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The practical protection of taxpayers' fundamental rights

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Pietro Mastellone*

Summary and conclusions

Italy has in recent decades enhanced taxpayers' rights and limited tax authorities' powers during tax inspections, tax assessment, litigation before tax courts and forced tax collection mechanisms.

The introduction in 2000 of the Taxpayer's Bill of Rights represents a cornerstone in this sense, since it provides detailed rules permitting the tax authorities to carry out effective control over the correct fulfilment of tax duties and, at the same time, provides a clear legislative recognition of taxpayers' rights, while before this balance was scarcely achieved by fluctuating case law. Although the ongoing process for achieving a fair balance is still not complete, the practical enforcement of taxpayers' rights is significantly developing in case law and in recent legislation.

On 11 March 2014, Parliament approved Law No. 23 which gives power to the government to render the whole tax system more fair, transparent and growth oriented. This law sends an important signal to the whole Italian tax system, which is very complex, and where the average time for complying with the various tax duties (compliance costs) for each taxpayer is estimated at 269 hours per year (see World Bank and IFC, *Paying Taxes 2014*, 158): this aspect is one of the main reasons for tax evasion.

Reshaping the relationships between tax authorities and taxpayers is a challenge aimed at making the latter more confident with tax rules and more relaxed during tax audits given that their rights are effectively safeguarded. In this respect, article 6 expressly mandates the government to introduce new forms of enhanced communication and cooperation between undertakings and tax authorities, in line with the cooperative compliance promoted by the OECD. The process of simplification will also involve the introduction of mechanisms aimed at helping taxpayers, especially individuals, to correctly fulfil the various duties (e.g. filing the tax return) and to facilitate the payment by instalment of taxes already determined. In line with the principle of proportionality, the government will reform the actual tax regimes, eliminate the duties considered superfluous and extend the number of tax duties that can be completed via the internet.

* LLM (University of Amsterdam), PhD (University of Bergamo), Postdoctoral research fellow in international tax law (University of Florence); Cordeiro Guerra & Ass., Florence-Milan

In this transition period, this report tries to highlight the various examples of effective enforcement of taxpayers' rights by analysing the relevant norms, the case law and the approach followed by the tax authorities.

1. General overview

Following the 1970s reform,[1] Italy has adopted a system where taxpayers assess themselves (self-assessment approach): this change, on the one hand, put on the shoulders of taxpayers the duty to determine, declare and pay the correct amount of tax and, on the other hand, made the tax authorities intervene only in cases of divergence between taxes declared and taxes assessed.

This fundamental change in the relationship between tax authorities and taxpayers rendered necessary a detailed discipline aimed at establishing the rights and duties of the taxpayers and realising a fair balance with the state's tax interests. The 1990 OECD document *Taxpayers' Rights and Obligations* immediately triggered in Italy a proposal to introduce a comprehensive discipline,[2] to introduce also in tax law certain guarantees of citizens towards the state's powers similar to what had happened in administrative law.[3]

After a ten-year-long and complex debate, characterised by various bills of law (even constitutional), Parliament approved Law 27 July 2000, No. 212 (the so-called Taxpayers' Bill of Rights (TBR)), which represents an important innovation in the Italian tax system with the clear intention of balancing the rights and duties of taxpayers and tax authorities.[4]

The TBR codifies – within an "ordinary" statute – certain principles laid down in the Italian Constitution (IC)[5] and, in particular, the principle of equality (article 3), the principle of legality (article 23), the ability to pay principle (article 53), and the principle of good administration (article 97).[6]

The TBR is structured in three parts:

(a) provisions that limit future legislative activity (articles 1–4);
(b) the tax authorities' duties (articles 5–9);

1 Law 9 October 1971, No. 825 (Delegating law to the government to reform the tax system).

2 Bill of Law No. 5079, presented to Parliament on 20 September 1990.

3 Law 7 August 1990, No. 241 on administrative procedures.

4 For comments, see Fantozzi and Fedele (eds.), *Statuto dei diritti del contribuente*, Giuffrè: Milan, 2005; Marongiu, *Lo Statuto dei diritti del contribuente*, Giappichelli: Turin, 2008; Falsitta (ed.), "Diritto costituzionale tributario e Statuto del contribuente", in Vv.Aa., *Commentario breve alle leggi tributarie*, I, CEDAM: Padua, 2011. On the various connections between the rights guaranteed to citizens in administrative and in tax proceedings, see Del Federico, "I rapporti tra lo Statuto e la legge generale sull'azione amministrativa", in RT, 2011, 1393 *et seq.*

5 For this reason, the Italian Supreme Court (ISC) considers that the TBR, in the hierarchy of tax law sources, should be considered substantially superior to other statutes since it gives practical enforcement to constitutional principles: see ISC, Tax Chamber, 14 April 2004, No. 7080.

6 Art. 1(1) makes clear that all rules contained in the TBR enforce the constitutional general principles of the tax system and may be derogated from or amended only expressly and never through special laws.

(c) taxpayers' rights and guarantees (articles 10–19).

Leaving aside point (a) – which represents a unique example from a comparative perspective[7] – this report focus on the other two.

2. Tax authorities' duties

2.1. Principle of proportionality

In general, the tax authorities maintain great discretion in carrying out their investigative powers, in the choice of taxpayers and methods, etc.,[8] but there are certain limits. First, administrative actions are subject to the principle of proportionality, according to which the state's tax interest must create the least possible damage to taxpayers' rights.[9] For example, domiciliary access aimed at obtaining certain documents is considered unlawful if the tax authorities could have reached the same result through a less invasive method, such as a request for production.

In practice, this principle implies that:

- the taxpayer should not be asked to provide documents or information already available to tax authorities or other administrations indicated by the taxpayer;[10]
- access, inspections and tax controls at the taxpayer's premises must be carried out only when there is an effective need for control in such places;[11]
- the collection agent, in choosing the measure of forced tax collection between an administrative block on vehicles[12] and a mortgage on land or property,[13] must evaluate which is the least detrimental to effectively attain the objective pursued: in this sense, the ISC has held that a collection agent should not establish mortgages to recover tax claims of less than 8,000 euro.[14]

The tax authorities must comply with several duties aimed at realising a level playing field with the taxpayer involved, whose position is ontologically weaker: the TBR revolutionised the relationships between these two subjects on the basis of the principles of cooperation and good faith, which are expressions of the principle of good administration laid down in article 97 (IC) and in article 41 of the 2000 Charter of Fundamental Rights of the European Union.

7 Marongiu, "Statuto del contribuente", in Cassese (ed.), *Dizionario di diritto pubblico*, Giuffè: Milan, 2006, VI, 5765.

8 Gallo, "L'istruttoria nel sistema tributario", RT 2009, 30 *et seq.* See ISC, Tax Chamber, 17 December 2004, No. 23480.

9 CJEU, 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, *Garage Molenheide*, ECR 1997, I-7311 *et seq.*

10 Art. 6(4) TBR; violation renders the tax authorities' request unlawful: see ISC, Tax Chamber, 28 June 2012, No. 10843.

11 Art. 12(1) TBR.

12 Art. 86, Presidential Decree 29 September 1973, No. 602 (Tax Collection Act, TCA).

13 Art. 77 TCA.

14 ISC, Grand Chamber, 22 February 2010, No. 4077.

2.2. The bona fide principle and the general respect of taxpayers' legitimate expectations

The relationship between taxpayer and tax authorities must always comply with the bona fide principle,[15] which is considered pivotal in public law and represents a corollary of the rule of law.[16] In other words, the state must guarantee to the citizen-taxpayer not only a proportionate control activity, but also that the administrative action is always aimed at favouring the exercise of citizens' duties and rights.[17] The bona fide principle has a "bidirectional" nature and also obliges the taxpayer to behave correctly and fully cooperate with tax authorities during assessment activities: therefore, if the taxpayer does not justify the business reasons for a certain transaction considered "abusive" by the tax authorities, the latter may legitimately carry out an assessment based not on the accounting books, but only on other documents (so-called *accertamento extracontabile*).[18]

An eloquent application of the principle of bona fide is the duty of tax authorities to maintain coherent behaviour and avoid contradictory decisions (*non venire contra factum proprium*): article 10 TBR codifies this rule (the so-called legitimate expectation principle) and provides that a taxpayer which has behaved consistently with the indications of the tax authorities should not be subject to:

- negative civil law consequences (i.e. interest on late payments); or
- negative tax and criminal law consequences (i.e. tax administrative and criminal sanctions).[19]

Those consequences are also excluded if the taxpayer has infringed an "objectively unclear" tax provision: in this respect, the ISC considers that this solution is compatible with the so-called principle of "mild law", which, aimed at balancing public and private interests, applies to all judicial and administrative proceedings (and also to tax matters) characterised by a malfunctioning of public administration.[20]

The ISC initially considered that the enforcement of a taxpayer's legitimate expectations should always render a notice of assessment unlawful if the taxpayer relied on a previous administrative act issued in the investigation phase that agreed a lower payment of taxes initially claimed:[21] this extensive approach led to the annulment of tax claims contradictory to previous indications of the same tax authorities.[22] Nevertheless, more recent case law interprets article 10 TBR literally, with the consequence that if a notice of assessment is issued which is contradictory

15 Trivellin, *Il principio di buona fede nel rapporto tributario*, Giuffrè: Milan, 2009.

16 ISC, Tax Chamber, 6 October 2006, No. 21513; ISC, Tax Chamber, 14 April 2004, No. 7080; ISC, Tax Chamber, 10 December 2002, No. 17576; ISC, Tax Chamber, 13 May 2009, No. 10982.

17 ISC, Tax Chamber, 13 February 2009, No. 3559.

18 ISC, Tax Chamber, 9 February 2001, No. 1821.

19 See, for example, Circular Letter 6 July 2007, No. 42/E, where the tax authorities – changing their interpretation on the specific tax regime of the severance compensation related to the agency agreement – established that taxpayers that had acted in conformity with the previous administrative practice (i.e. Resolution 9 April 2004, No. 59/E) were not subject to tax administrative sanctions or to interest on late payments.

20 ISC, Tax Chamber, 21 March 2008, No. 7765.

21 ISC, Tax Chamber, 10 December 2002, No. 17576.

22 See also ISC, Tax Chamber, 14 April 2004, No. 7080; ISC, Tax Chamber, 6 October 2006, No. 21513; ISC, Tax Chamber, 29 August 2007, No. 18218; ISC, Tax Chamber, 13 May 2009, No. 10982.

to a previous administrative act, interest and sanctions are not due, but the tax claim remains valid.[23] Similarly, the taxpayer need not pay sanctions or interest if it has behaved in line with a circular letter previously issued by the tax authorities.[24]

In practice, this principle applies if the mistake made by the taxpayer was due to the malfunctioning of software provided by the tax authorities for estimating, on the basis of statistical data, the business income of certain undertakings.[25] Again, if the taxpayer notifies the act of appeal to the wrong tax office due to objectively unclear information about identifying the office territorially competent, the first – in line with the bona fide principle and the duty of cooperation – should have transmitted it to the latter: therefore, the non-appearance in court of the competent tax office cannot be considered due to a taxpayer's mistake, but is the mistake of the tax authorities.[26]

Following the OECD initiatives on cooperative compliance, which encourage states to establish more cooperative relationships between taxpayers and revenue bodies,[27] the tax authorities have launched a pilot project of cooperative compliance for "large" business taxpayers operating in Italy: this programme was aimed at stimulating multinationals and large companies to examine with the tax authorities several issues (e.g. internal tax control mechanisms,[28] tax planning schemes, etc.). The recently introduced article 6, Law 11 March 2014, No. 23 (Delegating Law, DL) – which mandates the government to adopt measures aimed at strengthening communication and cooperation between taxpayers and tax authorities, in line with the enhanced relationship method recommended by the OECD – confirms this approach.

The bona fide principle also implies that taxpayers' non-cooperative behaviour inevitably leads to negative consequences. For example, since tax inspections are aimed at searching for all the relevant documentation that will serve to check the taxpayer's due fulfilment of its tax obligations and since such activities may also be carried out against the taxpayer's will, before starting the searches tax officers must invite the taxpayer to voluntarily provide all the accounting books. In that case, the taxpayer may:

- provide a copy of the accounting books referring to the tax years under assessment or exhibit a certificate issued by a third party that keeps the accounting books, which will enable officers to obtain such documents;
- refuse to exhibit (or voluntarily postpone the exhibition of)[29] the documents requested: except in cases of *force majeure* or negligence in keeping and

23 ISC, Tax Chamber, 10 September 2009, No. 19479.

24 ISC, Tax Chamber, 1 October 2014, No. 20710.

25 CTP Udine, Sixth Chamber, 16 November 2006, No. 89. Similarly, see CTP Treviso, Fifth Chamber, 20 October 2008, No. 75, where the court considered correct the non-payment of the regional business tax (IRAP) by a self-employed worker (payable only by those who have an organised professional structure), due to the "rigidness" of the software for filing the tax return.

26 ISC, Tax Chamber, 10 February 2010, No. 2937. For the same conclusions reached in relation to a mistake between two tax offices belonging to the same metropolitan area, see ISC, Tax Chamber, Order 20 April 2010, No. 9405, which confirms the direct link between art. 97 IC and art. 10 TBR.

27 OECD, *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance*, Paris, 2013.

28 Art. 6, Legislative Decree 8 July 2011, No. 231.

29 ISC, Tax Chamber, 23 May 2012, No. 8109.

maintaining accounting records,[30] this non-cooperative behaviour leads to the following consequences:
- the taxpayer cannot use – before other administrative or judicial organs – in its favour any documents subsequently found by tax officers;[31]
- if the assessed taxpayer is obliged to keep accounting records, the tax authorities are allowed to base the assessment of income tax or VAT on presumptions;
- the taxpayer must pay a tax administrative sanction from 1,032 to 7,746 euro.

2.3. Information duties

The tax authorities must comply with several information duties, both towards all taxpayers and towards the single taxpayer subject to tax assessment.

Article 5 TBR provides an institutional information duty of the tax authorities towards the community of taxpayers, who must always be informed of all legislative and administrative rules applicable through circular letters that clarify the administrative practice and the interpretation of vague provisions. In practice, the tax authorities fulfil this duty through a specific online database freely accessible, which contains tax laws, administrative practice acts (which, nevertheless, are not legally binding) and the *ratio decidendi* of certain lower tax courts.[32]

The following article 6 TBR requires that tax authorities must, in particular:
- ensure for the taxpayer the effective knowledge of tax acts regarding its position through notification;[33]
- inform the taxpayer of any fact or circumstance that may lead to negative consequences (e.g. penalties, denial of tax reimbursements, etc.);[34]
- guarantee that the taxpayer has received, within a reasonable time, all the relevant documentation, models and instructions, which must be comprehensible and permit the correct fulfilment of tax duties.

The duty to inform the taxpayer is an unavoidable condition for a transparent, efficient and impartial activity of administrative authorities, the violation of which enables the taxpayer to bring an action for damages.[35] Information duties are functional for realising the *audi alteram partem* principle (principle of hearing) in all its various applications, which will be further analysed below at section 3.2.

30 ISC, Grand Chamber, 25 February 2000, No. 45; Circular Letter 5 December 2000, No. 224/E.

31 Obviously, documents not expressly requested by the tax authorities are not subject to this preclusion: see ISC, Tax Chamber, 14 November 2012, No. 19871; ISC, Tax Chamber, 7 February 2013, No. 2867.

32 CeRDEF database, available at http://def.finanze.it/DocTribFrontend/RS1_HomePage.jsp?.

33 The correct application of notification rules fulfils the need to provide legal knowledge to the taxpayer and allow him to fully exercise his right of defence. Case law considers that art. 6 TBR codifies a general principle already implicit in tax law: see ISC, Tax Chamber, 10 December 2002, No. 17576; ISC, Tax Chamber, 7 July 2003, No. 10659.

34 A practical application of this rule led the ISC to consider valid the payment of a taxpayer in favour of a tax collector agent not territorially competent to receive it, due to an "excusable" mistake. See ISC, Tax Chamber, 30 May 2005, No. 11477.

35 Pierro, *Il dovere di informazione dell'Amministrazione finanziaria*, Giappichelli: Turin, 2013, 3 *et seq.*

Also the tax police (*Guardia di Finanza* (GdF)) that start an investigation or an audit must immediately inform the taxpayer of their reasons and object:[36] if the GdF's officers do not fulfil this duty, the subsequent notice of assessment based on the tax investigation will be declared void.[37]

2.4. Clarity and duty of reasoning tax acts

A further information duty of the tax authorities must be fulfilled in each tax act notified to the taxpayer, which must be clear and contain certain basic indications (i.e. the competent tax office; the authority that may review the legitimacy of the act notified; modalities and terms for contesting the act).

In this respect, article 7 TBR provides that the act formalising the tax claim must make clear the reasons that brought about its issuance and, as a minimum standard, all acts issued by the tax authorities or tax collection agent must indicate:

- the office that issued the act and the officer in charge of the dossier;
- the office that has the power of internal review of the act issued;
- formalities, deadline and the (judicial or administrative) body that may declare the act unlawful and void.

A specific application of this rule determines the voidness of a tax act that does not indicate the tax rate adopted by the tax office (but only the lowest and the highest ones), since the taxpayer is not put in a position to comprehend the methodology used for calculating the claim without appointing a tax expert.[38] Similarly, a notice of assessment that determines a tax without indicating which provision was violated by the taxpayer will be considered void.[39]

Again, the tax courts consider void a notice of assessment based on statistical data concerning the business field of the taxpayer (*studi di settore*) that does not justify why the arguments of the taxpayer were rejected (e.g. a crisis that brought about the reduction of business and the loss of clients).[40]

Article 7(1) TBR also provides that if in their reasoning the tax authorities make reference to another act, this should be attached to the act notified (so-called *per relationem* reasoning): this duty ensures the effective right to a timely defence and permits effective knowledge of the reasons that led the tax office to issue the act. Case law distinguishes between recalled acts that are effectively known (e.g. previously notified to the taxpayer)[41] and recalled acts that are not known or received by the taxpayer, which must necessarily be attached or transcribed in their essential elements (i.e. object, content and addressees) in the notified act, which will otherwise be unlawful and void.[42] More recently, compliance with this duty of clarity

36 GdF, Circular Letter 29 December 2008, No. 1.

37 CTP Milan, Thirty-first Chamber, 10 May 2010, No. 126; CTP Reggio Emilia, First Chamber, 25 October 2010, No. 199.

38 ISC, Tax Chamber, Order 24 January 2013, No. 1645; ISC, Tax Chamber, 11 June 2008, No. 15381.

39 CTP Brescia, Third Chamber, 4 February 2013, No. 9.

40 CTR Genoa, 11 May 2012, No. 18.

41 For example, the recalled report of a tax inspection previously made in the presence of the taxpayer does not need to be attached to the notified tax act, which is perfectly valid: see ISC, Tax Chamber, 28 January 2010, No. 1825.

42 ISC, Tax Chamber, 22 March 2005, No. 6201; ISC, Tax Chamber, 25 March 2011, No. 6914; ISC, Tax Chamber, 25 July 2012, No. 13110; ISC, Tax Chamber, 15 March 2013, No. 6642.

by the tax authorities has been considered applicable not only to assessments of VAT and income taxes, but also for assessments concerning registration tax, where tax authorities often make reference to other documents not known by the taxpayer or easily available (e.g. other sale contracts, cadastral estimates, etc.).[43]

3. Effective enforcement of taxpayers' rights during tax investigations and following the issuance of the notice of assessment

3.1. Taxpayer's right to make a preliminary ruling

A corollary of the principle of cooperation consists in the right of the taxpayer to ask for a preliminary ruling from the competent tax authorities, in order to check the tax implications of a specific transaction. In general, the various mechanisms of ruling grant the taxpayer the right to request and obtain from the tax authorities a decision on the application or disapplication of specific tax rules, in relation to a specific situation: they guarantee to the taxpayer the right to know in advance the approach followed by tax authorities in cases of uncertainty and, at the same time, permit the taxpayer to rely on the decision.

The "ordinary" ruling provided by article 11 TBR allows the taxpayer to make a written request to the tax authorities in cases of "objective uncertainty":[44] this request must contain a specific question to the tax authorities and the solution proposed by the taxpayer.

Within 120 days from the request:

- the answer of the tax authorities, which must be duly reasoned, will exclusively bind the requesting taxpayer;[45]
- if the tax authorities do not answer, the taxpayer may behave in line with its proposed solution (so-called tacit approval).

Every subsequent act that imposes taxes and/or sanctions which are in contradiction of the express or implied answer of the tax authorities is automatically void: this means that the protection of the taxpayer's legitimate expectations is higher than the level provided by article 10 TBR, although the tax authorities' answer is a mere non-binding legal opinion.[46] In any case, tax administrative or criminal sanctions cannot be imposed on a taxpayer that did not receive an answer within 120 days. In the rare case where the tax authorities unlawfully consider the preliminary

43 ISC, Sixth Chamber – Subsection T, Order 11 February 2013, No. 3262; ISC, Sixth Chamber – Subsection T, Order 4 July 2013, No. 16783; ISC, Tax Chamber, 28 May 2014, No. 11967; CTP Reggio Emilia, Third Chamber, 27 August 2014, No. 385.

44 ISC, Tax Chamber, 28 November 2007, No. 24670.

45 If the request is particularly important, the tax authorities may decide to issue a resolution, which is a public document accessible to all taxpayers.

46 Italian Constitutional Court (ICC), 14 June 2007, No. 191, considers that the answer following a preliminary ruling *ex* art. 11 TBR binds the tax authorities, but does not bind the requesting taxpayer.

ruling inadmissible, the taxpayer may appeal against this decision, although it is not clear whether the jurisdiction is of the tax court or of the administrative judge.

Italian law also provides other mechanisms of preliminary rulings in specific areas – such as controlled foreign corporation (CFC) legislation, anti-avoidance provisions, deductibility of costs arising with transactions involving tax havens, transfer pricing, etc. – which, although with different procedural rules, have the same logic of permitting the taxpayer to know in advance the position of the tax authorities.

3.2. Right to *audi alteram partem*

Article 24(2) IC provides that defence is an inviolable right in each state and phase of the proceedings and this general principle also applies to tax matters. One of the main expressions of the right of defence is the *audi alteram partem* principle. Article 111 IC guarantees the effectiveness of this right in all proceedings before courts with the aim of achieving a "fair trial" and, albeit without constitutional recognition, it also finds application in administrative proceedings.

In tax matters, this right allows the addressee of the effects of a given tax act to be heard before the latter is adopted (guarantee function) and the tax authorities to have knowledge of all the public and private interests involved (investigative function).[47] Although the right to *audi alteram partem* is fully guaranteed during proceedings before tax courts (i.e. following the issuance of the notice of assessment), for a long time there has been a debate on its enforcement during tax investigations.[48]

Although case law was initially hesitant in recognising the right to *audi alteram partem* in the investigation phase,[49] considering sufficient its exercise in the subsequent phase where the taxpayer acts before the tax court against the notice of assessment (so-called postponed exercise of the right of defence),[50] recently the ISC took decisive steps towards the need for its enforcement also during tax investigations:[51] this trend confirms that this right acts as a guarantee for the taxpayer and renders the administrative action fair and efficient.[52]

Along these lines, for example, the notification of an act whose validity is not certain (e.g. the tax authorities believe it is not harmful for the taxpayer) may

47 The achievement in Italy of a "fair" tax trial is an ongoing process that, in recent years, has been further stimulated by the influence of the ECHR. On this issue, see Bilancia, Califano, Del Federico and Puoti (eds.), *Convenzione Europea dei Diritti dell'Uomo e giustizia tributaria italiana*, Giappichelli: Turin, 2014.

48 Ragucci, *Il contraddittorio nei procedimenti tributari*, Giappichelli: Turin, 2009.

49 Probably fearing to render void a great number of tax acts.

50 ICC, 31 May 1995, No. 210; ISC, Tax Chamber, 16 September 2005, No. 18429; ISC, Tax Chamber, 10 November 2006, No. 24091; ISC, Tax Chamber, 21 December 2007, No. 27060; ISC, Tax Chamber, Order 18 July 2008, No. 19875; ISC, Tax Chamber, 19 February 2010, No. 4016.

51 ISC, Tax Chamber, 28 July 2006, No. 17229; ISC, Tax Chamber, 7 February 2008, No. 2816; ISC, Tax Chamber, Order 15 March 2011, No. 6088.

52 In this sense, see Gallo, "Accertamento e garanzie del contribuente: prospettive di riforma", in DPT 1990, I, 66 *et seq.*; Salvini, "La 'nuova' partecipazione del contribuente (dalla richiesta di chiarimenti allo statuto del contribuente ed oltre)", in RDT 2000, I, 13 *et seq.*; Viotto, *I poteri di indagine dell'amministrazione finanziaria nel quadro dei diritti inviolabili di libertà sanciti dalla Costituzione*, Giuffrè: Milan, 2002, 35.l.

always produce negative consequences for the taxpayer, who will probably need a tax advisor to check its potential effects: for these reasons, the tax act notified is void.[53] The negative consequences of tax assessments for taxpayers, especially when the tax authorities issue an act declared void by judges, are not only economic, but may also affect the taxpayer's existential and personal sphere: in this respect, case law sometimes considers the taxpayer entitled to compensation for the damage suffered.[54]

If the notice of assessment is based on an audit report (*processo verbale di chiusura delle operazioni* (PVCO)) containing the results emerging from investigations carried out by the GdF, the tax judge will declare its voidness if the tax authorities did not carefully evaluate the observations made by the taxpayer once it received the report.[55]

Another important rule aimed at ensuring the effective right to *audi alteram partem* is contained in article 12(7) TBR, which provides that following the delivery of the PVCO to the taxpayer, the latter may communicate within 60 days its comments and requests (*spatium deliberandi*): before the expiry of this time-frame, the tax authorities cannot issue the notice of assessment, except in cases of particular and reasoned urgency. Although the so-called accelerated tax assessment represents an exception to the ordinary assessment procedure, the tax authorities often derogate from the 60-day term, especially if the notice of assessment is issued close to the deadline for assessing the tax year in question.[56] After a long debate, case law recently ruled that the *spatium deliberandi* was a guarantee of the taxpayer's pre-assessment right to *audi alteram partem* and that the tax authorities cannot issue a notice of assessment before its expiry date, also if the taxpayer did not communicate any observation.[57] This rule must always be applied to taxpayers that have been subject to inspections in their business premises or homes.[58] In

53 ISC, Tax Chamber, 26 February 2009, No. 4622.

54 Tribunal of Venice, Third Chamber, 23 April 2007, No. 2391, which ascertained (and determined by equity in the amount of 15,000 euro the existential damage suffered by a married couple subject to a great number of tax assessments that significantly lowered their quality of life.

55 CTR Milan, First Chamber, 27 June 2014, No. 3467.

56 A tax year may be subject to tax assessment that will be notified to the taxpayer within the following four or five years if the taxpayer did not file the tax return: these terms are doubled (i.e. they become eight or ten) if the tax authorities have solid suspicion that a tax crime has been committed.

57 ISC, Grand Chamber, 29 July 2013, No. 18184; ISC, Tax Chamber, 29 January 2014, No. 1869; ISC, Tax Chamber, 5 February 2014, No. 2595; ISC, Tax Chamber, 12 February 2014, No. 3142; ISC, Tax Chamber, 28 March 2014, No. 7315; ISC, Tax Chamber, 26 June 2014, No. 14573. Also lower tax courts (i.e. CTP Genoa, Fourteenth Chamber, 28 August 2014, No. 1530) are following this approach and remark that the failure of the tax authorities to timely issue the notice of assessment cannot be considered a valid reason of urgency.

58 ISC, Tax Chamber, 13 June 2014, No. 13588, excludes the analogical application of art. 12(7) TBR to other situations. This trend disregards the approach of certain lower tax courts that extended the compliance of the 60-day time limit for defence also to the case where the tax authorities notify to the taxpayer their interview report (*verbale di contraddittorio*), which does not indicate the reasons for the tax control or the possibility of appointing a professional for the defence: this default jeopardises taxpayers' rights and, having an impact on the subsequent notice of assessment, renders the latter unlawful and ineffective. See CTP Milan, Thirty-first Chamber, 10 May 2010, No. 126.

addition, a notice of assessment issued before such a term is declared void if the tax authorities do not specify the reasons for the urgency.[59]

That the need for the right to *audi alteram partem* is effectively enforced during tax investigations appears even more clearly in the following cases.

3.2.1. Tax assessments based on bank information

Articles 32–33, Presidential Decree No. 600/1973 (Income Tax Assessment Act (ITAA)) provide far-reaching powers for the tax authorities to collect financial information from banks and directly during controls in a taxpayer's premises. Article 32(1)(2) ITAA considers that all bank withdrawals and deposits made by the taxpayer may be used by the tax authorities as elements for grounding the tax claim, unless the taxpayer demonstrates that such movements were considered in the determination of income; with particular reference to bank withdrawals, the taxpayer must identify the beneficiary of each transaction,[60] in order to avoid such transactions presumptively being considered profit. Although this presumption and the consequent reversal of the burden of proof has been considered applicable not only to business income, but also to income from self-employment,[61] in October 2014 the ICC declared unconstitutional its application to the latter since it contradicts the ability to pay principle and the principle of reasonableness of taxation.[62] Interestingly, the ISC confirms that the counter-proof provided by the taxpayer has virtually no limitations: the taxpayer may provide written evidence, presumptive proof, documents containing third party declarations[63] and even testimonial evidence – generally prohibited in tax proceedings and trials before the court – if there is an objective impossibility of providing written evidence.[64] Requests for information to a bank are subject to prior written authorisation from the tax authorities' regional director or, if investigations are carried out by the GdF, from the regional tax police chief officer (article 32(7) ITAA).[65] Considering the great powers of tax authorities in assessments based on bank information,[66] it is clear that the *audi alteram partem* principle plays a fundamental function, with the consequence that – as indicated by EU case law that enshrined the need for compliance with it also in tax administrative proceedings[67] – the notice of assessment should otherwise

59 ISC, Tax Chamber, 24 September 2014, No. 20074.

60 ISC, Tax Chamber, 14 December 2012, No. 23079.

61 ISC, Tax Chamber, 20 November 2013, No. 25984.

62 ICC, 6 October 2014, No. 228.

63 ISC, Tax Chamber, 26 February 2003, No. 4423.

64 ISC, Tax Chamber, Order 15 January 2010, No. 587, admits this possibility if the documents were stolen or destroyed by fire.

65 In this specific case, see ISC, Tax Chamber, 17 September 2014, No. 19559, which considers sufficient the authorisation given by telephone from the GdF's regional tax police chief officer to his subordinate who carried out the access and the tax inspection (whose evidence was used in the final notice of assessment).

66 Nevertheless, ICC, Order 6 July 2000, No. 260, has considered legitimate this criticisable presumptive discipline since the taxpayer may, in any case, exercise its right of defence against those ordinary (and not irrebuttable) presumptions in administrative and judicial fora.

67 CJEU, 18 December 2008, Case C-349/07, *Sopropé*, ECR 2008, I-10369 *et seq.*; CJEU, Fifth Chamber, 3 July 2014, Joined Cases C-129/13 and C-130/13, *Kamino*, not yet published. On this point, see Wattel, "Access to effective legal remedy", in Brokelind, *Principles of Law: Function, Status and Impact of EU Tax Law*, IBFD: Amsterdam, 2014, 192 *et seq.*

always be considered void[68] (although case law does not always reach this conclusion).[69] The tax authorities consider highly "desirable" (but not compulsory) that the taxpayer is heard in the administrative phase, since this aims at (a) anticipating the taxpayer's right to defence before the judicial trial and (b) permitting the taxpayer – through evidence that it may provide – to avoid the issuance of a notice of assessment likely to be declared void by the tax court.[70]

3.2.2. Tax assessments based on presumptions

Article 38 ITAA provides a tool aimed at simplifying the tasks of tax authorities: the possibility of using simple presumptions and starting the assessment of elements expressing ability to pay as determined in Ministerial Decrees[71] and divided into expenditure (e.g. loans, pay-TV, clubs, horses, pets, travel, etc.) and investments (e.g. land and property, cars, participation in companies, antiques, etc.). This method – which represents an exception to the analytical method of tax assessments – does not look at "how" the income was produced, but at the way in which it is used. In order to issue a valid notice of assessment, tax authorities must guarantee the right to *audi alteram partem* to the taxpayer,[72] who may provide various counter-proofs aimed at demonstrating that the expenses and investments were made with means other than own income. For example, the taxpayer may prove:

- that the purchase of a property was made with the money of a spouse;[73]
- recent disinvestments of property or financial assets;
- lottery winnings;
- inheritances or gifts;[74]
- undeclared offshore assets "repatriated" through the so-called tax shield amnesty procedure;[75] etc.

3.2.3. Tax assessments based on statistical data concerning the business field of the taxpayer

The tax authorities may carry out assessments based on statistical data, which identify the average income of certain categories of taxpayers. In case of "serious" mismatch[76] between what is declared by the taxpayer and the presumptive

68 Marcheselli, *Accertamenti tributari e difesa del contribuente. Poteri e diritti nelle procedure fiscali*, Giuffrè: Milan, 2010, 84.

69 See, recently, ISC, Tax Chamber, 26 September 2014, No. 20420, which considered valid a notice of assessment based on bank information issued in the absence of a prior discussion with the taxpayer, arguing that he should always provide counter-evidence in a trial before the tax court.

70 Circular Letter 19 October 2006, No. 32, §4.4.

71 Ministry of Economy and Finance, Decree of 24 December 2012.

72 CTP Turin, Fourth Chamber, 8 January 2013, No. 3.

73 CTP Lecce, Eighth Chamber, 13 January 2009, No. 8.

74 ISC, Tax Chamber, 17 June 2008, No. 16348.

75 Mastellone, "The New Italian Tax Shield: Amnesty for Undeclared Offshore Assets", in *European Taxation*, 2010, 152 *et seq.*

76 Case law considers that the mismatch able to stimulate a subsequent tax assessment activity will be quantitatively significant (i.e. higher than 25–30 per cent): see CTP Milan, Eighth Chamber, 18 April 2005, No. 60. Along the same lines, see ISC, Tax Chamber, 26 September 2014, No. 20414, which considers void a notice of assessment based on a mismatch of only 7 per cent between income

income resulting from such data, the tax authorities should not immediately issue a notice of assessment, but must first allow the taxpayer to offer its reasons:[77] otherwise, the tax assessment will be void for infringement of the procedural right to *audi alteram partem* and also the substantive right to be taxed in line with the ability to pay principle.[78] Moreover, if this taxpayers' right has been guaranteed, the notice of assessment is likewise void if it does not give the reasons that led the tax office to disregard the objections raised by the taxpayer[79] or if the statistical method used is not attached, thus rendering the taxpayer's defence much harder.[80]

A further application of the right of defence consists in the possibility for the taxpayer to have access to the file regarding its tax assessment. In this respect, while initially the approach rigorously applied the principle of inaccessibility of tax proceedings acts to safeguard investigative secrecy (relying on article 24, Law No. 241/1990 on administrative procedures), recent case law has drastically mitigated this interpretation considering that the inaccessibility is limited to the duration of the tax assessment, but that after its conclusion the taxpayer must always have full access to the files.[81]

The recent trend is to give increasing importance to the right to *audi alteram partem* in tax investigations, tax assessment activities, disputes before tax courts and forced tax collection,[82] and this clearly shows that Italian courts are implementing EU principles.

3.3. Rights during tax inspections in business premises and taxpayer's domicile

In order to carry out investigations and audits, officers of tax authorities and the GdF may enter a taxpayer's business premises or domicile, but this power must be exercised with certain limitations aimed at guaranteeing the taxpayer's rights.

Article 12(1) TBR provides that inspections carried out on business premises must:

- be duly motivated by effective investigation needs;
- be made during working hours, unless there are adequately described exceptional circumstances;

cont.

declared and income presumed. In respect of assessments carried out against companies, ISC, Tax Chamber, 24 September 2010, No. 20201, remarks that tax authorities are entitled to legitimately use statistical data if the mismatch reaches "levels of abnormality and unreasonableness" capable of rendering the accounting books totally unreliable.

77 E.g. general economic crisis; crisis in a specific economic field; natural disasters or calamities; taxpayer's personal situation such as pregnancy, disease, etc.

78 ISC, Grand Chamber, 18 December 2009, No. 26635, remarks that tax authorities using statistical data should check the effective income capacity of the taxpayer assessed, since those data are a "simple" presumption capable of triggering a more in-depth assessment, and that – in any case – standard tax assessments made in violation of the right to *audi alteram partem* are void. Similarly, see ISC, Tax Chamber, 20 December 2012, No. 23554; ISC, Tax Chamber, 20 February 2013, No. 4166; CTR Naples, Twenty-eighth Chamber, 4 May 2014, No. 4337.

79 ISC, Tax Chamber, 18 July 2014, No. 16457.

80 ISC, Tax Chamber, 9 July 2014, No. 15633.

81 Supreme Administrative Court (SAC), Fourth Chamber, 31 July 2014, No. 4046.

82 See, recently, ISC, Grand Chamber, 18 September 2014, No. 19667, which declared void the hypothecation of property registered without the taxpayer having been previously informed.

- create "the least possible inconvenience" to the taxpayer.

Reading this provision (which has a general application) in conjunction with other specific rules governing tax inspections,[83] every access to the taxpayer's premises must be based on a specific written authorisation by the chief officer of the relevant authority.[84]

When tax authorities or GdF officers need to carry out investigations in the taxpayer's domicile, the law provides the maximum level of safeguard in order to protect the "civil" right of individuals to the inviolability of their homes (article 14 IC):[85] the need for a prior authorisation from the Public Prosecutor, which will be given only in the presence of serious suspicions that tax rules have been violated. Case law considers a domiciliary search unlawful if the authorisation was issued in the absence of serious suspicion[86] or on the basis of anonymous information.[87] Such authorisation is also needed if searches are carried out in places used both for business purposes and as a private home.[88]

These rules must obviously take into account the *Ravon* case,[89] where the European Court of Human Rights (ECtHR) decided that in the case of searches and seizures carried out in the domicile – which must be balanced with the "civil" right of individuals to the inviolability of their homes – the taxpayer must always have the possibility of applying to an impartial and independent body, since the formal act issued by the judge who authorised such inspections is not sufficient to guarantee effective protection of the whole administrative activity.

Access obtained without prior authorisation is unlawful and capable of rendering void the whole assessment, since *ex post* ratification of unauthorised access is not possible.[90] In the absence of clear indications in tax law, unlawful access by the tax authorities during investigations may lead to various outcomes:

- a first approach considers that unlawfully obtained evidence will inevitably lead to a void notice of assessment by virtue of the "domino effect" (consequential voidness),[91] but only if there is a consequential link between the proof and the subsequent notice of assessment;[92]

83 Art. 32(2) ITAA and art. 52, Presidential Decree 26 October 1972, No. 633.

84 While there have never been doubts about the need for tax authorities' officers to be authorised, case law prior to the introduction of art. 12 TBR considered that the GdF's officers did not need any authorisation: see ISC, Tax Chamber, 8 July 2009, No. 16017; ISC, Tax Chamber, 28 April 2010, No. 10137.

85 "The domicile is inviolable. Inspections, searches and seizures are prohibited, unless in the cases and modalities provided by law in order to protect the personal freedom. Assessments and inspections carried out for health and public safety or for economic and tax purposes are regulated by special laws" (reporter's translation).

86 ISC, Tax Chamber, Order 18 January 2012, No. 631.

87 ISC, Tax Chamber, 16 October 2009, No. 21974; ISC, Tax Chamber, 19 October 2012, No. 17957.

88 ISC, Tax Chamber, 28 July 2011, No. 16570.

89 ECtHR, 21 February 2008, A pplication No. 18497/03, *Affaire Ravon et Autres* v. *France*.

90 ISC, Tax Chamber, 29 November 2001, No. 15209.

91 ISC, First Chamber, 8 November 1997, No. 11036; ISC, First Chamber, 27 July 1998, No. 7368; ISC, First Chamber, 27 November 1998, No. 12050; ISC, Tax Chamber, 26 February 2001, No. 2775; ISC, Tax Chamber, 29 November 2001, No. 15209; ISC, Tax Chamber, 6 August 2008, No. 21153; ISC, Grand Chamber, 16 March 2009, No. 6315; ISC, Tax Chamber, 21 July 2009, No. 16874; ISC, Tax Chamber, Order 18 January 2012, No. 631.

92 ISC, Tax Chamber, 29 May 2013, No. 13319, makes this remark.

- a second approach considers that unlawfully obtained evidence is unusable in the subsequent assessment, with the consequence that if the notice of assessment is not adequately based on other lawfully obtained evidence, it must be declared void.[93] Recently, the ISC ruled that this principle of unlawfully obtained proof (expressly regulated in criminal law) should also apply in tax matters, given the defensive guarantee laid down in article 24 IC;[94]
- some decisions follow the previous approach, but limit the unusability of unlawfully obtained evidence to proof that infringes constitutional rights (e.g. right to defence, presumption of innocence, domicile inviolability, confidentiality of communication, etc.);
- finally, certain decisions consider that, in the absence of a specific rule providing for its unusability, unlawfully obtained evidence may be used for tax assessment and cannot invalidate the subsequent notice of assessment.[95]

With particular regard to evidence unlawfully obtained abroad (e.g. stolen bank information) then used by the Italian tax authorities for assessment purposes (e.g. following an exchange of information procedure), there is an ongoing debate in case law, which sometimes considers such "foreign" violations capable of affecting the notice of assessment's validity and sometimes not.[96]

Article 12(5) TBR provides another fundamental taxpayer's right during tax inspections carried out on its business premises: in principle, the officers (belonging to the tax authorities or to the GdF) must conclude such activities within 30 working days, a period that may exceptionally be extended once for another 30 working days.[97] After that period, tax officers may – subject to a prior authorisation of the chief officer – return to the taxpayer's business premises to examine its observations and requests made after the inspection. Case law does not interpret this provision rigorously and considers that, since the rule does not explicitly make clear whether or not the violation of such term determines the unlawfulness of the subsequent tax assessment, the term may be derogated from.[98]

93 ISC, Tax Chamber, 1 February 2002, No. 1344; ISC, Grand Chamber, 21 November 2002, No. 16424; ISC, Tax Chamber, 19 October 2005, No. 20253.

94 ISC, Tax Chamber, 28 July 2011, No. 16570.

95 ISC, Tax Chamber, 6 March 2001, No. 3852; ISC, Tax Chamber, 8 June 2001, No. 7791; ISC, Tax Chamber, 19 June 2001, No. 8344; ISC, Tax Chamber, 17 December 2001, No. 15914; ISC, Tax Chamber, 2 February 2002, No. 1383; ISC, Tax Chamber, 1 April 2003, No. 4987; ISC, Tax Chamber, 23 December 2005, No. 28695; ISC, Tax Chamber, 2 April 2007, No. 8181; ISC, Tax Chamber, 19 February 2009, No. 4001.

96 On this topic, see Mastellone, "First decisions on the Liechtenstein case: exchange of information, burden of proof and taxpayer's rights protection", in RDTI 2011, 501 *et seq.*; Mastellone, "Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero", in DPT 2013, 791 *et seq.*

97 The term is reduced to 15 working days contained in a three-month period if the taxpayer assessed is self-employed or an undertaking with simplified bookkeeping duties.

98 SAC, Fifth Chamber, 30 August 2013, No. 4333. In relation to searches made by tax authorities, see: ISC, Tax Chamber, 22 September 2011, No. 19338; ISC, Tax Chamber, 29 November 2013, No. 26732; ISC, Tax Chamber, 20 June 2014, No. 14045; ISC, Tax Chamber, 17 July 2014, No. 16323.

3.4. *Nemo tenetur se detegere*

The Italian tax system does not expressly provide the taxpayer's right to remain silent during tax inspections, but, on the contrary, the tax authorities often require the taxpayer's active cooperation: this trend will, nevertheless, be analysed in the light of the general principle of criminal law *nemo tenetur se detegere*, which EU and international case law also enforce in tax matters.[99]

In *Otto BV*,[100] the the European Court of Justice (CJEU) ruled that "the right not to give answers which might entail admission of the existence of an infringement of the competition rules" represents a guarantee "essentially intended to protect an individual against measures of investigation ordered by public authorities to obtain his admission of the existence of conduct laying him open to administrative or criminal penalties". Similarly, the ECtHR on various occasions has recognised that the right to silence and the right not to incriminate oneself must also apply to preliminary investigations that may lead to administrative or criminal consequences.[101] With particular reference to tax issues, in the recent *Chambaz* case the ECtHR recognised that the taxpayer's refusal to provide the requested documents to the tax authorities was a clear expression of its right to silence: accordingly, the Court considered in contradiction of article 6 ECHR the administrative sanction imposed by the Swiss tax authorities on the taxpayer.[102]

The approach followed by European courts confirms the need to enforce the *nemo tenetur se detegere* also during tax inspections as a corollary of article 6 ECHR and this conclusion is even more correct if it is considered that the tax administrative penalties that may be imposed on taxpayers have a "punitive" nature.

Italian case law recognises this "fundamental principle of legal culture":[103] the ICC considers that the right of defence should always be guaranteed to citizens in all authoritative proceedings aimed at collecting evidence and that this right may be exercised in all its active and passive forms.[104] From this perspective, the *nemo tenetur se detegere* principle must always be enforced even though it may render impossible the testimonial evidence.[105]

In 2011, Italy introduced a specific tax crime for those who provide false documents and information to tax authorities during the assessment proceedings:[106] this

99 Dourado and Silva Dias, "Information duties, aggressive tax planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR", in Kofler, Poiares Maduro and Pistone (eds.), *Human Rights and Taxation in Europe and the World*, 131 *et seq.*

100 CJEU, 10 November 1993, Case C-60/92, *Otto BV* v. *Postbank NV*, ECR 1993, I-5683 *et seq.*

101 ECtHR, 25 February 1993, application no. 10828/84, *Funke* v. *France*; ECtHR, 17 December 1996, application no. 19187/91, *Saunders* v. *United Kingdom*; ECtHR, 21 July 2009, application no. 19235/03, *Marttinen* v. *Finland.*

102 ECtHR, Fifth Chamber, 5 April 2012, application no. 11663/04, *Chambaz* v. *Switzerland.* See also European Commission of Human Rights (ECnHR), Second Chamber, 26 February 1997, application no. 27943/95, *Abas* v. *The Netherlands*, which considers that the right to silence and the *nemo tenetur se detegere* principle are protected under art. 6 ECHR if the taxpayer's position is "substantially affected".

103 ISC, Third Chamber, 18 June 2004, No. 11412; ISC, Grand Chamber, 28 February 2011, No. 4773; ISC, Second Chamber, 17 January 2014, No. 870.

104 ICC, 30 July 1984, No. 236; ICC, Order 26 June 2002, No. 291; ICC, Order 12 November 2002, No. 451; ICC, Order 28 June 2004, No. 202.

105 ISC, Order 26 November 2002, No. 485.

106 Art. 11, Law Decree No. 201/2011.

rule, in order to avoid contravening the right to silence, must be interpreted in such a manner that the taxpayer, during tax inspections, is not obliged to give answers that may involve a criminal liability.[107]

3.5. Confidentiality

Rules governing tax inspections and rules aimed at protecting citizens' right to privacy are apparently contradictory and their coexistence needs an accurate job of interpretation. Various problems arise from the parallel needs to inform the taxpayer of an ongoing tax inspection and to preserve investigative secrecy: in this respect, tax inspections inevitably involve an infringement of the right to privacy and the relevant legislation protecting sensitive information.[108]

Article 20 of the Privacy Code[109] provides that the treatment of sensitive information by public bodies must always be authorised by a law that specifies the types of information, treatments applicable and objectives of "relevant public interest": tax investigations certainly have such objectives (article 66). In 2008 the tax authorities issued a regulation aimed at enforcing privacy rights in the field of tax assessments through the identification of the types of sensitive data and their treatment,[110] but this instrument does not seem to be sufficient for that purpose: in its administrative practice, the GdF expresses the need to act in compliance with privacy needs, but, at the same time, makes clear that during tax inspections officers may collect information and documents also without the taxpayer's consent.[111]

The need to safeguard taxpayers' right to privacy is quite evident in tax assessments based on bank information, since from 2011 onwards all financial institutions are obliged to provide any information required about the relationships with their clients, and to automatically communicate to the Central Tax Registry (the so-called *Anagrafe Tributaria*, which is the main electronic tax database in force for tax assessment) all financial transactions made by all taxpayers.[112] The practical enforcement of this discipline,[113] following the initial doubts of the Italian Privacy Commissioner (IPC) which hoped for more rigorous technical measures for information transmission and storage, fearing hackers' attacks,[114] has been amended and now provides for:

- transmission through a new digital system of data exchange (*Sistema di Interscambio Dati* (SID)), whose increased firewall should be able to guarantee the highest level of confidentiality;

107 Scholars are very critical towards this new tax crime: see Marcheselli, "Obbligo di collaborare con il Fisco e diritto di tacere: violazione del diritto comunitario?", in CT 2012, 2533 *et seq.*; Marello, "Evanescenza del principio di specialità e dissoluzione del doppio binario: le ragioni per una riforma del sistema punitivo penale tributario", in RDT 2013, I, 238.

108 Basilavecchia, "La tutela della riservatezza nelle indagini tributarie", in CT 2009, 3577 *et seq.*; Basilavecchia, "Riservatezza e indagini fiscali: dalle norme alla prassi", in CT 2010, 49 *et seq.*; Montalcini and Sacchetto, "Privacy e fisco: la consultazione e la pubblicazione dei documenti nell'era della digitalizzazione", in DPT 2009, I, 679 *et seq.*

109 Legislative Decree 30 June 2003, No. 196.

110 Regulation 22 January 2008.

111 GdF, Circular Letter 29 December 2008, No. 1, containing instructions on investigative activities.

112 Art. 11(2), Law Decree 6 December 2011, No. 201 (so-called Monti Decree).

113 Director of Tax Authorities, Regulation 3 April 2012.

114 IPC, Opinion 17 April 2012, No. 145.

- creation of a database containing the transmitted bank information, which will be directly accessible to the tax authorities without intermediaries.[115]

This mechanism is considered satisfactory from the right to privacy point of view, but the IPC requires the additional safeguard of using encrypted data in order to guarantee disclosure only to the tax authorities.[116]

3.6. Agreements between taxpayers and the tax authorities

Italian tax law provides several mechanisms aimed at settling the controversy between taxpayer and tax authorities from the phase of tax investigations to the phase before the tax court: since they contribute to reducing tax litigation, they are strongly encouraged through various rewards, consisting usually in reductions of sanctions. The self-explanatory Table 1 summarises the main advantages for taxpayers and the "stability" of agreements in respect of further tax assessment activities.

Taxpayers must pay the taxes (and sanctions, if applicable) originally determined or redetermined by means of agreements through the specific F24 model provided by tax authorities and, from 23 January 2014 onwards, it is possible to compensate such payment with credits that the taxpayer has with other public bodies (e.g. local entities, the national health service, etc.).[117]

3.7. Power of internal review of unlawful tax acts

The tax authorities have the power of internal review of unlawful tax acts (*auto-tutela tributaria*): this mechanism, which stems from administrative law, is a practical application of article 97 IC aimed at realising a fair administrative action and reducing proceedings before tax courts.

The exercise of this administrative power is very delicate, since it derogates to the principle of legal certainty: for this reason, the CJEU has ruled that "Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way", but, according to the principle of cooperation arising from the former article 10 TEC (now article 4(3) TEU), each administrative body has

> "an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:
> – under national law, it has the power to reopen that decision;
> – the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
> – that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

115 Director of Tax Authorities, Regulation 5 October 2012.
116 IPC, Opinion 15 November 2012, No. 861.
117 Art. 9, Law Decree 8 April 2013, No. 35; Ministry of Finance, Decree 14 January 2014; Resolution 4 February 2014, No. 16/E.

Table 1. Agreements between taxpayers and the tax authorities

	Tax investigations			Notice of assessment		Litigation before the tax court	
	Agreement on the GdF's final report[a]	**Agreement on the request for clarification**[b]	**Agreement on the notice of irregularities**[c]	**Agreement on the notice of assessment**[d]	**Acquiescence**[e]	**Mediation for "small" controversies**[f]	**Conciliation before the tax court**[g]
Can the tax authorities carry out a further tax assessment?	Yes	Yes	No, the agreement excludes any further assessment activity	In principle the agreement is definitive for the taxpayer[h] and for the tax authorities, but in specific cases a further assessment activity is possible[i]	The tax assessment is definitive	The tax assessment is definitive	The tax assessment may be subsequently modified or integrated by the tax authorities

a *Adesione al PVC.*
b *Adesione all'invito al contraddittorio.*
c *Adesione alle comunicazioni di irregolarità.*
d *Accertamento con adesione.*
e *Acquiescenza.*
f *Accordo di mediazione per controversie di piccola entità.*
g *Conciliazione giudiziale.*
h See, for example, ISC, Tax Chamber, 29 December 2011, No. 19587, which denied the taxpayer's request for reimbursement of the taxes paid by virtue of such an agreement.
i These exceptional cases are: (i) supervening knowledge of new elements showing a 50 per cent increase of the income initially assessed and not less than 77,468.53 euro; (ii) agreement on a tax assessment based on statistical data concerning the business field of the taxpayer (*studi di settore*); (iii) agreement on a partial tax assessment; (iv) agreement exclusively on participation income in partnerships that allows a further assessment on other types of income; (v) agreement signed by a shareholder that allows a further assessment on the partnership; (vi) mismatch between tax returns presented by the taxpayer for reaching the agreement and tax returns otherwise obtained by tax authorities.

Table 1. Agreements between taxpayers and the tax authorities (*cont.*)

	Tax investigations			Notice of assessment		Litigation before the tax court	
	Agreement on the GdF's final report[a]	**Agreement on the request for clarification[b]**	**Agreement on the notice of irregularities[c]**	**Agreement on the notice of assessment[d]**	**Acquiescence[e]**	**Mediation for "small" controversies[f]**	**Conciliation before the tax court[g]**
What is the object of the agreement?	All the violations contained in the report	All the violations contained in the request	The amounts redetermined by automatic or formal controls on the tax return	All the tax claims contained in the notice of assessment	All the tax claims contained in the notice of assessment	All tax disputes with an overall value not exceeding 20,000 euro	It may concern several claims
What is the reduction in tax administrative sanctions?	Reduction of 1/6 of the statutory minimum	Reduction of 1/6 of the statutory minimum	Reduction of 10% in case of automatic controls and of 20% in case of formal controls	Reduction of 1/3 of the statutory minimum	Reduction of 1/3 or 1/6 of the statutory minimum	Reduction of 2/5 of the amount claimed in the appealed tax act	Reduction of 2/5 of the amount claimed in the appealed tax act

[a] *Adesione al PVC.*
[b] *Adesione all'invito al contraddittorio.*
[c] *Adesione alle comunicazioni di irregolarità.*
[d] *Accertamento con adesione.*
[e] *Acquiescenza.*
[f] *Accordo di mediazione per controversie di piccola entità.*
[g] *Conciliazione giudiziale.*

Table 1. Agreements between taxpayers and the tax authorities (*cont.*)

	Tax investigations			Notice of assessment		Litigation before the tax court	
	Agreement on the GdF's final report[a]	Agreement on the request for clarification[b]	Agreement on the notice of irregularities[c]	Agreement on the notice of assessment[d]	Acquiescence[e]	Mediation for "small" controversies[f]	Conciliation before the tax court[g]
What is the reduction of criminal tax sanctions?				Reduction up to 1/3 of the statutory minimum and no additional sanctions are imposed if the agreed payment is made before the opening of the debate that follows the criminal preliminary hearing[k]	Reduction up to 1/3 of the statutory minimum and no additional sanctions are imposed if the agreed payment is made before the opening of the debate that follows the criminal preliminary hearing[k]		Reduction up to 1/3 of the statutory minimum and no additional sanctions are imposed if the agreed payment is made before the opening of the debate that follows the criminal preliminary hearing

[a] *Adesione al PVC.*
[b] *Adesione all'invito al contraddittorio.*
[c] *Adesione alle comunicazioni di irregolarità.*
[d] *Accertamento con adesione.*
[e] *Acquiescenza.*
[f] *Accordo di mediazione per controversie di piccola entità.*
[g] *Conciliazione giudiziale.*
[j] This implies that, in parallel to the tax dispute, the taxpayer has been prosecuted for tax crimes before the criminal judge.
[k] If the tax assessment having originally also a criminal relevance is subsequently settled through an agreement that makes it fall below the criminal thresholds, the criminal judge is not bound to the amount of taxes determined in such a way, but shall justify in the decision the reasons for reaching a higher amount of taxes evaded: see ISC, Third Chamber (criminal), 14 February 2012, No. 5640.

Table 1. Agreements between taxpayers and the tax authorities (*cont.*)

	Tax investigations			Notice of assessment		Litigation before the tax court	
	Agreement on the GdF's final report[a]	Agreement on the request for clarification[b]	Agreement on the notice of irregularities[c]	Agreement on the notice of assessment[d]	Acquiescence[e]	Mediation for "small" controversies[f]	Conciliation before the tax court[g]
Does the agreement have effects outside tax matters?				The income agreed has relevance exclusively for social contribution payments	The higher income assessed has relevance exclusively for social contribution payments	Yes	Yes

[a] *Adesione al PVC.*
[b] *Adesione all'invito al contraddittorio.*
[c] *Adesione alle comunicazioni di irregolarità.*
[d] *Accertamento con adesione.*
[e] *Acquiescenza.*
[f] *Accordo di mediazione per controversie di piccola entità.*
[g] *Conciliazione giudiziale.*

– the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court."[118]

The institute consists in a power of annulment and revocation of unlawful or unfounded tax acts, or in a power of abdication of a tax assessment concerning a taxpayer that did not file a tax return; it also involves the power of renewal of acts affected by procedural defects. Typical cases of unlawfulness may be mistakes in the taxpayer's name, in tax calculations or in the condition for the application of the tax, double taxation, wrongful non-recognition of tax benefits, etc.[119]

The tax authorities may autonomously review their unlawful tax acts or the taxpayer may stimulate the exercise of this power. If the tax act in question has been appealed before the tax court, its annulment, revocation or renewal by the tax authorities constitutes a case for extinguishing the pending judicial proceedings.[120] This power cannot be exercised if a tax court has already issued a decision on the matter that, in the absence of an appeal, has gained the status of *res judicata*.

Since this power is one of the most eloquent expressions of administrative discretion, the tax authorities are not obliged to justify their decision, but at the end of the procedure, the taxpayer has the right to have access to the files.[121] The annulment or revocation of the tax act immediately takes priority over all other consequential acts and the taxpayer acquires the right of restitution of all the sums (i.e. taxes, sanctions and interest on late payments) *medio tempore* paid.[122]

In the case of a taxpayer's initiative, case law (and administrative practice)[123] initially considered that the tax authorities had a mere discretion to examine the issue,[124] but a recent *revirement* led to it being considered a proper duty: from this perspective, tax authorities that delay in the exercise of their power of internal review may be obliged to compensate the damage suffered by the taxpayer (for non-contractual liability) that, in the meantime, suffered the negative consequences of the unlawful tax act (e.g. forced tax collection, legal fees, etc.).[125]

Since the tax authorities have a duty to examine a request for internal review and, at the same time, their final decision on revoking or keeping valid and effective the tax act remains within administrative discretion, the appealability of the refusal (express or implied) to exercise this power is highly problematic. Case law is divided between:

- decisions denying the appealability, which argue the discretionary nature of the power, which, if appealable, would enable the taxpayer to act against a final administrative decision;[126]

118 CJEU, 13 January 2004, Case C-453/00, *Kühne & Heitz*, ECR 2004, I-00837 *et seq.*, §§24 and 28.
119 Ministry of Finance, Regulation 11 February 1997, No. 37.
120 ISC, Tax Chamber, 15 February 2010, No. 3519.
121 SAC, Fourth Chamber, 13 January 2010, No. 53.
122 Ministry of Finance, Circular Letter 5 August 1998, No. 198/S.
123 Ministry of Finance, Circular Letter 8 July 1997, No. 195/E.
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126 ISC, Grand Chamber, 4 October 1996, No. 8685; ISC, Tax Chamber, 9 October 2000, No. 13412; ISC, Tax Chamber, 26 October 2001, No. 13208; ISC, Tax Chamber, 5 February 2002, No. 1547; ISC, Tax Chamber, 1 December 2004, No. 22564; ISC, Tax Chamber, 26 January 2007, No. 1710;

- decisions admitting the appealability, which argue that the discretionary nature of the power of internal review does not remove cases to the tax courts' jurisdiction and that the non-exercise of such power does not imply the reopening of a discussion on the merits.[127]

cont.

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