRES and eliminated IRPEG, but also eliminated the system based on the tax credit that has substituted it with the system based on the exemption.

The most important contribution in this project was received by the European court of justice[42].

[42] The European Court of Justice had, at first, developed the fiscal implications of the non-discrimination principle in tax law referring to the fundamental freedom laid down by the TFUE. It has then demonstrated which is the extent of these freedom, so the Court said that this freedom

The court ends up talking about taxation and the relationship for tax purpose between shareholders and their company. The court declared incompatible with the freedom of movement of capital all the rules imposing more favorable treatment for the resident subjects and worse for non-resident one, or to create an obstacle for a nonresident subject to invest in another member state.

After the court had declared incompatible several national laws, also the Italian tax credit system was believed that it would be declared incompatible (since the court had already taken a decision and declared incompatible several national laws similar to the Italian)[43]. Moreover, the European Commission published in 2003 a communication[44]in which it stated that the court should declare incompatible the provisions of the member state by which it applies to inbound or outbound dividends higher tax rate than the ones applied to internal dividends.

This is the juridical and historical background that leads to the reform and to the substitution of IRPEG based on the tax credit with IRES based on the exemption system.

1.5 The Pass-Through rule

Pass-through rule applicable to corporations' income is ruled by art. 115 and 116 TUIR;[45] this tool also called "consortium relief" avoid double taxation in case of distribution of dividends to shareholders[46], it makes Italian system more homogenous to the other European systems. The pass-through rule does not provide only for rule in order to avoid double taxation, but the extension of the applicability of the Pass-through rule to corporations permits to avoid the

---

forbid a member State to impose to a subject, that is resident in another member State, a treatment that is worse than the one granted to the resident of the first member State (non-discrimination rule). Moreover, we have to say that taxation rule may not have the effect to dissuade a subject to invest into a certain member State (prohibition on restriction).

[43] Case: "*Schmid"* (C-516/99) in which the court had to declare itself incompetent since there was a procedural error; but also in "*Manninen"* that was concluded in 2004 (C-319/02) that declared this system as "restraining".

[44] European commission COM 2003-810 :"*Natural persons taxation dividends' into the internal market"*

[45] Art.115 refers to companies participated by other companies.
Art.116, instead, regards limited liabilities companies with a limited number of shareholders, who are all natural persons.

[46] The former rule avoid double taxation by granting the shareholders a tax credit.

disadvantages corporations suffered from the reform regarding capital losses of participation.[47]

This system, regards companies, could be adopted on an optional basis, so it is not compulsory.

In order to exercise this option, ex art. 115, there are several requirements that should be satisfied. These requirements should last from the beginning of the tax-year in which this company decides to opt for the Pass-through rule until the end of the option period.[48]

This list comprehends requirements for both the participated and the participating companies:

1. Their legal form may be among one of the forms described by art. 73, par. 1, let. a) TUIR[49];
2. their shareholders cannot decide to benefit of the reduced IRES tax-rate [50];
3. The company may not have issued financial instruments comprehended into the ones listed by the last paragraph of art. 2346 Italian Civil Code[51];
4. They may not have already opted, as a parent company, for group taxation provided by art. 117 and 130 TUIR;
5. They may not be subject to one of the insolvency proceedings provided by art. 101, paragraph 5 TUIR[52];
6. Their participation in the capital may not go below 10% and it may not exceed 50% of voting rights[53] or their rights to profit-sharing.

It seems that are not allowed to opt for Pass-Through rule partnership and entities, both commercial or not, since they already are transparent entities, Italian

---

[47] They were granted, if several conditions were satisfied, the deductibility of fiscal losses, now this possibility is denied unless this company opt for the Pass-through rule, so the shareholders could sum/subtract to their income profits/losses that are imputed to them.

[48] The option lasts 3 years.

[49] Joint-stock company, limited-liability companies with share-capital, limited liability companies, but also cooperatives, mutual insurance companies, all of these have to be resident within the state.

[50] Participation exemption, provided by art 89 TUIR

[51] Financial instruments that grant one or both administrative and economic charges but without granting voting rights in the general meeting.

[52] The first four conditions refers to the participated company, the other, instead, refers to the shareholders (participating company).

[53] Voting rights that could be exercised in the general meeting of joint stock companies without supervisory board as art. 2364 provides, but also voting rights in joint-stock companies with a supervisory board (2364-bis) and voting rights in limited liabilities companies (2479-bis).

legislator wants to avoid multiple transparent taxation regarding the same income; on the other hand, the tax-base of partnership and companies are determined applying different rules.

The faculty to opt is granted on the basis that both the participated and the participating company have the same legal form, so that are companies.

Also public or private entities both commercial and non-commercial entities, consortium that are not organized in form of a company. This possibility is not granted in relation to commercial entities, this is not due to the fact that they are subject to different form of determination of their income, there are not substantial reasons, it is a subjective decisions of the Italian legislator that wanted this rule to apply only to joint ventures not participated by non-commercial entities.

Ag regards consortium, we cannot avoid talking about their unjustified exclusion, they are considered as taxpayers, this element would have made them comprehended in the possibility to opt, but we have to focus on the way in which their income is calculated. We have to distinguish between consortiums that carries out a commercial activity and the one that do not the same , so in case of the sole or main exercise of this kind of activity this consortium will be considered as a commercial activity, in case in which it does not carry out this activity it will not be considered as a commercial entity and ii will be treated as a non-commercial entity. So, the consortium will be, unjustifiably, not granted the possibility to opt for transparency, even more so if we take into consideration that the cooperative activity could be carried out using the form of the corporations, so having the possibility to opt for transparency, but also in a different form being, that way, excluded from this possibility. This choice is justified by the will of the Italian legislator to reserve a more favorable treatment to joint ventures, which often operates in the form of consortium.

It seems that Pass-through rule could only be applied to resident companies participated by resident/non-resident companies. The participating company could be both resident and non-resident, but the participation of non-resident shareholders may be allowed only in several circumstances. This non-resident shareholders must fulfill the requirements fixed for resident shareholders and, furthermore, it is necessary that these companies do not apply withholding tax on the distributed profits. In case it applies, it should be fully repaid. Thus, this requirement is necessary in order to obtain a situation of" indifference"; transparency may be neutral and it may permit to maintain the former situation regarding taxation.[54]

The situation, derived from the application of this rule, is very unfavorable for joint ventures which shareholders are non-resident companies, in particular shareholders-companies that are non-resident in one of the member-State of the EU.[55]

These companies could be exempted from the application of the withholding tax:

- as effects of conventional disposition,
- if the non-resident participating companies could be subject to Directive n. 90/435 CEE (s. c. Parent-subsidiary), realized, regarding outbound dividends, by art. 27-bis d.p.r. n. 600/1973,
- If the non-resident participating companies carry out their business in Italy through a permanent establishment to which it is possible to refer the participation in the participated company; this participation must not be subject to withholding tax.[56]

In case of non-resident companies, they would be subject to tax disadvantages, unless the case in which they operate in Italy through a permanent establishment, since, according to art. 27, par. 3, d.p.r., n. 600/1973: *"a withholding tax may be applied on the profits earned by participation owned by non-resident companies, but not in case this participation could be referred to a permanent establishment"*.

[54] D. VOCCA, *La imputazione del reddito per trasparenza: analisi di alcune problematiche, con particolare riferimento al socio non residente, IL Fisco,* 2004, p. 1295.
[55] L.SALVINI, *La tassazione per trasparenza*, Rassegna tributaria, Il Fisco, 2003, p. 1510.
[56] In this case, the non-resident participating company may also be a non-EU company.

The existence, within the State, of a permanent establishment, permits the State to protect its tax claims making them operable towards non-resident shareholders[57] without checking if the other requirements were satisfied or not.

Operating through a permanent establishment in Italy is the sole possibility granted to the non-resident in the EU companies to have the Pass-Through rule applied.[58]

Non-resident companies are not subject to the "parent-subsidiary" Directive so the non-application of this withholding tax could not be verified in absence of conventional rule, this is why Italian art. 115 TUIR is incompatible with EU law. For a non-resident subject it is more difficult to obtain the right to opt for the Pass-through rule, since this possibility is anchored to certain conditions that are not required for Italian companies.

The Pass-through rule could be used also by non-resident companies indicated by art. 25, par. 1 and 2, law 31 May 1995 n. 218, this law states the applicability of Italian law regarding the subjects indicated by par. 2 but only in the case in which the non-resident company/entity has its head office or its sole/main object in Italy. The Pass-through rule, in order to be applied, must impose the Parent company that is resident within the EU to participate in the Italian subsidiary at least with a participation between 25% and 50% from at least a year.

This rule could be applied also to the permanent establishment of a non-resident company. This permanent establishment may have a participation in an Italian company and no withholding-tax must be applied on the profits distributed by the transparent company. If so, the participating company could also be a non-resident in the E. U..[59]

[57] V. FICARI, *L'imposizione per trasparenza delle piccole società di capitali,* Rassegna tributaria, Il Fisco, 2005, p. 131.
[58] L. SALVINI, *La tassazione per trasparenza,* p. 1510.
[59] L. ABRITTA, L. CACCIAPAGLIA, V. CARBONE, M.R. GHEIDO, Commentario al Testo Unico delle Imposte sui Redditi, IPSOA, 2014, p.2077.

This option could also be exercised in the case in which these subjects have already opted, since they are controlling or controlled company, for fiscal consolidation (worldwide or national).[60]

1.5 Exercise of the option

The option may be exercised by the participated company, but also by all its shareholders. Paragraph 4 of art. 115 have recently been amended by Legislative-Decree n. 175/2014, so it simplifies the way in which the option may be exercised.

Now the company shall communicate the option to the tax authorities during the tax-year in which this company want the pass-through rule to begin to be applied[61].

This option lasts three financial years and it cannot be revoked. At the end of the third financial year after exercising this option it shall be subsequently tacitly renewed for another three years[62]; unless the company does not exercise its right to revoke it within the provided term .

1.5.2 Loss of efficacy of the option

Art. 6 of Ministerial–Decree 23 April 2004 rules the case in which the option loses its efficacy before the deadline expires:

- when the participating subjects or the participated company back out of the subjective requirements, or in the case in which the participated company decides to issue financial instruments between the ones provided by art. 2346 Italian civil code; in these cases the option starts losing its efficacy from the tax-year in which the subjective requirements have backed out;
- when the participated company goes subject to an insolvency proceeding provided by art. 101, par. 5 TUIR, in this case the loss of efficacy of the option will begin to produce effects from the date of the decision declaring the insolvency;

[60] Applying art. 1, par. 3 and art. 2, par. 1, let. a) of Ministerial-Decree we can just affirm that a consolidating or consolidated company could be imputed an income by transparence, but the profits produced by a consolidated company could not be imputed applying transparence.
[61] Tax authorities, Circ. 30 December 2014, n. 31/E
[62] Art. 7-quater, par. 27 law n.225/2016

- when the participated company transformed into another entity that is not an IRES taxpayers, in this case the loss of efficacy of the option will operate from the date in which this transformation will have been completed;
- when the residency of the participated company is moved abroad according to art. 166 TUIR, in this case the loss of efficiency will operate from the transfer's date. We have to say that in case in which the residency is moved abroad in the second half of the tax-year, so the company has been resident for more than 183 days, these circumstances make the company still to be considered as resident[63];
- in case of merger and division[64] involving the participated company, the option will lose its efficacy from the date in which the fiscal effects of this operation will be realized. It is possible to maintain the rule applicable by the means of an option in that sense of all the involved subjects without prejudice for the requirement fixed by art. 115, par. 1 and 2.[65]

1.5.3 Effect of the Pass-through rule

In the Pass-through rule, the income produced by the participated company is imputed to all the shareholders, even if it has not been distributed, in proportion to their participation in the capital.

Art. 2, par.1 D.M. 23 April, 2004 states the income produced by the company will be imputed to the shareholders at the end of the current tax-year of the company, in proportion to their participation in the capital at that moment.[66]

The date to which we have to refer, in order to impute the income produced by the company to the shareholders, is the date of the end of the financial-year.[67]

The Pass-through rule is not incompatible with other forms of tax incentive. We can affirm that tax incentives whose effect is to reduce the tax base of these

[63] Tax Authority, Circ. N. 49/E
[64] Art. 10 Ministerial-Decree 23 April 2004 n. 161
[65] CEPPELLINI P., LUGANO G., *Commentario al Testo Unico delle Imposte sui Redditi,* Gruppo24ore*, p. 1236*.
[66] Cfr. Art.7, par. 1 D.M. 23/04/2004.
[67] The application of this system, regarding transparent company, was provided by tax authority within Circular n.49/E of 2004.

companies could be applied and has the effect to reduce the income that are directly imputed to the shareholders. The incentives will not exempt corporate income from the application of the IRES tax-rate, since this exemption could not be transferred to its shareholders since transparency operates only regarding profits earned by the company.

The art. 115, par.3 states that withholding tax as advanced payment on the income, the related tax-credit and the potential advanced payment made by the transparent company should be necessarily attributed to its shareholders. The tax-credit that could be used to reduce the tax-base should be transferred from the participated company to the shareholders that will be imputed this income.[68]

Some problems could happen due to the rule governing the treatment of the losses realized before the option for the Pass-through by the company or by the shareholder but also the losses realized after the option has been exercised.

The art. 115, par. 5 TUIR provides rules governing the taxation regime applicable to income produced before the option has been exercised, art. 8, par. 1 Ministerial-Decree. This article states that the profit that has been formed in the "transparent" financial-years does not constitute income referable to the shareholders also in case the distributions have been done after the period covered by the option. Moreover, in the case in which the shareholders have changed and they are now different from the one who went subject to Pass-Through taxation without receiving payment of dividends.[69]

1.6 The Pass-through option for limited-liability companies with a limited numbers of shareholders

Art.116 provides the possibility to opt for transparency also for limited liability companies with a limited number of shareholders. Art. 116 TUIR contains a huge reference to art. 115 TUIR since the rules are almost the same.

[68] Tax Authority, Circ. n.10 16 March 2005.

[69] We can refer also to tax Authority circular 49/E that establishes that:" *Even the portion of distributed profit exceeding the taxable income of the participated company may not contribute to form shareholders' tax-base".*

First, it is necessary to identify which are the subjects to which the right to opt for Pass-Through should be granted by art. 116 TUIR.

Both the shareholders and the participated company may satisfy certain requirements starting from the first day of the tax-year in which they want this rule to be applied. These requirements may last during the whole period, in which, they want this rule to produce effects.

In regarding the subjective requirements, the participated company should satisfy:

- this rule can be applied only if the company choose the form of the limited liability company;
- the profit revenue provided by the tax return of the former tax-year may not go beyond the threshold established to apply sectoral studies without taking into account the revenue indicated by art. 85, par. 1 let c), d), e)[70]

Art. 36, par. 16,let a) of Decree-law n. 223 of 4 July 2006 modified paragraph 1 of art. 116 has eliminated the inapplicability or exclusion cause [71] from the pass-through rule due to the possession or the purchase of participation to which participation exemption could be applied.

Art. 36, par. 16, let. b) of this law-Decree states that regarding limited liability companies that are subject to the pass-through rule to the income they have produced and the capital gain they have realized will contribute to the extent of 40% of their value in forming the shareholder's tax-base as provided for IRPEF by art. 58, par. 2 and 59 TUIR.

[70] "c)Consideration for transfer of shares or quotas (even if not represented by securities) of the capital of one of the entity and company provided by art 73, this participation do not constitute financial assets, these are different from the one which the exemption provided by art. 87 could be applied. If the participated company is comprehended into the list made by art. 73, par. 1 let.d) so we should apply art. 44,par 2 TUIR.
d)consideration for the transfer of securities similar to shares under art 44 TUIR that have been issued by companies listed by art 73, other than the one to which it could be applied the exemption by art 87 TUIR
e) consideration for the transfer of bond or other securities other than the one provided by par.c) and d, that do not constitute financial assets and they are not the traded goods that constitute the activity to carry out to reach the main object.

[71] The function of this cause was , as witnessed by Circ. N. 28/E of the 4 August 2006 :"*to avoid that natural persons shareholders could benefit from the facilitation rule regarding taxation of capital gain that is reserved to company and not applicable to natural persons, so such limitations considering the recent reforms have lost their reason of being.*

So regarding limited liability companies with a limited numbers of shareholders, the taxation of profits and capital gains will follow the same rule applicable in the same situation to partnerships.[72]

In addiction, the shareholders must comply with certain subjective requirements in order to obtain the right to the option:

- all the shareholders have to be resident-natural person. They can also set up their own business, but they cannot incorporating a company. This is also valid for non-resident natural persons. It is necessary for them that this participation must be related to a permanent establishment within the state. So the option is not granted to limited liability companies whose shareholders are companies or partnerships;
- the total number of the shareholders cannot go beyond 10 in the limited liability companies and 20 in the cooperatives. Nothing has been said regarding the moment by which these requirements may be satisfied to obtain the right to opt, we can just consider to apply the same rule applicable to joint-stock company. All the requirements must be satisfied beginning from the first day of the tax-year in which the company wants to opt for this rule and they must ensure they persist during the whole period in which they want this rule to apply.

Art.116 does not provide for a minimum or a maximum participation as instead art.115 does. Thus, what is relevant is not just the extent of the participation, but the number of the shareholders.

The exercise of the option is ruled by art.4, par.1 of Ministerial-Decree 23 April 2004, it states that not only that the participated company may express its will, but also that all the shareholders have to.

[72] Tax authority, Circ. n. 28 /E , 4 August 2006 stated that :" as regard natural persons the fact that he participates indirectly into a company by the means of a limited liability company cause him to ne subject to the same treatment he would have been subject to if he has directly owned this participation, thus this rule does not allow natural persons to benefit from the exemption rule regulating capital gains or dividends that is applicable to IRES taxpayers only by just the fact that they own it nor directly, by the means of a limited liability company.

The option is irrevocable for three consecutive tax-years and art.14 of the abovementioned Ministerial-Decree 23 April 2004 describes the situation that determines the loss of efficacy of the option:

- when the revenue produced by the participated company exceed the threshold, the option will lose its efficacy from the first tax-year after the one in which this requirement is no more satisfied;
- when the shareholding is not only composed by natural persons but , in this case, the loss of efficacy will begin operating in the same tax-year;
- when the participated company purchases a participation between the one provided by art 87, unless this participation has been imposed as a result of law, regulation or administrative act.

1.6.1 Effect of the option

In the pass-through rule, the taxable income is imputed to the shareholders in proportion to their participation in the capital even if these dividends have not been distributed. This rule as just said is the natural regime applicable to the partnership, but it is optional regarding companies and limited companies.

Art.7, par.1 of the above-mentioned Ministerial-Decree establishes that *the income produced by this company in this tax- year will be imputed to the shareholders at the end of the tax-year referring to their quotas at that date.*

From this rule, we can learn that the reference date for the taxable-income is at the end of the financial-year, and that we have to refer to the participation of the shareholders at the indicated date.[73]In regarding profit distribution, but also the rule applicable to losses, we can refer to what has been stated by art. 115 TUIR and I have analyzed in the precedent lines.

---

[73] We can find there a difference between art.116 and art. 115 since this provides that *: it is presumed that shareholders' quotas are determined in proportion to their contribution in the capital if there is not an official record or a private agreement of incorporation or that has been drawned-up before the start of this tax-year"*

2. Dividends

2.1 Capital income

Capital income is one of the income categories, but the Italian legislator does not provide for a general definition, it provides[74] a list that permits us to distinguish between two different income groups: the first regards profits deriving from participation in companies and entities, the latter includes interests and profits from loans and other forms of use of capital. To this list, we should also add:

- perpetual annuities and perpetual annual services,

- the fees for the provision of sureties and other guarantees,

- income deriving from the management, in the collective interest of a plurality of subjects, of assets held with sums of money or goods supplied by third parties,

- income from carry-overs and repurchase agreements,

- income from the guaranteed mortgage loan,

- income included in capital paid out in relation to life insurance and capitalization contracts.

The list in question closes with a residual formula, whose object is, in general, the proceeds deriving from "*other relationships concerning the use of capital".*[75]

Capital gains deriving from the sale of shares or bonds do not constitute capital income ; these incomes, indicated by the legislator as proceeds deriving from "*relationships through which positive and negative differentials can be realized in dependence of an uncertain event*", belong to the category of other income.

Dividends and other income, deriving from "*the participation in the capital or in the assets of companies and entities subject to corporate income tax are included within the capital income*".

[74] Art. 44, par 1 TUIR
[75] Art. 44, par. 1, let. h) TUIR

In this context, it becomes relevant the possession of shares or securities similar to shares, these instruments are identified based on the fact they represent a portion of the capital or the asset of the issuing company.[76]

It is important to distinguish the situation of the owner of securities and the owner of shares. The shares represent a portion of the capital of the company; they confer the status of shareholder, the right to participate to profit-sharing ant the right to vote in the general meeting of the shareholder. The securities, instead do not represent portion of the capital, but credit rights, so the owner of bonds will be granted a different treatment from the shareholder.[77]

For a company, it is not indifferent, from a tax point of view, to have equity or risk capital: the first is remunerated by the distribution of profits, while credit capital repays itself with the payment of interest, which is tax deductible from the income of the lending company.

The rule applicable to the share remuneration may be applied also to remuneration of all securities and other financial instruments that are similar to shares, that are securities or financial instruments the remuneration of which is "*entirely represented by the participation in the economic performance of the issuer company or of other companies within the same group or of the deal in relation to which they were issued.*[78]

Profits are not taxed as interests, but as dividends; these securities are referred to as participative financial instruments, or hybrids, as the middle ground between the shares and the bonds.

Depending on the characteristics possessed, in fact, these financing instruments can be positioned along an imaginary line. At one extreme we will find the instruments of pure capital (ordinary corporate shares), while at the opposite extreme we will find the instruments of pure debt (ordinary bonds), with the

[76] We refer to corporation, since the income produced by the partnership is imputed to its shareholders applying pass-through rule.
[77] Furthermore, dividends, since they are preliminarily subject to taxation in the hand of the company that distributes it, they could not be subject to taxation on their entire amount in the hand of the shareholders that receive the payment of this dividend; all of these in order to avoid double economic imposition. The interests, instead, could be deducted as a cost by the company that pays them.
[78] Art. 44, par. 2, let. a) TUIR

related rights connected to the position of shareholder / bondholder. Hybrid financial instruments vary from sort to sort, making it extremely difficult to place them along the aforementioned imaginary line connecting a normal loan to shares. In this regard, we can limit ourselves to defining as financial hybrid instruments all those instruments that are made up partly as equity securities and partly as debt securities.

Capital income are subject to taxation on the basis of the cash basis principle, in case of business income the accrual basis principle[79], this kind of income are subject to gross taxation, since the deductibility of these expense is not granted.

Capital income, if they are paid to natural persons or non-commercial entities, they will be subject to a withholding tax, for the extent of the 26% (s.c. soggetti nettisti), if the percipient is a corporation (s.c. soggetti lordisti) no withholding tax would apply.

2.2 Taxation rule of dividends

Art. 1 Legislative-Decree n. 344, 12 December 2003 has modified the provision of par. 2 of art. 44 TUIR, thus it has rewritten which is the tax rule applicable to the financing instruments. The result of this situation is the formation of different forms of corporate participations, which can be distinguished in:

- new shares categories,
- new financial instruments granted right to profit sharing or voting rights,
- securities similar to bonds,
- atypical securities.

For the purpose of the Income tax, profits deriving from these new categories of securities could be classified as dividends (art. 44, par. 1, let. e)).

Profits deriving from these financial instruments could not be classified as dividends, since the possession of it will not grant voting rights neither right to profit-sharing, nevertheless profits earned due to these hybrid financial instruments are, according to art. 44, par. 2, let. a) subject to the same tax treatment as the shares.

[79] Except dividends.

First, this rule provides for a criterion by which it is possible to identify and to describe these securities similar to shares; this criterion is based on the nature of the remuneration and not the nature of the contribution. Therefore, the distinction between shares (and securities giving rise to dividends) and bonds (and securities giving rise to interests) is based on the fact that a security attributes or not a participation in the issuer company and that the remuneration of it is entirely represented by the participation in the economic performance of the issuer company or the deal to finance which these securities had been issued. In the lack of this requirement, this security cannot be considered as shares.

The category of security similar to bond is described by art. 44, par. 2,let. c) TUIR, it states that qualify as bonds:" *mass securities containing the unconditional obligation to pay, at maturity an amount not less than that indicated in them, with or without the payment of periodic earnings, and which do not confer to the holders any rights of direct or indirect management of either the issuer or the deal in relation to which they were issued, nor any control right over the management itself.*"[80]

So the TUIR, in describing these two categories, does not provide for a unique criterion for each of them, but these categories can be defined by referring to the criterion of" return on investments" and on the criterion of the" risk underlying the investments". This application could lead to a confusion that could be solved by referring to art. 109, par. 9, let. B) TUIR that provides for the non-deductibility from the issuer's business income of the remuneration of securities and financial instruments regulated by art. 44 TUIR, in case they allow a direct or indirect participation in the issuer's economic results. Since the income by the holders of

[80] In the same direction of this provision, the tax authority with Circ. 10/E of 12 March 2005 states that securities which remuneration is constituted by the participation in the economic results of the issuer company may be considered similar to shares.

In particular, the possibility to consider similar to dividends the profits deriving from these financial instruments :

-it is applicable only regarding profit that are "totally connected to the economic results of the issueing company, to one of the company of the group or to the affair to finance which these securities have been issued both regarding "an" and "quantum" of this operation, that is why this rule can not apply to securities with a prefixed bond-yield,,

-this rule could not apply regarding securities which remuneration is composed partially by interests partially depending on the economic results of the company (Circ. 13 february 2006, n. 6/E, risp. 1.3).

these securities may be qualified as profits, this assimilation must apply to the companies so they could not deduct the paid dividends as costs.

The requirement of the participation in the economic results shall go subject to a wider interpretation, since it comprehends all the form of participation in the profits or in the losses, either direct or indirect.

Except what we have just said, it is necessary to specify that, according to the law, the tax treatment to which the income deriving from the securities similar to shares are subject can be distinguished into:

- "*financial instruments that represents participation in the share capital":* these securities could be considered similar to, either qualified or not, shares depending on the amount owned,
- *"financial instruments that do not represents a participation in the share capital":* these securities can be considered similar to qualified[81] participation, so these will be subject (under the former rule) to taxation in the form of art.9, par.2 TUIR.

Before the reform of 2003 (Legislative-Decree n.344/2003) the former system was characterized by the fact that, in order to avoid double economic imposition on dividends and capital gains obtained by the transfer of the participation, to impute the income produced by the company to its shareholders. They were, in this way, subject to taxation for this income, but at the same time, they were also granted a tax credit to the extent of the tax that the company must pay. Therefore, avoiding double imposition on the same income, these will be subject (under the former rule) to taxation in the form of art. 9, par. 2 TUIR, this tax system does work when companies and shareholders come from the same jurisdiction, but if not this model will face difficulties since non-resident shareholders will be subject to taxation on income in the State of residency of the participated company.

These reasons led to the reform and to the adoption of the exemption method (s.c. pex). This rule shapes the taxation referring to the objective situation of the company and not on the situation of its shareholders.

[81] Art.67, par. 1, let. c), n. 1TUIR.

The tax-disregard on dividends is implemented by, in an almost complete way only regards to IRES taxpayers, the pex that does apply not only to dividends[82], but also to capital gains (deriving from the transfer of participation). This exemption on capital gains provides a non-deducibility (to the same extent) of the capital losses and related costs.

Natural persons, individual entrepreneur and partnership are subject to a different rule, this system provides for them a partial non-taxation of dividends and capital gains, so it will be subject to taxation, but not for their entire amount.

According to the former rule, in case the shareholder is a natural person and he does not receive the payment of the dividends as entrepreneur, but as a shareholder, the tax regime applicable will vary depending on his participation in the capital or referring to voting rights granted, so the participation in the capital will be considered " qualified" in corporations if it exceeds the 5% of the capital, or if it grants more than the 2% of the voting rights in the general meeting of the shareholders.

The participation in non-listed company or other IRES taxpayers will be considered "qualified" in case it goes beyond 20% of the capital or grant the 25% of the voting rights.

Analyzing the tax treatment to which the dividends are subject, it is unavoidable to refer to art. 47 TUIR. There is the need to refer to art. 67, par. 1 let. c) TUIR as well, since it describes the distinction between qualified participation or not that leads to a different tax treatment in case of a "qualified" participation or not.

The former rule provided for a strong difference between tax treatment of dividends depending on the fact that the participation was "qualified" or not, in case it was, the dividends derived would have not been subject to taxation for its entire amount, since there was (is) a partial exemption. The dividends paid to the owner of a "qualified" participation would have contributed to form his tax-base for the extent of 49,72% and it would have been subject to a tax rate at 27,50%. This rule was expressly provided by art. 1 D.M. 2 April 2008 for dividends deriving from:

[82] F. TESAURO, *Istituzioni di diritto tributario*, p. 48.

- "qualified" participation held by natural persons that do not operate in the company in companies and other IRES taxpayers
- participation , both qualified or not, held by natural persons that operates in the entity, in partnership , or in other taxpayers
- remuneration deriving from participation contracts.

Dividends deriving from "non-qualified" participation were, instead, subject to taxation for their entire amount; in addiction, they were applied a withholding tax with a 26%[83] tax-rate. This taxation was implemented by imposing this compulsory withholding tax; it was not possible to avoid it to be applied, since it was forbidden to opt for the ordinary system, except particular cases.[84]

This rule and this distinction was introduce in order to ensure different tax mechanisms for shareholders that are interested in managing the company (qualified participation) and the one who just wants to speculate on their investments (not-qualified participation). The ratio of this rule was the intention of the Italian legislator to impose a heavier tax burden on the shareholders holding "non-qualified" participations that the burden applied to the owner of "qualified" participations. Thus, these dividends, regarding "non-qualified" participations, will contribute to form their tax-base; instead, regarding qualified participations, it applied scheduler taxation[85]that permits to avoid difficulties in the management of the participation for small investors.

The Budget-law 2018 (n. 205/2017) has strongly amended the regime applicable to capital income and to other income of financial nature. So, this law went standardizing the tax treatment of dividends and capital gains deriving from both "qualified" or not participations, the law provides for the application of the tax-

[83] This tax-rate was at 20%, but it was amended by Law- Decree 24 aprile2014 n.66.

[84] The withholding tax cannot be applied

- in case of option to apply the " regulated saving regime" rule,
- in case the beneficiaries declares, at the moment of the receipt, that this profits are linked to the fact that these persons operate in the company or it refers to a qualified participation,
- in the tax-year in which the company has decided to opt for pass-through rule according to art.116.

[85] This system provided for the application of a withholding tax (s. c. *cedolare secca*) on the gross dividend, in that way the tax would have been paid at the moment of the distribution by the application of this withholding by the company, so that no more actions were required for the shareholders.

rate of 26% in both the hypothesis and not only in the case of non-qualified participations. Due to the amendment to art. 47 TUIR and to art. 27 of DPR n. 600/1973, dividends deriving from qualified participations, in both domestic and resident in black list State, would be subject to a tax-rate of 26% as well as happens for dividends deriving from non-qualified participations. In particular, dividends from foreign companies will no more be subject to the "incoming" withholding tax at 26%; moreover, in case of inbound dividends received without the withholding tax, taxation will be applied by the means of a reverse-charge (with the tax-rate always at 26%) provided for foreign capital income (art. 18, par. 1 TUIR), since it is forbidden to opt for ordinary taxation. The exclusion of these dividends deriving from qualified participation in forming the tax-base make the tax credit mechanism provided by art. 165 TUIR, regarding tax payed toward another jurisdiction, impossible to apply.

There were any amendment as regards taxation of entrepreneur and partnerships, for these subjects dividends will contribute to form the tax-base not considering whether the participation is "qualified" or not:

- to the extent of 40% (profits formed until the financial year that ends 31.12.2007);
- to the extent of 49,72% (profits formed from the financial year that ends 31.12.2007 until 31.12.2016);
- to the extent of 58,14% (profits earned after 31.12.2016).

This rule will be applicable regarding profit-sharing after 31.12.2016 and it will be applied from 31.12.2022.

These dividends will not be subject to withholding tax, since this could not be applied in case the preceptor is an entrepreneur.

The tax regime applicable to dividends paid to IRES taxpayers was not modified, so when they receive payments of dividends they will continue to go exempt to the extent of 95% of their amount, whether the participation is qualified or not.

Paragraph 1005, art. 1 of Budget-Law 2018 states that the new rule on taxation of dividends will apply to the dividends earned from 1st January 2018, par. 1006 provides a transitional rule stating that for profit-distributions deliberated from 1.01.2018 to 31.12.2022 and formed with profits earned in the financial-years until 31.12.2017 will continue to be subject to previous rules. Thus, only dividends gained after 1.1.2018 will be subject to the new rules regarding withholding tax, whilst the profits derived from "qualified" participation earned in the previous financial-years, which sharing is deliberated until 31-12.2022 will contribute to form the tax-base.

The income distributed by partnership resident within the State will be imputed to its shareholders in proportion to their participation in the capital, without taking into account whether they have been distributed or not (s. c. Pass-through rule).[86] The shareholders, so, will be imputed the fiscal income produced by the company, as resulting from the tax form.[87]

The profits derived from participation in corporations are subject to art. 89 that states a particular taxation mechanism by which it is possible to avoid applying the accrual basis principle. Thus, the income deriving from participations in corporations or other IRES taxpayers will contribute, partially, to form the tax-base in the financial-year in which they have been produced.

Art. 89, par. 2 TUIR provides rules regarding taxation of dividends distributed by resident companies toward IRES taxpayers, these dividends will be subject to taxation in the hand of the company to the extent of 5% of its amount in this tax-year in accordance with cash basis principle. This exemption regarding 95% does not require any condition to be satisfied;[88] moreover, it is applicable to all distributed dividends whatever their form is.[89] At the same time, to this almost full-exemption the Italian legislator also provides for the full deductibility of the

[86] Art. 5 TUIR.
[87] Every shareholders is obliged to declare the portion of corporates' income that has been imputed to him, even in the lack of distribution. (Cass., 8.1.1993, n. 125)
[88]Thus, it is applicable also in the case in which the earned profits have not been subject to taxation in the hands of the company, that have, instead, decided to offset these profits with previous losses.
[89] That is:

- remunerations of securities similar to shares,
- remunerations of financing exceeding so that " thin capitalization" can be,
- remunerations paid for participation contracts similar to shares,
- payments or far value of the goods received in case of withdrawal, exclusion, buy-back and reduction of the exceeding capital or liquidation of companies or entities,
- dividends distributed by companies that are part of a fiscal consolidation.

managing cost of the participations[90], excluding the costs to face in order to obtain usufruct, or other real estate rights, on corporate's participation that are not deductible.[91]

2.3 Deductibility of corporates' distributed dividends: Business income tax

In order to avoid the phenomenon of the double economic imposition, the Italian legislator have introduced, starting from 2017, another mechanism aimed to fight this problem: the deduction of distributed dividends from corporate's income.

This provision is due to the Budget Law 2017 (law 11 December 2016, n. 232) at art. 1, par. 547, let. B), this was part of a wider reform project that leads to the introduction of IRI (Business income tax). Business income realized by partnership or individual entrepreneur and partnership may not contribute in forming IRPEF tax-base for the entrepreneur or for the shareholders of the transparent entity that produced it.

The Italian legislator has always tried to insert in the Italian Jurisdiction this kind of mechanism; we can refer to Law 23 December 2000, n. 388 that provided for the possibility to opt for a different tax regime, applicable to partnership and to individual entrepreneur. Applying this rule the distributed income would have been subject to IRPEF ordinary taxation rule, whilst the non-distributed income would have been subject to the same tax-rate provided for IRPEG; this rule was repealed in 2001.

The will to overcome such discriminations in taxation of business income moved the legislator toward new reforms, as happened in 2007 (law n. 244/2007), this was aimed to reintroduce proportional taxation regards income produced by individual entrepreneurs or by commercial partnership, in order to soften the disadvantages deriving from the abolition of the tax credit mechanism. This reform was not completed since the implementing decrees were never emanated.

The target of the elimination of this qualitative discrimination in business income was, finally, realized by the introduction of IRI, it provides for separated taxation

[90] CEPPELLINI P., LUGANO G., Commentario al testo unico delle imposte sui redditi, p.878.
[91] Art. 109, par. 5-8, TUIR.

for the income that have not been distributed, applying the same tax-rate applied for IRES, instead of applying IRPEF tax–rate. Thus, IRI provides for the avulsion of the business income to the total income of the individual entrepreneur or of the shareholders of the (no more) transparent entity, this income will be subject to a different tax regime and to the application of the same tax-rate provided for IRES. The individual entrepreneur or the shareholders of the partnership are granted, during the period of validity of the option, the possibility to deduct, from the business income, what they have received as dividends. These subjects will also be granted, once the validity of the option is over, a tax credit to the extent of IRI paid earlier.

The advantages granted by IRI regards a lower tax burden, they are strictly connected to the non-distribution of the produced income, so this rule is also aimed to promote capital strength of these entities through reinvestment of the profits.

This rule could be applied until the subject is no more an IRI taxpayer, in this hypothesis, in order to avoid double imposition, the Italian legislator provided that what has been paid by the former IRI taxpayer will contribute to form the total income of the entrepreneur or of the shareholders and granting them a tax credit to the extent of 24%. In this way, it is possible to ensure that this income will be subject to the same tax treatment they would have been subject to in the lack of the IRI option. The possibility to opt for this rule shall be granted also to limited liabilities companies with a limited number of shareholders provided by art. 116 TUIR, this provision is aimed to avoid building a different treatment between commercial partnership, subject to the ordinary accounting regime, and the limited liability companies provided by art. 116 TUIR, since they are in "*a similar factual situation*". This rule can also be applied to the family business; this is due to the provision contained in art. 55-bis, par. 3 TUIR that states this rule is applicable also to the "*family worker*".

In order to apply such a rule it is necessary that the entity adapt the ordinary accounting system.[92]

The income produced by the IRI taxpayers is determined following the ordinary rules to apply in determining the business income[93]. This, once it has been determined, will be subject to the application of the ordinary IRES tax-rate at 24%. Therefore, when IRI taxpayers will distribute profits to its shareholders or the individual entrepreneur will earn what he has produced; this sum, after the deduction, will contribute in forming the business income of the percipient.

2.4 Taxation of interests

2.4.1 Interest incomes

The "investment income" derives from interests and other proceeds that have been employed in financial activities, other than participation in the risk capital of companies and entities, these are:

- mortgages, deposits and current accounts;
- bonds and securities similar to bonds.

The interest incomes, as a form of remuneration of the capital employed by the company by way of a loan, contributes to the formation of the income of the company for the amount accrued in the year in question according to the accrual principle. The definition of interest incomes includes all the interests of the subjects that produce business income, whatever their nature (fees, default interests).[94]

It is possible to cite, purely by the way of example:

• Interest deriving from mortgages, deposits and current accounts [art. 44, letter a) TUIR]

• Interest deriving from bonds and similar securities, even if issued by state administrations, and territorial entities.

---

[92] Since this is the model that grant a punctual registration of all the fiscal movement and that permits to keep track of all the movement of the profits

[93] Heading 4, Title 1 TUIR.

[94] Cass. n. 7091, 18 February 1990.

• Interest other than those until now listed, including:

- Default interest in general, including those on tax credits,

- Compensatory interest, due as a result of the extension of the sale price of goods that produce fruit,

- Interest due to the tax authorities.[95]

The tax regime applicable to capital income and to other income of financing nature has been amended by Law-Decree 13 August 2011, n. 138, converted in Law 14 September 2011, n. 148 at art. 2, par. 6-34. This rule strongly amended the tax regime applicable to capital income and to financial other income by merging in the sole tax-rate at 20% the former tax-rates at 12,50% and at 27%.

Then, also art. 3 law-decree 24 April 2014, n. 66, converted in law 29 June 2014, n. 89, have raised the tax-rate to the extent of 26%.

Both these reforms are aimed to provide general rule, and to fix a unique tax-rate at 20/26%, but also these laws went describing exceptions that permits several incomes to apply the former tax regime.

The Italian legislator had provided that withholding tax and substitute-tax *"wherever they occur"* they will apply a tax-rate at 26%, the legislator has then established a general criterion on the basis of which when there are different tax-rates, these will be substituted by this.

As regard the field of applicability of this rule, the tax authority with Circ. 27 June 2014, n. 19/E has established that, in determining the field of applicability of these provisions, we should refer to art. 44 TUIR, so these rules are applicable not only to capital income, but also to income that are strictly linked with the business activity so that they could not be classified as capital income, but as business income.

There are several exemption to this tax regime; these apply both to capital income and to financial other income:

[95]This interest are considered compensatory interests, this, since its specific function is to compensate the damages due to the tax surplus paid, COMM. Trib. Centr., Sez. 9, 3 October 1994, n.3149.

- government bonds and other similar securities (bond issued by the State treasury and assimilated securities issued by territorial entities, that apply a tax-rate at 12,5%
- similar bonds, that apply the same tax-rate:
- securities issued by entities established according to international agreement (Bei, Birs, Ceca, Euratom),
- securities that must be repaid by shares of companies controlled by the State,
- securities issued by the securitization company,
- bonds issued by white list[96] – State, these are subject to taxation applying the tax-rate of 12,50%,
- interests deriving from project bonds issued by companies provided by art. 157 legislative –Decree 12 April 2006, n. 163 (12,50%),
- intra-group interests (5%),
- profits distributed to non-resident companies or entities (1,20%, from 2017),
- securities issued for the southern economy (5%),
- duly established long term saving plans (20%)[97]

Natural persons that produce financial income, without a commercial enterprise, could decide to opt for one of the following regimes:

- declaration regime, that provides for a separation between capital income and financial capital gains; it is based on the cash basis principle. This regime provides for the application of the ordinary rule to the capital income (tax-rate at 26%, 12,50% in case of government bonds). The applicability "on declaration" of the tax-rate at 26% for financial capital gains net of capital losses. Other income deriving from government bonds and from securities similar to it will contribute to form the tax-base to the extent of 48,08%;
- regulated saving regime, that provides for a separation between capital income and financial capital gains, this regime is based on the cash

[96] This way the state that permit appropriate exchange of information with Italy
[97] Tax authority, Circ. 19/E: these plans have been mentioned only in the reform of 2011 and not in 2014 since the Italian legislator have took note of their lack of discipline.

principle. As happens in the declaration regime the capital income will be subject to the ordinary rule. The financial intermediary, where the management and deposit account has been opened will apply, on financial capital gains net of the capital losses, the substitutive tax at 26%. Other income deriving from government bonds and from securities similar to it will contribute to form the tax-base to the extent of 48,08%;

- managed saving regime, this rule provides for a unitary treatment of capital income and financial capital gains, this rule provides for taxation "per maturazione"[98] of the positive gap.[99] In addition, in this case the financial intermediary will apply the substitute tax at 26% on the economic results of the management.[100] Other income deriving from government bonds and from securities similar to it will contribute to form the tax-base to the extent of 48,08%.

2.4.2 Interest expenses

Art. 96 TUIR rules the tax treatment of interest expenses, the Italian legislator has built a system that provide for the deductibility of such interests. The law 24 December 2007, n. 244 has repealed art. 97 and art. 98 TUIR and it also has amended art. 96; the ratio inspiring this reform was the will of the Italian legislator to pursue the rationalization and the simplification of this rule.

This provision strictly links the possibility to deduct interest expenses to the gross operating result (GOR). Referring to the explanatory memorandum to Finance Act 2008, the aim of this rule is to promote the capitalization of the companies, without imposing rule that could have damaged, in an irreversible way, the under-capitalized companies.

[98] Once this income have been produced.
[99] Capital income+ capital gains- capital losses
[100] This value is calculated by referring to the value at the end of the tax-year (or at the end of the contract) and subtracting the value at the beginning from the value at the end.

In the following years, this rule has been subject to many reforms[101], the most important certainly was the Stability Law 2016 (law n. 208/2015) that wit art. 1, par. 67 modified par. 5-bis of art. 96.

According to what has been established by par. 1 and 4 of art. 96 TUIR, interest expenses and charges that are similar to it are deductible, in each tax-year, up to the limit of interests incomes and similar proceeds; the portion of interests expenses that exceeds, during the tax-year, the interest incomes, could be deduct to the extent of the 30% of the GOR. In case the portion of interests expenses exceed both the interest incomes and the 30% of the GOR, these could go reducing, without temporal limits, the tax-bases of the successive tax-years up to the GOR that in these tax-years will be available, " *if, during these tax-years, the portion of interest expenses and other similar charges exceeding interest incomes and other similar proceeds do not exceed the 30% of the accrual GOR*".

The last paragraph of art. 96 provides, in case the interest incomes exceed the expenses and there is a surplus of GOR to carry-forward to following tax-years, without temporal limits, this surplus in order to increase the accrual GOR.[102]

Tax authority has clarified with Circ. N. 19/E of 21 April 2009 that in order to avoid" *taxable income to move from a financial-year to another*" the fact that the available GOR has not been used in case there were interest expenses non-deductible, as long as they exceed the interest incomes, the not used GOR could not be carry-forward to the following tax-years for the same amount of interest expenses that they decide not to compensate by using the available GOR.

It has been clarified that, in case there are, at the same time, available GOR and past losses: the potential surplus of interest expenses should be compensated by using first the available GOR and then, after all the available GOR has been used, the past losses. Therefore, it is clear that the possibility to carry-forward GOR to

[101]The Decree-law 25 June 2008, n. 112 introduced par. 5-bis. This reform provides for interest expenses paid by financial entities, which until that moment were excluded from the application of this rule, a specific threshold ahead of which they cannot deduct interest expenses.
[102]This rule is applicable to the exceeding portion of GOR realized after the third financial-year after the one ongoing at 31 December 2007.

the following tax-years lies on the lack of interest expenses or on the fact that these have already been compensated by using interest incomes.[103]

The field of application of the rule regarding the deductibility of interest expenses coincides, mostly, with IRES taxpayers provided by art. 73 TUIR.[104]

Art. 96, par. 5 states that are the subjects that are excluded from the application of this rule:

- banks,
- other financial subjects indicated by art. 1 of legislative-Decree 27 January 1992,[105]
- insurance companies,
- parent company of banking-insurance groups,
- consortium companies,
- project company.

The tax-authority, with resolution n. 268/E of 3 July 2008 stated that this list may be considered as imperative.

These subjects are allowed to deduct interest expenses for their entire amount as long as they are linked with the activity they carryout.

A further amendment to this rule was added by the law n. 208 of 28 December 2015, it modified par. 5-bis at art. 96, this rule will be applied starting from 2017, the banks, the credit and financial institutions can now deduct the interest expenses for their entire amount, so the limit for the deductibility of interest expenses to the extent of 96% will continue applying only to insurance companies and the parent companies of insurance groups

[103] As stated by Legislative-Decree n. 147 12 September 2015, in calculating GOR also dividends received by foreign parent companies have to be taken into account..

[104]This list should be enlarged comprehending also the industrial holding, that is the company that carries-out as its principal activity to buy and manage participation in companies other than the ones who carry-out financial or credit business. This requirement is satisfied, according to Circ. N. 19/E of tax-authority of 21 April 2009 and to Circ. n. 37/E of 22 July 2009, when the sum of the book value of the participations in non-financial companies and the value of the other elements regarding the relationship with the same company does not overcome the 50% in the assets side of the balance-sheet of the holding.

[105] - Asset management companies,
- Financial companies, parent of banking group registered in the register,
- Companies operating in the financial sector, regulated by heading 5TUB.

This rule regards both interest incomes and expenses; it comprehends also the proceeds and the charges similar to these deriving from:

- loan contracts,
- financial leasing contracts,
- issuance of bonds and similar securities,
- any other relationship having a financial cause.

As a general rule, it may be considered included in the scope of application of this discipline all the interests related to the provision of a supply that is a sum of money, securities or other fungible assets for which there is an obligation to return, accompanied with a specific remuneration.

This wide interpretation permits us to comprehend into the field of application of art. 96:

- income deriving from loans to employees, provided that the obligation to repay and a specific remuneration is provided,
- the charges and income relating to "National cash pooling", which constitutes a system for the compensation of interests between the companies belonging to the same group,
- interest expenses relating to the financial bills and obligations referred to Article 32, par. 9 of Legislative Decree n. 83/2012.
- This rule does not apply to:
- objectively non-deductible interest expenses,[106]
- Interest expense capitalized in the cost of assets pursuant to art. 110, par. 1 let. b),
- Interest expenses deriving from commercial debts,
- Default interest for delaying payments of pecuniary debts compensatory interest for contracting taxes, as they are not attributable to voluntary financing deeds.

[106] That are the expenses which are non-deductible as effects of the transfer-pricing rule or the one linked to operations with companies located in black-list States, interest expenses on bonds issued by non-listed companies other than bank institutions exceeding the thresholds fixed by art. 3, par. 115, law n. 549/1995.

Bibliography

ABRITTA L., CACCIAPAGLIA L., CARBONE V., GHEIDO M. R., *Commentario al Testo Unico delle Imposte sui Redditi*, IPSOA, 2013.

ANDREANI G., FERRANTI G., *Commentario al Testo Unico delle Imposte sui Redditi,* IPSOA, 2017.

ASSONIME, Circ. 31 October 2007, n. 67.

BALLANCIN A., *Nota in tema di esterovestizione societaria tra i criteri costitutivi della nozione di residenza fiscale e l'interposizione elusiva di persona,* Rivista di Diritto Tributario, Pacini, 2008.

BONUZZI A., *La deducibilità degli interessi passivi per i soggetti IRES,* Euroconference news, 2015.

CAMPOBASSO G.F., *Diritto Commerciale-2-Diritto delle società,* UTET, 2014.

CARETTI P., DE SIERVO. U, *Diritto Costituzionale e Pubblico,* Giappichelli, 2014.

CASTALDI L., FRANSONI G., RUSSO P., *Istituzioni di Diritto Tributario*, Milano, Giuffrè, 2014.

CEPPELLINI P., LUGANO R., *Commentario al Testo Unico delle Imposte sui Redditi,* Gruppo 24ore, 2016.

COUNCIL DIRECTIVE 30 November 2011, n. 96/EU.

D.P.R. 22 December 1986, n. 917.

D.P.R. 29 September 1973, n. 600.

FANTOZZI A., *Commentario breve alle leggi tributarie volume 3- TUIR,* Cedam, 2010.

FICARI V., *L'imposizione per trasparenza delle piccole società di capitali,* Il sole 24ore, 2005.

FICARI V., *Profili applicativi e questioni sistematiche dell'imposizione "per trasparenza" delle società di capitali*, Rassegna tributaria, Il Fisco,2005.

Italian Budget Law 2017 (L. 11 December 2016, n. 232).

Italian Budget Law 2018 (L. 27 December 2017, n. 205)

Italian Finance Act 2008 (L. 24 December 2007, n. 244).

Italian Stability Law 2016 (L. 28 December 2015, n. 208).

Law 28 December 2015, n. 208.

MAISTO G., *Brevi riflessioni sul concetto di residenza fisale di società ed enti nel diritto interno e convenzionale,* Diritto e pratica tributaria, Cedam, 1988.

MANZITTI A., *Considerazioni in tema di residenza fiscale delle società,* Rivista di Diritto Tributario, Pacini, 1988.

MARINO, G., *La residenza nel diritto tributario,* Cedam*, 1999.*

MARONGIU G., MARCHESELLI A., *Lezioni di Diritto Tributario,* Giappichelli, 2014.

MELIS G., *Lezioni di diritto tributario*, GIAPPICHELLI, Torino, 2016.

RASCIO R., *Studi in onore di Cesare Massimo Bianca* Capitolo-1, Gli Enti, Milano, Giuffré, 2006.

RASI F., *la tassazione per trasparenza nelle società di capitali a ristretta base proprietaria,* Cedam, 2012.

SALVINI L., *La tassazione per trasparenza*, Rassegna tributaria, Il Fisco,2003.

Tax Authority, Circular 21 April 2009, n. 19/E.

Tax Authority, Circular 22 July 2009, n. 37/E.

Tax Authority, Resolution 3 July 2008, n. 268/E.

TESAURO F., *Istituzioni di Diritto Tributario 1-Parte Generale,* Miano, UTET, 2016.

TESAURO F., *Istituzioni di Diritto Tributario 2-Parte speciale*, Milano, UTET, 2016.

TINELLI G., *Commentario al Testo Unico delle Imposte sui Redditi,* Cedam, 2009.

VALENTE P., *Erosione della base imponibile mediante gli strumenti ibridi,* criticità secondo l'OCSE, International Tax Law Review, Sapienza Università editrice, 2014.

VALENTE P., RIZZARDI R., *Delocalizzazione, migrazione societaria e trasferimento di sede,* IPSOA, maggio 2014.

VOCCA D., *La imputazione del reddito per trasparenza: analisi di alcune problematiche, con particolare riferimento al socio non residente,* IL Fisco*,* IPSOA, 2004.

EUCOTAX Wintercourse 2018

Edinburgh

Università LUISS "Guido Carli" – Roma

Facoltà di Giurisprudenza

Cattedra di Diritto Tributario

Tax autonomy and non-discrimination rules

Andrea Franchella

128553

TABLE OF CONTENT

INTRODUCTION

In any organized economic context, tax policy assumes an obvious social importance rules. At Community level, the guiding principle in the Treaty is the prohibition on Member States to create tax barriers to cross-border trade and more generally to the implementation of Community policies. So, the provisions of the Treaty are translated into a constraint for the policies and choices of national governments in this area. This link is linked above all to the objective of integration and liberalization of the single market which has made its first step with the elimination of tax barriers. One of the most important reasons for the tax reform was the need to comply with the European Community regulations on tax matters and in particular the two Directives issued by the EEC Council on 11.04.1967. The tax system adopted by the Community aims to guarantee a system of free competition within the Community, through the principles of taxation in the country of destination and that of non-discrimination in tax matters. The principle of taxation in the country of origin has been applied as a key principle for direct taxes; only the State of belonging of the exporter can ascertain the total income that the exporter has realized and can therefore tax it according to the criteria of progressivity and ability to pay.

For the principle of taxation in the country of destination, each product is subject to the tax regime of the State in which it is consumed: so is avoiding the double taxation.

We have to remember that Europe has become a single area of exchange in which the assets of the Member States can move freely without any sort of discrimination and the EC is a "unitary body" towards other countries. So there was the abolition of border rights in Community trade and a regulation of the common system of value added tax. The Union recognizes the rights, freedoms and principles set out in the European Charter of Rights. The enjoyment of these rights raises responsibilities and duties towards others as well as the community and future generations. A lot of commentators, affirmed that the EU currently already has a form of constitutional balance and that, therefore, what is really needed is not a new written constitution, but the adoption, and the implementation of effective economic or social policies.

“Economic freedoms of the EU treaty and direct imposition of states. The prohibition of discrimination: fiscal reflexes "was the theme of a study conference organized in Bologna in European tax law, which is affirmed that in the various processes discussed before the Court of Justice of the European Union about of non-tax discrimination, the name of an Italian citizen has never appeared. Is it really possible to say that Italy is the most "European" country among all those in the union?

Or the problem of the prohibition of discrimination has not yet been sufficiently known by italian citizens?

The principle of non-discrimination is one of the fundamental rules of the European Community and perhaps the fundamental right of all the citizens. The taxation is the factor through which the national State can have a more penetrating effect on the lives of residents in its territory, the one through which differentiated treatments can be more burdensome for the tax payer or more disadvantageous for the companies.

CHAPTER 1

1.1 DOMESTIC NON-DISCRIMINATION RULES: ARTICLE 53 OF THE ITALIAN CONSTITUTION, THE CRITERIA OF PROGRESSION AND THE ABILITY TO PAY.

The problem of the protection of equal treatment can be found in Article 53 of the Italian Constitution. This article establishes the principle of the ability to contribute, the duty of all citizens to contribute to public spending in proportion to their contributive capacity [1].The implementation of article 53 marked the fading of citizenship as a form of personal attachment on which taxes were levied[2].

The ability to pay would have the function of guaranteeing equal treatment of those who are in equal situations, and at the same time ensuring the uniformity of the criteria of taxation of subjects who are in different situations[3]. This interpretation, however, seems to have been overcome. In fact, the most recent doctrine regards Article 53, something more than the simple criterion of equality, affirming that it limits the freedom of the legislator. But we must remember how the ability to pay is not specified only in the Constitution but is the result of discretionary legislative evaluations. So the ability to pay is the foundation of the taxes, it is both the justifying cause and the measure parameter[4].

In fact, if we consider the ability to contribute as a rigidly constrained assessment of the constitution, and to which the legislator must absolutely abide, it would lead to a restrictioning of the tax system.

This situation is really unsustainable and that is how today article 53 is considered as an instrument rather than protection of tax equality, of a simple link between imposition and capacity[5]. About to a conceptual distinction between principles of equality and contributive capacity, we must stress that they have different functions in terms of law.

The principles of equality are based on equal treatment and have as their objective to exclude that certain situations of fact can be distinguished on the normative level. The principles of distributive justice, on the other hand, aim to inspire the same legal criterion for the juridical regulation of very similar situations and imposing the proportion between a reality and the benefits. Let's take an example. The example concerns the equality of male and female remuneration, in articles 36 and 37 of the Constitution. The first rule states that the remuneration of workers is proportionate to the

---

[1] "I Tutti sono tenuti a concorrere alle spese pubbliche in ragione della loro capacità contributiva. II Il sistema tributario è informato a criteri di progressività."

[2] G. MELIS, Il trasferimento della residenza fiscale nell'imposizione sui redditi, Roma, 2008, p. 31.

[3] G. MARONGIU-A. MARCHESELLI, Lezioni di diritto tributario, Torino, 2011, p.13.

[4] G. MARONGIU-A. MARCHESELLI, Lezioni di diritto tributario, cit., p. 12.

[5] F. TESAURO, Istituzioni di diritto tributario, parte speciale, Padova, 2012, p. 54.

quantity and quality of the work done and determines a binding criterion for male and female remuneration. There is equal treatment and prohibition of discrimination between male and female workers.

This equal treatment is the result of applying the same rule to different situations and so the legislator is limited in the choice of remuneration. Article 37 concerns equal remuneration between male and female labor. It leaves the legislator with the possibility of determining the amount of remuneration, but the article requires that it be equal between male and female workers. We must stress that today equal treatment is no longer identified with tax justice and its study requires the identification of the limits in which it is still considered as a fundamental value.

For a correct analysis, we have to analyze article 53. It concerns two functions: on the one hand it establishes the duty of everyone to contribute to public expenditure; on the other hand, it affirms a criterion for the distribution of tax burdens, which is aimed at ensuring uniformity of treatment. We must analyze the term" all." It means all those who enter into a relationship, mediated or immediate, with Italian public services. The contribution to public spending is required to all those who have the opportunity, personally or as a result of the production of wealth in Italy, to consume the services. It does not mean that it may require the fulfillment of the duty to contribute to those who have no relationship with the State and with Italian services. For example, a tax required, by a US citizen resident in Marocco for income produced in the Congo, could not be justified on the basis of that everyone contained in article 53 of the Italian Constitution. The ability to pay is the foundation of the taxes, it is both the justifying cause and the measure parameter. Those who do not hold the capacity to pay are not required to pay. Article 53 is a guarantee against the State: a limit to the possible interference of the State[6]. This rule constitutes a duty of solidarity, such that all social classes are required to collaborate by making available to the population a share of their wealth, for a common purpose. The most important argument that emerges from Article 53 is that the tribute is not only an expression of sovereignty and it is no longer enough to have a public power to justify it: public power is not "arbitrary", but it is a "function". The tax power is functionalized to the financing of public spending, in correlation with the capacity to contribute. According to the jurisprudence of the Constitutional Court this norm is a generic provision, and affirms that by contributive capacity, in any form, and without the Constituent having expressed a preference for any manifestation of it. A first question to ask is this: in the presence of an expression of wealth, is the tax automatically due? The answer is negative: without a legal provision that imposes the imposition this is not configurable. According to the orientation of the constitutional Court, the contributory capacity must be effective and current. It means that the object of the tax must be a

[6] R. DOMINICI - A. BODRITO, Lezioni di diritto tributario, Torino, 2011, p. 12.

tangible indicator of wealth and effectively connected to the taxable person of the tax[7]. An example of tax not in line with this precept was the tax on ideological c.d. advertising (it was not for profit)[8]. There is no ability to pay when the subject has the only means necessary for his existence. It is legitimate, indeed obligatory, the exclusion of taxation for the minimum income [9]. At this point, it seems necessary to underline that the principle of non-discrimination is fundamental within our legal system. First of all, the legislator aims to eliminate all situations that could lead to unequal treatment, in any field, but above all in tax field. The principle of equality is one of the fundamental principles of the Italian Constitution. Expression of "right" in the strict sense, the principle of equality prohibits arbitrary distinctions related to certain factors enunciated by the law through his "Negative" represented by the prohibition of discrimination and we can see it on the article 3 of the Italian Constitution.

1.2 THE PROHIBITION OF FISCAL DISCRIMINATION AND THE INTERNAL LEGAL SYSTEM

In general terms, the principle of non-discrimination requires that similar situations are not treated differently and different situations are not treated in the same way as unless such treatment is objectively justified.

Tax provisions very rarely make a distinction directly on the basis of nationality (or citizenship). A different treatment based on residence - or on the headquarters for companies - can constitute disguised discrimination on the basis of nationality since non-residents generally have foreign citizenship. The Court of Justice has clarified that the principle of equality of treatment prohibits not only direct or overt discrimination, but also indirect or covert discrimination which, although based on other criteria of distinction, effects to the same result.

The principle of fiscal equality, which guarantees the equal treatment of taxpayers who are in the same situation and the same treatment of those who are in different conditions, is generally accepted by all the legal systems.

This principle is based on the criterion of the conformity of the levy with the actual economic potential, with the consequence that subjects with the same tax capacity are subject to the same tax treatment.

In the absence of this equality, the principle of fairness simply assumes a guarantee value against discrimination.

[7] Corte cost. 26 giugno 1965, n. 50.
[8] Corte cost. 16 luglio 1973, n. 131.
[9] Corte cost. 10 luglio 1968, n. 97.

Horizontal equality only deals with the non-admissibility among others of tax discrimination based on race, gender and religion. Therefore, fiscal justice presupposes compliance with both the horizontal equity and the vertical equity.
The prohibition of tax discrimination is normally provided indirectly in the legal systems through the principle of equality, contained in the Constitutions and in the basic laws or ordinary laws.
Within the category of constitutional discriminatory bans, three different categories can be identified:
1. A first is the principle of equality, which explicitly extends the applicability of the prohibition of discrimination against foreign citizens both in the Brazilian Constitution and in Argentina.
2. A second sub-category is constituted by constitutional norms, which express a principle of general equality that is easily extended to foreign citizens. These are the norms of the Dutch and Italian Constitution. With reference to the latter, the majority interpretation considers, in fact, the term all of art. 53 of the Constitution also includes foreigners. Equality (horizontal and vertical) underlies the content of the principles of the inviolability of human rights, of equality and of contributory capacity, all present in our Constitution. Moreover, the Italian legal system does not explicitly provide for provisions concerning non-discrimination between citizens and foreigners; however, the art. 10 of the Constitution[10], establishing that the juridical condition of the foreigner is regulated by the law in accordance with international norms and treaties, establishes the constitutional illegitimacy of the laws which, in regulating the condition of the foreigner, do not conform to the applicable features. It is therefore evident that the aforementioned constitutional provision also refers to those conventions on tax matters which provide for the prohibition of discrimination against foreigners.
3. A third subcategory concerns the principle of equality expressly referred only to national citizens. Thus, for example, the art. 3 of the German Constitution establishes a prohibition on differentiation according to some specific characteristics, but not to nationality. However, this prohibition is generally broadly interpreted, so that, in individual cases, the tax treatment of foreigners should be compared to that reserved for German nationals, assessing whether (in the event that this treatment is different), nationality can be considered an element suitable to justify this differentiation. If they are not justified, the distinction must be considered arbitrary and constitutionally illegitimate. At this point it is quite evident how the distinction between the sub-categories is only formal and inherent to the expressions contained in the individual Constitutions, but the interpretative result and the normative effectiveness seem to be the same. In fact, in the first sub-category fall within the

[10] "L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute. La condizione giuridica dello straniero è regolata dalla legge in conformità delle norme e dei trattati internazionali."

constitutional anti-discrimination rules that expressly refer to foreigners; in the latter, those that indirectly guarantee them and in the third those provisions that only apparently exclude them.

1.3 ITALY AND THE RESPECT FOR TAX RIGHTS: ARTICLE 3, 23, 53, 75 OF ITALIAN CONSTITUTION

In Italy a guide for the correct application of tax rules, is the Constitution, in particular articles 23, 53, 75. In the tax field, the principle of the reserve of the law is in force (laws and acts with the power of law).

It is a relative reserve: the norm must identify the taxable persons, the assumption of the tax (manifestation of the capacity to pay the levy), the criteria for determining the taxable amount, the rate, the penalties.

Details can be established by secondary regulatory acts often delegated by the legislator (methods of declaration, collection and assessment of taxes).

If the regulation fails to comply with the law or regulates issues that were not attributed to it, it may be disapplied by the tax court (limited to the case decided) or canceled by the administrative judge.

Community regulations can not introduce taxes in the individual country, but they can influence their tax policy choices.

The treaty establishing the European Community prohibits customs duties:

VAT is the only general consumption tax. The harmonization of rules is needed.

Community regulations are directly enforceable in our legal system

The directives must be transposed into national laws (if we consider these directives to be mandatory, then there is no space for any interpretation). The National and international jurisprudence is constant in affirming that: the internal judge disappears the internal law contrasting with the community law; in case of doubt, the European Court of Justice invests.

In Italy, Article 3 of the Constitution is fundamental for non-discrimination on the basis of nationality. The fundamental principle on which the whole activity of the Union is based on the art. 12 of the EC Treaty[11] which gives the Council the power to take the necessary measures, through the codecision procedure , to make it effective.

---

[11] "National parlaments contibute actively to the good functioning of the Union:
(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 61 C of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 69 G and 69 D of that Treaty;
(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

Indeed, Community law provides for the abolition of all forms of discrimination based on nationality, providing for equal treatment of nationals of the Member States in respect of employment, remuneration, tax and social benefits and the access to education. The applicants' rights include:

• access without time limits or free from assessments about the regularity of stay;

• assistance and information in comprehensible language;

• specific guarantees for minors and persons without partial or total autonomy, the right to an individual interview and the submission of a written application, with the possibility of receiving assistance during the drafting phase;

• prohibition of expulsion during the procedure;

• availability of legal assistance;

• the right to obtain a temporary residence permit.

To implement the right of establishment, the Member States undertook to suppress existing restrictions during the transitional period (1958-1969) and not to introduce (in the meantime) new restrictions with respect to the situation existing on the date of entry into force. of the Treaty of Rome. In turn, the Council of the EU undertook to establish, by the end of the first stage of the aforementioned transitional period (1961), a general program for the abolition of restrictions on the freedom of establishment, to be implemented later through the issuance of specific directives.

The presence of different tax systems in the EU has always represented a tangible obstacle to the creation of a common European market. Given that the Treaty does not provide for specific provisions on the alignment of direct taxes, tax coordination was particularly difficult in this area. Direct taxation must naturally respect the four freedoms provided for by the Treaty: free movement of goods, persons, services and capital, to which must be added the right of establishment of persons and undertakings. However, progress in this area represents a partial response to specific situations such as double taxation or cross-border economic activities. The differences between the various national tax systems are more evident today and influence decisions on the allocation of capital even more. The risks of harmful tax competition increase in a global context invaded by technological innovation and in which globalization increasingly intensifies the mobility of services and capital movements. It will become a growing source of conflicts between states if greater coordination is not established, at least at the European level. Tax competition is harmful and the Commission proposes various measures to combat and closer coordination in the tax area between Member States, in particular: through a code of conduct in the field of company taxation, by

---

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty; (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union".

regulating fiscal state aid; through a series of measures to eliminate the distortions due to the taxation of capital income or with measures to eliminate withholding taxes on cross-border payments of interest and fees between companies; with simple mechanisms designed to eliminate the relevant distortions in the field of indirect taxes.

The Code of Conduct on Company Taxation is a legally non-binding instrument, although it includes assessment and control procedures. It contributes to preventing economic distortions and erosion of tax bases within the Community. Member States will undertake to respect the principles of fair competition and to refrain from adopting harmful tax measures. The common European market was to be created by member states by removing obstacles to the free movement of goods, persons, services and capital, and competition in the internal market should not be distorted by initiatives taken by individual member states. Clearly, different tax systems can lead to a distortion of behavior within a common market. The main economic reason for tax harmonization in Europe concerns the production and consumption of goods that must be carried out on the basis of real economic costs and benefits and not be excessively influenced by considerations of a fiscal nature. The existence of different tax systems within the EU constitutes a real obstacle to free trade. For this reason, in some cases, the Court of Justice of the European Communities has proceeded to the disregard of the fiscal legislation of a member state whenever there has been discrimination between resident and non-resident subjects or when this tax law has been an obstacle to the free movement of goods, capital and freedom of establishment.

There is no doubt that a minimum of harmonization can bring economic benefits within the common European market. However, the slow and fragmented progress towards a common fiscal policy, in the last half of the century, clearly indicates that there are still many difficulties to overcome. It would therefore be desirable for at least the creation of a federalist fiscal model which would allow for the harmonization of some taxes at European level, while others would be regulated by each member state in correspondence with each specific requirement. Finally, it should be remembered that the imminent entry of 10 new countries into the European Union will inevitably lead to a more in-depth analysis of the suitability of taxes that will have to be regulated at the EU level or in each member state. Currently, VAT appears to be in the forefront as a "European tax", while direct taxes are still left to the wide discretion of individual governments.

On the basis of the foregoing and the aforementioned legal bases, if we wish to bring forward a summary of the financial statements, it is not difficult to see the lesser relevance of what has been achieved by the Community institutions in this field. Some initiatives have been undertaken, see VAT, with the adoption of a single basic model of turnover tax. Much remains to be done: a certain delay is still found in the finalization of planned initiatives, perhaps because the subject of taxes is still jealously guarded by individual States. Fiscal matters are still regulated and organized differently at the level of individual Member States, despite changing political and economic circumstances.

After the analysis we have carried out, it is possible to reach conclusions. First of all, we must point out that the tax problems in our legal system are not few; these problems arise both from the incorrect observance of the rules, from their incorrect application but often these problems arise because there are no rules that regulate delicate fiscal phenomena. A point that should certainly be improved and we hope will happen soon is a radical reform regarding the relations between the authorities of different states. We have noted how our country has been repeatedly condemned by national and European institutions for the violation of tax rules. Condemnations that have certainly not been a pleasant thing for our government. We hope that such unpleasant situations will end as soon as possible. The importance of the rules on tax non-discrimination is undeniable. They constitute a fundamental element for the correct application of tax laws

1.4 THE DIRECT IMPOSITION

Problematic is the theme of the competences of the Community for the elimination of fiscal discrimination between member countries.

The EC Treaty specifies the scope, conditions and procedures for the exercise of the various powers conferred on the Community, in the sense that, according to the principle of allocation powers (Article 3 EC Treaty)[12], they are the same material rules of Community law as to establish whether, in the sector governed by it, the Community enjoys exclusive competence (absolute reserve), or a shared competence, which is complementary to that of the Member States (relative reserve).

With evolutionary interpretation, the Court of Justice[13] has resulted in a widening of the actual scope of competences as they were originally intended, since the provision in question provides for a formal procedure aimed at achieving the integration of the powers of the Community institutions.

With Article 3B, introduced by the Treaty of Maastricht, on the one hand the different competences of the Community and of the Member States have been distinguished, and on the other the individual peculiarities of the individual national realities have been guaranteed through a system

[12] "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

[13] Recognizing more frequently in Article 243 of the Treaty.

based on on the principle of subsidiarity, which identifies the specific dividing line between the state competences and the community acts.
The principle of subsidiarity, set by art. 3B, expresses a criterion of vertical distribution of competences; this new formulation recognizes a secondary and limited Community competence, since the community can intervene only if the objectives can not be satisfactorily achieved by the Member States. With the Treaty of Maastricht, an attempt was made to divide competences, distinguishing, in the logic of a federal system, those exclusive to the European Community, those competing and those reserved for the Member States.
Community law does not directly limit the fiscal power of the Member States, except in cases involving indirect taxes, with particular reference to VAT and excise duties.
Community action in the field of national legislation on direct taxation is essentially justified by the aim of preventing internal tax systems from causing serious distortions to the common market and competition. With this in mind, the Treaty rules on freedom of movement for persons, services and capital are applicable to the tax sector (although this is not the exclusive competence of the Community), in order to eliminate situations of discrimination.
In view of the Community's action on national legislation on direct taxation, since it is not explicitly provided for by the rules of the Treaty, it can’t go beyond what is necessary to achieve the objectives set by it and is not governed by the subsidiarity principle laid down by the 'art. 3B. Indeed, in the absence of a specific Community provision which recognizes specific competence for the Community in the field of direct taxation, Article 3B can not regulate this competence precisely because it is not provided for, nor can it provide a legal basis for action by the Community in scope of direct taxation. If, as mentioned, art 3B can not be invoked as a general rule of the powers of the Community, where there is a lack of competence, it is clear that the interpretation of the Court of Justice which recognizes the fiscal value of Articles. 52, 59, 67 and 48 of the Treaty can not be used to extend the Community's powers in the field of direct taxes. This interpretation seeks only to guarantee freedom of establishment or circulation, which is often hindered by internal tax rules and does not in fact increase the Community's competence in the field of direct taxation, which has not been regulated by the Treaty. Therefore, it is necessary to identify the legal basis for Community intervention in the context of direct taxation, aimed at eliminating any discriminatory rules. The failure to envisage the harmonization of national legislation with regard to direct taxes by the Treaty was based on the consideration that they constitute an instrument of social policy and income redistribution; whose competence lies exclusively with the individual member countries. The discipline of direct taxation is the main expression of their fiscal sovereignty; the consequent lack of Community rules aimed at harmonizing national legislation on direct taxation, very often

determines the persistence of widely differentiated tax regimes, characterized by a disorganization and by discriminatory provisions with regard to income, the assets of citizens and non-resident companies. The ascertainment of this disorganization has led to a slow, but constant, legislative and jurisprudential evolution in the field of direct taxation.

1.5 COHERENCE OF TAX SYSTEM AND DIVERSITY OF TREATMENT OF NON-RESIDENTS

Among the reasons for the different tax treatment by a country against a non-resident that produces income in its territory, the consistency of the tax system is particularly relevant. This reasoning can be considered a case in the rule of reason, a principle which allows the restriction of fundamental Treaty freedoms by a national law, if justified by reasons of public interest.

An example of the application of the principle of consistency of the tax system by the Court of Justice was in the Bachmann case[14]; in this case the Court considered the reasons for the Belgian Financial Administration to be legitimate, which supported the intent of the law to ensure the consistency of the tax system, based on the compensation between the tax relief and the consequent application of the income tax. In this specific case, the consistency of the tax system justifies that a Member State, which grants the deductibility of insurance premiums paid in another State, must levy the capital income tax received by the beneficiaries, in execution of the old-age insurance contracts and on death. It therefore follows that premiums paid to companies established in another Member State, which are presumed to receive capital gains tax, are not deductible.

Ultimately, the Court has identified, in the link between the facilitating law and the law establishing the tax, a legitimate ratio that justifies a difference in tax treatment, making the specific provisions of the Belgian legal system compatible with the Treaty and non-discriminatory.

However, this decision by the Court lends itself to some critical importance: in fact, it is clear that the Belgian tax law hindered the exercise of the professional activity of non-residents and the exercise of the right of free movement of foreign insurers, 'tax liability in Belgium of the capital paid by the latter and thus excluding the deductibility of the premiums paid.

In fact, all the agreements against international double taxation stipulated by Belgium provide that this country waives the tax on capital income deriving from insurance premiums if the beneficiaries of such income are resident in another State at the time when the payment is carried out.

The rationale of the internal discriminatory norm should therefore be identified in order to guarantee the collection of taxes on capital income by citizens residing in a member country, which

[14] Case 204/90, Hans-Martin Bachmann vs Belgian State.

stipulate insurance contracts with foreign companies and are still resident in that country at the moment in to whom the premium is paid to them, avoiding that these subjects (despite having made use of the deductibility) can evade the tax, due to the lack of knowledge by the financial administration of the payment of capital by a foreign company.

This anti-evasive function, however, in the light of the principles enunciated in the Schumacker ruling, particularly discriminates against non-residents who produce most or all of their income in Belgium, since they can not even deduct the premiums paid from taxable income in the own State of residence, due to the absence or inadequacy of taxable income produced in that State. Ultimately, the recognition of the coherence of the tax system, as a justification for a different tax treatment by a Member State, can lead to the view that certain discriminatory tax laws are legitimate, provided that the existence of such coherence is demonstrated; this tendency, however, risks undermining the steps taken by the Court to eliminate the phenomenon of tax discrimination in the field of direct taxes.

1.6 NON DISCRIMINATION RULES AS AN EXPRESSION OF THE PRINCIPLE OF NEUTRALITY: THE EVAPORATION OF FISCAL SOVEREIGNTY

We can state that the principle of fiscal non-discrimination can represent a manifestation of the principle of formal equality. The overcoming of the concept of discrimization based on nationality and the elaboration of the non-restriction principle have made all the differences between similar cases and the equal treatment of objectively different cases incompatible. This elaboration is a clear manifestation of the aspiration to neutrality that distinguishes the tax phenomenon in the community; since the Community's funding is in fact entrusted to the system of the own resources of the states, the importance of taxation can only be that of a potential obstacle to the functioning of the internal market.

All community construction is based on economic theories that state the need to pursue neutrality in international transactions. The common market is therefore a more ideal than geographical dimension, in which the phenomenon of efficient allocation of resources occurs. This view emerges from an even superficial analysis of the tax treaties, all of which are geared towards the completion of the internal market and enable its operation. In fact, it is no coincidence that the principle of neutrality is one of the inspiring principles of the tax system of all states, as well as that of the Italian state. We can not deny that the theories spread throughout the world and especially in Italy have had positive feedback from the application that has been given in the European Union, but we can not forget the fiscal distortions in our system. The limit that has been found in the jurisprudence of the Court in terms of non-discrimination derives from the original structuring of the principle of fiscal neutrality as a function of implementation. This genetic feature also derives from the lack of systematicity in the field of possible justifications of discrimination: if it is sustainable that it is clear what constitutes a discrimination or a restriction, it still causes doubts the concept of justification. Prohibiting, removing, preventing discrimination and obstacles to the correct functioning of this market are concepts and actions that have been well developed. The justifications concern the promotional dimension of the finality and postulate a substantial vision of the principle of equality that has not yet been obtained, sufficient attention to allow a systematic organization.

1.7 NON FISCAL DISCRIMINATION UNDER THE LENS OF THE CONSTITUTIONAL COURT

There are two articles of the Charter of Rights fundamentals of the European Union that open Chapter III dedicated to Equality: The article 20, entitled "Equality before the law", for which "All persons are equal before the law" and the art. 21 – "Not discrimination[15]". First of all, the fact that art. 20 is indicated as corresponding to a general principle of law that appears in all constitutions European authorities authorize to them and also to the Constitution Italian. With regard to indirect taxes, the Community legislator has prohibited Member States from maintaining or introducing discriminatory or protectionist internal taxation against products from other EU Member States. The prohibition in question concerns both the cases of direct discrimination both those of indirect discrimination.

In Italy, the constitutional court has, on several occasions, ruled on situations in which the principle of non-discrimination had been violated. Forty years ago, with the famous ruling no. 79 of 15 July 1976, the Constitutional Court considered appropriate to stop the attention on some aspects or aspects of the IRPEF discipline. The rules violate the principle of equality of all citizens before the law and are not ordered on the legal equality of spouses. In the face of equal situations there are different treatments. In particular, the Court affirmed that a more burdensome tax treatment than the one provided for cohabitants not united in marriage (which are subjected separately to the tax) has been applied to the spouses. The Court stressed that differentiated or different treatment has no rational justification or appears to be aimed to protecting family unity and it contrasts with art. 31 of the Constitution. The legislation in question does not facilitate the formation of the family and the fulfillment of the relative tasks with economic measures and other provisions and actually gives life

[15] "Is prohibited discrimination based, in particular, on sex, race, color of skin or ethnic or social origin, genetic characteristics, language, religion or personal beliefs, political opinions or any other nature, belonging to a national minority, heritage, the birth, handicaps, age or sexual tendencies. In the scope application of the Treaty establishing the European Community and of the Treaty on European Union any discrimination based on discrimination is prohibited on citizenship, without prejudice to the special provisions contained in treated themselves".

to the legitimate family units and to free unions, de facto families and other family cohabitations, to a worse treatment. Lastly, the non-compliance with art. 53 of the Constitution and is proven not demonstrable, also due to the great variety of possible hypotheses and concrete situations (characterized, by the existence of children), which in any case for this influence has increased contributive capacity of the two subjects together considered .After another seven long years, the Constitutional Court, with the equally well-known sentence n.76 of 23 March 1983, returned to the subject and renewed the invitation to the legislator to remedy the inequalities that this system, strictly applied, could deriving to the detriment of the family in which only one of the spouses has taxable income, compared to that in which both spouses have income, equal in total to that of the single income family, but subject to separate taxation, with milder rates for the two components[16] . The two authoritative warnings of the Judge of the Laws urged the Parliament to delegate the Government to adopt, by December 31, 1992, one or more legislative decrees concerning the revision of the tax treatment of family income according to a long indication of principles and guiding criteria (including the proportioning of the tax to the ability to pay the family unit taking into account the number of people who compose it and the income they own through the application of the average rate corresponding to total income divided by the number of members of the nucleus).

The issue of tax discrimination of the matrimonial family was discussed again in Parliament during the sessions of February 7 and 8, 1995, during which twelve motions were filed, in which the Government was committed to creating a system of family allowances of suitable and significant economic scope, with particular regard to large families and single income , and it was urged to issue measures for a broader tax protection with the introduction of the so-called family quotient or an equivalent method that, when taxing family income, takes into of the number of members, reducing taxes to single and numerous families. After the Constitutional Court, with the sentence n. 358 of 24 July 1995, verified conclusively that from the tax calculations it is undoubtedly found that the current tax treatment of the family it penalizes single-income households and large families with components that do not produce or do housework. These families in fact - which should be facilitated pursuant to art. 31 of the Constitution - are required to pay a tax on the income of natural persons significantly higher than other households composed of the same number of members and with the same income but received by more than one of its members.

The Constitution's article 3, 23, 53 are taked into consideration. Moreover, many judgments of Constitutional Court deal with budgetary stability and are therefore linked to Article 81. The evolution of the jurisprudence of the constitutional court can be divided into three phases: in a first

[16] P. M. GANGI, Riflessioni sulla Convenzione Europea, Bruxelles, 2003.

phase the court has outlined the bases of our tax system and has sought to remove the old discipline that was detrimental to freedom of establishment and fundamental freedoms. The path of the court starts from the principle of consent contained in article 23. The court states that it must be the law that establishes the criteria and conditions of the application of taxes and avoid the discretion of the legislator. The relative reserve of law is respected when the essential elements of taxation are defined by an act having the force of law. Regarding article 53, the Court has defined the ability to pay as an expression of strength and economic potential. A very important role has the sentence 48/68 which has declared illegitimate ex art 24 and 113 the supersolidarial tributary. In a second phase, the constitutional court began with the recognition of these fundamental rights, in order to arrive at the discipline of tax matters. The capacity to contribute is defined as an attribute of the subject and not of the only economic good. It is important to remember how the Court with the sentence n. 179/1976 declared illegitimate the imputation to the husband of the income of the spouse not included in its legal availability and the exclusion of the wife from any subjectivity tax. In this regard, it is noted that Article 53 is not a value to be protected exclusively, but is rather a purpose, a function.

The third phase, in the 90s, coincides with the financial crisis and the court intervenes to protect fundamental rights and the tax levy. The court has addressed the subject of tax litigation. The court affirmed the jurisdictional nature of tax commissions. This doubt arose because of a political-administrative composition and a procedure that ignored the parity of the parties. The Community rules, the emanation of which does not depend on further Community or national measures of execution or integration, are provided with direct effect; in fact, the Community standard is able to create rights and obligations directly to individuals, without the State having to activate a formal procedure to allow rules outside the national legal system to produce their effects.

An important concept is the Direct effect, that is relevant in terms of tax discrimination, since the individual can directly appeal to the national court in order to obtain the protection of his subjective legal position, as claimed by the Community law. The recognition of the suitability of the rules of the Treaty to create rights that individuals can invoke even in mutual relations is an original datum of the Community legal system with respect to international law, which only covers states as subjects of law.

The direct efficacy is closely linked to a further quality of the community norms, which consists in their primacy on the internal norms with them conflicting, both previous and successive, of any rank.

What emerges here and it seems to me to underline is the fundamental role that the constitution and other laws have in the tax field. Surely there have been and there will be violations of tax rules and the principle of non-discrimination, which is fundamental in our legal system. The role of the constitutional court has been instrumental in trying to circumvent these problems. In my opinion, it would be better to increase the controls of the administrations and try to punish with more severe penalties all cases of violation of these principles. More collaboration between financial authorities would be needed, more dialectic, more detailed rules should be enacted.

CHAPTER 2

2.1 A BIT OF HISTORY: FROM THE AMSTERDAM TREATY TO THE PRESENT DAY

Significant progress has been made in the recognition of the importance of fundamental rights in the European Union in recent years.

The TFEU contains many forecasts regarding the principle of non-discrimination, such as Article 18[17].

The Treaty of Amsterdam states that the Union is based on the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, principles common to all Member States [18], that the Union respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4/11/1950, and which result from the common constitutional traditions of the members, as general principles of Community law . Art. 46[19] of the Treaty on European Union concerns the jurisdiction of the Court of Justice of the European Community and gives it the power to rule on the acts of the European Union institutions belonging to the European Convention for the Protection of Human Rights and Freedoms fundamental principles (Council of Europe, 1950).

The Treaty of Amsterdam makes binding on the EU the obligation to respect the European Convention for the Protection of Human Rights (Article 6.2 TEU) and, for the Member States, to respect the principle of "freedom, democracy", respect for human rights and fundamental freedoms, as well as the rule of law "on which the Union is founded (Article 6.1 TEU)[20]. Despite these advances, the process of European integration, with its clear implications for human rights, requires a real and effective protection of fundamental rights for European citizens and workers and the explicit definition of these rights in a single text.

Fundamental rights are an indispensable element both to strengthen the social dimension of the European Union and to protect and develop the European social model. The inclusion of the Charter in the Treaties is therefore of crucial importance in view of the imminent enlargement of the Union.

The Union is emerging as one of the main actors on the world stage. The Council, Parliament and the Commission often speak about the need to develop human rights, accepted and signed in the

[17] "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination".

[18] Article 6.1 TEU.

[19] "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish, by means of directives or regulations, the measures necessary to implement the free movement of workers."

[20] A. ROBERTO, Il Trattato di Amsterdam, Milano, 1992.

Declarations, in the Agreements and in the Conventions drawn up by the United Nations and its institutions.
The EU Council has declared that Europe must be the spokesman of human rights. This respect for fundamental rights must become an integral and continuous part of the commitments and demands of the European Union and its Member States in their trade and foreign policy relations.
Human rights are indivisible, the whole body of civil, political, economic, social, cultural and trade union rights must be incorporated into the Treaty in a binding way; therefore, a Charter that confines itself to a solemn political declaration would not only not satisfy current needs in relation to the objectives of European construction, the enlargement of the Union and our global role, but, would not restore the confidence of the our European citizens compared to economic and monetary union.
The respect of these important rights is also relevant in tax matters and in this way also the right of all citizen sto have equal rights in the fiscal field.
The adoption of a law that leads to a reversal of the pension calculation system and which is applied retroactively, with disproportionate sacrifices for pensioners is a violation of the European Convention on Human Rights. With the consequence that the State is obliged to pay compensation to the claimants for the pecuniary damage suffered.
It is the European Court of Human Rights to intervene with the sentence filed yesterday concerning eight appeals lodged against Italy for the so-called "Swiss pensions", with which Strasbourg ruled, after having already ascertained the Italian violation with the sentence of April 15, 2014, establishing the amount of the indemnity due from Italy to the applicants. At the center of the story, the appeals of Italian citizens who had worked in Switzerland for several years. When the contributions paid into the Swiss country were transferred to Italy, the applicants had requested the application of the 1962 Italian-Swiss Convention for the calculation of the pension. This was not the case because the pension scheme used a theoretical salary rather than effective.
So, the appeals before the national courts, but while the internal proceedings were pending, the Parliament had adopted the law 296/2006, which provided for a very penalizing calculation. Hence the appeal to Strasbourg that had given the plaintiffs a "double" condemnation of Italy for both violation of Article 6 of the European Convention, which guarantees the right to a fair trial, both of Article 1 of Protocol No. 1 on the right to property.
Under the first profile, Strasbourg found the retroactive application of the law to the detriment of pensioners to be contrary to the Convention. Regarding the right to property, the Court rejected any justification put forward by the Government considering that the balance of the pension system, in

this case, could not be classified as an overriding reason in the general interest, also because the damage suffered had been completely disproportionate.

In fact, the applicants suffered a serious injury, with a reduction of more than half of the amount of the pension, a clear sign of disproportionate and unreasonable cuts. For the Court, however, since a reasonable intervention would have been compatible with the Convention in the presence of general requirements, the calculation of the damage suffered should be done only for the part that goes beyond that considered reasonable. Thus, Strasbourg decided not to carry out an automatic calculation based on the pension which the applicants should have received before the law came into force and the sums actually received but took into account 55% of the amount that would have been obtained without legislative changes. The European Court of Justice has condemned Italy to pay a fine of 30 million euro for not having recovered aid for labor training contracts granted to hundreds of companies in the form of tax relief. An already salted fine that will rise for every six months of delay in the recovery of funds that should have already been triggered in 2004.

2.2 THE EUROPEAN COURT AND ITALY: COMPARING CASES

Once again, the Italian State aid, judged illegal and incompatible with the common European market by the courts of Luxembourg, ends up in the dock of the defendants of the EU Court. In this case it is about aid granted by Italy for interventions in favor of employment starting from November 1995 and aimed at recruiting workers through training and work contracts. In short, a "just cause" would say. In fact, the EU pays out several million euros each year in the European Social Fund, but only if the rules are respected.

The legitimacy of this aid is linked to the creation of new jobs in the beneficiary company for workers who have not yet found a job or who have lost their jobs or to hire workers who have difficulty entering reintegrate into the labor market, in particular young people under 25, graduates up to and including 29 and long-term unemployed. In all other cases it is illegal aid and therefore to be returned to Brussels.

In the ruling, the EU Court does not expressly speak of scams, but of illegitimacy in the allocation of funds. What does not change is the result: Italy must return 30 million and interest. Needless to say, the Italian government had many chances to avoid the sanction, given that the proceeding began in 2004 and the European Commission, before referring to the EU Court, sent various reminders to Rome. The responses of the Italian Government are evasive, incomplete and strictly late. On July 19, 2007 the formal notice of the EU offices arrives, but on February 1, 2008, after three years from the first sentence, the recovered aid is only 0.5% of the total. And to say that in July 2006 the Italian Republic had even announced the creation of a new administrative body that would have centralized all recovery proceedings. Finally, in 2010 Italy disputes the total amount to be recovered, but by now it is too late, the proceedings have already started in the Court of Justice[21] The 2004 ruling was to be applied immediately. Waiting for has not helped the country that gets only a very substantial sanction, comments Sergio Cofferati from the European Parliament. "Training has a fundamental value if it serves to include a person in the world of work and not to nurture training in itself". Italy continues to live in Community Europe regardless of its rules, and not only in work, but also in the use of structural funds and in interventions in the face of environmental emergencies.

Italy is not in fact new to convictions for illegitimate use of EU funds. The last episode that saw Italy condemned by the Court of Justice for aid received by some regions for natural disasters in 2002 dates back to last July, in particular the eruption of Etna, the earthquake in Campobasso and the floods to North. Also, in this case, State aid was judged by the EU Court "incompatible with the common market".

2.3 PECULIARITIES OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY

The Court of justice of the European communities has been established with the Treaty of Rome and has as its function not only that of guaranteeing respect for the law in interpretation but also aims to be the point of reference for all subjects in the European context. The court assumes the role of main instrument for the diffusion and evolution of Community law and tends to eliminate the divergences in the system itself. A fundamental characteristic of the court is the legitimization to the action both from the contracting states and from the private individuals, both physical and juridical persons. They can therefore apply to the ECJ both the courts of the various Contracting States and all those having the legitimacy to act in the rule of law. It is necessary to underline how the court of justice enjoys only a competence for attribution: that is, it can act only by virtue of a specific provision of the Treaty which gives it jurisdiction.

Apart from this hypothesis, it will be up to the national courts to disapply the provisions of law that are contrary to the provisions of the Treaty. The relationship between domestic law and community law, in Italy, would be regulated in this way: the conflict must be resolved by ensuring the application of Community law, even by the national court, without the temporal succession influencing the result of the contrast regulatory. The fact that the Italian law is contrary to the Community legal order does not mean that it is unconstitutional unless it conflicts with the provisions of the Treaty and recourse to the Constitutional Court will be necessary. It must be

[21] A. AMATUCCI, Trattato di diritto tributario, Padova, 1998.

considered that the Community regulations are directly applicable and mandatory in all member states and do not need any provision of reception.

2.4 THE PROVISION OF THE TFEU ON NON-TAX DISCRIMINATION

The principle of fiscal non-discrimination has an indispensable function within the Community and is the protection for the free movement of persons, goods, services and capital; consequently, in the Treaty there are numerous provisions which prohibit discriminatory treatment. Also, the discipline of the free circulation of goods (according to a certainly shared distribution) is articulated in the Treaty in three main and distinct moments:

- the prohibition of internal taxation of a discriminatory nature for imported products (art.95)[22];
- the abolition of quantitative restrictions on intra-Community trade and equivalent effective measures (Articles 30-36);
- the customs union, which provides for the abolition of duties and taxes having an effect equivalent to customs duties within the common market, as well as a common customs tariff for trade with third countries (Articles 9-29).

Article 95 essentially guarantees the free movement of goods between the Member States under conditions of normal competition, by eliminating any indirect taxation which could jeopardize the neutrality of intra-Community trade; the standard is based on the link between the principle of fiscal non-discrimination and the guarantee of freedom of competition and circulation of goods.

The Court of Justice has also had the opportunity to clarify that the abolition of customs barriers pursues not so much the objective of hindering the possible protectionist intentions of the States, but of giving a concrete scope to the free movement of goods, thus considering also the hypothesis in which there are no competing national products, against which the result of the discriminatory action can be measured.

However, the Treaty essentially contains provisions that prohibit tax discrimination with regard to the field of indirect taxes, while there are few references to discrimination in the field of direct taxes.

We must emphasize the importance of the open skies case. Particular interest in the sentence in question is the importance of the European Court according to which the "nationality clauses" deduced in international agreements, if they restrict the international traffic rights to only the carriers of a given country, they are contrary to the EC Treaty. The Commission had indeed argued that these clauses undermine the right of establishment - one of the fundamental rights enshrined in

[22] "In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited."

the EC Treaty - by which citizens and businesses in the Community are free to establish themselves throughout the Community in order to pursue economic activity there, without any discrimination. The Court reiterates that the disputed clauses have the effect of discriminating Community airlines on the basis of the nationality of their holders. The Commission considers that this discrimination has limited the benefits resulting from the Community liberalization process which began in 1992, as Community air carriers offering their services on international routes have not been able to make investments and consolidate their activities in the territory of the Community. . In fact, these bilateral agreements, including those to which today's ruling refers, require that European air carriers must belong or be controlled more than 50% by citizens of their country of origin, otherwise they risk losing their international traffic rights.
Equally important is also the statement by the Court, which reiterates the well-known principle that every time the EC has adopted common rules concerning companies from third countries, the Community acquires at the same time the necessary international expertise. Currently, in practice all aviation sectors are covered by European legislation, and - in these matters - Member States can no longer make commitments to other countries. Member States which conclude bilateral agreements risk triggering a conflict between the commitments they have entered into at international level and the obligations imposed on them by Community law.
In order to harmonize the relations between the Member States and the USA with Community legislation, negotiations between the US on the one hand and the EU should be opened urgently with the aim of reaching an agreement, extended to all EU Member States, which discipline bilateral problems. To this end, the Commission presented to the Member States some proposals for the negotiation of a "transatlantic common airspace", which would have the advantage of further encouraging EU / US relations. The Commission will also propose, in the near future, the opening of negotiations with other third countries.
The Commission will shortly adopt a communication to illustrate its policy on external relations in aviation in which it will present proposals for the negotiation, conclusion and management of international aviation agreements.
This discriminatory treatment by some is admitted because it generates advantages from an economic point of view and allows an improvement for competition between countries, but according to many these agreements negatively affect the internal market and transport systems. In this case there is the tendency to give preference to the state’s tax autonomy over the requirements of the non discriminations rules of the TFEU.
According the foreign pension schemes, under the Community regime the institution of the totalization of the contributions paid is foreseen. In practice, periods of insurance, of subordinated

activity, of self-employment or of residence completed under the legislation of an EU State are added to those accrued in another Member State, to the extent necessary, provided that such periods do not overlap and that they are not less than one year under the State granting the pension. The totalization allows the worker to accumulate the different periods of work carried out in several States for the purposes of accrual of the right. However, the contributions paid in each State are not transferable in another, nor repayable, and will be useful for the calculation of the benefit to be paid by each State in which the work took place once the right has been accrued according to the rules of each legislation.

Let's take the example of a worker who has paid 14 years of contributions in Italy and another 10 years in Austria. Without totalisation, the worker could not accrue the right to an old-age pension as he would not achieve the minimum 20-year contribution requirement. On the other hand, when the retirement age is paid, INPS will pay the old-age pension, counting the foreign periods for the purposes of the law and, in total, it will have matured for 24 years. However, the amount of the pension will be calculated only on the 14 years of contributions paid in Italy, while the Austrian social security institution will liquidate its pension with respect to the 10-year contribution according to Austrian law. In the case of the reader, the four years of French contributions are indifferent to the accrual of the contribution requirement for the old-age pension, but could be useful for the minimum threshold of social security contributions for early retirement[23]

We must admit how the interpretation of the rules of non-discrimination has been influenced by the evolution of the rules of non-discrimination, just think of the numerous new rights that have been recognized in recent years. Regarding the non-discrimination norms, it is necessary to underline how they have not been privileged yet, as happens in the rest of the world. There are still many problems in this regard, but we hope that these problems will soon be solved. From this point of view, it is clear how greater emphasis is given to individual norms rather than to the autonomy of individual states.

2.5 THE PRINCIPLE OF NON –DISCRIMINATION AND THE MOVEMENT OF CAPITAL

According to the provisions of art. 63 of the EC Treaty all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited. Paragraph 2 of the same article also states that all restrictions on payments between Member States and between Member States and third countries are prohibited[24]. Already from the dictation of the article we can draw a difference between the two paragraphs, in relation to the object of freedom examined: in

[23] F. AMATUCCI, Il principio di non discriminazione fiscale, Padova, 1998.
[24] “Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited”.

fact, while payments are “transfers of currency that constitute a counter-performance in the context of an underlying shop”, the capital movements they are “financial transactions which essentially concern the placement or investment in question and not the consideration for a benefit”[25]. The clarification has its importance in defining the field of application of freedom in question, since for the free movement of capital no absolute and unconditional liberalization was implemented as for other freedoms, but only to the extent necessary for the proper functioning of the market. common. This is undoubtedly a more prudent and less liberal formulation, by virtue of a sector that was going to invest the economic and monetary policies of the Member States: all this, until the beginning of the 80s, was looked at with great caution, because it was considered that an absolute liberalization of capital movements could have led to an imbalance in the balance of payments of one or more States, jeopardizing the proper functioning of the common market.[26]

The liberalization of capital movements was implemented through the enactment of three directives (respectively in 1960, 1962 and 1986) which, however, had not removed all the remaining restrictions.

It was only with Directive 88/361 of 24 June 1988 that the complete liberalization of capital movements was introduced within the Community, with the abolition of all foreign exchange controls and restrictions.

The EC Treaty nevertheless provides for a safeguard clause, inserted in art. 60, where it states that a Member State may, for serious political reasons and for reasons of urgency, take unilateral measures against a third country with regard to capital movements and payments.

However, the adoption of such measures is subject to certain conditions:

- the Council must not have taken any measures;
- the State must inform the Commission and the other community partners;
- there must not be a Council resolution requiring the revocation of such acts.

In order to cope with exceptional circumstances, it is also envisaged that the safeguard measures may be adopted by the Council, on a proposal from the Commission, after consultation with the ECB. And for a period not exceeding six months.

The free circulation of capital is notoriously achieved through an extraordinary variety of forms which can also be traced back to two fundamental categories: the freedom to raise capital for the subsequent development of business activities or, more generally, economic ones; the freedom to use material resources and financial capital to obtain an economic return[27]. As explained further below, the attention of the editors of the TFEU still seems to be prevalently addressed to the first of

[25] ECJ judgment, Luisi, 30 January 1984, n. 82 and n. 83.
[26] ECJ judgment Casati, in 203/80 case of 11 November 1981.
[27] P. BORIA, European Tax Law, Milano, 2010, 140 ss.

the two cases mentioned, given the evident link of instrumentality with the freedom of enterprise and therefore with the implementation of the objective of free competition on the common market. European. Nonetheless, there are also unequivocal traces of attention in the TFEU for the second type of case, which can be inferred indirectly from the new competences in the investment sector introduced by the Lisbon Treaty [28].

Article. 63 of the TFEU distinguishes “capital movements” from “payments”, although the latter are logically included in the notion of capital in a broad and generic sense, even if the TFEU rightly unifies the discipline in Chapter IV in order to enhance the undeniable complementarity existing between them. The reference is in particular to the objective pursued both by the movement of capital and by the circulation of payments for the start-up of an economically significant activity in another country[29]. The TFEU omits instead of defining the terms 'capital movements' and 'payments.

2.6 DISCIPLINE ON MOVEMENTS OF CAPITAL AND PAYMENTS IN THE FRAMEWORK OF FUNDAMENTAL CIRCULATION FREEDOMS GUARANTEED BY THE TFEU

It is suggested by the art. 63 of the TFEU that the regulation on the circulation of capital and payments is informed of the legal obligation to eliminate “all” the restrictions between Member States, as well as between Member States and third countries[30]. The principle of free movement of capital and payments, implicitly inferable from this provision, has therefore a general scope and direct vertical effects, as demonstrated in particular by the expression 'do not affect' clearly attesting to the intention of the TFEU editors to apply this principle immediately. Furthermore, the negative wording of the provision in question, which too cautiously mentions only non-absolute obligations not to do (concerning the elimination of restrictions on the mobility of capital and payments) rather than obligations to make (concerning the liberalization of financial markets within the territory of the Union). In other words, the art. 63 of the TFEU suggests that for compliance with the general principle of free movement it is sufficient for Member States to remove restrictions on the importation and export of capital. As for the non-absolute nature of the obligations not to make there foreseen, it is clearly derived from the literal interpretation of the art. 63 in general and more specifically from the reference to the material scope of the provisions contained in the TFEU as a

---

[28] On EU competences in the field of foreign investments see last A. DeLuca, Non-Trade Values Protection and Investment Protection in the EU Investment Policy, and T.-Seatzu, F.-Trevisanut, Foreign Investment, International Law and Common Concerns, Abingdon, 2013, chapter 9.

[29] In a critical sense v. Baratta, R., Circulation of capital and payments, in European Union Law, Special Section, edited by G. Strozzi, Turin, 2010, 271, which considers the choice justified only in part by the presence of common elements and the obvious connections between the circulation of capital and payments.

[30] The Italian Court of Cassation (Section III, Pen.150 of 19.01.1994) has specifically established that the principle of fiscal neutrality consists in not discriminating between national and imported products that hinder the free movement of goods.

limit to the operation of the free movement of capital and payments[31]. It is less easy to understand whether the rules on capital movements and on the free circulation of payments must be considered as producing direct effects that are only vertical or even horizontal, that is to say in inter-individual relations. In support of an extensive interpretation of the effects that can be linked to the two provisions of art. 63 and, more generally, to the provisions that make up the head dedicated to capital and payments, the indeterminacy of the subjective circle to which they are addressed has been asserted[32]. However, an even horizontal effectiveness of art. 63 of the TFEU badly reconciles with the prudent wording of this provision and more specifically with the negative nature of the legal obligations laid down therein. Neither the literal formulation of the art. 63 nor does its contents prevent an interpretation of domestic law by judges and administrative bodies in accordance with the provisions on the free movement of capital and payments. Another fundamental article is Article 43 dealing with the free movement of workers[33].

No less controversial than the direct vertical or even horizontal effectiveness of art. 63 is the question concerning its subjective scope of application. In this regard, it has been rightly pointed out that the fact that the other basic freedoms of movement in the TFEU are addressed immediately only to the citizens of the Member States is not sufficient to automatically exclude applicability to non-national residents of Member States of the rules on the circulation of capital and payments referred to in Articles 63-66. In fact, there are arguments in favor of extensively applying the subjective scope of application of the aforementioned provisions to non-citizen residents. Among these arguments, in our opinion, the most significant is that the term “restrictions” on the free movement of capital and payments, despite the ambiguities naturally connected to the persistent absence of its general definition by the Court of Justice[34], can not be interpreted restrictively. As already explained above, the art. 63 prohibits "all" the restrictions between Member States[35], as well as all obstacles to the free movement of capital and payments between Member States and third countries. Another argument to support the extension of the primary rules on capital movements and on the free circulation of payments in the aforementioned sense is the failure to provide for an express limitation of articles. 63-66 to the citizens of the member countries only.

[31] R. BARATTA, Circulation of capital and payments, cit., 273.
[32] R. BARATTA, Circulation of capital and payments, cit., 273.
[33] Article 48 states that "Free movement of workers within the Community shall be ensured no later than at the end of the transitional period.
It implies the abolition of any discrimination based on nationality among the workers of the Member States, as regards employment, remuneration and other working conditions ".
[34] L. Daniele, European Single Market Law, Milano, 2012, p. 172.
[35] “All obstacles of any kind that are impeded by the free movement of capital and payments, even if they may be different from exchange restrictions such as, for example, national tax laws or regulations nationals which make transfer of money, means of payment, securities generally subject to the prior attainment of an administrative authorization”.

CHAPTER 3

3.1 NON-DISCRIMINATION RULES IN MULTILATERAL HUMAN RIGHTS CONVENTIONS: IN PARTICULAR ARTCILES 14 AND 21 OF CHARTER OF NICE

The well-known principle of non-discrimination, already present in the European Convention on Rights of Man (ECHR) in Article 14, has been reaffirmed in Article 21 of the Charter of Nice[36]. The principle of non-discrimination is widely recognized as a manifestation of the most general principle of equality. Based on the latter, similar situations must be treated equally while different situations differently. In case contrary, and in the absence of reasonable justification, the processing must be considered discriminatory. These principles are fundamental elements of international law relating to human rights. In particular, the principle of non-discrimination is found in the Declaration Universal of Human Rights of 1948, in article 7, as in the International Covenant on Rights Civilians and Politicians at the article 26 and is reaffirmed in all the universal instruments and regional protection authorities.

In the European context, it is consecrated in the European Convention on Human Rights, and the article 14 states that the enjoyment of the rights and freedoms recongnized in the present Convention must be guaranteed without any discrimination, in particular those based on sex, race, color of skin, language, religion, political opinions or those of other gender, national or social origin, belonging to a national minority, the wealth, birth or any other condition. Title I of the Convention sets out the fundamental rights and freedoms that the Contracting States must respect and, since these principles are of an abstract nature, they have been concretely filled by the jurisprudence of the ECtHR. Italy has signed the aforementioned Convention and has implemented it with Law no. 848/1955. The two twin sentences of the Constitutional Court, nos. 348 and 349 of 2007, have affirmed that the norms of the ECHR have a sub-constitutional nature, that is of constitutionally interposed norms, superordinate to the ordinary laws and subject to the respect of the Constitution, as hierarchically superordinate. The ECHR is part of the national system and, therefore, its rules must be respected by the three powers of the state. In particular, the national court must verify whether the complaints raised by the citizen are well founded and carry out a conventionally oriented interpretation of the internal rules which are objected to the contrast with the ECHR.

[36] "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

It is opportune to identify the relevant articles of the Convention in the tax field:

- art. 6: right to a fair trial, excluded from the tax cases with the Ferrazini ruling but that the revirement of the Court has currently foreseen its application also in these judgments;
- art. 7: principle of legality in criminal matters, which also applies in the tax context, through recognition of the essentially criminal nature of administrative and tax penalties and through the Engel criteria coined by the jurisprudence of the Court EDU;
- art. 8: the right to respect for private life, which helps the legitimacy of the access of the Tax Authorities to the tax payer's office and the protection of confidentiality of documents and correspondence in general;
- art. 13 and 14: respectively the “right to an effective remedy”, if the taxpayer is denied immediate appeal to a judge, and the “prohibition of discrimination”;
- Article 1 of the first Additional Protocol: property protection;
- art. 4, Protocol No. 2: Ne bis in idem, ie the right not to be tried or punished twice, which has been at the center of the recent jurisprudential debate of the EDU Court and the jurisprudence of legitimacy.

The trial before the EDU Court can be concluded pursuant to art. 41 of the ECHR with the conviction for the State to repair the injury to the citizen, restoring the status quo ante; the aforesaid article establishes compensation for damages in the hypothesis in which the return in integrum is not possible

An additional instrument to protect the fundamental rights of the tax payer can be provided by the c.d. European Charter, ie the Charter of Fundamental Rights of the European Union, also known as the Charter of Nice, which became part of the European treaties with the entry into force of the Treaty of Lisbon.

The Charter sets out three categories of rights, the “correspondents” to those of the ECHR, the "existing" rights and the “emerging” rights, dividing them into six titles related to as many individual and universal values: dignity, freedom, equality, solidarity, citizenship and justice. The Charter, as stated in art. 51 of the same, applies to the organs and institutions of the Union and as regards the Member States exclusively in the implementation of Union law. Therefore, the aforementioned subjects respect the rights, observe the principles and promote their application according to their respective competences. The Charter "does not introduce new powers or new tasks for the Community and for the Union, nor does it change the competences and tasks defined by the Treaties. The same EDU Court in the sentence of June 16, 2010, Di Belmonte c. Italy, stresses that the tax issue does not escape the control of the Court and provides three parameters to

verify the correct application of the aforementioned article: such interference must have a legal basis, pursue a legitimate purpose and be proportionate to the objectives pursued.
Another provision of the ECHR has been invoked even more frequently in relation to tax matters and has been the subject of a series of case law rulings by the ECtHR.
It is about art. 6, first paragraph, which, in introducing the principle of fair trial, gives each person the right to a fair and public hearing within a reasonable time, before an independent and impartial tribunal established by law, in order of the determination both of his rights and his duties of a civil nature, and of the validity of any criminal accusation that is directed to him.
The EDU Court reiterated that the explicit reference to art. 6 to "civil rights and duties" and "criminal prosecution" excludes the applicability of these rules to tax litigation, by referring to obligations that, although of patrimonial content, relate to civic duties imposed in a democratic society[37].
This orientation was reiterated in two subsequent rulings by the EDU Court, both relating to the Italian tax system
We must stress taht there is no internationally customary rule that prohibits tax discrimination. If it existed, in fact, the principle of equality would be violated in all cases in which States guarantee, for example, foreign companies a more favorable tax treatment than that reserved for domestic companies in order to favor foreign capital investments and in general for reasons of economic policy.[38]

3.2 EDU COURT AND ITALY'S CASES

In the Ferrazzini v. Italy judgment, the judges in Strasbourg pointed out that fiscal matters still fall within the sphere of the prerogatives of the power of imperio, since the "public nature of the relationship between the taxpayer and the community" remains predominant and the "evolutions in democratic societies do not concern the essential nature of the obligation for individuals to pay taxes. " The same arguments are used by the Court in its judgment of March 31, 2009, Faccio c. Italy, to declare inadmissible the appeal of a taxpayer against the coercive affixing of the seals to the television set for non-payment of the fee, based on the violation of articles 8 and 10 of the ECHR.
In recent times, the Corte EDU has shown a cautious and prudent opening with respect to its granitic orientation expressed in the Ferrazini ruling, recognizing the elements of due process even in disputes of an exquisitely fiscal nature.

[37] European Court of Human rights, 9 december 1994, case Schouten and Meldrum v Netherlands.
[38] P. ADONNINO, Non discrimination rules in international taxation, Firenze, 1993, p. 40.

The European Court of Human Rights is an international court that performs the contentious function and may receive individual appeals and appeals by the Contracting States in which it complains about the violation of one of the provisions of the Convention or its additional protocols. However, it plays a subsidiary role in relation to national judicial bodies, as the applications are admissible only after the domestic remedies have been exhausted.

All states that make up the EU are also members of the Council of Europe and have signed the Convention, but the Court of Justice of the European Union (CJEU) is a separate body from the European Court of Human Rights. For this reason, the judgments of the two bodies could be contradictory; To avoid this, the Court of Justice refers to judgments of the Court of Human Rights and treats the Human Rights Convention as part of the EU legal system.

Any natural person, any non-governmental organization or groups of individuals who consider themselves to be victims of a violation by the State of one of the rights and guarantees recognized by the Convention or its protocols European Convention for the Protection of Human Rights may introduce an appeal before the European Court. The appeal must be made in writing by completing and signing the appropriate form that the Court makes available. The procedure is written and any decision taken by the Court will be communicated in writing. The celebration at the hearings is exceptional.

The Court has first to rule on the admissibility of the appeal: this means that the latter will have to satisfy a series of requirements set out in the Convention. If these requirements are not met, the appeal will be declared inadmissible with definitive and irrevocable character.

If the appeal is declared admissible, the Court encourages the parties to reach a friendly regulation. In the absence of amicable settlement, the Court proceeds with the examination of the merits of the appeal, that is, it judges whether or not there has been a violation of the Convention.

Some appeals can be qualified as urgent and treated as a matter of priority, especially if there is an imminent danger that threatens the physical integrity of the applicant.

If the Court finds an infringement, it can recognize “fair compensation”, which consists in an economic compensation for the prejudices suffered. The Court may also require that the sentenced State reimburse the expenses anticipated by the claimant to enforce his rights (attorney fees or research and correspondence expenses).

If the Court finds no violation, no additional burden is foreseen (in particular as regards the costs incurred by the defendant Government).

Does the Italian tax court violate the European Convention on Human Rights? The Constitutional Court will answer that for the first time it will have to decide whether the Italian tax court violates the European Convention on Human Rights and international law with regard to the values of independence and impartiality of the tax court. The case was raised by the Tax Commission of Reggio Emilia with an order destined to make a lot of discussion inside and outside the Parliament, as if it were accepted by the judges of the Consulta would be canceled hundreds of thousands of pending tax processes in all parts of Italy and you should then start from scratch. The Tax Commission of Reggio Emilia collects, sharing them, the complaints of the doctrine on the possible profiles of incompatibility of the order structure of tax justice with the art. 6 of the ECHR, raising an exception of constitutional legitimacy of certain provisions "suspected" of violating international law with regard to the values of independence and impartiality of the tax court. The task of the Constitutional Court is very delicate: the need for a reformist intervention of general scope no longer seems to be postponed.

Finally, the tax law collects, sharing them, the complaints of the doctrine on the possible profiles of incompatibility of the order structure of the tax justice with the art. 6 of the ECHR, as interpreted by the consolidated jurisprudence of the Court of Strasbourg, raising an exception of constitutional legitimacy of certain provisions "suspected" of violating international law as regards the values of independence and impartiality of the tax court.

This is the synthesis of the Ordinance n. 280/3/14 of the Tax Commission of Reggio Emilia, with which the Constitutional Court was asked to comment on the constitutionality of a large group of provisions of Legislative Decree no. 545/1992 (in particular, Articles 2, 13, 15, 19-bis, 31, 32, 33, 34, 35) and of Legislative Decree no. 546/1992, as well as art. 51 c.p.c., which - in light of the established jurisprudence of the Court of EDU on the subject of independence and impartiality of the judge - would be in contrast with the aforementioned art. 6 of the ECHR and therefore, as an interposed parameter of constitutional legitimacy, with our fundamental Charter: the risk is a condemnation of the State to an indemnity to the injured parties, pursuant to art. 41 of the ECHR. The issue is not new, because the friction profiles - today denounced by the Emilia judges - of the regulation of Italian tax justice with the principles of independence and impartiality, as deemed by the Court EDU, had already been the subject of a meticulous and, how much to the results, shocking basic research by Alberto Marcheselli (started in 2011, on the occasion of an important scientific conference on the relationship between the ECHR and fair tax trial, and concluded with a weighty publication: The independence of the Italian judge in the lens of the European Convention for the safeguarding human rights,[39] - all possible tensions had been regularly stripped ", hoping the due (and never implemented to a careless legislator) modifying interventions.

[39] A. MARCHESELLI, La (in)dipendenza del giudice tributario italiano nella lente della convenzione europea per la salvaguardia dei diritti dell'uomo in Dir. prat. trib., 2013, p. 387.

For the Emilia judges, in the wake of the aforementioned doctrine, the values of independence and impartiality of the tax court, as resulting from the ECHR system, where they are treated as an endemic of non-dissociable content, would be violated in several respects.

Independence would be violated, first of all, because the tax courts do not have auxiliary staff autonomously: today, in fact, the relative powers belong to the same Administration (the Ministry of Economy and Finance) to which the authorities belong (see, for example, the Revenue Agency) that issue tax acts subject to judicial review.

Furthermore, there would be an infringement of the “appearance” of independence because the determination, liquidation and administration of the compensation of the tax courts is the responsibility of the Administration itself to which the authorities issuing the tax acts subject to judicial review also belong.

And again, from the standpoint of the omitted provision of an autonomy of financial and accounting management of the Tax Commissions, because they do not have autonomously the material means, whose management belongs to the authority issuing the tax acts to be submitted to judicial review (pursuant to Article 13 of Legislative Decree No. 545/1992, the compensation of the tax court, determined by the Ministry, is paid by the Regional Directorate of the Inland Revenue and the payment materially made by the Manager of the Secretariat!). The European Convention for the Protection of Human Rights and Fundamental Freedoms (4/11/1950), in art. 14, places the prohibition of discrimination in every field in order to ensure the enjoyment of rights and freedoms, without however expressly referring to the fiscal sector.

However, the additional protocol also refers to the payment of taxes in the sphere of application of the guarantees referred to in art. 14, thus involving, at least indirectly by the Convention, the sanction of the prohibition of discrimination between resident and non-resident if the different treatment does not find a reasonable and objective justification.

The taxing power of a State in respect of the productive activity of income carried out abroad by an own citizen is recognized by international tax law only if and in so far as there is a sufficient connection between that particular legal system and the tax payer

3.3 THE USE OF TAXES AS AN INSTRUMENT OF ECONOMIC AND SOCIAL POLICY AND THE NEW FORMS OF INEQUALITY: A NEW OBJECTIVE FOR TAX LAW

The concept of inequality and the various hypotheses of discrimination have developed in relation to concrete facts, limited from a subjective point of view; for this reason, inequality and discrimination are interpreted as violations of citizens' rights and also of human rights. The result is the active legitimacy before the Court of Human Rights in Strasbourg for individuals, associations and non-governmental organizations. Other situations exist today in the economically developed States, which concern groups of subjects sharing the same economic interest: certain types of companies, exporters, entrepreneurs, disabled persons, asset holders, natural persons, etc. The presence of these collective situations, bearers of specific interests, and the use of the tax system as an instrument of economic and social policy, has created many differences in legal terms. The right must ask to what extent a legislator subject to concrete constitutional principles (economic capacity, equality) can use the taxes to achieve objectives of economic and social policy, thus creating inequalities. To this observation should be added the current tendency to interpret the judgment of equality no longer in consideration of individuals and the presence of identical or otherwise very similar elements between situations. what previously had a marked subjective connotation today has a collective scope. Currently entrepreneurs, income holders, retirees, exporters. present situations of equality and inequality in order to ensure that a given treatment also includes their specific situation or excludes it, given the diversity of its situation. Two companies competing on the market are thus considered equal, even though starting from very different legal situations; two tax payers are considered different even if the income received is quantitatively the same. Tax law has before it the difficult objective of examining and proposing new limits to tax equality, taking into account the economic and social scenarios that change and become more indefinite[40].

3.4 PROCEDURAL APPLICABILITY FOR THE PROTECTION OF HUMAN RIGHTS IN TAX MATTERS

The compromise between the right of the tax authorities to impose the tax and that of the taxpayer to oppose the protection of his liberties has been complex[41].

In recent years, European tax law scholars have resumed the debate on the application of the right to a fair tax process[42].We must consider that the debate on the applicability of Article 6 of the ECHR to the fiscal subject needs clarification. The inclusion of this right in a supranational text, should put an end to the debate, on the applicability or otherwise of Article 6 to tax matters. The inclusion in the Charter attests the will to proceed in the recognition of fundamental rights and shows how this matter is intended to broaden its scope of application. We believe that the problem of applying Article 6 of the ECHR in tax law merits an exposure that incorporates the legal content of this rule, such as its applicability in the field of taxation. In fact, this rule guarantees the right to a fair trial in matters of civil rights. On several occasions it has been clarified by the European Court,

---

[40] A. DI PIETRO, Per una costituzione fiscale europea, Milano, 2008.

[41] M. BALTUS, Taxation and Human Rights, Proceedings of a Seminar held in Brussels in 1987, during the 41 Congress of the International Fiscal Association, IFA, vol.12, 1988.

[42] J.P. CASIMIR, Controle fiscal, droits, garanties et procédures, Paris, 2003.

the Human Rights Commission[43] and some national jurisdictions[44] that a tax dispute does not fall into either category. Article 6 of the ECHR guarantees the right to a fair trial. Every person has the right that his case be examined impartially, within a reasonable time, by an independent and impartial judge, established by law, who will decide, both in order to disputes about his civil rights, and on the foundation of any criminal charges. The jurisprudence of the European Court of Human Rights[45] has defined the right to a judge as the right to access an independent and impartial judge, who can decide the cause. According to the European Court of Human Rights, everyone has the right to have their case examined by a judge who can decide. The judge must enjoy a power of full jurisdiction, which consists in the possibility to annul the decision of the lower organ in every respect[46].Impartiality is defined by the court as a jurisdiction which has the status of a third with respect to that which adopted the contested decision[47].Other fundamental principles are the adversarial principle, the right not to speak and not to contribute to one's own indictment. In the tax area, the right in question implies that the tax payer does not suffer the burden of proof if he is accused of tax fraud or is obliged to cooperate in ascertaining the facts that have been attributed to him[48]. Recall that in the tax field, the jurisprudence of the European Court of Human Rights states that tax proceedings are not attributable to the concept of civil rights and obligations, even if the disputed tax provisions have important repercussions on property rights. Mr. Ferrazzini[49] had requested a reduction in taxes applicable in Italy to the conferment to a company of some properties, by reason of their agritourism destination. He had complained that the dispute had exceeded a reasonable duration. However, the Court found that this controversy could not enjoy the protection applicable to civil cases, given the persistent public nature of the relationship between the State and the taxpayer, unlike what happens, for example, with regard to social security. In this way, the interests and the compensation payments on taxes and taxes due to the financial administration fall within the scope of public law.

[43] Europena Court of Human RightsCorte Europea Diritti dell'Uomo, 1 October 1965, n. 21457/64, in Raccolta n. 18.
[44] L. PARTOUCHE, The Right to a Fair Trial: the French Civil Supreme Court Reduces its Scope of Application to Tax Matters, Intertax 2005.
[45] Corte Europea Diritti dell'Uomo, 21 February 1975, Golder c. Regno Unito.
[46] A. DI PIETRO, Per una costituzione fiscale europea, cit., p. 250 ss.
[47] Corte di giustizia dell'Unione europea, 30 marzo 1993, n. 24, in Raccolta 1993, I, p. 1277.
[48] T. AFSCHRIFT, Traité de la preuve en droit fiscal, Bruxelles, 1998, p. 503 e ss.
[49] Corte Europea Diritti dell'Uomo, 12 luglio 2011, n. 44759, in Raccolta VII-327.

BIBLIOGRAPHY

TESAURO, F. - *Istituzioni di diritto tributario. Parte speciale*, Padova, 2012

MARONGIU, G - MARCHESELLI A. - *Lezioni di diritto tributario, Terza edizione*, Torino, 2009

FALSITTA, G. - *Manuale di diritto tributario. Parte speciale*, Padova, 2010

MELIS, G. - *Il trasferimento della residenza fiscale nell'imposizione sui redditi*, Roma, 2008

GANGI, P, M. - *Riflessioni sulla Convenzione Europea*, Bruxelles, 2003

TESAURO, F. - *Diritto comunitario*, Padova, 1995

MARESCA, M. - *Le tasse di effetto equivalente*, Padova, 1984

EECKHOUT, P. - *The EU Charter of Fundamental Rights and the Federal Question*, in *Common Market Law Review*, 2002

TINELLI, G. - *Manuale di diritto Tributario. I principi generali*, Padova, 2016

DONATI, A. - *Partite IVA e nuovo regime forfettario*, Fisco e Tasse, 2017

UCKMAR, V., CORASANITI, G., DE' CAPITANI DI VIMERCATE, P., CORRADO OLIVA, C. - *Diritto Tributario Internazionale*, Padova, 2012

DI PIETRO, A. - *Per una Costituzione fiscale europea*, Padova, 2008

MELIS, G. - *Lezioni di diritto tributario*, Torino, 2017

AMATUCCI, F. - *Il principio di non discriminazione fiscale*, Padova, 1998

EUCOTAX Wintercourse 2018

Edinburgh

University LUISS Guido Carli

Rome

Department of Law

Challenges to Tax Autonomy in an Era of Conflicting Political Goals

Tax autonomy and the administration of tax law

Enrica Core

TABLE OF CONTENTS

1. Introduction.

This paper aims at providing a global picture of the stage of the Italian legislation concerning the important and complex discipline of the exchange of information, as provided both at international and European level.

Such paper is going to have its grounds on six different, yet linked, main parts.

In the first part, in particular, it will examine the relation between international and European legislation and the Italian legal system with a specific focus on the general manner in which such “foreign” legislation is implemented in the domestic legal order.

In its second part, instead, the paper will describe the national legislation on exchange of information in response to the legal framework outlined at International level, mainly, by the article 26 of the OECD Model and at European level by the Directive 2011/16/EU, as well as the implementation of the new international standard concerning the automatic exchange of information. More specifically, regard to discipline of the exchange of information, an important emphasis will be provided on the important ruling of the Court of Justice on the related to the exchange of information and the protection of taxpayer’s right and their effect in the domestic legal system.

In the third and fourth part, in a nutshell, the paper will outline the implementation of Foreign Account Tax Compliance Act (FATCA) and of the Common Reporting Standard (CRS).

The new possibilities offered by the exchange of information have led to a significant changes also with regard to the transfer pricing. Therefore, the fifth part will focus, on one hand, on the Italian transfer princing policy as the result of the relevant and recent reform introduced by the national legislator which have allowed a stronger alignment of the domestic regulation with the OECD guidelines on such matter and, on the other hand, on the national implementation of the Country by Country Reporting (CbCR).

Finally, in the last part this paper will show also the implementation of the new provisions on mutual assistance in the tax collection, which have been adopted at European level through Directive 2010/24/EU and its coordination with the national legislation on tax collection phase.

2.The implementation of international and European law in the Italian tax system.

2.1. The traditional dichotomy between the theories of monism and dualism.

In general, the problem of the relation between international and domestic law arose in the 19th century due to the changes in the function and character of international law. In particular, as well known, for many years two main theoretical and competing conceptions were advanced purporting to show the true inwardness of the occurring changes: monism and dualism.

As regard the dualism prospective, Heinrich Triepel and Dionisio Anzilotti are the leading exponents of the dualistic construction. Triepel treats the systems of state law and international law as entirely distinct in nature ([1]). He contends first that they differ in the particular social relations they govern; State law, indeed, deals with individuals, while international law is based on the law-making "agreement" (*Vereinbarung*) and on the common will of the States parties to the "agreement" ([2]). Secondly, he argues, their juridical origins are different; the source of domestic law is the will of the state itself, while the source of international law is the common will of states (*Gemeinwille*). This concept comes from the political conviction that a State is an independent self-sufficient entity. In this respect, the State can become bound by an international law only by its own will and finds the basis of the obligatory force of the international law in the common will of the States which, by means of "agreement", constitutes the common will resulting from a combination of wills. Hence, although the will of States is essential for the creation of a common will, it is the latter, and not the will of the individual States, which is the source of international obligations ([3]).

---

[1] H. TRIEPEL, *Völhrrecht und Landedrecht,* Leipzig: C.L. Hirschfeld, 1899, repr. Aalen: Sicentia, 1958; *Les rapports entre le droit interne et le droit international*, *Recueil des cours*, 1923, pp. 73-121.

[2] For an exposition and criticism of Triepel's theory see G. JELLINEK, *Allgemeine Staatslehre*; VERDROSS, *Verfassung der Völkerrechtsgemeinschaft*, 1926, pp. 20-21 and in *Recueil des Cours*, 1927, pp. 275-2796.

[3] H. *KRABBE, Die Lehre von der* Rechtssouveränität, Groningen, 1906; Id. *The Modern Idea of the State*, trans. G. H. Sabine and W. J. Shepard, The Haugue, 1922; J. G. STARKE, *Monism and Dualism in the Theory of International Law*, *British Year Book of International Law*, 1936, p. 66-81 and was reprinted in J.G. Starke, *Studies in International Law*, London, 1965, p. 539, where he points out, referring to the position of Krebbe, that*"it is impossible for the will of the state to be the source of international law, since it presupposes a pre-exitent rule defining when its*

Anzilotti, on the contrary, goes a step further. He starts, as Triepel, from the proposition which the rules governing the relations of States are different form those governing the relations of persons within the State.

Within the State, in fact, the creation of legal rules is exclusively, or almost exclusively, left to organs exercising power over the people so that the legal rule appears as a command issuing from above, whereas the legal rule among States can not be anything else except agreements and promises between equals. In other words, according to Anzilotti, the establishment of a power over States would mean the end of international law ([4]).

The whole dualistic positions, hence, seems deny the juridicial nature of the international law by treating it as a kind of morality governing the relations between States and grounded only in their consent ([5]).

As regard to the monism theory, as well known, one of the leading adherent was Kelsen ([6]). For him two normative systems with binding in the same field must form part of the same order (unity of cognition) and, in the relation between international and domestic law, he was a strong supporter of the supremacy of international law. Indeed, there must be an international law which confers to the States the competence to enter into treaties with another State or to create customary law by acting in a certain way, being the domestic law unable to award any kind of competence to another State ([7]). In other words, monism has held that

---

expression subjects the state to international law. The position is essentially the same with a collective declaration of state wills, which equally does not obviate the necessity for norms of superior validity".

[4] D. ANZILOTTI, *Corso di diritto internazionale*, Rome, 1928, p. 51. In this respect, Anzilotti overcomes the Triepel's theory of the Vereinbarung and found the source of the international law in the rule pacta sunt servanda, conceived as a necessary a priori assumption of the international legal system which can not itself proved juridically. Within the State, in particular, the rule pacta sunt servanda is one of the rules of law sanctioned by the legal order; in international society it constitutes the highest, irreducible, final criterion.

[5]J. G. STARKE, *Studies in International Law, op. cit.*, p. 544.

[6]See H. KELSEN, *Les rapports de système. Entre le droiot interne et le droit international public, Recueil des Cours*, 1926, pp. 227-331.

[7] Kelsen, *Introduction to the Problem of the Legal theory, 1992, pp. 122-123.* In particular, here he pointed out which *"if states are coordinates of one another, equally ordered, the each state can impose obligations on , and grant rights to, only its own citizens. The competence of a state does not reach beyond the sphere of validity of the state legal system. And since the competence of one state and that of another cannot be added up like mathematical quantities, then – unless a higher-order system delegates appropriate powers – not even two states together are in a position to create norms that, like norms created by state treaty, are valid for the territory of both states".* In this respect, presuming two two different legal system which can call A and B, according to the

international law is supreme over domestic law and that hierarchic order constitutes a single, unified legal system ([8]).

However, we can observe that the contemporary practice does not conform clearly to either the monistic or the dualistic view ([9]).

Kelsen's theory, while state A can confer legal competence to the organs and citizens of A, as well as the state B, A can not confer such competence on B and B can not confer such competence on A. Hence, it is necessary a norm which is independent from A and B and confers the necessary competence on both A and B and it the norm of international law.

[8] See H. Kelsen, *Principles of International Law*, *op.cit*, p. 553, "*the international legal order is significant only as part of a universal legal order [...] the international legal order determines the territorial, personal, and temporal spheres of validity of the national legal orders, thus making possible the coexistence of a multitude of states. [...] The dualistic theorytaking into account the existence of numerous national legal orders - the pluralistic theory is in contradiction with the content of international law, since international law itself establishes a relation between its norms and the norms of the different national legal orders. The pluralistic theory contradicts positive law, provided that international law is considered to be a valid legal order[...].International law and national law can not be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space and at the same time. It is not logically possible to assume that simultaneously valid norms belong to different, mutually independent systems*"; G. SOELLE, *Precis de droit des gens*, I, 1932, pp. 32-33, "*Ainsi, la survenance de rapports d'exchange entre individus appartenant a des collectivitès politiques distinctes, crèe des callectivitès a des collectivitès politiques distinctes, rnouvelles secr6tant leur propre systsne juridique, lequel crrditionne ir facto les systimes juridiques peexistant. [...] C'est sur cette constatation de fait que se fonde de doct-rine juridique du monisme du de 1'unitè du droit intersocial et du Droit en general. Elle seule correspend a la realité des faits en meme temps qu'aux necessites logiques*".

[9] A. CASSESE, *International Law,* 2005, pp. 216-217, where he explained that, although dualism has been dominating for some time, it is nolonger valid in its entirety and some of Kelsen's ideas are coming to be accepted in the international community. Indeed, he pointed out that the international law "*no longer constitutes a different legal realm from the various municipal systems, but has a huge daily* direct *impact on these systems. It conditions their life in many areas and even contributes to shaping their internal functioning and operation. In addition, many international rules address themselves directly to individuals, without the intermediary of national legal systems: they impose obligations on them (this chiefly applies to rules on international crimes), or grant them rights (for instance the right to petition international bodies). Those obligations must be fulfilled, and the rights may be exercised, regardless of what national legal orders may provide. In short, in many respects individuals have become international legal subjects, associates associated to sovereign States".*

In this respect, it is worth also highlighting the much discussed decision by the European Court of Justice, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International*, where the central question was whether the European Council had the legal power or competence to enact a regulation that provided for the freezing of funds of people or organisations that were suspected of financing the activities of terror organisations, such as Al Qaeda, and, if so, whether the enactment of this regulation violated the human rights of the people involved. In this matter, on one hand, the Court of First Instance took the view which the norms of the UN Charter take priority both over the norms of the legal systems of the member states and over the norms of the EC Treaty and the European Charter of Human Rights. On the other hand, instead, the Court of Justice has held that the Council is under the duty of EU law to ensure that the regulation was in line with the fundamental European norms as well as the Court itself is duty-bound to review any proposed act of the different European institution according to the fundamentals norms of EU law.

This change is due to the fact that, during the years, there is much evidence that international law and national law, as with international and national aspects of life, are increasingly becoming more entangled: partly, because of the topics that they cover, partly due to the fact which treaties rely heavily on national law for their implementation and also the judicial decisions indicate an intensification in the relationship between international and national law ([10]).

As many scholars have noticed, in fact, the differences between legal system regarding the reception of international law are more nuanced in practice. It sufficiently noticed, according to a research has curried out, which most of the monistic countries (countries in which ratified treaties automatically become part of domestic law) requires legislative approval for ratification of some treaties and in the same manner, such requirements are less frequent in dualistic countries ([11]). Hence, this study suggests that the difference between the role of the legislature in monistic and dualistic system may be overstated.

2.2. The relationship between European and Italian law.

Clarified the overcoming of the traditional monistic and dualistic theories to explain the relation between international and domestic law, this paper is going to illustrate how the European and international legal systems are implemented, nowadays, in the Italian legal system.

In general, it may be observed that in the Italian legal system the acts of other jurisdictions are assuming increasing relevance in the field of tax law, contributing to the developments of the so-called "multiplication of sources" which implies the existence of a large quantity of legal acts that are competitive with the ordinary domestic law and belonging to different legal system.

Starting from the relationship between the European and national legal system, it is important to verify how the European acts enter in the national legal system and, then, how they shall coordinate with the internal law.

[10] See A. NOLKAEMPER, E. HEY, *Introduction Theme I: The Relationship between International Law and National Law*, Heinonline, 2001, p. 9.

[11] P. H. VERDEIR, M. VERSTEEG, *International Law in Domestic Legal System: an empirical perspective,* Am. Soc'y Int'l L. Proc., 2014, p. 379.

Regard to EU Treaty and its subsequent and amending acts, they enter in the national legal system according to the typical procedure provided by the Italian law for the international conventional law as it will be better explain below.
As far as the so-called secondary European legislation - such as regulations, directives and decisions - the implementation of this kind of European legislation may be of two different kinds: on one hand, it is automatically and, on the other hand, it is required an implementing internal legislative act to ensure the effective application of the European law in the domestic legal system ([12]).
Once the EU law is entered in the national legal system, the EU law must confront with the domestic law. In this regard, it is important to point out that before the

[12] In this respect, it is worth noting that the law-maker has introduced by the Law, 4 February 2005, No. 11 (so-called "Buttiglione Law") which replaced the Law, 9 March 1989, No. 86 (so-called "La Pergola"), the "Annual Community Law" which provided the necessary measures to implement European legislation and the decisions of the European Court of Justice. Nevertheless, in 2012, the Italian Parliament approved Law No. 234/2012 (General Norms on the Italian Participation in the Formation and Implementation of European Union Law and Policies') that integrally replaced the previous "Buttiglione Law".
At the basis of the reform there were two fundamental necessities. First, Italy needed to adapt its own legislation in light of the new Lisbon Treaty. Aiming to strengthen the democratic legitimacy of the European Union, such Treaty increased the role and powers of national parliaments in the EU decision-making process.
Second, the reform aimed to make the system of transposition and implementation of EU law more efficient, overtaking the rigid separation between the "ascending" and "descending" phase and, therefore, strengthening the link between the Government, the Parliament and the Regions.
With specific regards to the "descending phase", Law No. 234/2012 (see art. 29 (4) and art. 30 (2) of such law) divides the previous "Annual Comunitary Law" into two separate legislative instruments: the annual "European Law" ("legge europea") and "European Delegation Law" ("legge di delegazione europea"). The "European Delegation Law" - which is introduced by the Government by 28 February each year - provides for a parliamentary law of delegation to the Government to implement European directives. If necessary, a further law of delegation may be introduced by 31 July of each year. Meanwhile, the "Annual European Law" contains the amendments to current domestic laws which are necessary in consideration of pending infringement proceedings, rulings of the Court of Justice and the necessity to implement other EU acts 8See art. 29 (5) and art. 30 (3) of Law No. 234/2012). Unlike the "European Delegation Law", the "Annual European Law" does not have a predetermined timeline for submission and approval. Thus, the previous "Annual Community Law" was not only doubled, but also lightened, making transposition and implementation more timely and effective. See, in this regard, L. BARTOLUCCI, *Legge di delegazione e Legge europea: obiettivi e risultati di una prima volta*, Amministrazione in Cammino, 2014; M. ROSINI, *Legge di delegazione europea e Legge europea,* Napoli, 2017. For a more deep examination, see N. LUPO, G. PICCALILLI, *The Italian Parliament in the European Union*, Oregon, 2017, p. 62 ss. Furthermore, with a specific focus on the relationship between European law and national tax law, see G. MELIS, *Lezioni di diritto tributario*, Roma, 2017, p. 176.

Constitutional law on October 2001- which, as it will explain below, has amended the Fifth Title of the Constitution - there was no specific reference to the European Union and the interaction between the national and European legal system. Indeed, the limit on State sovereignty and the consequent application of EU law was rooted in the Article 11 of the Constitution which allowed for limitation of sovereignty within the scope of a legal system in order to ensure peace and equity among nations ([13]).

Hence, before the constitutional reform, the literature and Constitutional Court found in art. 11 of the Constitution - which, as already explained, admits the limitations of sovereignty - the basis on which Italy could join to the EU and elaborated a theory of so-called "counter -limit".

In particular, from the *Frontini* case ([14]) since 1984, the Constitutional Court has ruled that if national laws were in contrast to the European law they were considered unconstitutional for violation of art. 11 of the Constitution. This solution was founded on the ideas that - to not reduce the sovereignty of Parliament - the European law was not directly applicable. Therefore, the application of incompatible European law was possible only in case of the declaration of unconstitutionality of national law.

Nevertheless, because of the long time of the constitutional judgment, the European Court of Justice (ECJ), in the well known case law *Simmental* ([15]), regarding the compatibility with the European law of the prior constitutional judgment, has ruled the incompatibility with the European law of any solution which would hinder the immediate implementation by the national judge of the European law.

Finally, this approach was accepted also by Constitutional Court that with the *Granital* case ([16]) stated that when the national law is in contrast with the European law, the judge should apply European law, because in the fields

[13] According such art. 11 of the Constitution "*Italy repudiates war as an instrument offending the liberty of the people and as a means for setting international disputes; it agreed to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encouraged international organisations furthering such ends*".

[14] C. Cost. sent. 18 December 1973, n. 183.

[15] ECJ, 9 March 1978, C-106/77.

[16] C. Const. sent. 5 June 1984, n. 170.

reserved to latter, the European law is prevalent on an antecedent or successive national law. In other words, by overruling the interpretation of art. 11 of the Constitution, the Court argued that the European law prevails on the Italian law, not in terms of hierarchy of norms, which implies a problem of sovereignty, but in terms of attribution of competences. Therefore, in case of incompatibility between national and European law, the judge must unapplied the national provision. This means not the repeal of the national law but only a "retraction" of such law that, hence, in case of the abolition of European law it will be again applicable, as well as in the hypothesis that are not covered by the European legislation.

However, the art. 11 of the Constitution does not allow limitations to the sovereignty in any case. Such limitations, in fact, are not allowed - according to the approach of the Constitutional Court - when they are able to breach the fundamental principles of the constitutional order or the fundamental rights of the individuals (so-called "theory of counter-limits"). Indeed, in such hypothesis the Constitutional Court recognise to have the power to exercise the constitutional review of the European law inconsistent with the principles of the Constitution.

In this respect, by reference to the field of tax law, the Constitutional Court it is expressed about the compatibility of the European law with the art. 23 of the Constitution provides the principle of rule of law. In particular, the Court has ruled that, on one hand, the art. 11 of the Constitution legitimises a partial replacement of the European bodies to the national Chamber and, on the other hand, that such art. 23 of the Constitution shall not apply to European law which represents an independent legal system with. Hence, the art. 23 of the Constitution allows that the tax discipline was provided both with the national law or national acts which have the effect of law and the European law.

In this respect the only counter-limits in the field of tax law, according to the main doctrine, seems to be the principle of ability to pay provided by the art. 53 of the Constitution.

Finally, with the above mentioned constitutional reform, in 2001, the art. 117 (1) of the Constitution was amended and its new wording provides that "*legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations*".

It is necessary to highlight that the introduction of such new art. 117 (1) of the Constitution and the reference to constraints deriving from EU law do not, however, appear to have altered the situation. Specifically, art. 117, on one hand, does not directly establish the hierarchical supremacy of EU law or recognise any limitations on sovereignty in favour of EU law in addition to those derived from art. 11 of the Constitution and, on the other hand, does not appear to add anything further to the conclusion reached by constitutional court. Accordingly, European law may prevail over constitutional provision, except for those establishing the fundamental principles of the Italian legal system and human rights.

In this scenario a key role is played by the well known Italian *Taricco* case law, which seems to have definitly brought to the fore the issue of the interaction between European law and the fundamental principles of the italian constitutional order ([17]). Indeed, in this case law national court asked to the CJUE whether the rules provided by the Italian criminal code on statutory limitation were in accordance with the European law. The CJEU, consequently, after clarifying the interpretation of Article 325 TFEU ([18]), set out that a national provision on limitation periods for proceedings which, for reasons relating to the scheme of that provision has the effect in many cases of exempting from punishment the prepetrators of fraud in matters of VAT, is incompatible with the European

[17] CJUE, 8 September 2015, Case C-105/14. In particular, Mr. Taricco and other individuals had been placed under investigation by the Court of Cuneo over allegations they committed VAT frauds. The frauds occurred between 2005 and 2009. In the relevant criminal proceedings, the Judge for Preliminary Hearing, after a long investigation by the Public Prosecutor, had to determine whether there were grounds for committing the defendants to trial. Under the Italian Criminal Code, the limitation period for prosecuting tax fraud cases is quite narrow. According to the Judge for Preliminary Hearing of the Court of Cuneo, all the crimes would have been time-barred by 8 February 2018 at the latest, before a final judgment could be delivered. As a result, the defendants may most likely enjoy de facto impunity. In the view of the Court of Cuneo, by establishing a strict limitation period, Italy was in breach of the obligation under EU law to take measures to contrast illegal activities affecting the financial interest of the Union. Therefore, the Judge for Preliminary Hearing asked the CJEU whether such a limitation was compatible with EU law.

[18] In particular, according to the CJEU, the latter provision, on one hand "*obliged the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures*" while, on the other hand, "*obliges them to take the same measures to countewr fraud affecting the finncial interests of the European union as they take to counter fraud affecting the fiancial interests of the European Union as they take to counter fraud affecting their own interests*".

provision. Nevertheless, this judgment raised a wide range of uncertainity among scholars and specially courts, since such outcome would be in contrast with the principle of legality in criminal matter, enshrined in Article 25 of the Italian Constitution. This principle requires that choices concerning the regime of punishment must be made exclusively by the legislator, through the enactment of laws that are sufficiently precise and applicable to acts carried out after their entry into force.

A few days after the delivery of the judgment the national courts, indeed, instead of applying the solution formulated by the CJUE, stayed the proceedings to raise a question of consitutionality before the Constitutional Court, since the doubts concerned about the compatibility of the case-law established in *Taricco* with supreme principles of the Italian Constituion. Hence, the Court Constitutional, with the ordinance No. 24 of 2017, asked to the Court of Justice whether the decision took in *Taricco* case law requires that the national courts should apply the rule even where it conflicts with a supreme principle of the Italian legal system.

The Court of Justice with the so-called *Taricco bis* ([19]), consequently, change its direction by limiting the primacy of the European law. The European Court, in fact, set out that the disapplication of domestic law in favour of European law must take place respecting the fundamental rights, including the principle of legality which is also a fundamental principle in the European legal system. Furthermore, with specific regard to the provision on limitation periods, the European judge pointed out that this latter provision does not affect the scope of the European Union. Therefore, the European judge refers to the discretion of the national courts in the assessment concerning the subsistence of sufficiently precise requirement of the single law.

In other words, according to the European Court "*Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application*

[19] CJUE, 5 december 2017, C-42/17, *Taricco bis*.

of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed".

In conclusion, according to the national legislation and the national jurisprudence, there is a multilevel system where the ranking of legislative powers appears to be as follows: first, the principles and fundamental right established by the Constitution, which can abstractly be considered to be counter-limits; second, primary and secondary European law; third, other provisions of the Constitution; fourth and finally ordinary law provisions ([20]).

2.3. The international law and its implementation in the national legal system.

As for European law, also the relationship between international rules and domestic legislation must be analysed in two matters. First of all, it is necessary to identify how the Italian legal system conforms to international sources of law. Once the international course is in force in Italy, the focus of the attention must be moved to the hierarchy of sources.

Addressing the issue of how Italian law conforms to international rules, the domestic legal system adopts a formal approach in accordance to which international rules are external source, hence, they will be recognised as sources binding in Italy only if they are actually incorporated into Italian law by means of an internal Italian source. In other words, international rules become part of domestic legislation when a specific duly approved legislative act conforms domestic law to the country's obligations under international law.

[20] See F. GALLO, L. SALVINI, *The Italian Tax System: International and EU Obligations and the Realization of Fiscal Federalism,* Bulletin for International Taxation, 2010, p. 402.

In this respect, the Article 38 of the Statute of the International Court of Justice performs its function by applying: a) international conventions, whether general or particular, establishing rules expressly recognised by contesting States; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognised by civilised nations.

Regard to the customary law, it is regulated by Article 10 of the Constitution, which deals with both its incorporation into Italian law and its rank. Such Article provides that "*the Italian legal system shall conform with the generally recognised rules of international law"*. The general reference to the "*generally recognised rules of international law"* entails the incorporation of international custom as a whole. Consequently, international customary rules and general principles are automatically in force in Italy since it is in force in the international community.

Furthermore doctrine ([21]) and the Italian Constitutional Court ([22]) agree that Art. 10 of the Constitution ranks the international custom above domestic law.

As already mentioned, the same conclusion is worth for the general principles of law recognised by civilised nations. In fact, they are principles which are established and uniformly applied in most States, as well as recognised as binding so that they pose as a particular expression of the customs ([23]).

The other international source is represented by the international conventions ([24]).

---

[21] G.U. RESCIGNO, *Note per la costituzione di un nuovo sistema delle fonti*, Dir. pub., 2002, p. 781; B. CONFORTI, *Diritto internazionale,* Naples, 2003, p. 314; C. SACCHETTO, *Le fonti del diritto internazionale tributario*, Materiali di diritto tributario internazionale, C. SACCHETTO, L. ALEMANNO, Milan, 2002, p. 1; Id., *Le fonti del diritto internazionale,*V. UCKMAR, *Corso di diritto tributario internazionale*, Padua, 2002, p. 52.

[22] Constitutional Court Nos. 974 of 19 October 1988, 278 of 17 June 1992; 172 of 18 May 1999; 131 of 15 May 2001; 67 of 22 December 1961; 135 of 13 July 1963; 48 of 18 April 1967 and 69 of 8 March 1976.

[23] In the field of tax law, for instance, the Italian legal writers for long time wondered whether in the international legal system there was a general prohibition on double international taxation. The main approach affirmed the lack of this general principle because of the lack of allocation rules such as those are provided in the international tax conventions on income and capital.

[24] Usually the treaty making process in Italy requires three steps: negotiation, authentication and ratification. At the first stage, Italy is represented by a team delegated by the Ministry of Finance. A draft treaty must be approved by the legislative branch pursuant to a process called "parafatura" (i.e. authentication). According to Article 80 of the Constitution, besides, the obligation to respect treaties arises in Italy after acceptance and ratification by the two Chambers of the national parliament (Camera and Senato). Once the treaty has been authorised by the Parliament the entry

In general, for treaties there are three methods of implementation: ordinary procedure, automatic procedure and the so-called "order of execution".

In particular, according to the ordinary procedure, Italy introduces *ad hoc* legal provisions reproducing the text of a treaty that modify the internal legal system and these legal provisions are equivalent to ordinary law. According to the automatic procedure, instead, provisions of a treaty automatically become part of the domestic legal system pursuant to the principles of international law or international customary law. Finally, as far as the "order of execution", a legislative statute is used to signify execution of a treaty and to create a link between the internal legal system and the provisions of the treaty; this statute simply orders complete execution of a treaty ([25]).

The ordinary procedure is cumbersome for tax treaties, while the automatic procedure is not viable because the provisions of tax treaties also include rules that are not part of the generally recognised international law. Therefore, Italy's tax treaties are implemented through the order of execution.

2.3.1. The relationship between international conventions and national law.

For a long time the issue of whether an international tax treaty prevailed over domestic legislation was not specifically (and directly) addressed in the Italian Constitution.

This led to a debate among Italian writers with some opting for a strictly formal approach whereas others favour a more substantive approach ([26]).

Briefly, writers advocating a substantive approach put forward a range of arguments in support of the legal basis for affording treaties superior rank. First there was the traditional theory that support the superiority of international conventions over domestic law in accordance with the principle *pacta sunt*

in force of the international rules is submitted for ratification by the President of the Republic pursuant to Article 87 of the Constitution, which provides that "*the President shall [...] ratify international treaty which have, where required, been authorised by the Houses*". Such ratification has to be countersigned by both the proposing minister and by the President of the Council of Ministers, as stated by Article 89 of the Constitution.

[25] See E. BAISTROCCHI, A Global Analysis of Tax Treaty Disputes, Cambridge university Press, 2017.

[26] P. BRACCO, *Italy*, in G. MAISTO, *Tax Treaties and Domestic Law*, Vol. 2, Milan, 2006, p. 245 et seq.

servanda which is legal binding in the Italian legal system because of Art. 10 of the Constitution as already described above ([27]).

Nevertheless this approach was firmly criticised by the majority of legal writers and by also Italian Constitutional Court ([28]). Among writers there were those who affirmed that the breach of the principle *pacta sunt servanda* through treaty override actually represented only violation on an international level and not on the domestic one.

According to a second substantive approach, on the contrary, which found its basis in Conforti's argument, the superiority of treaties over domestic law lies in the speciality principle ([29]). In this respect, the international conventions duly incorporated in Italy are supported by a double legislative will: on one hand, the desire that certain relationships are regulated by the same rules governing them in the international context and, on the other hand, the desire to honour the international obligations undertaken with third countries. In other words, according to the speciality principle, treaty override is allowed when the subsequent law shows the State's intention to disregard the international obligations.

Beside the two theories mentioned above, there is a last further substantive approach which distinguishes between domestic tax law in force before the international rules and domestic tax law passed by the parliament after the entry into force of a tax treaty. In the former case, the subsequent incorporation of the treaty implies that the ruled therein must prevail over the domestic law in accordance with the usual criterion of speciality. In the latter case, the existence of a tax treaty in force in Italy implies international limits on the domestic legal system's power to override the treaty such that the treaty rules would prevail over

[27] P. BARILE, *Rapporti fra norme primarie e comunitarie e norme costituzionali e primarie italiane*, Comunità int., 1966, p. 14; R. QUADRI, *Diritto internazionale pubblico,* Naples, 1968, p. 64; G. BISCOTTINI, *L'adeguamento del diritto italiano alle norme internazionali*, Jus, 1951, p. 213; G. PAU, *Considerazioni sul valore dei trattati internazionali nell'ordinamento italiano,* Riv. dir. int., 1984, p. 741.

[28] See Constitutional Court Nos. 32 of 18 May 1960, 68 of 22 December 1961, 188 of 22 December 1980, 96 of 20 May 1982 and 323 of 18 May 1989. Among writers, see B. CONFORTI, *Diritto internazionale op.cit,* p. 318.

[29] B. CONFORTI, *La specialità dei trattati internazionali eseguiti nell'ordinamento interno*, in Studi in onore di Giorgio Balladore Pallieri, Milan, 1978, p. 187.

any subsequent inconsistent domestic tax rules regulating the same international issues ([30]).

Coming to the formalistic view on the ranking of treaties, it was founded on the lack of a constitutional provision regulating the conflict between treaties and domestic law. If the legislator had wanted to give a specific guarantee to international conventions, it would have expressly done so, as it did for some international conventions such as, for example, human rights treaties and the Lateran Pacts. In other words, this approach provided a strictly formal view considering that the lack of a specific constitutional provision was the evidence of the *ubi voluit dixit, ubi noluit tacuit* principle. Therefore, treaty override was entirely natural when a subsequent law contrasted with international obligation.

Among these different approaches, the Italian Constitutional Court tended to favour the formalistic view according to which international conventions had the same rank as domestic legislation since they were incorporated into the Italian law by an "ordinary" act of parliament ([31]).

After the constitutional reform of 2001 ([32]), the majority of the legal writers agreed that such reform has definitively resolved the debate on the rank of treaties by introducing into Art. 117 (1) of the Italian Constitution the duty to observe the constraints deriving from international obligations. According to the new wording of such article international conventions prevail over domestic law because of a specific constitutional guarantee ([33]).

---

[30] G.C. CROXATTO, *La imposizione delle imprese con attività internazionale*, Padua, 1965, p. 59 and Id., *Diritto internazionale tributario*, Dig. disc. privi. sez. comm., Turin, 1989, p. 646; R. PISANO, *Il rapporto tra norme interne, diritto convenzionale e diritto comunitario*, *Aspetti fiscali delle operazioni internazionali,* V. UCKMAR and C. GARBARINO, Milan, 1995, p. 420; A. FANTOZZI, *Diritto tributario*, Turin, 2003, p. 154.

[31] See Constitutional Court Nos. 188 of 20 December 1980; 73 of 22 March 2001; 10 of 12 January 1993.

[32] The Article 1 provides that "*according to Article 117(1) of the Constitution, the constraints on the legislative power of the State and the Regions are those deriving from the generally recognised rules of international law governed by Article 10 of the Constitution, international agreement on the limitation of sovereignty under Article 11 of the Constitution, Eu law and international conventions*".

[33] F. SORRENTINO, *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario,* speech at the Congress on *Regioni, diritto internazionale e diritto comunitario*, Genoa, 2002; A. D'ATENA, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea*, speech at the Congress on *Il nuovo titolo V della parte II della Costituzione - Primi problemi della sua attuazione,* Bologne, 2002.

Nonetheless, for some further authors the new wording of such art. 117 (1) of the Constitution is an "explosive innovation", whereas others consider the reference to international obligations as just a codification of a principle implicitly present in the Italian legal system anyway such as the *pacta sunt servanda* principle approach referred above. In other words the requirement of observance of international obligations set out in art. 117 (1) merely codifies the implicit rule contained in Art. 10 of the Constitution, which regulates the incorporation into Italian law and the rank of international customary law ([34]).

The Constitutional Court with two main judgments Nos. 348 and 349, 24 October 2007, contributed to solve the doctrinaire dispute on the role of international law in the Italian legal system after the constitutional reform. Indeed, in these cases the Court stated that the rule for European law of non application of domestic law in favour of supranational law cannot be applied with reference to international law. In fact, according to the Court, international treaties create obligations that the States must respect but do not build a new legal order. Therefore, the ordinary judges cannot decide not to apply national laws in contrast with them, but have the only option to submit a question of constitutionality to the Court because of the indirect violation of art. 117 of the Constitution. Specifically, the international law has to be considered such as an "interposed" rule between the law and the Constitution, because of art. 117 of the Constitution which provide that the Italian legal system should respect the international obligations.

Nevertheless, with specific regard to the decisions of the European Court of Human Rights it is worth noting that this general rule of the relations between international and domestic law is an exception. Indeed, according to a recent decision of the Italian Constitutional Court, No. 49 of 2015, national courts are obliged to comply with the ECHR ruling when it constitutes a settled case-law, whereas does not exist any sort of obligation when the decision of ECHR are not expressive of an established case-law.

[34] B. CONFORTI, *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali,* Foro it., 2002, p. 230.

2.3.2. The domestic tax law and tax treaty obligations.

Beside the constitutional provisions on the relationship between international conventions and domestic law, as just discussed in the previous paragraph, the issue of the rank of tax treaties is regulated also by Italian tax law.

On one hand, Article 75 of Presidential Decree No. 600 of 29 September 1973 provides that the application of Italian income tax legislation is subject to the provisions of tax treaties in force in Italy. Consequently, if a domestic provision contrasts with a tax treaty, the latter shall prevail. Some authors pointed out that such disposition is a pleonastic provision, because the issue related to the superior rank of tax treaties is, nowadays, resolved by constitutional means ([35]).

On the other hand, according to the Article 169 of the Italian Income Tax Code (Presidential Decree No. 917 of 22 December 1986, hereinafter the "ITC"), Italian income tax legislation prevails over tax treaties if it is more favourable for the taxpayer.

Italian scholars consider the "more favourable principle" as a pure consequence of the function of the tax treaties. According to the fact that they remove the obstacles that double taxation present to the development of economic relations between countries by distributing tax rights among the contracting States, they cannot impose a new or heavier tax burden to taxpayers in regard to the one regulated by domestic law ([36]).

Accordingly, the primacy of international law implies the application *tout court* of the treaty provision even if it worsens the situation resulting from the application of national law. In this sense, art. 169 of the ITC does not confirm a general principle of speciality, but moderates its effects by allowing the taxpayer to make a choice that is not open to question by the tax administration on its merits regarding the applicable provision. Art. 169 of ITC makes sense only if a customary principle of "non-aggravation" is recognised. Endorsing the main doctrine, it is a legislative provision that cannot, on its own, resolve the normative

---

[35] C. SACCHETTO, *Le fonti del diritto internazionale tributario op. cit.,* p. 54.

[36] C. SACCHETTO, *Le fonti del diritto internazionale tributario, op. cit.;* S. MAYR, *Se più favorevole si applica il principio del regime interno*, Cor. trib., 1989, p. 3115.

conflict at issue ([37]). Obviously, the existence of this principle must be coordinated with the existence of a specific international obligation which must be fulfilled to avoid the State's liability in the international context. From this perspective, art. 169 ITC can only result in reduction in the tax revenue for the Italian State.

2.3.3 "Treaty override" and the "evolutionary" interpretation.

In the framework of the relation between international and national tax legal system, it is worth also tackling a further relevant issue, such as the possibility of the tax treaty being "infringed" by means of a subsequent amendment to national regulations, where the subsequent national provision is not "more favourable", but "less favourable" than the international one.

In general, the treaty override's issue refers to the possibility of a domestic provision breaching the tax treaty. In fact, if the domestic regulation change, it is necessary to verify whether or not the change is *sic et simpliciter* an infringement of the tax treaty or if an "evolutionary" interpretation of the tax treaty ([38]).

The first signs to address such problem came from the Commentary of Art. 3 (2) of the OECD Model, which in 1992 version, provides for an evolutionary

[37] A. FEDELE, *Appunti delle lezioni di diritto tributario*, Turin, 2003, p. 86.

[38] As is generally known, Article 3 (3) (c) of the Vienna Convention one the Law of Treaties recognises the interpretative value of any relevant rule of international law applicable to relationships between the parties. This rule, hence, allows the adaption of the treaty to change in international provisions by recognising the importance of customary international law in addition to treaty provisions that bind the contracting States. The primary principle of international law is always that each word should be attributed the meaning it had when the convention was executed (the "principle of contemporaneity"). It is worth noting that the principle of contemporaneity does not necessarily require a static interpretation. In fact, the meaning of the word can evolve, provided that this is compatible with the intentions and expectations of the parties when they concluded the tax treaty.

The issue does not relate to an evolutionary interpretation, but to the amendments to the national legal system, which are notoriously frequent in the tax field. This issue typically arises in the context of Art. 3 (2) of the OECD Model. This provision allows for the domestic meaning to be given to a term not defined in the tax treaty. The question arises as to whether or not this refers to the domestic law in force when the tax treaty was concluded (so-called "static meaning") or the domestic law applicable when the tax treaty is enforced (so-called "ambulatory meaning").

interpretation, by referring to the need to refer to the domestic meaning of words when the tax treaty is applied ([39]).

Regarding to such "evolutionary" interpretation, first, it is worth noting that the taxpayer makes a choice on the basis of a certain law that is affected by legislative amendments. This implies that the meaning to refer to is the one existing at the time when taxable objects arise.

Second, "evolutionary" interpretation must be considered to be subject to the same limits regarding recourse to domestic law under the art. 3 (2) of the OECD Model, which makes it possible to apply the former provisions rather than subsequent legislation. Consequently, it is necessary to consider the relevance of amendments to domestic legislation that do not significantly affect the distribution of cross-border income as provided for by the tax treaty; otherwise international obligations would be breached.

In respect of the consequences of a treaty override, some commentators emphasise that conclusions regarding international tort in the international doctrine cannot be applied in respect of taxation ([40]). According to this view, it appears that, in tax treaties, there are no provisions that directly impose obligations on certain subjects (such as the state and taxpayers), but there is only a general obligation to comply with the tax treaty. Exceptions can only be found in respect of certain provisions, such as those dealing with the non discrimination and the exchange of information. In contrast, in other cases, the problem arises at the level of interpretation and coordination between the tax treaty and domestic legislation and does not directly affect a breach of obligations under a tax treaty.

This interpretation focuses on the dynamics of "treaty override". As the main doctrine pointed out ([41]), it has been noted that amendments to domestic legislation are not prohibited if they remain within the limits of the balance

---

[39] This approach resulted in an amendment to such article in the 1995 OECD Model which established that "*for the application of the Convention at any time by a Contracting State, expressions not defined therein have the meaning which is currently given to them by the regulations of the State*".

[40] See M. MELOT, *Territorialité et mondialité de l'impột,* Paris, 2004, p. 696; C. SACCHETTo and S. PLEBANI, *Compatibilità della legislazione CFC italiana con le norme convenzionali e con l'ordinamento comunitario,* Dir. prat. trib. int., 2002, p. 13.

[41] See L. SALVINI, F. GALLO, *The Italian Tax system op. cit.,* p. 410; G. MELIS, *Lezioni di diritto tributario op. cit.*, p. 198 and 199.

established by the tax treaty. The State can even modify a tax system by providing for an interpretative adjustment or, if necessary (eventually, if required by the counter-party) by treaty renegotiation. In any event, the consequence is not compensation for damages, but, simply, the interruption of the tax treaty's effects. With regard to the taxpayer, who is also an addressee of the tax treaty, this cannot prejudice the possibility of challenging the conflict between the domestic and international provision before national courts. In this regard, the mechanism established by the Constitutional Court in the already discussed decisions No. 348 and 349 of 2007, which provides for the possibility to resort to the incidental question of constitutionality whenever it appears that the conflict cannot be resolved by means of interpretation, applies not only in the even that the Italian legislator enact a (special) internal provision expressly in breach of an obligation deriving from a tax treaty, but also with regard to general provisions, since only the part of the internal provision that conflicts with the specific treaty to be enforced can be declared unconstitutional.

In conclusion, provided that tax treaties contain certain obligations with regard to certain States, the interpretation advanced by some authoritative commentators must be also considered ([42]). According to this interpretation, in the event of domestic legislation enacted after those implementing the tax treaty, the conflict may be resolved by the application of the principle of *lex specialis,* whilst the principle of the succession of laws over time may apply in respect of former provisions. In this regard, the question of constitutionality only arise when there is an express intention to derogate from international obligations. Consequently, the hierarchical equality of provisions implied by this kind of analysis appears to be fully compatible with the principles expressed by the Constitutional Court in Decisions No 348 and No. 349 of 2007.

[42] B. CONFORTI, *La Corte Costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione*, Giurisprudenza italiana, 2008, p. 565.

3. Exchange of information.

3.1. The role of the tax cooperation at the International and European level.

As well known, in the last decades the globalisation of economy, the growth of cross-border trades, the internationalisation of companies and financial services, the computerisation of banking and the increase of mobility opportunities for taxpayers have increased the chances for an international tax evasion and created new challenge for tax administrations all over the world. These phenomenon rendered unavoidable an always greater need for the exchange of tax information among tax authorities on two different levels: on the level of tax assessment and on the level of tax collection.

In particular, the history of the international exchange of information burned in the twenties and has quickly developed past decades together with the globalisation ([43]).

Indeed the globalisation era has not only a positive effects on the economic growth in the global market, but it also has a negative impact especially when companies shift their profit to tax haven countries through aggressive tax planning schemes.

In tackling those issues, especially in the most developed countries, with complex and expensive tax systems, the tendency of taxpayers to subtract tax income by placing it in a tax low States, has induced governments to point out the difficulties to fight these schemes of aggressive tax planning without the aid of information exchange involving the other competent authorities and, hence, to develop forms of coperation with other States which hold useful information for tax claims. Furthermore, the global crisis, which exploded since 2008 ([44]), has made international tax cooperation one of the most important issues, giving rise to new international and European instruments of regulation.

---

[43] It is worth remembering, in fact, which the firsts traces of exchange of information tools are in some Draft Conventions issued by the League of Nations in the twenties, but the central is found in the several Model Conventions and Commentaries issued by the Organisation for Economic Cooperation and Development (OECD) starting in the sixties.

[44] See J. WOUTERS-K. MEUWISSEN, *Global Tax governance: Work in Progress?,* EUI Working Papers RSCAS, Badia-Fiesolona, 2011, p. 59, where the authors propose to create a new institution such as an informal forum for coordination among countries that share similar interests to cooperate and reach understandings about necessary policy adaptations.

3.2. The powers and limits of the tax administrations under the International and European disciplines.

Before going to analyse how Italy has transposed the discipline of the exchange of information in its legal system and its related limits, it is necessary, briefly, to highlight the main characteristics of the international and European discipline.

In particular, the OECD initiative of developing a legal instrument to address tax avoidance and tax evasion evolved from the OECD Report "Harmful Tax Competition: An Emerging Global Issue" published in 1998.

In 2002, as a result of the Global Forum's work, the OECD published the Model Agreement on Exchange of Information on Tax Matters (TIEA Model), which was the first legal instrument that enabled cross-border exchange of information in tax matters. To keep momentum on its initiative, in 2005, the OECD incorporated its international standard in Article 26 OECD Model on Income and Capital (Model Convention) and, a year later, approved the modular OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes to assist officials dealing with the exchange of information.

Such Article 26 of the OECD Model ([45]) covers exchange of information irrespective residence or nationality and taxes of every kind. When exchange of information takes place, some conditions should be verified. Firstly, it is mandatory to fulfil the *foreseeably relevant* standard for the correct application of a tax convention as well as of the administration and the enforcement of domestic laws of the contracting States. In particular, according to the Commentary to the OECD Model, the term *foreseeable relevant* has to be interpreted in a manner in which the requested State has the possibility to review if the requested information is *relevant* for the carrying out the treaty or to the administration of the tax legislation of the requesting State ([46]). Secondly, this standard also

[45] For more details, see O.C. GÜNTHER, N. TÜCHLER (Eds), *Exchange of Information for Tax Purposes,* Wien, 2013,p. 75 ss.

[46] The text of Art. 26 of the OECD Model of 2003 contained the phrase *"the competent authorities of the contracting state shall such information as is necessary for carrying out the provisions of this Convention or of the domestic law [...]"*. The term *necessary* was not further defined in the OECD Model itself or in the accompanying Commentary. This carries the risk of different interpretation of such term. Indeed, it could be interpreted in a strict way, which would make it hard to demonstrate it in some cases. For instance *necessary* because the obtained information would lead to a different tax assessment or because an offence occurs and the extent of the offence

prohibits the so-called *fishing expeditions*. According to the view of the OECD ([47]), such *fishing expedition* are speculative requests that have no apparent nexus to an open inquiry or investigation. In order to demonstrate its relevance, it is required that the requesting State provides reasons for its request and also information related to the taxpayers involved in the investigation. The prohibition of *fishing expeditions* offers the requested state the opportunity to decline the requests that cannot be qualified as *relevant* ([48]). Indeed, as it was pointed out, allowing *fishing expeditions* would transfer all the investigation cost to the requested state without any form of restriction ([49]).

In addition to demonstrate the *foreseeable relevance* of the request of information, a requesting State must exhaust its internal procedures to obtain the requested information (so-called "subsidiarity principle"). It means, in other words, that before asking for international help, a requesting State has to use its own resources first. In this way, the requested State is not obliged to comply with a request of information which the requesting state could obtain by its own means.

Finally, Art. 26 of the OECD Model covers both the exchange of information upon request, automatically and spontaneously ([50]).

---

is being investigated, or *necessary* in car an additional assessment has already been issued in the requesting state and further data is required. See A. P. DOURADO*, Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or where the Truth* Lies, RSCAS, 2013, p.19; K. VOGEL, *Double Tax Conventions1406,* Dordrecht, 1997.

[47] See Update to Article 26 of the OECD Model Tax Convention and its commentary, 2012, paragraph 5.1 of the commentary.

[48] In the Article 5, paragraph 5 of the OECD Model Agreement on Exchange of Information on Tax Matters provides some details on how to avoid *fishing expeditions.* Indeed, according to such article, when making a request for information and to demonstrate the *foreseeable relevance* of the information to the request, the requesting state must provide: "*a) the identity of the person under examination or investigation; b) the tax purpose for which the information is sought; c) and a statement that the applicant party has pursues all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties"*.

[49] P. PISTONE, M. GRUBER*, Die Möglichkeiten der Verweigerung des Informationsaustausches nach Art. 26 OECD-MA, M.* LANG, J. SCHUCH, C. STARINGER, Internationale Amtshilfe in Steuersachen Linde*,*Wien, 2011, p. 89.

[50] In particular, the exchange of information upon request is the most popular type of request among states. A requesting state makes a formal and specific request for information to another state. The assumption is that the competent authorities of the requested state could carry out the request. It is important to mention that it is also assumed that the requesting state has exhausted the possibilities to obtain information on its own. In general, information is related to the examination of a taxpayer's liability for one or more specified tax years. With regard to the Automatic Exchange of Information, this type of information involves delivering information periodically (for instance when information about one or various categories of income having their source in one contracting state and received in the other contracting state is transmitted

Coming to the European discipline, instead, the tax cooperation is governed by the European Directives as well as by rulings. In particular, on 15 February 2011, the European Council adopted the new Council Directive on Administrative Cooperation in the Field of Taxation (Administrative Cooperation Directive or DAC 1[51]) which was recently amended by extending the cooperation between tax authorities to automatic exchange of financial account information (DAC 2 [52]).

In particular, in common with the international discipline, also the DAC 1 provides the exchange of information in the form of spontaneous, automatic and on request. These three forms of information exchange, in fact, conform with standards agreed by the tax administrations at international level, notably at the OECD. Nevertheless, it is important to highlight that the DAC 1, as recently amended by the DAC 2, provides for a more effective and efficient exchange of information between Member States, based on - as it will be explained below - the mandatory automatic exchange of information and the exchange of information on request with specific time limits to answer.

The scope of the DAC 1, according to the Article 2, encompasses all taxes of any kind with the exception of VAT, custom duties, excise duties and compulsory social contributions because those taxes are already covered by the Union legislation on administrative cooperation. According to Article 3, the personal scope of the directive by providing explicitly that the term person is defined in a

systematically to the other state. Finally, as regards to the spontaneous exchange of information, according to the commentary of the OECD Model on Article 26, paragraph 9c, on a periodical basis, contracting states exchange information which they consider to be of interest to the other state.

[51] Council Directive 2011/16/EU (DAC 1). Before the Administrative Cooperation Directive was adopted, the Exchange of Information Directive concerning Mutual Assistance (Council Directive 77/799/EU of 19 December) by the competent authorities in the Field of direct Taxation and taxation of insurance premiums was in force. Under the Exchange of Information Directive, Member States 'competent authorities were required to exchange any information, which appeared relevant for the correct assessment of taxes on income and on capital as covered by the directive. The exchange of Information Directive was amended several times. First, Council Directive 79/1070/99EEC extended the scope to excise duties and third Council Directive 2003/93/EC extended the scope to taxes on insurance premiums to better protect the financial interests of Member States and the neutrality of the internal market. Furthermore, Council Directive 2004/56/EC was enacted to speed up the flow if information between Member States' tax authorities to better coordinate they investigative action against cross-border tax fraud and to carry out more producers on each other's behalf. Finally, Council Directive 2004/1067/EC amended the original title and the revised content of the Exchange of Information Directive.

[52] Council Directive 2014/107/EU (DAC 2).

wide sense, namely by including not only individuals, but also legal entities, association of persons and any other legal arrangement of whatever nature and form, regardless of its legal personality, whether it owns or manages assets that are subject to any of the taxes covered by the procedure.

Furthermore, under article 1 of DAC 1, information has to be provided if it is *foreseeably relevant* to the requesting administration and the enforcement of Member States domestic tax laws ([53]).

In addition, the directive permits Member States to refuse to provide information in five particular situations, some of which are very similar to those covered by art. 26 (1) and (3) of the OECD Model. In particular, DAC 1 refers to: *i)* the principle of subsidiary ([54]); *ii)* the breach of the national legislations ([55]); *iii)* Most-Favored-Nation clause ([56]); *iv)* the principle of reciprocity ([57]); *v)* the principle of confidentiality ([58]).

[53] It is a similar wording which, as seen before, we find in the art. 26 of the OECD Mode, that implies an obligation to provide all the information that may be *foreseeably relevant* for the requesting state to assess a tax situation. That means that the widest possible exchange of information is intended, but unreasonable requests, such as *fishing expeditions*, are not permitted.

[54] The DAC 1, in fact, has adopted the principle of subsidiary contained in the art. 26 of the OECD Model, which set out that if the requesting state has not exhausted its own usual sources of information, the requested state has ground for refusing the information exchange. In particular, it will be the requesting state to give evidence of the investigation procedure in its country, but it is up to the requested State to decide whether this is enough or not based on the lack of harmonization by exhausting its own domestic sources. See N. AMUYR, *Der Umfang des Informationsaustausches nach Art. 26 OECD-MA,* Internationale Amtshilfe op. cit., p. 47.

[55] The art. 17 (2) of the DAC1 contains, in fact, the second ground for refusal. Member States are permitted to deny providing information if this would be contrary to their own legislation. This provision no longer covers bank secrecy as art. 18 explicitly excludes the possibility to decline to supply information solely because this information is held by a bank, other financial institutions, nominee, or person acting in an agency or a fiduciary capacity or because it relates to ownership interest in a person. In the previous system, indeed, some States such as Austria or Luxembourg benefited from the former regulation under the European directive, which allowed them to decline information requests regarding bank information.

[56] According to this principle, a Member State which has a wider cooperation relationship with a third country may not refuse to provide such a wider cooperation to another Member State wishing to have the same type of wider cooperation with that Member State. This provision, as explained by the doctrine, will be the key element for a major development in the framework of exchange of information in Europe (see A. MUÑOZ FORNER, *The Council Directive on Administrative Cooperation in the Field of Taxation (2001/16/EU)*, in *Exchange of Information op. cit.,* p. 273).

[57] Article 17 (3) of the Administrative Cooperation Directive. The principle of reciprocity, that can be found also in the article 26 of the OECD Model, states that if a requesting State is legally unable to provide information in a similar case or in an inverse situation, the requested Member States has no obligation to provide such information.

[58] Article 16 (1) of the Administrative Cooperation Directive in line with the Article 26 of the OECD Model. In the OECD Model Commentary on article 26, in particular, as it will be better

Information obtained under the European directive can only be shared with the persons directly involved in the assessment or the persons involved in judicial or administrative proceedings related to the tax assessment. The information exchanged can also be forwarded to other Member States and to third countries according to article 16 (3) and (4) of the DAC 1 if the information could be useful for the other states, but the requesting state has to ask the requested state for its permission.

One of the most important weaknesses of the Exchange of Information Directive was the lack of a prevision determining time limits for the exchange of information, which produced delays and inefficiencies. DAC 1 identifies three different time limits. Indeed, according to the art. 17 (1), the information has to be provided as soon as possible, within a time period of six months and the receipt of the request and also information about any deficiencies in the request needs to be confirmed by the requested State. The requested State has no more than six months after the receipt of the request to submit the information, but in any case it has to provide the information as quickly as possible. In case the requested authority already has the information in its hands, the information must be submitted within two months after the receipt of the request. Nevertheless, States can agree to different time limits. In case the requested State is not able to comply

explained, it is stated that also in the deliberation regarding the application of secrecy rules the contracting state should take into account this confidentiality rules. The information may also not be used for unauthorised purposes; thus, States need to address in advance the possible consequences that an exchange of information can produce to the taxpayer. According to the art. 16 (2) of the DAC 1, Member States can also use the information exchange for other purposes if such information is in line with the national laws of both Member States involved and if the authorities of the requested State give their permission. This enlargement clause is also contained in the art. 26(2) of OECD Model. For instance, if the receiving state requires the information to be used in an investigation (criminal) process exclusively dealing with money laundering, the use of the tax information to be used should be verified in both states and, additionally, an express authorisation of the supplying state is needed. If one of the conditions is not met, the disclosure for that new purpose is not allowed. Furthermore, the same article states that the information exchanged can also be used in connection with judicial and administrative proceedings that may include mutual assistance for the recovery of claims relating to taxes or the assessment and enforcement of compulsory social security contributions (see C. CHIRINOS SOTA, *Confidentiality Rules under Article 26 OECD Model,* eds O. CHRISTOPH GÜNTHER, N. TÜCHLER*, Exchange of information for tax purposes*, *op. cit.*, p. 106; A. MUÑOZ FRONER*, The Council Diurective on Administrative Cooperation in the field of taxation*, eds O. CHRISTOPH GÜNTHER, N. TÜCHLER*, Exchange of information for tax purposes cit.*, p. 2769.

within the deadline it is obliged to communicate the reason for the delay immediately, in this case within three months, and to inform about when it will be able to submit the information.
In conclusion, if it is clear that the European discipline is able to produce binding effects on the legal systems of the Member States, it is more difficult to support the same statement for the international discipline, which, as well known, requires the consent of the individual State. In this respect, on one hand, the challenge is to guarantee the need to respect the internal rules and procedures and, on the other hand, the need to follow up international commitment. In this respect, Italy assumed, as it will be seen, a propensity to encourage extensive form of cooperation with the other States.

3.3. The exchange of information according to the Italian system.

3.3.1. The implementation of the tax cooperation in Italy.

As already mentioned in the previous paragraph, Italy, as an OECD member, has developed a wide and effective exchange information system fully following the international standards of transparency in tax matters, building an extensive network of relationship with the Member States of the European Union and third countries ([59]). Italy is also a member of the *Global Forum on Transparency and Exchange of Information for Tax purposes* and a member of the *Peer Review Group of the Global Forum* in order to adapt the discipline of exchange of information to the new international standard ([60]).
Indeed, the Italian legal system has had a positive approach in the field of exchange of information for long.
In particular, the legal and regulatory Italian framework for transparency and exchange of information includes the large network of bilateral double taxation conventions (DTCs), as well as seven tax information exchange Agreements (TIEAs), based on, as already mentioned, the TIEA Model.

[59] OECD, *Countering Offshore tax Evasion. Some Questions and Answer on the Project*, p. 12.
[60] See the *Peer Review OECD*, 2011.

Actually, Italy has signed 103 double taxation conventions with countries all over the world, including developing countries and countries with economies "in transition".
Consequently, in response to such positive approach, with the Decree of the Ministry of Economic Affairs, 9 August 2016, Italy updated its own "white list", finally including traditional Tax Haven, such as Switzerland, the Cayman Islands, Hong Kong, Isle of Man, Jersey, Cook Islands and Gibraltar. To complete the view of instruments available for Italian tax authorities in order to fight international tax evasion it has to be mentioned also the *Common reporting standard* (CRS) and the implementation of the *Foreign Account Tax Compliance Act* (FATCA), as they will be explained below.
Moreover, Italy, as a member of the Council of Europe and OECD Convention on Mutual Assistance in Tax Matters ([61]) has ratified the Law of 10 February 2005, No. 19, as well as its recent amending protocol which entered in force on 1 June 2011. This protocol, which aims to adapt the Convention to international standards, with particular regard to bank secrecy, has been ratified in the Law 27 October 2011, No. 193.

[61] The Convention came into force in April 1995 after the ratification of some States (United States, Norway, Sweden, Finland and Denmark). Nevertheless, at the beginning this Convention had limit success. Later, due to the international crisis in 2008, OECD and Council of Europe, started understanding the relevance of this bilateral tool and they adopted an Amended Protocol of such Convention which was opened for the ratification in Paris on 27th May 2010. Such Protocol was immediately a huge success and, in fact, it came into force on 1 June 2011. As explained by Council of Europe "*this treaty allow the parties, the Member State of the Council and the Member countries of OECD, to develop, on common foundations and respecting the basic rights of taxpayers, extensive administrative cooperation covering all compulsory taxes, with the exception of customs duty. The types of assistance are varied, covering the exchange of information between Parties, simultaneous tax examinations and participation in tax examinations carried out in other countries, the recovery of taxes due in other Parties and notification of documents issued in other Parties. Moreover, any State wishing to accede to the Convention may tailor the extend of its obligations, by virtue of a detailed system of reservations expressly provided for in the text; it may restrict its participation to certain types of mutual assistance or to assistance in connection with certain taxes. This enhanced mutual assistance is intended to help combat tax evasion, and is accompanied by safeguards to protect tax-payers, whether individual or corporate, and national economies. Thus a party may refuse to supply information when this would mean divulging trade, industrial or professional secrets, or to provide assistance in connection with a tax which it regards as incompatible with the generally accepted principles of taxation. Moreover, application of the Convention may not restrict the rights and guarantees accorded to individuals by the law of the assisting State. There are strict rules covering the secrecy of information obtained in application of the text*".

As a member of the European Union, Italy must also allow procedures of exchange information with the other Member States according to the above discussed DAC 1. In particular, the national law maker has introduced a specific national provision in order to discipline the exchange of information between Member States in line with the standards imposed by the European directive. Such provision is Article 31-*bis* of the Presidential Decree No. 600 of 1973, introduced by Article 1 of the Legislative Decree No. 215 of 2005 ([62]).

According to such disposition, for the exchange of information revenue authorities apply the ordinary powers (with the related limits) granted for the domestic assessment of taxes provided by the articles 32 and 33 of the above mentioned President Decree No. 600/1973 for income taxes.

Information, specifically, could be already available in a database handled by tax authorities, or they can collect information from third person, public and private ([63]), in accordance to a detailed authorisation procedure provided by the legislator. The collection of information and documents, furthermore, can be performed by requesting taxpayers' collaboration through specific written questionnaires or directly listing their business premises or their private premises, obtaining before an authorisation from the judge.

3.3.2. The legal protection of taxpayers: right to be heard and right of defence.

Both European and international legislation on the exchange of information have no specific provisions governed by the relations between taxpayers and tax authorities, which are generally regulated by the domestic law mechanism and

[62] For a more estensive debate, see A. DI PIETRO, *La collaborazione comunitaria nell'accertamento*, in GLENDI-UCKMAR, *La concentrazione della riscossione nell'accertamento*, Milan, 2011, p. 642; moreover, see C. SACCHETTO, *L'evoluzione della cooperazione internazionale tra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche "incrociate" internazionali*, *Parte II: La collaborazione fiscale nell'ambito della Comunità Economica Europa,* BT, 1990, p. 563.

[63] It refers to all bodies and governmental departments, non commercial public bodies, insurance companies and institutions business companies and organisation engaged in the collection of credits and in payment.

procedures ([64]). Such legislation highlights a limited or a non-consideration of the legal position of the taxpayer in the procedures of the exchange of information between tax authorities. This situation gives rise to considerable concern not only in terms of the internal equilibrium in the relations between tax authorities and taxpayers, but also in a comparative perspective. It is well known, in fact, how national rules are non-consistent with each other and provide a different level of interference of administrative activity in the private sphere of taxpayers, depending on the approach that each State adopts in carrying out their activities ([65]).

Some guidelines on such matter, nevertheless, come from the European jurisprudence. Indeed, the right to be heard and the consequent need to ensure a legal protection of taxpayers during the exchange of information stage has been object of two relevant decisions of the European Court of Justice (ECJ).

In particular, in the *Sabou* case ([66]) the European court has negated the possibility by the taxpayer to interfere with the exchange of information of being heard and to oppose to such a request including any room for an adversarial procedure with the requested administration or judicial review of any kind. Indeed, on one hand, the right of defence is anyway protected in the subsequent phase of assessment, as provided according to the single national systems, and on the other hand, the Court considers that "*where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view*".

However, this position appears now to be recessive, surpassed as it is – at least in part – by the new *Berlioz* precedent ([67]). Indeed, in such case the ECJ recognised

---

64 L. DEL FEDERICO, *Scambio di informazioni fra autorità fiscali e tutela del contribuente: profili internazionalistici, comunitari ed interni*, Riv. dir. trib. int., 2010, p. 222.

65 See M. G. DE FLORA, *Protection of the Taxpayer in the Information Exchange Procedure*, Kluwer Law Online, 2017, p. 448.

66 ECJ, 22 Oct. 2013, C- 276/12, *Sabou.* Such case, in particular, concerned a tax assessment issued by the Czech tax authorities based on information obtained from other Member States (Spain, France, Uk). Sabou claimed that Czech tax authorities had illegally obtained information about him, as he was not informed of the request for assistance; and secondly, he was also not invited to take part in the examination of witness. For a more deep dissertation, see F. A. GARCIA PRATS, G. MELIS, *Exchange of Information and Taxpayers'right*, Dir. Proc. Trib,, 2015, p. 299.

67 ECJ, May 16th 2017, C-682/15, *Berlioz.* It refers to a tax administration of a State requested the tax office of the other about information on a specific taxpayer which were available to a legal entity resident in the latter Country. The requested administration forwarded the request to a company resident in tis territory which had the information available. This company refused to

that taxpayers has a sort of protection even during the exchange of information procedure: specifically, according such decision, there are rights and situations that must be weighted and compare with the demand for data coming from the requesting administration. Indeed, disproportionate or even redundant information collected would possibly lead to the taxpayer *profiling* which is prohibited by the same EU law and also by the recent regulation on Privacy protection 2016/679, art. 23 (1), let. e) which allows derogation to the privacy protection, but only in the respect of the principles of reasonableness, proportionality and the respect of democratic life. Taxation and financial interest of the State are considered, but only insofar their protection is consistent with these overarching principles.

Coming to the Italian prospective, Italy seems to not ensure the approach enshrined in the *Berlioz* case.

In Italy, indeed, the already mentioned art. 31-*bis,* D.P.R. n. 600/1973 does not consider the need to ensure any kind of protection of taxpayers involved in the exchange of information. Specifically, concerning the right to be heard, such provision does not enshrine any obligation for tax authorities to warn taxpayers about the activation of a procedure for mutual administrative assistance and the impending transmission of information requests, so as to avoid invalidating the international investigations or affecting the investigative secrecy inherent in the tax investigation. Consequently, if taxpayers are not aware of the request, they will have no right to intervene during such investigation phase.

Therefore, when the information is transmitted violating the expected requirements or not respecting the established procedural dispositions, a problem in the protection of the taxpayer arises. As such, it is necessary to verify if according to the domestic law the power of tax authorities is subject to any kind of limits.

Firstly, we have to observe that in the Italian legal system there is not a general right to be heard during the investigation's phase and the general approach of the

---

convey the information to the requested, administration arguing that they were irrelevant for tax purposes and also mentioning the confidentiality of them.

national courts is to partially implement the jurisprudence of the Court of Justice on such matter ([68]).

Indeed, according to a decision of the Italian Supreme Court ([69]) on the subject of "non-harmonised" taxes the obligation of the tax administration to enable the right to be heard, on pain of invalidity of the tax assessment, exists only in relation to the cases for which it is specifically enshrined by the law; while on the subject of "harmonised" tax, the breach of the right to be heard by the fiscal administrations provides the invalidity of the act if the taxpayer proves the reason that he could have argued, if the right to be heard had been promptly activated and taking into account of those reasons had not been purely specious.

In other words, only in the subject of "harmonised" taxes the need to ensure a legal protection of taxpayers is expected to be achieved with the provision and guarantee of a general right to be heard between the tax authorities and the taxpayer.

The tax investigation activity, secondly, can also produce a curtailment of fundamental rights. In such hypothesis, in Italy limits for the tax investigation activity, aimed to protect the individual fundamental freedoms, are governed, on one hand, by the law, on the other hand, they arise from a long debate.

Focusing on the latter debate, the main doctrine points out that, according to Article 97 of the Italian Constitution that provides the principle of impartiality and goodness of the administrative action, the tax administration must take into account the taxpayers' interest of not reducing their individual freedoms and, therefore, must ensure that the exercise of their own powers are in line with the principles of *proportionality* and *reasonableness* which, in this respect, can seriously undermine their legitimacy.

---

[68] As well known, according to the Court of Justice (18 December 2008, Case C-349/07, *Sopropeé*), the right to be heard is a general legal principle of the European Union, as a direct and immediate manifestation of the right of defence. See also Court of Justice, 3 July 2014, C- 129/13 *Kamino*, C-130/13 *Datema*.

[69] Court of Cassation, Joined Sections, sent. No. 24823 of 2015. It is worth noting that before this case law, the approach of the national Supreme Court was totally different. Indeed, previously the right to be heard was recognised a fundamental principle of the legal national system to ensure its application. The right to be heard was considered, in fact, an expression of the right of defence and of the right to a fair trial ensured by Article 41 of the Charter of Fundamental Rights of the European Union (Court of Cassation, No. 1405 of 2010; Joined Sections, Nos. 19667 and 19668 of 2014).

The *proportionality* means, in particular, that the power must be proportionate to the aim pursued. Conversely, *reasonableness* means that the exercise of the administrative power must be useful and not unreasonable ([70]).

According to a recent approach of the Supreme Court ([71]), in case of a breach of such limits, taxpayers are able to access only a "deferred" legal protection. It means that taxpayers can appeal against the violation of their rights only after the conclusion of the proceeding and the formalisation of the tax request by the prosecuting office. In other words, taxpayers may only submit an appeal against the breach of the mentioned limits through the appeal of the following tax assessment. Nevertheless, in order to not create a lack of legal protection, according to such jurisprudential approach, in the hypothesis in which the tax assessment is missing or it has not been challenged, taxpayers have the right to appeal before a civil court to obtain a legal protection ([72]).

The decision of Italian Supreme Court appears, furthermore, also in contrast with the well-known *Ravon* case ([73]) of the European Court of Human Rights (ECtHR), which has surprisingly been extended the safeguards of Article 6 of the European Convention of Huma Rights (ECHR) ([74]), which provides the right to a fair trial, also to tax matter.

---

[70] For example when the tax administrative acquires a completely useful document for the investigation and the acquisition such document breach the taxpayer's individual freedom. See, G. MELIS, *Lezioni di diritto tributario,* Rome, 2016, p. 295.

[71] See Cass. SS.UU. sent. No. 8587/2016.

[72] Nevertheless, it is worth noting that the previous jurisprudential approach, on the contrary, laid down the "unusable" of the information obtained in breach of constitutional rights and the invalidity of the subsequent tax assessment if it is not based on other relevance. In this respect, see Supreme Court sent. Nos. 6908/2011; 16570/2011; 17959/2010; 13319/2013; 11672/2013; 8505/2015; 8506/2015.

[73] ECtHR, 21 February 2008, *Ravon v. France*, Riv. dir. trib., 2008 with the note of S. MULEO, *L'applicazione dell'art. 6 CEDU anche all'istruttoria a seguito della sentenza 21 febbraio 2008 della Corte Europea dei diritti dell'uomo nel caso Ravon e altri c. Francia e le ricadute sullo schema processuale vigente;* I.d., *La Corte europea dei diritti dell'uomo apre alle questioni tributarie in tema di sindacabilità giurisdizionale delle indagini domiciliari*, Dial. trib., 2009, p. 381. See also A. MARCHESELLI, *Accessi, verifiche fiscali e giusto processo un importante sentenza della Corte europea dei diritti dell'uomo*, Riv. giur. trib., 2008, p. 743; P. BAKER, *Some recent decisions of the European Court of Human Rights*, Eur. Tax., 2009, p. 596; M. G. DE FLORA, *Protection of the taxpayer in the information exchange procedure*, Intertax, V. 45, p. 455.

[74] According such article "*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial*

As it is well known, in fact, the traditional approach of the ECHR considers the Convention not applicable to tax relationships since they are part of the power of the States to the Council of Europe ([75])

Moreover the Italian solution, as pointed out by the doctrine, is unsatisfactory having to consider that it could be always available form of direct and immediate protection of the individual freedoms in order to obtain the cessation of harmful activities at least in the "pathological" case of exchange of information illegally obtained abroad ([76]).

In this regard, an important issue was represented by the possible utilization of stolen bank data. The interpretation given by the Italian jurisprudence, in fact, also in such matter is very strict as well shown by the important cases concerning the utilization of so-called "list" of possible tax evaders who have bank account in tax-law countries, obtained by means of stealing from the banks. In this case law, indeed, Italy in line with many other jurisdiction permitted the use of the information collected cross border in violation of the law on the basic assumption that the need to address properly evasion had to be considered prevailing over traditional procedural rule.

The Italian Supreme Court observed that the rule of law in the collection of evidence has to be interpreted narrowly in case of criminal law, while in the field of tax law, the illegal collection of evidence does not necessarily reverberates on the possibility to use the latter in front of the Court.

Regarding the well-known *Falciani list* case, for example, the Supreme Court has ruled that an alleged illicit action by a disloyal employee has no relevance as to

in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

[75] An other main case law is the well know case Chamber v. Suisse (5 Apr. 2012, n. 11663/04) where the Court ruled on the taxpayer's right to remain silent during the investigation, because the right to silence is generally recognised by the international standard that lies at the basis of the notion of fair trial, according to art. 6 of the Convention.

[76] See. F. GALLO, *Verso un giusto processo tributario*, Rass. trib., 2003, p. 11; F. TESAURO, *Giusto processo tributario*, Rass. trib., 2006, p. 11; L. DEL FEDERICO, *I principi della Convezione Europea dei Diritti dell'Uomo in materia tributaria*, Riv. dir. gin. sc. fin., 2010, p. 218; E. LA SCALA - P. MASTELLONE*, New exchange of information versus tax solutions of equivalent effect*, EATLP Congress 2014, Instabul, 2014, p. 15.

whether the Italian tax authorities can utilize the data it has obtained. According to the judges, on one hand, there could be not assumed a right of secrecy over any Italian citizen's undeclared foreign bank account, on the other hand, the information could not be said to have been obtained in breach of any Italian laws or by any action of Italian tax authorities themselves ([77]). Nevertheless, such approach is clearly contrary to the human rights perspective. Indeed, the latter perspective considers the use of illicitly collected information an unjustified interference of State's activities in the sphere of the taxpayer's fundamental rights. The ECHR, in fact, in the decision *N.K.M. v. Hungary,* laid down that "*an interference [...] must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"* ([78]). Applying this principle to the practice of using data stolen abroad for the tax assessment, it is not possible to see a *fair balance* between the public interest to the collection of taxes and the taxpayers' rights ([79]).

Finally, beyond such specific case of a tax assessment issued on the basis of stolen bank data, it is worth identifying, in general, the validity of a tax assessment notice carried out in breach of individual fundamental freedoms.

In this respect, in Italy there are two main theorises concerning the consequences of a tax assessment provided on the basis of illegal tax investigations: on one hand, the theory of the "derivative invalidity" of the tax assessment, on the other

---

[77] See Court of Cassation, ord. Nos. 8605 and 8606, April 2015, where, ideed, the Suprem Court pointed out that data was legitimately acquired following a request to the French tax authorities within the exchange of information stipulations foreseen in European Union directives and the double taxation agreement between Italy and France. See also Court of Cassation, sent. no. 17503/2016; 9760/2015; 16950 and 16951/2015, where, furthermore, it has also been excluded that the use of illegally collected information may conflict with the principle of fair process, as laid down by art. 6 of the ECHR Convention.

[78] See ECHR, 14 May 2013,N.K.M. v. Hungary, par. 42.

[79] See G. MARINO, *Paradisi fiscali: dalle black list alle white list, dallo scambio di informazioni alla ricettazione di informazioni*, in G. FRANSONI (edited by), *Finanziaria 2008*, Quaderni della Rivista di Diritto Tributario, Milan, 2008, p. 213, where the author highlighted which this practice is considered a *receiving of stolen information* rather than a proper *exchange of information.* Furthermore, R. LUPI, *Delazioni e indagini fiscali,* in A. VIGNOLA-R. LUPI, *Sono utilizzabili le informazioni bancarie illecitamente sottratte da impiegati di istituti di credito esteri?*, Dial. Trib., 2011, p. 271, who remarks that stealing indiscriminately an entire bank account database containing information of thousand of clients, in violation of the principle of hearing both sides, appears an illicit on which tax authorities cannot rely on in their tax assessment activity not, *a fortiori*, in the trial before tax courts.

hand, the theory of "uselessness" of the collected evidences in breach of fundamental rights of taxpayers.
In particular, according to the theory of the "derivative invalidity" the faults in the investigation phase determine the invalidity of the subsequent act, while according to the thesis of the "uselessness" – nowadays prevailing among the main writers - the violation committed determines the non-usability of the evidence unlawfully obtained during the investigations.
Nevertheless, pursuant the main approach of the Italian Supreme Court ([80]) the "uselessness" is applied only when the faults in the investigation lead to the damage of a right directly protected by the Constitution, as inviolability of personal freedom or of the premises. In these cases, therefore, the information obtained in breach of rules governing investigative powers must be considered unusable as evidence of the following act of assessment unless it is justified by other information legitimately obtained.

3.3.3. The protection of privacy in the exchange of information.

Among the rights of the taxpayers which are likely to be affected by the exchange of information, there is the right to the protection of personal data and the right to a processing of these data to the extent constant with the purpose of their collection.
As already mentioned both the international and European level content consisted of references to the right to privacy and the principle of confidentiality. In general, according to this principle the authority receiving information from another Member State cannot communicate it to third parties, not involved in the proceedings for which the information was provided. Information received through the exchange of information should be accessible only to the persons directly involved in the tax proceeding.
In particular, the OECD Model refers to the right to confidentiality and to data protection. Indeed, the commentary laid down that if contracting States are required, according to their domestic law, to observe data protection laws, these

[80] See. Joined Chambers of the Court of Cassation, No. 8587 of 2016.

States can include provisions in their bilateral conventions concerning the protection of personal data exchange ([81]).

On the contrary, at the European level, article 16 (1) of DAC 1 states that "*information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it"*. Thus, the protection of confidentiality is left to the domestic law of the recipient country.

The Directive strengthened the position of the taxpayer, by declaring that Reporting financial Institutions and the competent authorities of each Member States shall be considered to be data controllers for the purposes of the Data Protection Directive ([82]). This means that the personal data need to be: *i)* processed fairly and lawfully; *ii)* collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; *iii)* adequate, relevant and not excessive in relation to the purposes from which they are collected and/or further processed; *iv)* accurate and, where necessary, kept up to date; *v)* finally, kept in a form which permits identification of data subjects for no longer than it is necessary for the purposes for which the data were collected or for which they are further processed.

The above mentioned instruments show that both the instruments at international level and European level do not provide any specific safeguards to protect the right to confidentiality and the right to privacy. These instruments have left, in fact, the protection of taxpayers' rights to the EU Data Protection Directive and to domestic legislations.

Recently, the European Court of Justice tried to read specific safeguards into more general norms providing the right to privacy.

[81] See Commentary to art. 26 (1) to OECD Model, par. 10.

[82] Such Directive provides that each Member States shall ensure that each Reporting Financial Institution under its jurisdiction informs each individual Reportable Person concerned that the information relating to him will be collected and transferred and shall ensure that the Reporting Financial Institution provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights.

One of the most important decision is the well-known *Bara* case ([83]) where the Court specified that tax data should be considered as personal data and should thus fall within the scope of the Data Protection Directive. Specifically, according to the European judges, the processing of personal data and the free movement of such data must be interpreted as precluding national measures which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing without the data subjects having been informed of that transfer or processing.
Coming to the national level, art. 31-*bis* (5) of D.p.r. No. 600/1973 states that the information is treated and kept secret within the above discussed limits and modalities provided by the Chapter IV (conditions governing administrative cooperation) and Chapter VI (relations with third countries) of the DAC 1.
Furthermore, according to the art. 31-*bis* (6) the communication by the national tax administration to the competent authorities of the other Member States of information necessary to allow the correct assessment of income and asset shall not be considered a violation of professional secrecy.
Indeed, in the already discussed *Falciani* case law, the Supreme Court states that the communication by the Revenue Agency to the competent authorities of other Member State of information necessary to allow the correct assessment of income and asset cannot be considered in breach of the professional secrecy.
Indeed, pursuant article 47 of the Legislative Decree No. 196/2003 (Personal Data Protection Code) the processing of personal data carried out by self-regulatory bodies, the provisions of the Code shall not apply if the processing is carried out for purpose of justice. Specifically, personal data shall be considered to be processed for purposes of justice if the processing is directly related to the judicial handling of matters and litigations, or if it produces direct effects on the functioning of the courts, as well as if it is related to auditing activities carried out in respect of judicial offices.
Furthermore, with specific regard to the bank secrecy, repealed by the Law No. 413 of 1991, it is worth noting that the Monti's Government imposed to every

[83] ECJ, 1 Oct. 2015, C-201/14, *Smaranda Bara*.

financial institutions the reporting of any information concerning the financial transactions necessary for tax assessment ([84]). The Italian Privacy Authority considered admissible such discipline, although it required more rigorous measures aimed at minimising the risk of abusive and improper access to such information by non-authorised parties ([85]). Consequently the Italian tax authorities issued the new Guidelines on 5 October 2012 on the practical management and storage of financial data, following already at the time the lines of the European Commission provided in its proposed amendment aimed at emphasise the automatic exchange of information as the only tool capable of identifying the beneficial owner for anti-money laundering purposes ([86]).

3.4. Mandatory Automatic Exchange of Information.

Mandatory Automatic Exchange of Information (AEoI) has become a globally accepted solution for countering international tax evasion on capital income. Originally, as already mentioned the DAC 1 provided for exchange of information on request, the competent authority of each Member State must exchange information automatically to the competent authority of any other Member State regarding taxable periods as from 1 January 2014. However, information had to be available in only five categories, such as employment income, director's fee, life insurance products, pensions as well as ownership of and income from immovable property.

The momentum provoked by the above already mentioned FATCA and by the Common Reporting Standard (CRS) developed in response to the G20 request and approved by the OECD Council on 15 July 2014 which - as it will explain better below - called the jurisdiction to obtain information from their financial institutions and automatically exchanged that information with other jurisdiction,

[84] See Law Decree 6 December 2011, No. 201, article 11 (2), converted in Law 22 December 2011, No. 214.

[85] See GARANTE PER LA PROTEZIONE DEI DATI PERSONALI, *ComunicazionE dei dati contabili all'anagrafe tributaria da parte di banche e operatori finanziari: parere dell'Agenzia delle entrate sulle modalità di trasmissione e di conservazione dei dati,* Administrative Provision No. 145 of 17 April 2012, p. 6.

[86] EUROPEAN COMMISSION, *Proposal for a Council directive amending Directive 2003/48/EC on taxation on savings income in the form of interest payments, COM, Brussels, 2008.*

has brought about the need for a new amendment of the DAC 1 earlier than envisaged. In fact, the European Commission has prepared a proposal for an amendment of the DAC 1 as regards mandatory AEoI in June 2013. One reason of the efforts to amend the DAC 1 was the most favoured nation clause provided in the Article 19 of such DAC 1, which have committed under bilateral or multilateral agreements with third States to a wider cooperation than under the DAC to provide the same level of cooperation also to the other EU Member States upon they request. Thus, in the attempt to achieve a similar scope of AEoI as that under FATCA, the Commission proposed expanding mandatory AEoI to the following types of income: dividends, capital gains, and any other income generated with respect to assets held in a financial account, and amounts with respect to which the financial institution is debtor, including any redemption payments and account balance ([87]). According to the Commission's proposal financial income had to be reported regardless whether it was "*for the direct or indirect benefit of a beneficial owner who is a natural person resident in that other Member State*". The Parliament accepted the proposal of the Commission to a large extent, but extended it in two important aspects: on one hand, introducing mandatory penalty regimes for breaches of the Directive and, on the other hand, a mandate to the EU Commission to negotiate agreements on AEoI with the third states on behalf of the EU ([88]). This proposal was however not adopted. Instead the ECOFIN Council has decided to go in different direction. Indeed, whereas the Commission's proposal was just extending AEoI to more categories, the Directive 2014/107/EU (DAC 2) which was adopted at the ECOFIN Meeting on 9 December 2014 builds up on the DAC 1 and the wording of the CRS in its text.

In particular, the DAC 2 maintained the main building blocks of the DAC 1, subjecting to amendments the Preamble, Article 8 of Chapter II "*Exchange of information*" and the article 25 of the Chapter VII "*General and Final Provisions*".

[87] European Commission, Proposal for a Council Directive amending Directive 2011/16/EU ad regards mandatory automatic exchange of information in the field of taxation 12 Jun. 2013.

[88] European Parliament, Report on the proposal for a Council directive amending Directive 2011/16/Eu as regards mandatory AEoI in the field of taxation, 12 Nov. 2013.

Therefore, the structure of the DAC 1 did not change by the amendment which it just included AEoI on financial information to bring the exchange of information in line with the new international standard.
As a result of such amendment, the scope of the AEoI within the Directive has been significantly extended. Indeed, a new paragraph 3a has been inserted in the art. 8 which provides for reciprocal automatic exchange of financial information by two reporting mechanism. In a first step, the Reporting Financial Institution must perform the due diligence rules set out in the Annex 1 to the Directive and report to the competent authority of the Member States in which they are located. In a second step, the information received by Reporting Financial Institution has to be exchanged by the Member States annually. For AEoI provided for in the DAC 2 the Member States should use a secure IT network (so-called CCN system) ([89]). Once the reportable accounts are identified, the reportable information should include: *i)* identification account in the itself and the financial institution where the account is held and *ii)* financial information depending on the type of the account. Indeed, in the case of a *Cash Value Insurance or Annuity Contract*, the Cash Value or surrender value is relevant. If the account was closed during the reporting period, the financial institution must only report that the account was closed. For *custodial accounts* the total gross amount of interest, dividends, other income generated with respect to the assets held in the account, and the total gross proceeds from the sale or redemption of financial assets paid or credited to the account, have to be reported. For *depositary account* the total gross amount of interest paid or credited to the account has to be reported. On *accounts which are neither custodial nor depositary* the total gross amount paid or credited to the account holder with respect to which the financial institution is the obligor or debtor has to be reported.
Concerning the Italian legislation to make real the international commitment, Italy has approved the Law 18 June 2015, No. 95, implemented then by the Decree 28 December 2015 (hereinafter just Decree), which as well as has ratified the

[89] See Art. 21 DAC 2. Furthermore, to have a more deep examination, see M. SOMARE, V. Wöhrer, *Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency*, Intertax, vol. 43, 2015, p. 808 ss.

agreement between the Government of the United States of America and Italy has also introduced provisions concerning the obligations to be fulfilled by Italian financial institutions to implement the AEoI set out by agreements concluded by Italy with the ggovernments of foreign countries according to the OECD standard and the DAC 2.

According to the art. 31-*bis* of D.p.r. No. 600/1973 and new discipline of the Law No. 95/2015 and the related Decree, the Italian competent authorities shall, respectively, on one hand, communicate automatically the information of one of the five categories as provided by art. 8 of the DAC and, on the other hand, also automatically communicate to a Member State information which concern income generated with respect to the assets held in a financial account as determined by art. 8 (3a) of DAC 2.

Indeed, art. 31-*bis* (2) states that in the context of assistance and cooperation in the exchange of information, the Revenue Agency acts in compliance with the terms set out by Articles 7, 8 and 10 of the DAC 1. Specifically, according the art. 8 (1) of the DAC 1 the competent authority of the Member States shall communicate to the competent authority of any other Member State, information regarding five specific categories of income and capital, such as: *i)* income for employment; *ii)* director's fee; *iii)* life insurance product not covered by other Union lega instruments on exchange of information and other similar instruments; *iv)* pensions; *v)* ownership of and income from immovable property.

With regard to the discipline provided by the Law No. 95/2015 and the related Decree, it is worth pointing out that the Decree enshrines that an account must be reported from the date on which is identified as such after the conclusion of the verification procedure and the relevant information must be sent to the Revenue Agency every year, in the year after the one which the information relates.

The explanatory memorandum of the Decree refers to the so-called *wider approach* for the participating jurisdictions. This kind of approach requires that whether at the end of the procedure of the due diligence the account will be identified as a foreign account, which shall not be reported, institutions can in any event use the overcome of such procedure to identify future clients. In other words, in the event that foreign jurisdiction will become a jurisdiction which must to be communicate, the financial institutions may consider acquitted the obligations of adequate verification for tax purposes to financial accounts affected by this change.

Regarding the due diligence procedure, in line with DAC 2, the Decree makes distinction between four different types of accounts: pre-existing individual account, new individual accounts, pre-exiting entity account and new entity accounts.

Regard to new accounts, the financial institutions have to obtain a self-certification from the account holder stating the residence(s) for tax purposes ([90]). If the account holder is an entity, the self-certification further has to include - if that information is not already available - whether it is a passive non-financial entity through an self-certification of the holder of the account. In this latter case, information on the controlling persons, including the tax residence has to be collected as well. This information may be obtained from the information collected through the money laundering procedures ([91]).

As far as pre-existing accounts it is typically more difficult to obtain new information from the account holder, therefore the requirements are less strict. For pre-existing individual accounts the financial institutions may rely on an indexes search to assume the tax residence of their customers. The elaboration of this search - including whether electronic record search is enough or whether also a paper record search is required - depends on the aggregate balance or value of the account ([92]). Indeed, no reviewing and reporting requirements exist with regard to pre-existing entity accounts with a balance that does not exceed the equivalent of USD 250,000 as of 21 December 2015.

However, the Reporting Financial Institution may choose to report either all pre-existing entity accounts or any clearly identified group of such accounts. In case an entity account has to be reviewed, the financial institution need to determine the residence of that entity and whether it is a passive non-financial entity and - if it is a passive non financial entity - their controlling person. If this information is

[90] See the Annex A, Section III, Decree 28 December 2015.
[91] See Annex A, Section V, Decree 28 December 2015.
[92] See Annex A, Section IV, Decree 28 December 2015.

not already available in the finical institution, a self-certification of the account holder has to be obtained.

Finally, concerning the type of information shall be transmitted, first of all, according to the article 3 of the Decree, it is necessary to report for each account the name, the address, the jurisdiction or jurisdictions of residence, the TIN (taxpayer identification number) or the TIN of each person object of communication; in the event that account holders are natural persons, it shall be reported also the date and place of birth of each persons. Whether the account holder is a non-financial passive entity, the Decree requires the need to identify the persons who exercise control.

For each reportable account, furthermore, is necessary to report the account number or, if absent, another sequence identifying the account relationship; the name and the fiscal code of the Italian financial institution obliged to comunicate; the balance or value of the account. Moreover, in the case of any custodial account or any depository account further information shall be provided: such as, for instance, as far as the former account (*i.e.* custodial) the Decree requires the total gross amount of interest and dividends, as well as the total gross amount of other income generated with respect to the assets held in the account and the total gross proceeds from the sale or redemption of financial assets paid or credited to such account; regard the depositary account, instead, the law maker requires also the gross amount of interest paid or credited to the account.

4. The Foreign Account Tax Compliance Act.

4.1. The implementation of FATCA in Italy.

As already highlighted, the recent financial crises and banking scandals in the world have started a new debate on effective measures against tax evasion and the issue is placed at very high level in the political agenda of various countries and international organisations. At the London Summit in 2009, the G20 leaders agreed to enhance cooperation for effective exchange of information and take effective actions against non-cooperating countries. In particular, three requirements were identified in order to qualify a jurisdiction as “cooperative”: *i)* commitment to adopt the OECD international standard on administrative co-operation; *ii)* signature of at least twelve treaties providing a specific exchange of information clause; *iii)* check on the effective implementation of the goals of transparency, exchange of information and antimony laundering through the internal legislation. The latter analysis is carried out through the so-called *peer review* process made by the OECD.

Since then, there has been an unprecedented move towards international exchange of information and transparency, together with improvements in the recovery of taxes in cross-border scenarios.

The United States has in parallel expanded the scope of its own information network and increased the compliance under its domestic law unilaterally by introducing provisions of the already mentioned FATCA ([93]).

It is likely to affect the development of transnational tax information networks and presents an administrative model that requires multinational corporations to internalise the costs of administration of tax information exchange ([94]).

FATCA requires foreign financial institutions (FFIs) to report to the Internal Revenue Service (IRS) information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

In particular, there are two different FATCA models.

According to the Model 1, non-US financial intermediaries have to sign up on the IRS' site to get the Global Intermediary Identification Number (GIIN) in order to be included in the list of financial institutions "FATCA compliant". In this case, the information exchange takes place under the intergovernmental agreement (IGA) between the united States and the States of residence of the financial intermediary, through the financial administration of the latter's state of residence.

Coming to the Model 2, it is adopted in the absence of an IGA and it provides, besides the restoration of the financial intermediary on the IRS website, that the

[93] It is worth noting that the United States was already heavily intervened with regard to financial intermediaries, also Italian, with the discipline known as *Qualified Intermediary* (IQ).

[94] STEWART, *Transnational Tax Information Exchange Networks: step towards a globalized, Legitimate Tax Administration*, World Tax Journal, 2012, p. 152.

exchange of information takes place directly between the foreign financial intermediary and the IRS, under a specific understanding concluded between the aforementioned subjects.

On 8 February 2012, Italy signed the *Joint Statement regarding an intergovernmental approach to improving international tax compliance and implementing FATCA* ([95]).

Italy has implemented the FATCA agreement with the Law No. 95/2015 and its documents annexed. Beside such Law, there are also the implementing provisions, such as the Decree of the Ministry of the Economy and Finance of 6 August 2015 - published on the official Gazette No. 187 of 13 August 2015 - and a provision of the Director of the Revenue Agency of 7 August 2015, which contains instructions for the fulfilment and transmission of data and the provisions of the Guarantor for Personal Data that identifies the necessary actions to protect and safeguard the privacy.

The intergovernmental agreement signed by the US and Italy substantially replicates the above discussed Model 1-IGA with some minor changes in Annex II with reference to certain Italian financial institutions exempt from reporting obligations as well as to some exempt products.

The most interest part of such agreement is represented by the sanctioning system as provided by the Italian legislation. In particular, sanctioning system put in place the Italian law for financial institutions that do not fulfil the communication obligations diverges significantly from that provided for by the US legislation and in particular by Section 1471 of the Internal Revenue Code (IRC), which provides that "*in the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b), the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment*".

In fact, the IGA and the implementing legislation provide that the competent authority to sanction is, first of all, the State where the financial institution is

[95] U.S. TREASURY DEPARTMENT, *Joint Statement regarding an intergovernmental approach to improving international tax compliance and implementing FATCA,* 8 February 2012, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Italy-1-10-2014.pdf

located; so that the provisions relating to sanctions must be those provided for by the legislation of the country where the financial institution is established. Only if this system of sanctions is ineffective, the provisions of Section 1471 of the IRC may be applied.
The IGA provides that, in the event of failure to notify by the Italian financial institutions, the IRS will notify this to the Revenue Agency. The latter will apply the Italian legislation to ensure which the Italian financial institution complies with the due diligence and reporting obligations envisaged by the Italian implementing legislation. Clearly, the Italian tax authority will be able to take legal action against the non-compliant Italian financial institutions even in the absence of any notification by the IRS ([96]).
The Italian law, therefore, provides for the application of a pecuniary administrative sanction to Italian financial institutions that do not acquire the information relating to their customers in order to be able to assess which financial accounts must be communicated and which are not considered US reportable account so that they are not subject to any review.
Indeed, Article 9 of the Law No. 95/2015 expressly refers to the sanction regime established by Article 10 (1-*bis*) of Legislative Decree No. 472 of 1997 and, consequently, breaches of due diligence and communication obligations will be punished with an administrative sanction between 2,000 and 21,000 Euro. Pursuant to the same provision, furthermore, the communication which has not been carried out within the prescribed period is considered omitted and if the transmission takes place within the following fifteen days the penalty is reduced by half.
In addition, art. 9 (3) of Law No. 95/2015 provides that in the event that the omitted or incomplete communication of the information mentioned above affects the application of the 30% withholding tax on US source payments paid to non-participating financial institutions, it will be applied a penalty of 100% of the withdrawal not made in respect of the intermediary required to fulfil such communication obligations. However, the latter penalty is not applied to financial

[96] See IGA Article 51.

institutions which according to the agreements with the US authorities, can be considered as "qualified" intermediaries ([97]).

According to the act of the Director of the Revenue Agency of 26 July 2016 it is possible distinguished two kind of errors: on one hand minor error and administrative ones, on the other hand, errors involving "*serious non conformity*".

The transmission of the corrective data by Financial Institution can take place following a communication received from the Financial Administration. In case of a minor error, the corrective data must be communicated by the Financial institution within 90 days; on the contrary if it is a serious non-conformity error, the correction can be transmitted within 16 months from the date of Financial administration's communication.

Furthermore, in the event of serious and systematic breaches by the Italian financial institutions ("serious non-compliance" to use the terminology of the IGA), if the system of penalties implemented and applied in Italy proves to be ineffective and if the non-compliance behaviour continue for more than 18 months from the notification by the IRS, United States will treat the Italian financial institution as a "non-participating" financial institution. This will imply its subjection to the 30 per cent withholding tax provided for in Section 1471 of the IRC.

5. Common Reporting Standard.

The United States is not the only country interested in pursuing foreign tax compliance involving overseas bank accounts, financial accounts and other incomes generating assets.

Indeed, like the FATCA agreements, the *Common Reporting Standard* (CRS) has been developed in response to the G20 request and released by the OECD Council on 15 July 2014. CRS is divided in three parts: the multilateral authority agreement on automatic exchange of financial account information, the common reporting standard (CRS) and the Commentary on the Agreement and the CRS. The Agreement was first signed by fifty-one countries on 29 October 2014. The group of this fifty-one countries, the so-called "early

[97] See art. 8 of the Law No. 95/2015.

adopters", will work towards having their first information exchanges by September 2017. The other countries are expected to exchange information by September 2018.

The CRS provides, as information must be reported, all types of investment income (including interest, dividends, income from certain insurance contracts and other similar types of income) and also account balances and sales proceeds from financial assets.

The automatic exchange of information is thus limited to financial information. Furthermore, not only banks and custodians will be required to report that information, but also other financial institutions such as brokers and certain collective investment vehicles. The reportable accounts include accounts held by individuals and entities, which include trusts and foundations, as the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.

The new global standard does not prevent the other types or categories of automatic exchange of information. It simply sets put a minimum standard for the information to be exchanged. States may choose to exchange information beyond the minimum standard sets out by the CRS Model.

In Italy, in particular, CRS was implemented by the already mentioned Law No. 95/2015 and followed by the Decree 28 December 2015.

According to such discipline, the Italian financial institutions that are required to communicate are: the banks, the centralised management companies of financial instruments referred to in Article 80 of the Legislative Decree of 24 February 1998, No. 58 (TUF); the company Poste italiane, limited to the activity carried out by the BancoPosta separate assets; real estate brokerage firms (SIM); asset management companies (SGR); insurance companies operating in Italy in the branches referred to the article 2, paragraph 1, of the Legislative Decree 7 September 2005, n. 209, as well as the holdings of these companies that meet the requirements in order to be considered an specified insurance company; the organisms of collective investment of savings that have the requirements to be considered investment entity; the fiduciary companies referred to the Article 199 of the TUF, as well as those pursuant to the Law No. 1966 of November 23

November 1939; e-money institutions and institutions of payment referred to Articles 114-*bis* and 114-*sexies* of the Legislative Decree, 1 September 1993, n. 385(TUB); special purpose vehicle of securization provided by the Law 30 April 1999, n. 130; trust which present the requirements of custodian institutions or entities investments managed by other institutions financial when the trust are resident in Italy or at least one of his trustees an Italian financial institution bound by the communication; the credit card issuers; the permanent establishment located in Italy of foreign financial institutions that carry out the same activities of the financial institutions obliged to the communication; finally, any other Italian financial institution which meets the requirements owned by custodial, depository institutions of investment entities and companies of specified insurance.

The financial institutions must correctly identify customers, both individuals and legal entities, that open relationship relevant to CRS purposes, by means of: *i)* identifying those having residence for tax purposes in an foreign jurisdiction; *ii)* exercise specific due diligence activities with reference to new customers who are recorded, in addition to current anti-money laundering and due diligence laws, also on the basis of a further certification of residence for tax purposes; *iii)* applying due diligence control to clients having assets equal to or higher than $ 1,000,000.00 (so called High Value Account); *iv)* contacting clients to confirm or disprove the evidences detected and state their potential residence for tax purposes in a foreign jurisdiction.

In general the following personal data must be disclosed: name and surname, jurisdiction of residence, tax code identifying the country where the person resides, date and place of birth.

The financial data that must be exchanged are the account number, the name and tax code of the financial institution that is obliged to send data and the balance or the value of the account as at December 31 2016.

Financial intermediaries will therefore be obliged to carry out and report on a type of tax due diligence on all accounts held by non-residents where the main duties consist of: a) verifying the truthfulness of the tax residence declared by the taxpayer who must show the residence certificates issued by the public institutions of the country in which he or she claims to be resident; b) the correct

identification of the "Account Holder" who is the actual beneficiary regardless of the person who has the powers to manage the use of the sums in the account.
The regulation provides that every year the actual account holder must be contacted at least once a year to verify the accuracy of the information required by the tax due diligence procedure.

6. Italian transfer pricing policy.

6.1. Italian discipline and corresponding adjustment.

The new possibilities offered by the exchange of information have led to significant changes with regard to the "Transfer Pricing". More specifically: *i)* in the OECD Model Convention (Art. 9, par. 2) the concept of "corresponding adjustment" has been included. It is an adjustment to the tax liability of the associated enterprise in a second jurisdiction made by the tax administration of that jurisdiction, corresponding to a primary adjustment made by the tax administration in a first tax jurisdiction, so that the allocation of profits by the two jurisdictions is consistent; *ii)* finally, the "Country by country reporting" (CbCR) legislation has been implemented. Now, the tax authorities may use the information provided even for the "transfer pricing" purposes.
Starting with the first matter, the domestic provision dealing with transfer pricing is Article 110 (7) ITC according to which income derived by a resident enterprise from transactions entered into with associated non-resident enterprises must be evaluated on the basis of the "normal value". Such normal value of goods transferred or services rendered or received is defined in Article 9 (3) of the ITC. According to this definition, the normal value is equal to the average price or consideration paid for goods or services of the same or similar kind, agreed in a free market and at the same level of commercialization, at the time and place in which the goods or serviced were purchased or performed, or, in their absence, at the closest time and place.
The jurisprudence of the Court of Cassation has constantly considered Italian transfer pricing legislation as an anti-avoidance measure, since aimed at preventing the transfer of profits within a group through the application of prices

lower or higher than the normal value, in order to remove them from Italian tax (98).

Consequently, provided the anti-avoidance nature of the transfer pricing legislation, the national courts held that, on one hand, the tax authorities had to describe and demonstrate the avoidance intent and the alleged manipulation or alteration of the traditional schemes that were not considered reasonable in standard market place; and, on the other hand, taxpayers had to prove the existence of alternative or concurrent valid economic reason to justify those scheme (99).

Nevertheless, with the most recent national cases law the national court change its approach, enshrining that the burden of evidence on the tax authorities is limited to the demonstration of the existence of the transactions between an associated enterprise and of the gap between prices applied and the normal value, without proving the avoidance function of the transactions. The taxpayer, on the other side, must prove every element that demonstrates that the transaction was an arm's length transaction (100).

Such transfer pricing discipline was recently reformed by the Law Decree No. 50 of 2017, converted into Law No. 96 of 2017, which amends some important aspects of the transfer price legislation: on one hand, it amends art. 110 (7) of the ITC and, on the other hand, it changes some procedural aspects to recognize the adjustments operated by foreign State.

This reform, in particular, replaces the reference to the "normal value" provided by the above mentioned art. 9 (3) of the ITC with the arm's length principle, in line with the approach adopted at OECD level.

The current new wording, in fact, states that the items of income arising from transactions entered into between associated enterprises (parent and subsidiary companies and companies under common control) shall be determined based on

---

[98] See Court of Cassation Nos. 24005/2013; 7493/2016, 6331/2016, 16399/2015, 15642/2015, 9709/2015, 13475/2014, 12502/2014, 22010/2013, 7716/2013, 7715/2013, 11949/2012.

[99] Court of Cassation Nos. 15642/2015, 20030/2010, 1465/2009, 22023/2006.

[100] Court of Cassation Decision Nos. 6331/2016; 7493/2016, 18392/2015, 16399/2015, 16398/2015, 15298/2015, 15282/2015, 15005/2015, 22010/2013.

the conditions and prices that would have been agreed, in comparable circumstances, between independent counter parties acting at arm's length.

In addition, as mentioned above, the new Law Decree has introduced new disposition, pursuant to which an Italian taxpayer is allowed to obtain a corresponding downward adjustment upon certain conditions.

In general, the topic referred to as "corresponding adjustments" covers a broad area of problems which arise if the transfer prices or allocations of profit adopted by an enterprise in its dealing with an associated enterprise in another country are not accepted by the tax authorities of one or other of the countries concerned. In thi case, indeed, to eliminate double taxation in transfer pricing cases, Article 9 (2) OECD requires a country to make adjustments to the transfer prices used to compute taxable income of their taxpayers if those prices have been adjusted by the other contracting state in accordance with the arm's length principle (101).

In other words, a corresponding adjustments is an adjustment to the tax liability of the related party enterprise in a second tax jurisdiction made by the tax administration of that second jurisdiction, corresponding to a primary adjustment made by the tax administration in the first tax jurisdiction (applying the primary adjustment) and so that the allocation of profit by the two jurisdictions is consistent.

Prior to the Law Decree, taxpayers where allowed to claim for a corresponding adjustment only if between Italy and the country of residence of the associated enterprise was concluded a mutual agreement procedure (MAP) under the arbitration convention or an applicable double tax treaty. Moreover, article 1(281) of Law No. 147 of 27 December 2013 provided an authentic interpretation according to which transfer pricing legislation applies also to the Italian regional tax on business activities.

---

[101] See J. A. BRIAN, *International Tax Primer,* The Netherlands, 2016, p. 107, where the author to better explained the functioning of the corresponding adjustments makes the following example: "assume, that a Country A adjusts the price at which ACo, a resident of Country A, sells its manufactured goods to its foreign affiliate, BCo, from 60 (the actual sales price) to 90 (the price that Country A considers that arm's length parties would have charged). Therefore, Country A will increase ACo's taxable income by 30. If Country B concurs with Country A's determination of the proper transfer price, it should allow BCo to increase its actual cost of acquiring the goods by 30 (60+30= 90) and reduce its taxable income accordingly, to 60".

The reform, on the contrary, has implemented the list of the cases in which the transfer price adjustments may be accepted by the Italian tax authorities.

Indeed, according to the new Article 31-*quarter* of Presidential Decree No. 600/1973 as provided by the art. 59 (2) of the Law Decree, lays down that reduction in taxable income are allowed only in the specific cases, such as: i) on the basis of mutual agreement procedures (MAPs) or the European Union Arbitration Convention (Directive 90/436/CEE of 23 July 1990); ii) after transfer pricing audits, carried out in the context of international cooperation procedures, whose finding are shared by all the acceding contracting states; iii) by filing a specific request of the taxpayer, when a definitive transfer pricing apward adjustment has been carried out, in compliance with the arm's length principle, by a foreign state with which Italy has concluded a bilateral tax agreement ensuring an appropriate exchange of information.

In this respect, it seems that the provision of two alternative procedures to the MAP, as illustrated in the technical report to the Law Decree, aims at reducing the overall number of friendly procedures and the timing of the investigation activities and, more in general, at improving the efficiency of the administrative activity.

Nowadays, taxpayers are waiting yet more specific instructions by the Italian Government to better set up terms and formal requirements for filing the application.

6.2. Country by Country Reporting.

Concerning the Country by Country Reporting (CbCR), in Italy, on 23 February 2017, the Italian Ministry of Economy and Finance released the Ministerial Decree (the Decree) with the implementation details of the CbCR process for Italian entities belonging to Multinational Enterprises (MNE) Groups, introduced by the 2016 Budget Law, No. 208 of 28 December 2015. In particular, the latter Law introduced a CbCR obligation for MNE Groups to submit an annual report indicating the amounts of revenue, profit before taxes, taxes paid and accrued, and other indicators of effective economic activities starting from the Fiscal Year (FY) commencing on 1 January 2016.

Under the Decree, a MNE Group is defined as a plurality (group) of enterprises, resident in different jurisdictions or having a permanent establishment in different jurisdictions, that are related through ownership/control and obliged to draft consolidated financial statements according to domestic accounting principles or that would be obliged if the shares of any enterprises were traded on a regulated market.

For CbCR purposes, the parent company of an MNE Group ("Parent") is the company that is obliged to draft consolidated financial statements according to its accounting principles and is not controlled, whether directly or indirectly, by other enterprises of the MNE Group.

Furthermore, always for CbCR purposes the entities that are considered to be MNE Group members are: i) any entity included in the consolidated financial reporting or that would have been included if the shares of such entity were traded on a public securities exchange; ii) any entity excluded from the consolidated financial reporting due to their size or materiality; iii) any permanent establishment (PE) of an entity that is a MNE Group member, if the PE prepares separate reporting for accounting, tax and management purposes.

According to the Decree, the entities that are obliged to file CbCR are: on one hand, the Italian resident parent of a multinational group that have consolidated revenues not lower than Euro 750 million (or a corresponding amount in the local foreign currency); and, on the other hand, the Italian subsidiaries of an MNE Group if the non-resident Parent is not obliged to file CbCR in its State of residence or there is no qualifying automatic exchange of information (AEoI) agreement for CbCR purposes between Italy and the residence State of the non-resident Parent or the Italian tax authorities notified the Italian resident subsidiary that the State of residence of the parent company suspended the AEoI or repeatedly omitted to transmit the CbCR files to the Italian tax authorities.

According to the Measure of the Director of the Revenue Agency issued on 28 November 2017, No. 275956, accompanied by a technical data-sheet, to implement the Decree, information must be provided in the form of three different tables.

The first table contains aggregate information of the jurisdictions in which the MNE Group entities are tax resident or, in the case of permanent establishments, the jurisdictions in which they are located. For each jurisdiction in which the MNE Group operates, the following details must be reported: the total revenue and the revenue from related parties and revenue from third parties; the profit (loss) before income tax; the income tax paid; the income tax for the current year; the stated capital; the accumulated earnings; the number of employees and tangible assets other than cash or cash equivalents.
Second table, contains a list of the MNE Group companies and permanent establishments for each jurisdiction in which the MNE Group operates, together with details on the core business activities of each of them.
Third table, finally, contains in addition to the name of the MNE Group, the relevant tax period, the source of the data and any further details or explanations deemed necessary or likely to facilitate understanding of the information provided in the CbC Report.
Obtained such information, the Italian Revenue Agency will leverage it to assess transfer pricing risks and other risks related to base erosion or profit shifting and for statistical analyses. The Decree clarifies also that transfer pricing adjustments cannot be made purely based on CbCR information. However, such information may give rise to further investigations on intercompany agreements or during tax audit, leading to potential adjustments to the taxable income.
As a general rule, the CbCR should cover fiscal years beginning on or after January 1, 2016 and the submission deadline should be within 12 months of the MNE Group's year-end. However, just for the first year, the report must be filed by 31 December 2017 if an MNE Group's tax year started on or after 1 January 2016 and ended before 31 December 2016. Nevertheless, on 11 December 2017 the Italian Revenue Agency issued the act No. 288555, in which it officially postponed the deadline for the first year of application (2016). Therefore, an MNE's group tax year started on or after 1 January 2016 and ended before 31 December 2016, the deadline for filing CbCR Report was 9 February 2018 (60 days after the date of the measure).

Besides, on 28 November 2017, the act of the Director of the Revenue Agency, No. 275956, have been recognized some essential guarantee rules regarding the information acquired by taxpayers and those that will be then communicated by the competent authorities of any other Member State of the European Union and of any other jurisdiction with which a qualifying agreement of the exchange of information is in force. In particular, according to the administrative measure, such information must be treated as secret in accordance with national legislation on privacy and data protection and are collected respecting the fundamental rights and freedoms of tax payers (102).

Finally, it is worth noting that a penalty regime was introduced in the budget Law and remains unchanged in the Decree. Indeed, failure to file a CbC Report or disclosure of incomplete or inaccurate information entails penalties from Euro 10.000 to Euro 50.000.

7. The tax collection phase.

7.1. Historical evolution of cooperation between States for tax collection in nutshell.

The discipline of tax collection assistance was affected by the different views developed on the concept of State sovereignty ([103]).

Indeed, the traditional conception of taxation as an expression of sovereign power rendered ineligible forms of collaboration for the collection of tax credits of another State, as, for instance, in the event that an assessment which became definitive in the latter could be satisfied by the execution on assets of the taxpayer who was in the territory of the first State ([104]).

---

[102] In particular, the Revenue Agency must guarantee a level of data protection no lower than that established pursuant to art. 22 of the Convention on Mutual Administrative Assistance in Tax Matters, by means of applying national legislation and, whether necessary, any safeguard clauses specified by the jurisdiction that provided the information, as required by the respective internal regulations.

[103] Court of Cassation, 28 April 2015, Nos. 8605 and 8606, with a note of S. MULEO, *Acquisizioni probatorie illegittime e vizi dell'atto: il caso della lista Falciani*, Rass. trib., 2016, p. 148.

[104] A similar form of assistance, in fact, would have entailed the activation of its administrative recovery procedures for the requested state, with the incurring of the relative costs and of no benefits, having to attribute to the requesting state the amount resulting from the activities

However, in recent years there has been an evolution that has led to an increase in the field of cooperation between the States with regard to the collection of tax credits. In this sense, the decision of Supreme Court of the United States was emblematic in the *Pasquantino* case ([105]), where the American judges admitted the collection of taxes in the United States and the subsequent attribution to Canada, considering that the revenue rule was unable to oppose that solution.

Nevertheless, the European Union represents an exception to this scenario, since from 1976 it provided a discipline for mutual assistance in the recovery of member States' credits, whose subjective and objective field of application has been progressively extended until the issuance of the commented Directive.

In particular, the new Directive No. 204/2010/EU (which repealed and replaced the previous Directive No. 2008/55/EC) made an important step by strengthening the role of mutual assistance for the recovery claims relating to taxes among Member States as a decisive factor for good functioning of the internal market and for ensuring fiscal neutrality, goals for which the previous discipline revealed itself to be unsatisfying.

7.2. The Italian implementation.

7.2.1 General principles.

Before going to explain the implementation of the aforementioned European directive, it is necessary to illustrate, shortly, the general national discipline of the tax collection phase.

Originally the collection phase, until recently, was entrusted to Equitalia, such publicly-owned company. Nevertheless, from the 1 July 2017, the tax collection phase is entrusted to a public economic entity, such as the Agency of Revenue – Collection.

Coming to the general discipline of tax collection, there are two different methods of collection: on one hand the "spontaneous" collection and, on the other hand,

---

performed. See, C. SACCHETTO, *Il principio della irrilevanza e della inapplicabilità delle leggi tributarie e degli atti d'imposizione di ordinamenti stranieri nella giurisprudenza degli Stati di common law e dell'Europa continentale*, Riv. dir. fin. e sc. Fin., 1976, p. 79.

[105] Decision 26 April 2005, *Pasquantino et al. V. United States.*

“no-compliance” collection. The different depends on whether or not it achieves a fulfilment of taxpayer.

Focusing on the “no-compliance” recovery, which is of greater interest for the purposes of this paper, it should be noted that it represents the main method of tax collection for income tax, IRAP and VAT.

Such method of collection, in particular, starts with the notification of the enforceable assessment and the registration on the tax roll.

Such tax roll, more specifically, is formed by the Revenue Agency and it indicates the taxpayer’s tax code, the type of the roll, the date on which the roll has become executive and the reference to any previous tax assessment or in general any tax claims.

With specific regard to the tax roll, the national legislation distinguishes between “ordinary” and “extraordinary” tax roll. Specifically, in the latter kind of tax roll (extraordinary), pursuant to article 11 (2) and (3) of the D.p.r. No. 600/1973, shall be entered the taxes, sanctions and interests for which there is a legitimate danger for the tax collection and they must contain a special motivation as provided by the article 7 of Law No. 212/2000 (Charter of Taxpayers’ Right).

This distinction based on the subjective conditions of the debtor is accompanied by another distinctive criterion based on the characteristics of the measure to which the collection relates and, in particular, on the definitive nature of the claim contained therein. These are the hypothesis of the “temporary” and “permanent” tax rolls. In particular, in “temporary” tax rolls, according to article 15 of D.p.r. No. 600/1973 shall be entered one-third of taxes assess on the basis of non definitive tax assessment.

Taxpayers, thus, become the addressees of the a tax demand and must pay the related amount. In the event that the taxpayer fails to pay the amounts to be collected, the collection agent will proceed with the enforced recovery procedures.

Coming to the Italian implementation of the above mentioned European directive, it was transposed by Legislative Decree 14 August 2012, No. 149 and Ministerial

Decree 28 February 2014 which provided the implementation of the articles 8 (3) and 9 (3) and (7) of the Legislative Decree ([106]).

According to the article 1, such Legislative Decree shall apply to claims relating to: a) all taxes and duties, of any kind, levied by a Member State or its territorial or administrative subdivisions, including the local authorities or on behalf of the Union; b) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with those actions; c) levies and other duties provided for under the common organization of the market for the sugar sector; d) administrative penalties, fines, fees and surcharges relating to the previous claims for which assistance may be requested, imposed by the administrative authorities that are competent to the assessment and collection of taxes or confirmed by administrative or judicial bodies at the request of those administrative or judicial bodies; e) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties; f) interests and costs relating to all the previous claims for which mutual assistance may be requested.

The national competent authority is the General Director of Finance. More specifically, the national authorities which have the power to make and receive a request for mutual assistance concerning credits referred to the Article 1 of European Directive (*i.e.* art. 1 (2) of Legislative Decree) are the central liaison offices of the: *i)* Revenue Agency for the taxes falling within its competence, pursuant Article 26 of the Legislative Decree No. 300 of 1999, such as all taxes revenue that are not assigned to the expertise of other agencies, independent State

[106] See. P. DE CAPITANI DI VIMERCATE, *La cooperazione internazionale in materia di accertamento e riscossione*, in AA. VV., *La concentrazione della riscossione nell'accertamento*, by C. GLENDI and V. UCKMAR, Padua, , 2011, p. 671; A. DI PIETRO*, La collaborazione comunitaria nell'accertamento e nella riscossione: la tutela del contribuente*, in AA. VV., *La concentrazione della riscossione nell'accertamento op. cit.*, p. 639; P. MASTELLONE, *L'attuazione della pretesa impositiva in territorio straniero*, in *Diritto tributario internazionale*, edite by R. CORDEIRO GUERRA*,* Padua, 2012, p. 271.

For a first statement concerned about the new Legislative Decree, see. A. TOMASSINI, *Le procedure di riscossione all'interno dell'Unione europea*, in Corr. trib. 2012, p. 3359; E. DELLA VALLE – E. D'ALFONSO*, La riscossione dei crediti tributari esteri e la riscossione all'estero*, in Corr. trib., 2011, p. 33.

administrations, other bodies and organs; *ii)* Custom agency for custom duties, internal taxation of international trade, excise duties on production and consumption, provided by Article 63 of already mentioned Legislative Decree No. 300/1999; *iii*) Territory Agency for the services related to land registry provided by Article 64 of the same Legislative Decree No. 300/1999; *iv)* finally, Department of Finance for the request of mutual assistance relating to the taxes provided by Presidential Decree, 30 January 2008, No. 43.

Such central liaison offices, in particular, provided to the applicant Member State any information which is *foreseeably relevant* ([107]) to the applicant authority in the recovery of its claims by gathering data according to the Presidential Decree, 29 September 1973, No. 605, which provides dispositions concerned about *Anagrafe tributaria*, fiscal code of taxpayers and the ordinary powers granted for the domestic assessment of taxes pursuant the already discussed art. 32 (1), no. 7, of the D.p.r No. 600/1973 for income taxes and art. 52 (2), No. 7, of the D.p.r., No. 633/1972 for VAT.

Specifically, according to the latter dispositions, Revenue Agencies may request, prior authorisation, to different entities and companies (such as, for instance, banks, insurance companies, company of investment and so on) data and documents relating to any relationships or operations as well as guarantees provided by third parties or financial players.

Nevertheless, the national requested authority shall not be obliged to supply information which would: *i)* disclose any commercial, industrial or professional secrets; *ii)* which it would not be able to obtain for the purpose of recovering similar claims arising in the national territory; *iii)* the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the national territory.

In those cases the central liaison offices shall inform the applicant authority of the grounds for refusing a requested for information.

With specific regard to the disclosure of secrets, in line with the already discussed national legislation, also in this matter the bank secrecy cannot represent an

[107] In this respect, the European Directive introduced the OECD standard information exchange on request, contained in the above discussed Art. 26 (1) OECD Model.

obstacle to the collection of information. In that regard, it is worth pointing out that, as already above mentioned, the Italian legal system is completely consistent with this disposition, due to the fact that the bank secrecy was already repealed by Article 18 of the Law No. 413 of 1991.

7.2.2. Assistance for notification documents.

Regard to the assistance for the notification of documents, notification measures are interested to help taxpayers to comply voluntary with their tax liabilities in the applicant State with the normal procedures for payment and collection in that State. Notification measures include all clauses aimed to facilitating the service of administrative documents issued by the applicant State in the requested State ([108]).

The Italian discipline provides that the applicant authority shall make a request of notification only when it is unable to notify in accordance with the rules governing the notification of the document concerned in the applicant Member State or when such notification would given rise to disproportionate difficulties.

In particular, according to the art. 7 (2) of the Legislative Decree, the request for notification must be accompanied by a standard form, provided by Commission implementing Regulation EU No. 1189/2014, describing the claim and details regarding the office where further information can be obtained.

At the request of the applicant authority, the requested authority must notify to the addressee all instrument and decisions, including those of a judicial nature that emanate from the Member State in which the applicant authority is situated and that relate to a claim or its recovery. The notification must be done in accordance with the Italian rules of law in force for the notification of similar instruments or decisions.

The liaison offices of the Department of Finance make use for the notifications received from the applicant authority of the national collection agents which carry out the activity of notification according to the provision of article 26 of the already mentioned Presidential Decree No. 602/1973.

---

[108] F. A GARCIA PRATS, *Mutual Assistance in collection of tax debts,* Intertax, vol. 30, 2002, p. 63.

More in general, such notifications are carried out by directly the national offices or organs according to the national legislation and if there is no provision, by registered mail or electronically.
Besides, according to the article 7 (5) of Legislative Decree, failure or late notification entails penalties from Euro 100 to Euro 1.000. Such penalty does not apply when the delivery of the documents that needed to be notified by the liaison offices has not taken place at least two months before the deadline provided for such notifications.

7.2.3. Assistance in recovery of claims.

Assistance in recovery claims are steps taken in lending administrative assistance in tax collection, as envisaged in the laws of the requested State in order to obtain effective satisfaction of the tax claim. They normally obtain effective satisfaction of coercive instruments on behalf of the other State – the applicant State – in recovering its previously assessed tax claims.
Article 8 of the Legislative Decree provides that the applicant authority may not make a request for recovery if and as long as the claim or the instrument permitting its enforcement in the applicant Member State are contested in that Member State, except in case the applicant authority asks the requested State to recover in any case the contested claim by a reasoned request.
Furthermore, before the applicant authority makes a request for recovery, appropriate recovery procedures available in the applicant Member State shall be applied except in the two following situations: on one hand, where it is obvious that there are no assets for recovery in the applicant Member State or that such procedures will not result in the payment in full of the claim and the applicant authority has specific information indicating that the person concerned has assets in the national territory; finally, on the other hand, where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty.
Any request for recovery shall be accompanied by an uniform instrument permitting enforcement in the requested Member State and constitute the sole basis for the recovery and precautionary measures taken in the requested Member

State. It must not be subject to any act of recognition, supplement or replacement by the national State. In particular, according to the European discipline, such instrument – which has to be fulfilled on the basis of the initial enforcement instrument issued by the applicant Member State – must contain the following information:

- information relevant to the identification of the initial instrument permitting the enforcement;
- name and other data relevant to the identification of the debtor;
- name address and other contact details regarding the office responsible for the assessment of the claim and the office where further information can be obtained.

In addition to the uniform instrument permitting enforcement, the request for recovery may be accompanied by other documents relating to the claim issued in the applicant Member State.

As soon as relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it must forward the information to the requested authority.

In this respect, the Legislative Decree provides an exemption to the national provisions related to the tax roll and the forced execution's discipline. Indeed, according the Decree, the collection agent by means of a registered mail sent to the address indicated by the competent liaison office, attaching the uniform instrument permitting enforcement, informs the debtor that he has assumed the amount for the recovery claims.

It should also be noted, moreover, that the discussing credits shall not benefit from the privileges accorded to similar claims arising in the national territory, unless otherwise agreed with the other Member State.

For the payment of the amount may be granted to the debtor deferments or installments within the limits and conditions set by the current national provisions.

7.2.4. Precautionary Measures.

As well known, precautionary measures should help to avoid situations where fraudsters organise insolvencies before an enforcement instrument is established and would presumably cover injunctions freezing bank accounts. In this respect exchange of information is vital before a request for precautionary measures can be taken since information will be needed about the status of the taxpayer, especially if there are bank accounts that can be subject to protective measures ([109]).

In this respect, according to the article 11 of the Legislative Decree, the liaison offices shall request precautionary measures pursuant article 22 of the Legislative Decree, 18 December 1997, No. 472 which provides mortgage and attachment order in case of a breach of tax rules.

Indeed, such precautionary measures in the requested State may be requested if the claim or instrument permitting enforcement is contested in the applicant State.

Such request, moreover, shall be accompanied by the title that legitimated the execution in the requesting State or by the document drown up for permitting precautionary measures in such requesting Member State which has directly effectiveness in the domestic legal system.

The request may be also accompanied by other documents relating to the claim issued in the applicant Member State.

Finally, any credit for which the request for precautionary measures has been filed is treated as a national credit, unless otherwise provided by the same Decree.

7.2.5. Periods of limitation.

In all requests for assistance (*i.e.* requests for information, notification, recovery and precautionary measures) the requested authority is not obliged to render assistance if the initial request applies to a claim more than five years old, counted

---

[109] See NEWEY, *Cross-border enforcement of tax liabilities: recent European legislation from UK perspective,* European taxation, 2004, p. 531.

from the due date of the claim in the applicant State to the date of the intial request for assistance ([110]).

Should the claim or the instrument be contested, the period is deemed to begin from the moment at which the applicant State establishes that the claim or the enforcement order permitting recovery may no longer be contested, instead in case of a payment extension or an installment payment has been granted, five years periods starts from the expiry date of the full payment.

In any case, the requested authority may not be obliged to grant assistance in respect of claims that are more than ten years old, dating from the due date of the claim in the applicant state.

7.2.6. De Minimis claims.

In line with the European directive, the Italian discipline provides a *minimum* threshold of Euro 1.500 for claims is imposed for which the request of assistance must not to be granted, under the Article 12 (3) of the Legislative Decree.

The objective of this rule is to focus on more substantial claims to limit the exponential growth of the number of assistance requests.

7.2.7. Disputes.

The European directive sets out also rules for appeal in respect of cross border enforcement of tax debts, dividing jurisdiction between the requesting state (for substantive tax law appeals) and the requested State (in relation to the enforcement itself) in consideration of the obvious significant complexity and difficulties for taxpayers in seeking to carry put appeals in multiple fora ([111]).

According to the national legislation, disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested State Member and disputes

---

[110] It is worth noting that as compared to the discipline under the previous Article 14 of the Directive 2008/55/EC, the date is counted from *"the moment the instrument permitting the recovery is established in accordance with the laws, regulations and administrative practices in force in the Member State in which the applicant authority ios situated to the date of the request".*

[111] See STEWART*, World Tax Journal*, 2012, p. 176.

concerning the validity of a notification made by a competent authority of the applicant Member State shall fall within the competence of the competent bodies of the applicant Member State.

As doctrine pointed out ([112]), in fact, the tax obligation to be levied in Italy has its origin abroad and it is therefore clear that the foreign State and its authorities respond of the existence and the amount of the tax (on the contrary, Italy will respond in the opposite case in which the credit originates in Italy and must be recovered abroad).

If in the course of the recovery procedure a dispute concerning the claim, the initial and uniform instrument permitting enforcement has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.

As soon as the liaison offices have received such information, either from the applicant authority or from the interested part, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise.

If the result of contestation is favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered together with any compensation due, in the requested State in accordance with the laws in force.

Finally, it is worth highlighting that could be hypothesis, more and more frequent, where the credit claimed in a State is a consequence of an assessment that generates international double taxation.

For instance, with regard to transfer pricing or permanent establishment, the tax payer could have concluded a MAP, or a friendly procedure aimed at approaching the tax administrations of different States in order to achieve a good assessment of the double taxation cases.

According to the Decree if a mutual agreement procedure has been initiated by the competent authorities of the applicant Member State or the requested Member

[112] See A. TOMASSINI, *Le procedure di riscossione all'interno dell'Unione Europea, op. cit.*

Sate, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the liaison offices shall suspend or stop the recovery measures until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency.

The forecast appears extremely opportune, given that the friendly procedure insists on the substantial claim. If the claim, in fact, is not certain because it is "suspended" between the sovereignties of two States, no recovery procedure can be initiated.

Bibliography

- A. CASSESE, *International Law,* 2005;
- A. D'ATENA, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea*, speech at the Congress on *Il nuovo titolo V della parte II della Costituzione - Primi problemi della sua attuazione,* Bologne, 2002;
- A. DI PIETRO, *La collaborazione comunitaria nell'accertamento*, in GLENDI-UCKMAR, *La concentrazione della riscossione nell'accertamento*, Milan, 2011;
- A. FANTOZZI, *Diritto tributario*, Turin, 2003;
- A. FEDELE, *Appunti delle lezioni di diritto tributario*, Turin, 2003;
- A. MARCHESELLI, *Accessi, verifiche fiscali e giusto processo un importante sentenza della Corte europea dei diritti dell'uomo*, Riv. giur. trib., 2008;
- A. NOLKAEMPER, E. HEY, *Introduction Theme I: The Relationship between International Law and National Law*, Heinonline, 2001;
- A. P. DOURADO*, Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or where the Truth* Lies, RSCAS, 2013;
- B. CONFORTI, *Diritto internazionale,* Naples, 2003;
- B. CONFORTI, *La Corte Costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione*, Giurisprudenza italiana, 2008;
- B. CONFORTI, *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali,* Foro it., 2002;
- C. SACCHETTO, *Le fonti del diritto internazionale tributario*, Materiali di diritto tributario internazionale, C. SACCHETTO, L. ALEMANNO, Milan, 2002;
- C. SACCHETTO, *Le fonti del diritto internazionale,*V. UCKMAR, *Corso di diritto tributario internazionale*, Padua, 2002;
- D. ANZILOTTI, *Corso di diritto internazionale*, Rome, 1928;
- E. BAISTROCCHI, A Global Analysis of Tax Treaty Disputes, Cambridge university Press, 2017;

- F. GALLO, L. SALVINI, *The Italian Tax System: International and EU Obligations and the Realization of Fiscal Federalism,* Bulletin for International Taxation, 2010;
- F. GALLO, *Verso un giusto processo tributario*, Rass. trib., 2003;
- F. A. GARCIA PRATS, G. MELIS, *Exchange of Information and Taxpayers'right*, Dir. Proc. Trib, 2015;
- F. SORRENTINO, *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario,* speech at the Congress on *Regioni, diritto internazionale e diritto comunitario*, Genoa, 2002;
- F. TESAURO, *Giusto processo tributario*, Rass. trib., 2006;
- G. BISCOTTINI, *L'adeguamento del diritto italiano alle norme internazionali*, Jus, 1951;
- G. JELLINEK, *Allgemeine Staatslehre*; VERDROSS, *Verfassung der Völkerrechtsgemeinschaft*, 1926 and in *Recueil des Cours*, 1927;
- G. MARINO, P*aradisi fiscali: dalle black list alle white list, dallo scambio di informazioni alla ricettazione di informazioni*, in G. FRANSONI (eidted by), *Finanziaria 2008*, Quaderni della Rivista di Diritto Tributario, Milan, 2008;
- G. MELIS, *Lezioni di diritto tributario*, Roma, 2017;
- G. PAU, *Considerazioni sul valore dei trattati internazionali nell'ordinamento italiano,* Riv. dir. int., 1984;
- G. SOELLE, *Precis de droit des gens*, I, 1932;
- G.C. CROXATTO *Diritto internazionale tributario*, Dig. disc. privi. sez. comm., Turin, 1989;
- G.C. CROXATTO, *La imposizione delle imprese con attività internazionale*, Padua, 1965;
- G.U. RESCIGNO, *Note per la costituzione di un nuovo sistema delle fonti*, Dir. pub., 2002;
- H. KELSEN, *Les rapports de système. Entre le droiot interne et le droit international public, Recueil des Cours*, 1926; *Introduction to the Problem of the Legal theory, 1992;*
- H. *KRABBE, Die Lehre von der* Rechtssouveränität, Groningen, 1906;

- H. *KRABBE, The Modern Idea of the State*, trans. G. H. Sabine and W. J. Shepard, The Haugue, 1922;
- H. TRIEPEL, *Völhrrecht und Landedrecht,* Leipzig: C.L. Hirschfeld, 1899, repr. Aalen: Sicentia, 1958; *Les rapports entre le droit interne et le droit international*, *Recueil des cours*, 1923;
- J. G. STARKE, *Monism and Dualism in the Theory of International Law*, *British Year Book of International Law*, 1936 and was reprinted in J.G. Starke, *Studies in International Law*, London, 1965;
- J. WOUTERS-K. MEUWISSEN, *Global Tax governance: Work in Progress?,* EUI Working Papers RSCAS, Badia-Fiesolona, 2011;
- K. VOGEL, *Double Tax Conventions1406,* Dordrecht, 1997;
- L. BARTOLUCCI, *Legge di delegazione e Legge europea: obiettivi e risultati di una prima volta*, Amministrazione in Cammino, 2014;
- L. DEL FEDERICO, *I principi della Convezione Europea dei Diritti dell'Uomo in materia tributaria*, Riv. dir. gin. sc. fin., 2010;
- L. DEL FEDERICO, *Scambio di informazioni fra autorità fiscali e tutela del contribuente: profili internazionalistici, comunitari ed interni*, Riv. dir. trib. int., 2010;
- M. G. DE FLORA, *Protection of the taxpayer in the information exchange procedure*, Intertax, V. 45;
- M. G. DE FLORA, *Protection of the Taxpayer in the Information Exchange Procedure*, Kluwer Law Online, 2017;
- M. ROSINI, *Legge di delegazione europea e Legge europea,* Napoli, 2017;
- N. LUPO, G. PICCALILLI, *The Italian Parliament in the European Union*, Oregon, 2017;
- P. BAKER, *Some recent decisions of the European Court of Human Rights*, Eur. Tax., 2009;
- P. BARILE, *Rapporti fra norme primarie e comunitarie e norme costituzionali e primarie italiane*, Comunità int., 1966;
- P. BRACCO, *Italy*, in G. MAISTO, *Tax Treaties and Domestic Law*, Vol. 2, Milan, 2006;

- P. H. VERDEIR, M. VERSTEEG, *International Law in Domestic Legal System: an empirical perspective,* Am. Soc'y Int'l L. Proc., 2014;
- P. PISTONE, M. GRUBER*, Die Möglichkeiten der Verweigerung des Informationsaustausches nach Art. 26 OECD-MA, M.* LANG, J. SCHUCH, C. STARINGER, Internationale Amtshilfe in Steuersachen Linde*,* Wien, 2011;
- R. LUPI, *Delazioni e indagini fisicali,* in A. VIGNOLA-R. LUPI, *Sono utilizzabili le informazioni bancarie illecitamente sottratte da impiegati di istituti di credito esteri?*, Dial. Trib., 2011;
- R. PISANO, *Il rapporto tra norme interne, diritto convenzionale e diritto comunitario*, *Aspetti fiscali delle operazioni internazionali,* V. UCKMAR and C. GARBARINO, Milan, 1995, p. 420; A. FANTOZZI, *Diritto tributario*, Turin, 2003;
- R. QUADRI, *Diritto internazionale pubblico,* Naples, 1968;

- R. QUADRI, *Diritto internazionale pubblico,* Naples, 1968;

- S. MULEO, *L'applicazione dell'art. 6 CEDU anche all'istruttoria a seguito della sentenza 21 febbraio 2008 della Corte Europea dei diritti dell'uomo nel caso Ravon e altri c. Francia e le ricadute sullo schema processuale vigente*, Riv. dir. trib, 2008*;*
- S. MULEO*, La Corte europea dei diritti dell'uomo apre alle questioni tributarie in tema di sindacabilità giurisdizionale delle indagini domiciliari*, Dial. trib., 2009;
- M. GREGGI, *In praise of Privacy in the Age of Exchange of Information*, in https://www.researchgate.net/publication/319103614, 2017.
- NEWEY, *Cross-border enforcement of tax liabilities: recent european legislation from UK perspective,* European taxation, 2004;
- STEWART, *World Tax Journal*, 2012.