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Section I - Academic Writings

The fiscal code models for Latin American countries and the Italian statute of taxpayers' rights (*)

Andrea Amatucci

SUMMARY: **1** – The existence, in Latin American fiscal code models and in the Italian Statute of taxpayers' rights, of the simplification and settlement function which was to be found in the codes belonging to the area influenced by Roman Law. **2** – These fiscal code models are based on the voluntarism and rationalism which characterise modern codification. **3** – The currency of rigid Constitutions takes away from the fiscal code model the role of interpreting constitutional principles. **4** – The fiscal code model has the task, through the orders of the Authorities, of rationalising the system, but this does not include the qualifying of the cognitive procedure of the said rationalised system. **5** – The regulation of non-fiscal purposes and of the concept of taxation implies that the fiscal code model should be based on the principle of tax-paying ability but not that it should interpret it. **6** – The difference between the two Latin American fiscal code models relating to the rule of proof. **7** – The greater safeguarding of civil liberties of the MCTAL fiscal code model and of the Italian statute of taxpayers' rights, as against that of the CIAT fiscal code model. **8** – The total subordination of the taxpayer, and of the Administration, to the law guarantees respect for constitutional principles and certainty in law.

1 – The existence, in Latin American fiscal code models and in the Italian Statute of taxpayers' rights, of the simplification and settlement function which was to be found in the codes belonging to the area influenced by Roman Law.

In the era of imperial Rome the code already fulfilled the task of safeguarding the cohesion of the system as a whole, of the provisions insert-

(*) Report read at the Convention organised by the Instituto Latino Americano de Derecho Tributario (Latin American Institute of Fiscal Law) and held at Salvador de Bahia in Brasil from 3 to 8 December 2000.

ed or included in it unilaterally which were amended and conceptually enhanced by interpolations in order to eliminate antinomies. This is the case in the *codex Theodosianus* and in the *codex Justinianeus*. Up to the XVIIth century the *codex* or *compilatio*, was the result of the organisation, by the authorities, of the pre-existing legal materials in order to clarify doubts and to resolve antinomies.

The code aimed at eliminating the legal particularism, by taking over the unifying role of the central Courts of Law, at selecting the Roman provisions linked to a fundamental *ratio* following the centuries old procedure of simplifying the Justinian laws, and at implementing the criteria of rationality. The co-existence of these three functions of the code was present to a considerable degree in the area of Roman Law.

The *Codigo Tributario* model in Latin America (MCTAL)(**) is the outcome of a joint programme of the *Organización de los Estados Americanos* (OEA) and of the *Banco Interamericano de Desarollo* (BID) of 1967, on which many fiscal codes in force in Latin American countries are based and of which the *Centro Interamericano Administradores Tributarios* model (CIAT) of 1997 (1) is an integration and a partial modification. This *Codigo* was inspired therefore, particularly because of the participation in the commission which drew it up (2) of the recently deceased Uruguayan master Ramón Valdés Costa, at Sainz de Bujanda, by the *ley general tributaria spagnola* (Spanish general fiscal law) and thus by the considerations of Achille Donato Giannini, a pupil of Oreste Ranelletti (3) who, like Myrbach-Rheinfeld *Grundriss des Finanzrechts*, Leipzig, 1906 (4) in Austria,

(**) The MCTAL model is published in Section III of this same number. For comments on CIAT model, see ahead in the text of this essay.

(1) The model was drawn up by a work group in co-operation by Hans Fuchs who prepared a project. This group was integrated by Rubén Aguirre Pangburn, Carlos Dentone, Carlos Esparza, Bernardo Lara Berrios and Claudino Pita. This project was modified by well-known tax experts such as Margarita Lomeli Cerezo (Mexico), Alba Lucía Orozco (Colombia), Javier Paramio Fernández (Spain) , Nikolaus Raub (R.F.T.), Jaime Ross Bravo (Chile) Ramon Valdés Costa (Uruguay) and, as regards the final revision, by Rafael Salinas.

(2) The other two members were Carlos Giuliani Fonrouge (Argentina) and Rubens Gomes de Sousa (Brasil).

(3) *Diritto finanziario*, III ed., Milan, 1928.

(4) *Grundriss des Finanzrechts*, Leipzig, 1906.

created the foundations of financial law during the first decades of the XXth century.

The above explains that this ley general, which should be integrated in Spanish law no. 1 of 26.2.1998 and aims at improving the carrying out of fiscal obligations and at a general and equitable contribution to public expenses, is similar to the Reich's *Abgabenordnung* which was born in 1919 and is still in force, though obviously it evolved during the course of the last century. Obviously the same doctrinal foundations are at the basis of the Italian Law no. 212 of 27 July 2000, which contains provisions relating to the statute of taxpayers' rights, which was defined by the proponent Marongiu (5): 'as a step towards the codification of the general principles underlying the fiscal regimen according to the indications of the Constitution'.

The Roman Law formation, common to Germany, Italy, Spain and Latin America (6), has facilitated the considerable affinity between the German fiscal system, the Italian statute of taxpayers' rights and the Spanish, general, fiscal law which, in its turn, has influenced the MCTAL and CIAT models.

In order to be able to assess the differences which exist between the two Latin American fiscal code models, bearing in mind particularly, as a European experience, that which was recently illustrated by the Italian statute of taxpayers' rights, it is essential to make a preliminary pinpointing of the requirements of a fiscal code, which aims at establishing, in the light of the codifying tradition of the Roman Law area, a simplified and conceptual system, a terminology and some common legal bases of the fiscal systems of the Latin American countries. The Italian statute of taxpayers' rights guarantees organic unity (art. 1, third and fourth paragraphs), obliging the Local Agencies to conform their respective systems to it, and enforces the clarity and transparency of the fiscal provisions. (art. 2) (7).

(5) Report of the V1th permanent Commission (Finance) of the Chamber of Deputies presented to the Presidency on 20 September 1999 relating to Bill no. 4818, approved by the Senate on 22 April 1998 (Official records of Parliamentary Proceedings, Chamber of Deputies ns. 4818 –324-1354-2878-4056- on page 75).

(6) VARIOUS AUTHORS, *Diritto Romano, codificazione e unità del sistema giuridico latino-americano , in Studi Sassaresi,* V, 1977-78.

(7) E. VANONI, *Il problema della codificazione tributaria,* in *Riv. dir. fin. sc. fin.*, 1938, I, 361, observes that the method of codification of the general part is the only one which satisfies the need to render the fiscal system clear, simple and rational.

2. These fiscal code models are based on the voluntarism and rationalism which characterise modern codification.

At the sunset of the XVIIIth century the code was no longer the instrument of the settlement of the Law, but constituted the law itself. In continental Europe and in Latin America the code represented the result of an ideological, political and linguistic process. A specialisation in the concept of code was born. This was understood to be a system of legal norms linked to a system whose subject matter is unitary, relating to the territory where political unity is in force, referring to all the citizens subject to the Authority which drew up the said system and, able to abrogate the pre-existing, long-standing law. This specialisation, and the innovations implemented by the Courts of law, led to modern codification (8), based, above all, on legal voluntarism, which had already been conceived in the seventeenth century and which considers the law as being the will of the supreme authority and therefore made up of orders, the knowledge of the law and the knowledge of the will of the sovereign legislator. Modern codification is based on rationalism as well, according to which the law is made up of legal propositions, true and therefore consistent, which form a system analysed by means of conceptualism. This codifying technique tends to produce codes that are expected to last over time.

First of all the fiscal code, which, as the expression of consistent manifestations of the supreme will of the Authority, must specify the level at which the hierarchy of its sources is to be found.

The code model MCTAL in art. 2, inasmuch as it does not specifically provide for a level for itself because it merely lists the Constitution, the international conventions, the law and the provisions, is considered to be a law on the same level as all the others.

On the contrary the code model CIAT in art. 2 places itself above the law and considers itself to be modifiable only by higher or equal ranking provisions.

The Italian statute of taxpayers' rights in art. 1 first paragraph stipulates that the provisions which it lays down, in compliance with the constitutional articles relating to tax law, constitute the general principles of the fiscal system and can be subjected to derogation or modification only explicitly and never by means of special laws.

Therefore the code model MCTAL provides for the possibility of being modified not only explicitly but also implicitly by means of a subsequent law, whereas the CIAT code model assumes that its collocation is at a higher hierarchical level than that of ordinary law.

(8) G. TARELLO, *Le ideologie della codificazione nel sec. XVIII*, Genoa, 1968-69.

On the contrary, the Italian statute of taxpayers' rights places itself at the same level as that of the law but, however, protects itself by requiring, through a non-special law, an explicit modification; just as a national law, which intends to disregard an international agreement, must explicitly repudiate it.

3 – The currency of rigid Constitutions takes away from the fiscal code model the role of interpretation as regards constitutional principles

Where rigid Constitutions are in force, the code does not play a constitutional role. The function of the conservation and unification of the law is attributed to judiciary bodies that are, in substance, political, such as the constitutional Law courts. The task of the code is determined by the structures of the constitution and not vice-versa.

An effective codification implies a firm political choice as regards provisions of a general and lasting nature, stemming from a doctrine-qualified system.

The delicate problem of the link between the fiscal code and the Constitution rests on these foundations.

It is not the task of the code to interpret the constitutional provisions through a more specific articulation of their contents, otherwise it would take the place of the decisions of the constitutional Courts of each country which might hold a different opinion, within the framework of the evolution of their convictions.

Furthermore, the analysis of the provisions of the two code models relating to the principles laid down by the Constitution illustrates their unsuitability to deal with constitutional themes. The reservation of law principle which represents - together with the principle of tax-paying ability - a pillar of all tax law systems, is assimilated by the MCTAL code model in art. 4 in absolute terms, in the sense that only the law can dictate those features which constitute fiscal obligations. The code model MCTAL is therefore useable only for those systems based on the principle of absolute reservation of law.

In art. 17, on the other hand, the CIAT model is based on a principle of relative reservation of law, and allows a public Agency, different from the State, to be a tax-levying subject and, according to art. 4 first paragraph, allows the executive Power to suspend the levying of taxes when there are formally stated emergencies. It also permits that same executive Power and the Administration to establish the rate between a legally established minimum and maximum. The CIAT model is, therefore,

useable only in systems that are based on the principle of relative reservation of law.

Generally speaking (9), the principle of the reservation of law regulates jurisdiction as regards the formation of the legal fiscal provision and that of the tax-paying ability regulates, on the other hand, the contents of this norm. The principle of the reservation of law, if it is relative, in the sense that it does not stipulate that all the elements constituting the tax-paying obligation must be entirely regulated by the law, permits, within the limits of the said law, that the Government intervene only rarely when the tax levying subjects are the national Agencies in the sector. These are usually local Agencies acting as tax-levying subjects to safeguard representative ability on the political plane and, on a technical level, efficiency, economic suitability and productivity.

In particular, the intervention of the Administration, as stipulated in the CIAT code, is not permitted by the principle of the reservation of law not even if it is relative. The Administration must apply the law and not complete it.

The ban on the retro-activity of fiscal law, seems to be laid down by arts. 9 and 69 of the MCTAL code model only as regards the more onerous of the punitive fiscal laws; this means that this ban is not operational as regards the others.

It is not, on the other hand, laid down by art. 5 of the CIAT code model.

On the contrary the Italian statute of taxpayers' rights in art. 3, first paragraph, stipulates this ban, excepting what is laid down by art. 1 second paragraph, which in exceptional cases permits the authentic interpretation; this reminder is incomprehensible inasmuch as the interpretative law, in order to be such, must appear very different from the retroactive law.

The Constitutional Court of each country can, moreover, declare to be legitimate or illegitimate a provision of the code which permits its retroactivity.

4 - The fiscal code model has the task, through the orders of the Authorities, of rationalising the system, but this does not include the qualifying of the cognitive procedure of the said rationalised system.

Another sector which does not lend itself to regulation by the fiscal code is that which concerns the interpretation of the law. In fact it is the

(9) See FEDELE, *El principio de reserva de ley*, in *Tratado de Derecho tributario*, directed by me, I Vol., tome I, Chapter V, Bogotà, Temis, 2000, and the classic text by S. BARTHOLINI, *Il principio di legalità dei tributi in materia di imposta*, Padua, 1957.

duty of the *doctrine* to draw from the specific contents of the fiscal law those particular hermeneutic criteria that complement general guidelines. The evolution of thought is ongoing and is based on intensive scientific debate. As a result of this there is the risk that the discipline of interpretation may become scientifically unacceptable by part or all of the *doctrine*.

In fact, art. 5 of the MCTAL code model, as does art. 6 of the CIAT code model, stipulates that the fiscal norms, even those relating to exemption, are to be interpreted by means of all the methods permitted in law. Art. 5 of the MCTAL code model adds that the interpretation can lead to restrictive or extensive results as regards the literal significance.

There is no doubt that all the general criteria for interpretation are permissible as regards any norm whatever. The problem consists, however, in the correct construction of the particular hermeneutic guidelines. A restrictive or declarative interpretation is not conceivable, because this constitutes the unpredictable result of a complete logical procedure. I.e. the provision, once it has been interpreted, may result in being wider or more restricted as to its literal or identical meaning (declarative interpretation). To forbid each of the three possible results means compromising the interpretation in these cases. Consequently allowing extensive or restrictive interpretation is superfluous.

Art. 6 of the MCTAL code mode permits, on the other hand, the analogy but forbids the creation, in virtue of it, of taxes and exemptions, and art.6 third paragraph, of the CIAT code model forbids the analogy if it extends, beyond its strict limits, the scope of the taxable event, of exemptions and of fiscal torts.

The sense of the two norms is identical. But the fundamental question that academic writings have looked at is precisely that of establishing whether the analogy creates new law and therefore new taxes and new exemptions. Nowadays the idea that the function carried out by analogic integration (10) is not creative is prevalent, because the situations to which it extends with rigour the legislative regime, contain common features as regards the case explicitly provided for. The uncommon features, however, are irrelevant as regards the legislative *ratio*. The correctly interpreted law can remain operational exclusively as regards the situation specifically provided for or extend itself to similar situations, with-

(10) See my chapter *La interpretación de la leyes tributarias*, in *Tratado de Derecho tributario*, Vol. I, Tome II, Chapter XIV, Bogotà, Temis, 2000 and the fundamental monographies of the Italian doctrine by E. VANONI, *Natura ed interpretazione della legge tributaria*, in *Opere giuridiche*, Milan, 1961, I, 299 e M. TRIMELONI, *L'interpretazione nel diritto tributario*, Padua, 1979.

out the cognitive nature of the logical procedure being altered. Therefore a code can at worst restrict itself to permitting or forbidding the analogy implicitly on the basis of other principles, such as that of the certainty of fiscal law, which does not seem to be violated by it, but it cannot permit the analogy on the condition that it does not create new law, because if it does create new law then it is not analogy.

It is therefore preferable that the code should leave to the evolution of scientific thought the task of drawing from the constitutional principles the prohibition or the consent to the analogy, and, should it truly desire to allow it, not subject it to any condition whatsoever.

On the contrary, the following: code model MCTAL, art. 7 relating to the applicable principles; code model CIAT art, 3 relating to the supplementary law (articles which permit, in the absence of a law which regulates the specific case, the appeal to general principles of fiscal law and, should these be lacking, to other branches of the law, i.e. to the *iuris* analogy); code model MCTAL, art. 8 relating to the interpretation of the generating fact and the code model CIAT, art. 7 relating to the legal form of the act (articles which recognise the independence of the fiscal law) appear to be fundamentally correct because they correspond to the present state of evolution of the doctrine.

The regulation, even if it is rigorous, of the analogic procedure by a code, remains, however, superfluous.

In particular, as in article 7, 3rd paragraph of code model CIAT, as specified in the relevant comment, represses, though to be truthful very blandly, cases of abuse of the legal form or of fraud on a law for avoidance purposes. The abuse of fiscal law through the freedom to negotiate and the fraud on the law which is side-stepped are the most widespread means of carrying out avoidance (11). Fiscal fraud is, on the contrary, violation subject to sanctions according to law. In fact, wherever the action of analogic interpretation ends, thereby begins the greater part of the avoidance, which can only be obstructed by general anti-avoidance clauses, such as those contained in the German system, or specific anti-avoidance clauses, such as the ones in the Italian system.

The Italian statute of taxpayer's rights devotes to interpretation only the second paragraph of art.1, which permits interpretative norms relating to fiscal questions only exceptionally, and subject to ordinary law. It qualifies as such the provisions of authentic interpretation, but renders exceptional that clarifying intervention of the legislator which might be

(11) PISTONE, *Abuso del diritto ed elusione fiscale*, Padua, 1995. FIORENTINO, *L'elusione tributaria. Scelte di metodo e questioni terminologiche*, Naples, 1996.

useful, but which often conceals a retroactive law which is forbidden, as mentioned before, by the statute itself.

5 – The regulation of non-fiscal purposes and of the concept of taxation implies that the fiscal code model should be based on the principle of tax-paying ability but not that it should interpret it.

A particularly delicate problem is that of the non-fiscal purposes of the taxation. In fact the financial payments governed by public law (taxation and pecuniary sanctions) are subject to the principle of reservation of law, while taxation only is subject to the principle of tax-paying ability. The fiscal purpose is enforced by the principle of tax-paying ability, inasmuch as, because of this, the tax-payer is obliged to contribute to public expenses; therefore it is deemed by the *doctrine* that the non-fiscal purpose is legitimate although, normally, subject to the condition that it co-exists with the fiscal purpose.

Art. 13 of code model MCTAL would seem to exclude non-fiscal purposes, inasmuch as it stipulates that the State imposes taxation to obtain income in order to achieve its ends. Also the alternative and not additional recognition, as regards the obtaining of income to finance public charges, of the non-fiscal purposes (other purposes of general interest) by art.9 of code model CIAT is inspired, therefore, by a conception which is not shared by the entire doctrine (12).

To be taken into consideration is the fact that the principle of tax-paying ability, as against that of reservation of law, is not explicitly taken into account by both the code models. This is, on the contrary, relevant, not because it constitutes a subject for interpretation, but rather for the formulation of the concept of taxation, distinguishing it, as mentioned before, from the other obligatory, payments which, however, are not fiscal. This formulation leads to the precise distinction between the revenues governed by private law and the tax; the difference can only be drawn from the definition of taxation illustrated in art. 16 of the code model MCTAL and in art. 11 of code model CIAT. This distinction is very delicate, because it involves the definition of the boundary between public and private law, which is not easy to do, so much so that it is possible to imagine an intermediate stratum, still to be examined, which divides public law from the private law.

(12) See A. AMATUCCI – E. GONZÁLEZ GARCÍA, *El concepto de tributo*, in *Tratado de Derecho tributario*, directed by the author, III Vol., Chapter XXIV, Bogotà, Temis, 2000.

To be able to achieve synthetic codes it was necessary, from a subjective viewpoint, to reduce the discriminating discipline in relation to the subjective *status*.

The codified law structure tried to regulate in a concise manner, the configuration and the distribution of goods and behaviour profiles. It was suitable for the liberal State and rejected the techniques described as 'promotional' outside the codified law, i.e. in administrative law. The characteristics of the political system with a codified structure are its conciseness and longevity.

The articles of the two code models relating to the fiscal norms are, therefore, similar. The provisions relating to constitutional principles and to interpretation should be suppressed, in order to render the code more concise and consequently longer-lasting.

The difference between the regulation of taxation and the tax-paying obligation indicated in the two code models is not considerable and is based on concepts which are widespread in modern doctrine. The regulation illustrated in code model CIAT relating to these points does not, therefore, seem to be necessary.

6 – The distinction between the two Latin American fiscal code models relating to the institution of proof.

The difference between the two code models seem to be more noteworthy on the other hand, when it is assessed from a procedural viewpoint. It is enough to analyse an institute such the one relating to proof, which is illustrated from art- 149 to art. 153 of the MCTAL code model, permitting all probative means, with the exception of the confession of the civil servant and those means that are inadequate.

On the contrary art. 107 of the code model CIAT contains an absolute presumption which, without permitting the rebuttal evidence obliges the Administration to accept as verified the unknown fact (taxable fact), when the known fact has occurred. If between the known fact and the unknown fact there is a rigorous causal connection, the law is not necessary, because according to logic, i.e. according to the *hominis* presumption, the Administration is permitted to deduce the existence of the unknown fact. If, on the other hand it is a law that contains an absolute presumption this means that there is no causal connection and that the unknown fact does not usually occur as a result of the known fact and the tax-payer is not allowed to demonstrate it.

The Italian Constitutional Court, in sentence n. 41 of 22 February 1999, stated, in fact, that the absolute presumption of donation, as re-

gards the sale of real estate between married couples, is illegitimate due to unreasonableness and to violation of the principles of equality and taxpaying ability.

7 – The greater safeguarding of civil liberties of the MCTAL fiscal code model and of the Italian statute of taxpayers' rights, as against that of the CIAT fiscal code model

This divergence between the MCTAL code model and the Italian statute of taxpayers' rights on the one hand, which are more respectful of civil liberties, and the CIAT code on the other, which accentuates the powers of the Administration, becomes evident in the entire regulation of the proceedings.

In fact, the MCTAL code model devotes only three articles to the formal duties of the taxpayer and of those responsible (from art.139 to art. 141) and only four to preventive measures (from art.181 to art. 184), the first of which allows the Administration to solicit the Judiciary bodies, even to order the seizure of taxpayers' accounting documents. Equally scarce (from art. 126 to 131) are the articles relating to the powers and the duties of the Administration. The restrictions to the verification activities is noteworthy. These restrictions concern professional privilege, secrecy relating to cult, correspondence, family, with the exception of criminally significant facts, the conditions stipulated by common law for out-of-hours and home inspections, and also the secret which binds the Administration concerning the information acquired, except in relation to the judicial authority.

These same principles are at the basis of the Italian statute of taxpayers' rights which devotes a considerable part of its twenty articles to the safeguards adopted in the proceedings. In point of fact it recognises the right of the taxpayer to information (art. 5), to the awareness of the provisions and to the simplification (art. 6), to the clarity and the motivation of the provisions (art. 7), to the protection of patrimonial integrity (art. 8), to the remission in terms (art. 9) and to the protection of reliance and of good faith (art. 10). Art. 12 of the Italian statute of taxpayers' rights ensures safeguards to the taxpayer which are similar to those conferred by the code model MCTAL as regards fiscal checks: they must cause the least possible disturbance and the assistance of a taxpayer's counsel is provided for should the latter require one; he is permitted to state his observations in the transcript and the check may not last more than thirty working days, which, with motivation, may be extended over the same period of time; the taxpayer can appeal to his own guarantor (a

collegial body of the three members), which (art. 13), with reference to each regional Department, controls the behaviour of the Administration.

The CIAT code model is far less respectful of civil liberties. In art. 20, in fact, it introduces the figure, not recognised by the MCTAL code model, of the substitute tax as a sub species of the taxpayer, and permits the Administration to nominate this figure through a general administrative norm, without the authorisation of the law. Therefore, any subject who may intervene in a taxpayer's operation may become, to all effects and purposes, the substitute of the passive subject on the basis of this discretion permitted to the Administration.

The CIAT code model bestows powers on the Administration under title 11 (duties and rights of passive subjects and of third parties) and under title III (powers and obligations of the Administration). The CIAT code model devotes, out of 146 articles, only four, from 56 to 59, to the rights of the taxpayer and also four, from 87 to 90, to the obligations of the Administration, whereas a good twenty seven, from 60 to 86, are devoted to the latter's powers.

The guarantees which safeguard the taxpayer are particularly compromised by art. 53, third paragraph, of the CIAT code mode, which stipulates that he cannot avail himself, against the Administration, of the bank secret or the internal regulations of public and private Organisations or Agencies.

Furthermore, in particular, the CIAT code model allows the Administration, as of art. 70, to impound the accounts should there be formal defaults, to apply the indirect method as of art 72, and permits the application for arrest to the judiciary Authority as of art. 80 and the adoption of precautionary measures as of art. 81.

The CIAT code model however, is somewhat similar, as regards the taxpayer's doubts and errors, to the *Abgabenordnung*, to the Italian statute of taxpayers' rights and to the MCTAL code.

Art. 85 of the CIAT code model, as does art 10 of the Italian statute of taxpayers' rights, excludes sanctions should there be excusable error.

In the German doctrine, the orientation adopted by the Administration concerning the interpretation of a norm does not produce in every case a right to entrustment as regards the receiver. Should no administrative act exist, should the orientation of the Administration to which the taxpayer has conformed be modified, the public interest overrides the latter's right to the supremacy of the previous orientation. The taxpayer's behaviour, sustained by an action of the Administration which declares it to be proper, is considered to be the result of an excusable error if the administrative orientation changes, as stipulated also by art. 10 the Italian statute of taxpayers' rights. This statute, in art. 11, first paragraph,

should the financial Administration fail to reply to the taxpayer's request for an opinion relating to the interpretation submitted by him, stipulates that the silence is to be understood as consent and thus that this interpretation is considered as having been accepted.

Art. 88 of the CIAT code model, on the other hand, considers this to be silence-dissent and thus to be contested. If the Administration does not reply within the stipulated times to the request for an opinion concerning the interpretation submitted by the taxpayer, the latter is considered as not being shared; in any case the resolution can be contested, as stipulated also by art.129 MCTAL.

8 – The total subordination of the taxpayer and of the Administration to the law guarantees respect for constitutional principles and certainty in law.

It is evident that the CIAT code model assumes that the principle of the community must prevail over that of the private person and that evasion, which is in contrast to equality and justice (13), must be fought against by conferring greater powers on the Administration.

On the contrary the problem of the relation between powers and safeguards cannot be considered in terms of supremacy (14).

The relationship citizen – administrated – taxpayer highlights a specifying process, but this can be represented more meaningfully by considering a triangle which places the law at the summit, at one side of the base the taxpayer and at the other the Administration, both of these being rigorously subject to the law.

The discipline underlying the proceedings must be based on the principle of the subordination of the Administration to the law, on respect for the principles of effectiveness, i.e. the awareness of the real fact, and on the apportionment of the administrative action as regards the relevance of the subject matter to be verified. To the Administration must be attributed powers, in order to avoid comprising of the fundamental safeguards of the citizen, such as the right to confidentiality, to professional, bank, religious and family secrecy and above all to the certainty of law, which consists in the creation of those conditions which permit him to predict the fiscal effects of his personal behaviour.

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(13) S. LA ROSA , *Amministrazione finanziaria e giustizia tributaria,* Turin, 2000.

(14) D. CORRADINI, *Garantismo e Statualismo. Le codificazioni civilistiche dell'Ottocento,* Milan, 1971.

The Italian statute of taxpayers' rights, in order to protect the certainty of fiscal law, forbids, in art. 4, the use of decree-laws because these are often modified during the procedure of their conversion into law.

The struggle against fiscal fraud does not imply powers of the Administration which go beyond these boundaries and which are therefore harmful to the principle of the certainty of the law or to other constitutional principles.

On the other hand the Administration need more efficiency, capability and professionalism.

The MCTAL code model has, therefore, greater respect for the certainty and the triangle illustrating the supremacy of the law.

For this reason this model is more effective in the struggle against fraud because it does not create arbitry.

Corruption is encouraged by the CIAT code model which accentuates the power of bureaucracy and should be eliminated at the source by modifying the mentality underlying it.

The observations carried out herein indicate that it would be preferable to adopt the MCTAL code, but that this should be purified from the provisions relating to constitutional principles and to interpretation, inasmuch as the result of scientific research must not be crystallised by law. It must also be integrated by the relevance of the special code of law and by the figure of the substitute, stipulated however by law, borrowed from the CIAT code model.

Without going to extremes which are favourable to decoding, not a lot can be expected from the code (15), which is not able in itself of causing the fiscal systems of the Latin American States to come closer together.

It surely permits the uniforming of the fundamental concepts. However fiscal harmonisation in Europe has not only involved concepts, but also legislation relating to taxes, basically in direct ones, because in this manner the principle of fiscal non-discrimination has been implemented and double taxation has been avoided. For this reason a common code is useful; it is, however, essential to give an even stronger impulse to the processes of harmonisation of Mercosur and of the Andinian Pact, so that the fiscal principles laid down by the Treaties may be implemented by means of community norms relating to taxes, which initially indicate the ends and oblige the States to implement them.

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(15) Concerning the present validity of the codifying process, cfr. N. IRTI, *L'età della decodificazione*, Milan, 1979, SACCO, *Codificare: modo superato di leggiferare?* in *Riv. dir. civ.*, 1983, I, 117 e G. REBUFFA, *Servono ancora i codici?*, in *Sociologia dir.*, VIII, 1981, 456. This theme was discussed during XIth Congresso dell'Accademia internazionale di diritto comparato held in Caracas in August 1982.

The widespread adoption by Latin American Countries of a common fiscal code, accurately re-drawn up, and of the contemporary re-launching of the process of harmonisation between their fiscal systems, which should make full use of the European community experience, will certainly result in conditions leading to an economic and social union able to consolidate those principles and safeguards which are proper to democratic States.

I Modelli di Codice Tributario per i Paesi dell'America Latina e lo Statuto italiano dei Diritti del Contribuente (*)

Andrea Amatucci

SOMMARIO: **1** - La presenza nei modelli di codice tributario per i Paesi dell'America Latina e nello Statuto italiano dei Diritti del Contribuente della funzione di semplificazione e sistemazione che fu presente nei codici dell'area romanistica. **2** – Al volontarismo ed al razionalismo, che caratterizzano la codificazione moderna, si ispirano tali modelli di codice tributario. **3** – La vigenza delle Costituzioni rigide sottrae al modello di codice tributario il ruolo di interpretazione dei principi costituzionali. **4** - Al modello di codice tributario spetta il compito, attraverso comandi dell'Autorità, di razionalizzare il sistema, ma non anche di condizionare il procedimento conoscitivo di tale sistema razionalizzato. **5** – La disciplina dei fini extrafiscali e del concetto di tributo implica che il modello di codice tributario si richiami al principio di capacità contributiva ma non lo interpreti. **6** – La distinzione dei due modelli di codice tributario per i Paesi dell'America Latina relativamente all'istituto della prova. **7** – Il maggiore garantismo del modello di codice tributario MCTAL e dello Statuto italiano dei Diritti del Contribuente rispetto al modello di codice tributario CIAT. **8** – La piena subordinazione del contribuente e dell'Amministrazione alla legge garantisce il rispetto dei principi costituzionali e la certezza del diritto.

1 – La presenza nei modelli di codice tributario per i Paesi dell'America Latina e nello Statuto italiano dei Diritti del Contribuente della funzione di semplificazione e sistemazione che fu presente nei codici dell'area romanistica.

Già nell'era imperiale romana il codice assolveva la funzione di garantire la coerenza dell'insieme delle norme in esso autoritativamente in-

(*) Relazione svolta al Convegno organizzato dall'Istituto Latino Americano de Derecho Tributario e tenutosi a Salvador de Bahia in Brasile dal 3 all'8 dicembre 2000.

serite o incluse, le quali erano manipolate ed arricchite di interpolazioni per eliminare antinomie. E' il caso del *codex Theodosianus* e del *codex Justinianeus*. Sino al secolo XVII il *codex* o *compilatio* costituiva il risultato della sistemazione da parte dell'autorità di materiali giuridici preesistenti al fine di chiarire i dubbi e risolvere antinomie.

Il codice tendeva ad eliminare il particolarismo giuridico, sostituendosi all'azione unificatrice degli Organi giurisdizionali centrali, a selezionare le norme romane collegate ad una *ratio* fondamentale in seguito al processo secolare di semplificazione delle leggi giustinianee ed ad attuare il criterio della razionalità. La coesistenza di tali tre funzioni del codice fu notevolmente presente nell'area romanistica.

Il modello di *Codigo Tributario in America Latina* (MCTAL) (**), che costituisce il frutto di un programma congiunto dell'*Organización de los Estados Americanos* (OEA) e del *Banco Interamericano de Desarollo* (BID) del 1967, cui si sono informati molti codici tributari vigenti in Paesi dell'America Latina e del quale il modello del *Centro Interamericano Administradores Tributarios* (CIAT) del 1997 (1) costituisce un'integrazione ed una parziale modificazione, si è ispirato, specialmente per la presenza nella commissione che lo ha redatto (2) del maestro uruguayano recentemente scomparso di Ramón Valdés Costa, a Sainz de Bujanda, perciò alla *ley general tributaria* spagnola e pertanto al pensiero di Achille Donato Giannini allievo di Oreste Ranelletti (3) che, come Myrbach-Rheinfeld (4) in Austria, gettò le basi del diritto finanziario nei primi decenni del secolo XX.

Ciò spiega che tale *ley general*, che dovrebbe essere integrata dalla legge spagnola n. 1 del 26.2.1998 e che tende al miglior adempimento dell'obbligazione tributaria ed ad una generale ed equa contribuzione alle

(**) Il testo integrale del modello (MCTAL) viene pubblicato nella Sez. III di questo numero, mentre le varianti del modello CIAT saranno commentate nel testo.

(1) Il modello è stato elaborato da un gruppo di lavoro con la collaborazione di Hans Fuchs che stese un progetto. Questo gruppo fu integrato da Rubén Aguirre Pangburn, Carlos Dentone, Carlos Esparza, Bernardo Lara Berrios e Claudino Pita. Tale progetto fu sottoposto alle modifiche da parte di noti tributaristi quali Margarita Lomeli Cerezo (Messico), Alba Lucía Orozco (Colombia), Javier Paramio Fernández (Spagna) , Nikolaus Raub (R.F.T.), Jaime Ross Bravo (Cile), Ramon Valdés Costa (Uruguay) e per la revisione finale da Rafael Salinas.

(2) Gli altri due componenti erano Carlos Giuliani Fonrouge (Argentina) e Rubens Gomes de Sousa (Brasile).

(3) *Diritto finanziario*, III ed., Milano, 1928.

(4) *Grundriss des Finanzrechts*, Leipzig, 1906.

spese pubbliche, sia affine all'*Abgabenordnung* che nacque nel 1919 riferita al Reich e che tuttora vige con l'ovvia sua evoluzione nel corso del secolo scorso. Ovviamente sulle stesse basi dottrinarie si fonda la legge italiana del 27 luglio 2000 n. 212 che contiene disposizioni in materia di statuto dei diritti del contribuente, il quale è stato definito dal relatore Marongiu (5) "come tappa verso la codificazione dei principi generali in materia tributaria secondo le indicazioni costituzionali".

La comune formazione romanistica in Germania, Italia, Spagna ed in America Latina (6) ha agevolato la notevole affinità tra l'ordinanza tributaria tedesca, lo statuto italiano dei diritti del contribuente e la *ley general tributaria* spagnola, la quale a sua volta ha influenzato i modelli di codice MCTAL e CIAT.

Per poter valutare le differenze esistenti tra i due modelli di codice tributario latino-americano, tenendo particolarmente presente come esperienza europea quella più recente rappresentata dallo statuto italiano dei diritti del contribuente, è necessario individuare preliminarmente i requisiti di un codice tributario, che aspira a stabilire, alla luce della tradizione della codificazione nell'area romanistica, un sistema semplificato e concettuale, una terminologia ed alcune basi legislative comuni tra gli ordinamenti tributari dei Paesi dell'America Latina. Lo statuto italiano dei diritti del contribuente garantisce l'organicità (artt. 1, terzo e quarto comma), vincolando gli Enti locali ad adeguare ad esso i rispettivi ordinamenti, ed impone la chiarezza e la trasparenza delle disposizioni tributarie (art. 2) (7).

2. Al volontarismo ed al razionalismo, che caratterizzano la codificazione moderna, si ispirano tali modelli di codice tributario.

Al tramonto del secolo XVIII il codice non ha costituito più lo strumento di sistemazione del diritto, ma il diritto stesso. Nell'Europa conti-

(5) Relazione della VI Commissione permanente (Finanza) della Camera dei Deputati presentata alla Presidenza il 20 settembre 1999 sul disegno di legge n. 4818, approvato dal Senato il 22 aprile 1998 (Atti parlamentari Camera dei Deputati nn. 4818 -324-1354-2878-4056 a pag. 75).

(6) AUTORI VARI, *Diritto romano, codificazioni e unità del sistema giuridico latino-americano*, in *Studi Sassaresi*, V, 1977-78.

(7) E. VANONI, *Il problema della codificazione tributaria*, in *Riv. dir. fin. sc. fin.*, 1938, I, 361, osserva che il metodo della codificazione della parte generale è il solo rispondente al bisogno di rendere chiaro, semplice e razionale il sistema tributario.

nentale e nell'America Latina il codice ha rappresentato il risultato di un processo ideologico, politico e linguistico. E' nata una specializzazione del concetto di codice, il quale è stato inteso come un insieme di regole giuridiche rapportate ad un sistema, avente ad oggetto una materia unitaria, relativo al territorio in cui vige l'unità politica, riferito a tutti i cittadini sottoposti all'autorità che l'ha redatto e capace di abrogare il diritto preesistente e vigente per tempi lunghi. Tale specializzazione e le innovazioni nelle Organizzazioni giuridiche ha determinato la codificazione moderna (8), la quale si è fondata innanzitutto sul volontarismo giuridico, che era stato ideato già nel seicento e che considera il diritto volontà dell'autorità suprema e pertanto composto di comandi, la conoscenza del diritto è conoscenza della volontà del sovrano legislatore. La codificazione moderna si fonda anche sul razionalismo, secondo il quale il diritto è composto da proposizioni giuridiche vere e perciò coerenti che formano un sistema analizzato attraverso il concettualismo. Tale tecnica codificatoria tende a produrre codici con pretese di durata.

Innanzitutto il codice tributario, quale espressione di manifestazioni coerenti della volontà suprema dell'Autorità, deve precisare a quale livello si colloca nella gerarchia delle fonti. Il modello di codice MCTAL all'art. 2, non prevedendo esplicitamente un livello per se stesso, in quanto si limita ad indicare nell'ordine la Costituzione, le convenzioni internazionali, la legge ed i regolamenti, si considera una legge come tutte le altre. Al contrario il modello di codice CIAT all'art. 2 pone se stesso prima della legge e si ritiene modificabile solo da disposizioni di rango superiore o eguale.

Lo statuto italiano dei diritti del contribuente all'art. 1 primo comma stabilisce che le disposizioni in esso contenute, in attuazione degli articoli costituzionali in materia tributaria, costituiscono principi generali dell'ordinamento tributario e possono essere derogate o modificate solo espressamente e mai da leggi speciali.

Pertanto il modello di codice MCTAL prevede di poter essere modificato non solo espressamente, ma anche implicitamente da altra legge successiva, mentre il modello di codice CIAT ipotizza una propria collocazione ad un livello gerarchico superiore a quello della legge ordinaria.

Invece lo statuto italiano dei diritti del contribuente si pone sullo stesso piano della legge, però si protegge richiedendo con una legge non speciale una modifica espressa, così come una legge nazionale, che intende disattendere una convenzione internazionale, deve esplicitamente ripudiarla.

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(8) G. TARELLO, *Le ideologie della codificazione nel sec. XVIII*, Genova, 1968-69.

3 – La vigenza delle Costituzioni rigide sottrae al modello di codice tributario il ruolo di interpretazione dei principi costituzionali.

In presenza delle vigenti Costituzioni rigide, il codice non assolve più un ruolo costituzionale. La funzione di conservazione ed unificazione del diritto è attribuita a magistrature sostanzialmente politiche, quali i Tribunali costituzionali. Il compito del codice è determinato dagli assetti costituzionali e non viceversa.

Una codificazione efficace presuppone una scelta politica decisa nei confronti di norme di carattere generale e duratura, ricondotta a sistema da dottrina qualificata. Su queste basi si pone il delicato problema del collegamento tra codice tributario e Costituzione.

Non spetta al codice interpretare le norme costituzionali attraverso l'articolazione più specifica del loro contenuto, altrimenti si sostituirebbe alle sentenze dei Tribunali costituzionali di ciascun Paese che potrebbero essere di diverso avviso nell'ambito del processo di evoluzione del loro convincimento.

Inoltre l'analisi delle norme dei due modelli di codice relative ai principi posti dalla Costituzione dimostra la loro inidoneità ad affrontare temi costituzionali. Infatti il principio di riserva di legge, che rappresenta come l'altro di capacità contributiva un pilastro di ogni ordinamento giuridico tributario, è recepito dal modello di codice MCTAL all'art. 4 in termini assoluti, nel senso che solo la legge può disciplinare gli elementi costitutivi dell'obbligazione tributaria. Il modello di codice MCTAL è perciò utilizzabile solo per ordinamenti che si fondano sul principio di riserva di legge assoluta.

All'art. 17, invece, il modello CIAT si ispira ad un principio di riserva di legge relativa, consentendo all'Ente pubblico diverso dallo Stato di essere soggetto attivo ed all'art. 4 primo comma al Potere esecutivo di sospendere l'applicazione dei tributi in casi di emergenza formalmente dichiarati ed inoltre al medesimo Potere esecutivo ed all'Amministrazione di determinare l'aliquota tra un limite minimo ed uno massimo legislativamente stabilito. Il modello di codice CIAT è perciò utilizzabile solo per ordinamenti che si fondano sul principio di riserva di legge relativa.

Sul piano generale (9) il principio di riserva di legge disciplina le competenze in materia di formazione della norma legislativa tributaria e quello di capacità contributiva invece il contenuto di tale norma. Il principio

(9) Cfr. FEDELE, *El principio de reserva de ley*, in *Tratado de Derecho tributario*, da me diretto, I Vol., I tomo, Cap. V, Bogotà, Temis, 2000, ed il testo classico di S. BARTHOLINI, *Il principio di legalità dei tributi in materia di imposta*, Padova, 1957.

di riserva di legge, se è relativa, nel senso che non impone che tutti gli elementi costitutivi dell'obbligazione tributaria debbano essere disciplinati integralmente dalla legge, consente nei limiti di questa l'intervento raramente del Governo allorchè soggetti attivi sono gli Enti nazionali settoriali e normalmente degli Enti locali in qualità di soggetti attivi per garantire sul piano politico la rappresentatività e sul piano tecnico l'efficienza, l'economicità e la produttività.

In particolare l'intervento dell'Amministrazione, così come è prevista dal modello di codice CIAT, non è consentita dal principio di riserva di legge neanche relativa. L'Amministrazione deve applicare la legge e non completarla.

Il divieto di retroattività della legge tributaria sembra posto dagli artt. 9 e 69 del modello di codice MCTAL solo per le leggi tributarie punitive più gravose; il che significa che tale divieto per le altre non opera. Invece esso non è posto dall'art. 5 del modello di codice CIAT.

Al contrario lo statuto italiano dei diritti del contribuente all'art. 3, primo comma, stabilisce tale divieto, salvo quanto previsto dall'art. 1, secondo comma, che consente eccezionalmente l'interpretazione autentica; non si comprende tale richiamo dal momento che la legge interpretativa per essere tale deve risultare ben diversa dalla legge retroattiva.

Il Tribunale costituzionale di ciascun Paese tra l'altro può dichiarare illegittima o meno una disposizione del codice che consente la retroattività.

4 - Al modello di codice tributario spetta il compito, attraverso comandi dell'Autorità, di razionalizzare il sistema, ma non anche di condizionare il procedimento conoscitivo di tale sistema razionalizzato.

Altro settore che non si presta ad essere disciplinato dal codice tributario è quello dell'interpretazione della legge. Difatti spetta alla dottrina ricavare dallo specifico contenuto della legge tributaria i criteri ermeneutici particolari, i quali si integrano con quelli generali. L'evoluzione del pensiero è continua sulla base di un dibattito scientifico intenso. Ne consegue il rischio per la disciplina dell'interpretazione di risultare scientificamente inaccettabile da parte o da tutta la dottrina.

Difatti l'art. 5 del modello di codice MCTAL, come l'art. 6 del modello di codice CIAT, stabilisce che le norme tributarie, anche di esenzione, si interpretano con tutti i metodi ammessi in diritto. L'art. 5 del modello di codice MCTAL aggiunge che l'interpretazione può pervenire a risultati restrittivi o estensivi del significato letterale.

Non vi è dubbio che sono ammissibili per qualsiasi norma tutti i criteri generali di interpretazione. Il problema comunque consiste nella costruzione corretta dei criteri ermeneutici particolari. Non è concepibile un divieto di interpretazione restrittiva o dichiarativa, perché questa costituisce il risultato imprevedibile di un procedimento logico completo. Cioè la norma, una volta interpretata, può risultare più ampia o più ristretta del significato letterale o identica (interpretazione dichiarativa). Vietare taluno dei tre possibili risultati significa compromettere l'interpretazione in quei casi. Conseguentemente è superfluo consentire l'interpretazione estensiva e restrittiva.

L'art. 6 del modello di codice MCTAL invece ammette l'analogia, ma vieta la creazione in virtù di essa di tributi ed esenzioni e l'art. 6, terzo comma, del modello di codice CIAT vieta l'analogia, se estende più dei suoi termini stretti l'ambito del fatto imponibile, delle esenzioni e degli illeciti tributari.

Il senso delle due norme è identico. Ma la questione fondamentale che la dottrina si è posta è proprio quella di stabilire se l'analogia crea nuovo diritto e quindi nuovi tributi e nuove esenzioni. Ormai prevale il convincimento della funzione non creativa svolta dell'integrazione analogica (10), perché le situazioni, a cui essa con rigore estende la disciplina legislativa, rilevano elementi comuni rispetto al caso espressamente previsto, però i non comuni risultano irrilevanti nei confronti della *ratio* legislativa. La legge interpretata correttamente può restare operante nei soli confronti della situazione espressamente prevista o estendersi alle situazioni affini, senza che sia alterata la natura conoscitiva del procedimento logico. Perciò un codice può tutt'al più limitarsi ad ammettere o vietare l'analogia implicitamente sulla base di altri principi, quali quello della certezza del diritto tributario, che non sembra da essa violato, ma non può ammetterla a condizione che essa non crei nuovo diritto, perché se lo crea non è analogia.

Pertanto è preferibile che il codice lasci all'evoluzione del pensiero scientifico il compito di trarre dai principi costituzionali il divieto o il consenso dell'analogia e, se volesse proprio consentirla, non la sottoponga ad alcuna condizione.

Al contrario il modello di codice MCTAL all'art. 7 sui principi applicabili ed il modello di codice CIAT all'art. 3 sul diritto suppletivo (artico-

(10) Cfr. il mio capitolo *La interpretación de la leyes tributarias*, in *Tratado de Derecho tributario*, I Vol., II Tomo, Cap. XIV, Bogotà, Temis, 2000 e le monografie fondamentali dalla dottrina italiana di E. VANONI, *Natura ed interpretazione della legge tributaria*, in *Opere giuridiche*, Milano, 1961, I, 299 e M. TRIMELONI, *L'interpretazione nel diritto tributario*, Padova, 1979.

li che consentono, in caso di assenza di una legge che disciplini il caso specifico, il ricorso a principi generali di diritto tributario ed, in difetto, di altri rami del diritto, cioè all'analogia *iuris*) ed il modello di codice MCTAL all'art. 8 sull'interpretazione del fatto generatore ed il modello di codice CIAT all'art. 7 sulla forma giuridica dell'atto (articoli che riconoscono l'indipendenza del diritto tributario) risultano fondamentalmente corretti, perché rispondono allo stato attuale di evoluzione della dottrina.

Resta tuttavia superflua la disciplina anche rigorosa da parte di un codice del procedimento analogico.

In particolare l'analogia, all'art. 7, 3° comma, del modello di codice CIAT, come è precisato nel relativo commento, reprime, per la verità molto limitatamente, i casi di abuso della forma giuridica o di frode della legge a fini elusivi. L'abuso del diritto tributario attraverso l'esercizio delle libertà negoziali e la frode della legge che è aggirata sono le strade più diffuse per realizzare l'elusione (11). La frode fiscale invece è violazione sanzionabile della legge. Infatti dove termina l'azione dell'interpretazione analogica, inizia la gran parte dell'elusione, la quale può essere ostacolata solo da clausole antielusive generali, come nell'ordinamento tedesco, o particolari, come nell'ordinamento italiano.

Lo statuto italiano dei diritti del contribuente dedica all'interpretazione soltanto il secondo comma dell'art. 1, il quale consente le norme interpretative in materia tributaria soltanto eccezionalmente e con legge ordinaria, qualificando come tali le disposizioni di interpretazione autentica. Lo statuto perciò non disciplina l'interpretazione, ma rende eccezionale l'intervento chiarificatore del legislatore che sarebbe utile, ma che spesso cela una legge retroattiva la quale è vietata, come si è osservato, dallo stesso statuto.

5 – La disciplina dei fini extrafiscali e del concetto di tributo implica che il modello di codice tributario si richiami al principio di capacità contributiva ma non lo interpreti.

Problema particolarmente delicato è rappresentato dai fini extrafiscali del tributo. Infatti le prestazioni patrimoniali di diritto pubblico (tributi e sanzioni pecuniarie) sono assoggettate al principio di riserva di legge, mentre solo i tributi sono sottoposti anche al principio di capacità contributiva. Il fine fiscale è imposto dal principio di capacità

(11) PISTONE, *Abuso del diritto ed elusione fiscale*, Padova, 1995. FIORENTINO, *L'elusione tributaria. Scelte di metodo e questioni terminologiche*, Napoli, 1996.

contributiva, in quanto in ragione di essa il contribuente è tenuto a concorrere alle spese pubbliche; pertanto si ritiene in dottrina (12) che il fine extrafiscale è legittimo però, in genere, a condizione che coesista con il fine fiscale.

L'art. 13 del modello di codice MCTAL sembra escludere i fini extrafiscali, in quanto stabilisce che lo Stato esige i tributi con l'obiettivo di ottenere entrate per il conseguimento dei suoi fini. Anche il riconoscimento alternativo e non aggiuntivo, rispetto all'ottenimento di entrate per finanziare le spese pubbliche, dei fini extrafiscali (altri fini di interesse generale) da parte dell'art. 9 del modello di codice CIAT si ispira pertanto ad una concezione che non è condivisa da tutta la dottrina (13).

E' da notare che il principio di capacità contributiva, contrariamente a quello di riserva di legge, non è esplicitamente considerato da ambedue i modelli di codice ed invece esso è rilevante non per costituire oggetto di interpretazione, bensì per l'elaborazione del concetto di tributo distinguendolo, come si è osservato, dalle altre prestazioni patrimoniali imposte però non tributarie. Questa elaborazione consente di pervenire con precisione alla distinzione tra l'entrata di diritto privato e la tassa; la differenza può solo desumersi dalla definizione di tassa contenuta nell'art. 16 del modello di codice MCTAL e nell'art. 11 del modello di codice CIAT. Tale distinzione è molto delicata, perché coinvolge la determinazione del confine tra diritto pubblico e diritto privato, la quale si rende non agevole tanto che si immagina l'esistenza di una fascia intermedia tutta da studiare che divide il diritto pubblico dal diritto privato.

Per pervenire a codici sintetici bisognava, sotto il profilo soggettivistico, ridurre la disciplina discriminante in rapporto allo *status* soggettivo.

La struttura a diritto codificato ha cercato di disciplinare in modo succinto la configurazione e la distribuzione dei beni ed i comportamenti. Era adatta allo Stato liberale e respingeva le tecniche definite "promozionali" fuori dal diritto codificato e cioè nel diritto amministrativo. Le caratteristiche del sistema politico a struttura codificata sono la compendiosità e la durevolezza.

Gli articoli dei due modelli di codice sulle norme tributarie risultano pertanto simili. Le disposizioni sui principi costituzionali e sull'interpretazione dovrebbero essere soppresse, per rendere più compendioso e conseguentemente più duraturo il codice.

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(12) PERFECTO YEBRA, *Los fines extrafiscales del impuesto*, in *Tratado de Derecho tributario*, da me diretto, II Vol., Cap. XXV, Bogotà, Temis, 2000.

(13) Cfr. A. AMATUCCI – E. GONZÁLEZ GARCÍA, *El concepto de tributo*, in *Tratado de Derecho tributario*, da me diretto, III Vol., Cap. XXIV, Bogotà, Temis, 2000.

La differenza della regolamentazione dei tributi e dell'obbligazione tributaria tra i due modelli di codice non è rilevante e si ispira a concetti espressi diffusamente dalla dottrina moderna. Non sembra perciò necessaria la disciplina contenuta nel modello di codice CIAT su questi punti.

6 – La distinzione dei due modelli di codice tributario per i Paesi dell'America Latina relativamente all'istituto della prova.

La differenza dei due modelli di codice appare più marcata invece, se verificata sul terreno procedimentale. Basti analizzare un istituto come quello della prova, il quale è considerato dall'art. 149 all'art. 153 del modello di codice MCTAL in termini garantistici in quanto essi ammettono tutti i mezzi probatori, tranne la confessione dell'impiegato pubblico e quelli inadeguati.

Al contrario l'art. 107 del modello di codice CIAT contiene una presunzione assoluta, la quale, senza consentire la prova contraria, impone all'Amministrazione di ritenere verificato il fatto ignoto (fatto imponibile), allorché si è realizzato il fatto noto.

Se tra fatto noto e fatto ignoto esiste un rigoroso nesso causale, non è necessaria la legge, perché con la logica e cioè con la presunzione *hominis* è consentito all'Amministrazione dedurre l'esistenza del fatto ignoto. Se invece è una legge che contiene una presunzione assoluta significa che non vi è nesso causale e che il fatto ignoto normalmente non si verifica come conseguenza del fatto noto ed al contribuente non è consentito dimostrarlo.

La Corte costituzionale italiana, con la sentenza n. 41 del 22 febbraio 1999, ha infatti dichiarato illegittima per irragionevolezza e per violazione dei principi di eguaglianza e di capacità contributiva la presunzione assoluta di donazione in caso di compravendita immobiliare effettuata tra coniugi.

7 – Il maggiore garantismo del modello di codice tributario MCTAL e dello Statuto italiano dei Diritti del Contribuente rispetto al modello di codice tributario CIAT.

Questa divergenza tra il modello di codice MCTAL e lo statuto italiano dei diritti del contribuente da un lato, che risultano più garantisti, ed il codice CIAT dall'altro, che accentua i poteri dell'Amministrazione, si manifesta in tutta la disciplina del procedimento.

Difatti, il modello di codice MCTAL dedica soltanto tre articoli ai doveri formali del contribuente e dei responsabili (dall'art. 139 all'art. 141) ed appena quattro ai mezzi cautelari (dall'art. 181 all'art. 184) dei quali il primo consente all'Amministrazione di sollecitare gli Organi giurisdizionali anche a disporre il sequestro dei documenti contabili del contribuente. Egualmente esigui (dall'art. 126 al 131) sono gli articoli sui poteri e sui doveri dell'Amministrazione. Significativo è il limite dell'attività di verifica, costituito dal segreto professionale, di culto, di corrispondenza, di natura familiare, tranne che per fatti penalmente rilevanti, dalle condizioni poste dal diritto comune per le ispezioni fuori orario e nelle abitazioni e dal segreto che vincola l'Amministrazione sulle notizie acquisite salvo che nei confronti dell'Autorità giudiziaria.

Agli stessi principi si ispira lo statuto italiano dei diritti del contribuente il quale dedica gran parte dei ventuno articoli di cui è composto alle garanzie nel procedimento. Difatti riconosce al contribuente il diritto all'informazione (art. 5), alla conoscenza degli atti ed alla semplificazione (art. 6), alla chiarezza ed alla motivazione degli atti (art. 7), alla tutela dell'integrità patrimoniale (art. 8), alla rimessione in termini (art. 9) ed alla tutela dell'affidamento e della buona fede (art. 10). L'art. 12 dello statuto italiano dei diritti del contribuente attribuisce garanzie al contribuente analoghe a quelle conferite dal modello di codice MCTAL nel caso di verifiche fiscali: esse devono provocargli la minore turbativa possibile ed è prevista l'assistenza di un difensore del contribuente se questi lo richieda; egli può dichiarare le proprie osservazioni a verbale e la verifica non può durare oltre trenta giorni lavorativi, prorogabile di altrettanti giorni con motivazione; il contribuente può reclamare al proprio garante (organo collegiale dei tre membri), il quale (art. 13) con riferimento ad ogni Direzione regionale controlla il comportamento dell'Amministrazione.

Il modello di codice CIAT risulta molto meno garantista. All'art. 20 infatti introduce la figura, non riconosciuta dal modello di codice MCTAL, del sostituto di imposta come subspecie del contribuente, consentendo all'Amministrazione di designarlo con una norma generale amministrativa, senza autorizzazione della legge. Pertanto qualsiasi soggetto che intervenga in un'operazione del contribuente può divenire sostituto a tutti gli effetti del soggetto passivo in base a tale discrezionalità riconosciuta all'Amministrazione.

Il modello di codice CIAT attribuisce poteri all'Amministrazione al titolo II (doveri e diritti dei soggetti passivi e dei terzi) ed al titolo III (poteri ed obblighi dell'Amministrazione). Il modello di codice CIAT dedica su 146 articoli soltanto quattro, dal 56 al 59, ai diritti del contribuente e del responsabile ed anche quattro, dall'87 al 90, agli obblighi dell'Amministrazione, mentre ben ventisette, dal 60 all'86, ai poteri.

Le garanzie del contribuente sono particolarmente compromesse all'art. 53, terzo comma, del modello di codice CIAT, il quale stabilisce che non è opponibile all'Amministrazione il segreto bancario o il regolamento interno di Organizzazioni o Enti pubblici e privati.

Inoltre in particolare il modello di codice CIAT consente all'Amministrazione all'art. 70 il sequestro della contabilità in caso di violazioni formali, all'art. 72 il metodo indiretto, all'art. 80 la richiesta di arresto alle Autorità giurisdizionali ed all'81 l'adozione di misure cautelari.

Il modello di codice CIAT tuttavia presenta talune affinità in materia di errori e di dubbi del contribuente con l'*Abgabenordnung*, con lo statuto italiano dei diritti del contribuente e con il modello di codice MCTAL.

L'art. 85 del modello di codice CIAT, come l'art. 10 dello statuto italiano dei diritti del contribuente, esclude le sanzioni in caso di errore scusabile.

Nella dottrina tedesca (14), l'orientamento manifestato dall'Amministrazione in sede di interpretazione di una norma non produce in ogni caso un diritto di affidamento nei confronti del destinatario. In assenza di un atto amministrativo, se si modifica l'indirizzo dell'Amministrazione al quale si è uniformato il contribuente, prevale l'interesse pubblico sul di lui diritto alla prevalenza del precedente orientamento. Il comportamento del contribuente, confortato da un atto dell'Amministrazione che lo dichiarava corretto, è considerato frutto di errore scusabile se muta l'orientamento amministrativo, come è stabilito anche dall'art. 10 dello statuto italiano dei diritti del contribuente. Tale statuto all'art. 11, primo comma, nel caso in cui l'Amministrazione finanziaria non dia risposta alla richiesta di parere del contribuente circa l'interpretazione da lui prospettata, stabilisce che il silenzio si intenda assenso e quindi si consideri accettata tale interpretazione.

L'art. 88 del modello di codice CIAT invece lo considera come silenzio-dissenso da impugnare. Se l'Amministrazione non risponde nei termini alla richiesta di parere circa l'interpretazione prospettata dal contribuente, questa si considera non condivisa; in ogni caso la risoluzione è impugnabile, come stabilisce anche l'art. 129 MCTAL.

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(14) Così PUHL, *L'accertamento tributario nella Comunità Europea. L'esperienza nella RFT*, Milano, 1997, 1, e *Besteuerungsverfabren und Verfassung*, in DStR, 1991, 1173.

TIPKE e LANG, *Steuerrecht*, 16ª ed., Köln, 1998, 901, evidenziano i possibili contrasti tra i principi di certezza del diritto e di tutela della fiducia da un lato ed il principio di legalità dall'altro. Particolarmente rilevante è l'esigenza della prevalenza dell'interpretazione più corretta. Tuttavia anche tale esigenza è contemperata con le altre. È solido il collegamento tra il principio dello Stato di diritto, cui si fonda il concetto di fiducia, e la certezza giuridica, il quale è evidenziato da GROLL, *Treu und Glauben im Steuerrecht*, in *Fin. Rund.*, 1995, 814, da KREIBIGH, *Der Grundsatz von Treu und Glauben im Steuerrecht*, Heidelberg, 1992, 35, e da BEERMANN, *Verwinkung und Vertrauenschutz im Steuerrecht* Münster-New York, 1991, 62.

8 – La piena subordinazione del contribuente e dell'Amministrazione alla legge garantisce il rispetto dei principi costituzionali e la certezza del diritto.

E' evidente che il modello di codice CIAT presuppone che il principio della comunità debba prevalere su quello della personalità privata e che l'evasione, la quale contrasta con l'eguaglianza e la giustizia (15), si debba combattere attribuendo maggiori poteri all'Amministrazione.

Al contrario il problema del rapporto tra poteri e garanzie non si pone in termini di prevalenza (16).

Il rapporto cittadino - amministrato - contribuente evidenzia un processo di specificazione, ma esso può essere rappresentato più significativamente considerando un triangolo che pone al vertice la legge ed alla base da un lato il contribuente e dall'altro l'Amministrazione, ambedue sottoposti rigorosamente alla legge.

La disciplina del procedimento deve ispirarsi al principio della subordinazione dell'Amministrazione alla legge, nel rispetto dei principi dell'effettività, cioè della conoscenza del fatto reale, e della proporzionalità dell'azione amministrativa alla rilevanza dell'oggetto da verificare.

All'Amministrazione bisogna attribuire poteri, in modo che non siano compromesse le garanzie fondamentali del cittadino, quali il diritto alla riservatezza ed il segreto professionale, bancario, religioso e familiare e soprattutto la certezza del diritto, la quale consiste nella creazione delle condizioni che gli consentono di prevedere gli effetti fiscali del proprio comportamento.

Lo statuto italiano dei diritti del contribuente, al fine di tutelare la certezza del diritto tributario, vieta all'art. 4 l'uso dei decreti legge perché questi sovente sono modificati in sede di conversione in legge.

La lotta contro la frode fiscale non implica poteri all'Amministrazione oltre tali confini e quindi una lesione del principio di certezza del diritto e di altri principi costituzionali.

E' invece necessaria più efficienza, capacità e professionalità dell'Amministrazione.

Il modello di codice MCTAL rispetta perciò maggiormente la certezza ed il triangolo del primato della legge.

Per tale ragione questo modello contrasta meglio la frode perché non crea arbitrio.

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(15) S. LA ROSA , *Amministrazione finanziaria e giustizia tributaria*, Torino, 2000.

(16) D. CORRADINI, *Garantismo e Statualismo. Le codificazioni civilistiche dell'Ottocento*, Milano, 1971.

La corruzione è incentivata dal modello di codice CIAT che accentua i poteri della burocrazia e va eliminata alle radici con la modifica di mentalità.

Le considerazioni svolte rendono preferibili l'adozione del modello di codice MCTAL, però depurato dalle disposizioni sui principi costituzionali e sull'interpretazione, in quanto non bisogna cristallizzare con legge il risultato della ricerca scientifica, ed integrato della rilevanza del codice di legge speciale e della figura del sostituto, però stabilita dalla legge, mutuate dal modello di codice CIAT.

Senza pervenire a posizioni estremiste favorevoli alla decodificazione, non bisogna attendersi molto dal codice (17), il quale non è in grado da solo di provocare l'avvicinamento degli ordinamenti tributari degli Stati dell'America Latina.

Certamente consente di uniformare i concetti fondamentali. Però l'armonizzazione fiscale in Europa ha impegnato non i concetti, bensì la legislazione sulle imposte e fondamentalmente quelle indirette, perché in tal modo si è attuato il principio di non discriminazione fiscale e si sono evitate le doppie imposizioni. Perciò è utile un codice comune; però è necessario anche un maggiore impulso ai processi di armonizzazione del Mercosur e del Patto Andino, in modo che i principi fiscali contenuti nei Trattati siano realizzati da norme comunitarie sulle imposte che inizialmente indichino i fini con l'obbligo degli Stati di attuarli.

E' dall'adozione diffusa da parte dei Paesi dell'America Latina di un comune codice tributario correttamente rielaborato e dal coevo rilancio del processo di armonizzazione dei loro sistemi tributari, il quale utilizzi pienamente l'esperienza comunitaria europea, che certamente conseguiranno le condizioni di un'unione economica e sociale che consolidi i principi e le garanzie degli Stati democratici.

Andrea Amatucci

(17) Circa la validità attuale del procedimento di codificazione, cfr. N. IRTI, *L'età della decodificazione*, Milano, 1979, SACCO, *Codificare: modo superato di legiferare?* in *Riv. dir. civ.*, 1983, I, 117 e G. REBUFFA, *Servono ancora i codici?*, in *Sociologia dir.*, VIII, 1981, 456. Tale tema è stato trattato in occasione dell'XI Congresso dell'Accademia internazionale di diritto comparato tenutosi a Caracas nell'agosto del 1982.

Notes on conventions for the avoidance of double taxation on income: international air transport (*)

Franco Picciaredda

1. A recognitive and historical analysis. – 2. Double taxation conventions. Grenznormen and Verteilungsnormen. – 3. Non taxation of profits from international air transport. Evolution o f related conventions. – 4. Activities referable to the notion of international air transport. – 5. The notion of international air transport and the liberalisation of home trade. – 6. Issues relating to the formal obligations air navigation enterprises are to fulfil. Clashes between conventions and internal legislation. – 7. The allocation of costs and charges between the company's headquarters and its branches.

1 – International double taxation is an issue that has been widely analysed; it is the subject of detailed *cahiers d'études* (1) and it is

(*) The Italian version of this essay has been published in *Diritto dei trasporti*, 2000.

(1) On this point, the following works, listed in chronological order, can be consulted (without claiming for this list to be in any way exhaustive): GARELLI, *Il diritto internazionale tributario*, Turin, 1899; LEHR, *Quelques notes sur les doubles impositions en droit international*, in *Revue de droit international et de législation comparée*, 1899, 428 ff.; BAR, *Observations sur les principes de droit international concernant les impôts-notamment les doubles impositions*, in *Revue de droit international et de législation comparée*, 1900, 435 ff.; ID, *Les double impositions en droit international*, in *Journal du droit international privé*, 1901, 722 ff.; FASOLIS, *Le doppie imposizioni*, Città di Castello, 1914; SELIGMAN, *Essais sur l'impôt*, Paris, 1914; SALVIOLI, *Le doppie imposte in diritto internazionale*, Napoli, 1914; NIBOYET, *Les double impositions au point de vue juridique*, in *Recueil des Cours de l'Académie de droit international de la Haye*, 1920, I, 1 ff; CLAVIER, *Les doubles impositions et l'évasione fiscale*, in *Revue économique international*, 1923, 477 ff.; PICARD, *Les double impositions au point de vue international*, in *Revue économique internationale*, 1923, 128 ff.; OUALID, *Les solutions internationales du problème des doubles impositions*, in *Revue de science et de législation financières*, 1927, 5 ff.; SELIGMAN, *Double taxation and international fiscal cooperation*, New York, 1928; THERY, *Le problème international de la double imposition*, in *Economiste européen*, 1929, 211 ff.; LERIDON, *Le problème des doubles impositions internationales*, Paris, 1929; COLARUSSO, *Le doppie imposizioni nei rapporti internazionali*, Padova, 1930; ISAY, *Internationales Finanzrecht*, Berlin, 1934; BÜHLER, *Les accords internationaux concernant la double imposition et l'évasion fiscale*, in *Recueil des Cours, as cited.*, 1936, I, 437 ff.; BASSANO, *Appunti sulla cosiddetta doppia imposizione internazionale*, in *Riv.dir.fin.*, 1937, I, 231 ff.; DORN, *Diritto finanziario e questioni fondamentali sulle doppie imposizioni, ibidem*, 1938, I, 15 ff.; CARROL, *La*

found extensively discussed in law textbooks. (2)

However, there is no systematic analysis available on the subject of the taxation of shipping and air companies, which, instead, is normally

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prevention de la double imposition internationale et de l'évasion fiscale, Geneva, 1939; STEVE, *Sulla tutela internazionale della pretesa tributaria*, in *Riv.dir.fin.*, 1940, I, 241 ff.; DEPERON, *International double taxation*, New York, 1945; UDINA, *Il diritto internazionale tributario*, in *Trattato di diritto internazionale, FEDOZZI-ROMANO editors*, X, Padua, 1949; UCKMAR V., *La tassazione degli stranieri in Italia*, Padua, 1955; CHRÉTIEN, *À la recherche du droit international fiscal commun*, Paris, 1955; MICHELI, *Problemi attuali di diritto tributario nei rapporti internazionali*, in *Dir.prat.trib.*, 1965, I, 217 ff. And now also in *Opere minori di diritto tributario*, II, *Teoria generale e sistema impositivo*, Milan, 1982, 41 ff.; CROXATTO, *L'imposizione delle imprese con attività internazionali*, Padua, 1965; BISCOTTINI, *Diritto amministrativo internazionale – La circolazione degli uomini e delle cose*, in *Trattato di diritto internazionale diretto da BALLADORE PALLIERI-MORELLI-QUADRI*, VI, t.II, Padua, 1966; DEL GIUDICE, *La doppia imposizione internazionale sul reddito e sul patrimonio*, Naples, 1975; AMNON-EFRATI, *International double taxation*, Tel Aviv, 1977; SACCHETTO, *Tutela all'estero dei crediti tributari dello Stato*, Padua, 1978; DAVIES, *Principles of international double taxation relief*, London, 1985; QURESHI, *The freedom of a State to legislate in fiscal matters under general international law*, in *Bulletin for international fiscal documentation*, 1987, 14 ff.; ID, *Unitary taxation and general international law*, *IVI*, 1987, 56 ff.; CROXATTO, *Le norme di diritto internazionale tributario*, in *Studi in onore di E.ALLORIO*, II, 1989, p. 2221 ff.; ADONNINO, *Doppia imposizione*, in *Enc.giur. Treccani*, XII, Rome, 1989 *ad vocem*; VOGEL-FANTOZZI, *Doppia imposizione internazionale*, in *Digesto, Quarta edizione – Disc.priv. – Commercial Section*, IV, Turin, 1990, p.181 ff.; PIRES, *International juridical double taxation of income*, London - The Haugue - Boston, 1989; MIRAULO, *Doppia imposizione internazionale*, Milan, 1990; GARBARINO, *La tassazione del reddito transnazionale*, Padua, 1990; BAKER, *Double taxation agreements and international tax law: a manual on the OECD Model Double Taxation Convention*, London, 1991; VOGEL, *Taxation of cross-border income, harmonization, and tax neutrality under European Comunity law: an institutional approach*, Cambridge (MA), 1994; ID, *On double taxation conventions: a commentary to the OECD-, UN- and US- model conventions for the avoidance of double taxation of income and capital. (Supplement 1994)*, London - The Haugue - Boston, 1994; ID, *Changes to the OECD model treaty and commentary since 1992*, in *Bulletin for international fiscal documentation*, 1997, 532 ff.-

(2) This subject has already been discussed in less recent institutional texts with reference to the principles on the effects of tax law and in relation to rules on territoriality. See on this point: MEUCCI, *Istituzioni di diritto amministrativo*, Turin, 1892, p.458 ff.; MYRBACH-RHEINFELD, *Précis de droit financier*, Paris, 1910, p.103 ff.; ROMANO Santi, *Principi di diritto amministrativo italiano*, Milan, 1912, p.322 ff.; EINAUDI, *Corso di scienza della finanza*, Turin, 1926, p.132 ff.; GRIZIOTTI, *Principi di politica, diritto e scienza delle finanze*, Padua, 1929, p.182 ff.; VANONI, *Lezioni di scienza delle finanze e diritto finanziario*, Rome, 1934, p.255 ff.; TROTABAS, *Précis de science et législation financières*, Paris, 1935, p.254 ff.; PUGLIESE, *Istituzioni di diritto finanziario. Diritto tributario*, Padua, 1937, p.104 ff.; TESORO, *Principii di diritto tributario*, Bari, 1938, p.28 ff.; GIANNINI A.D., *Istituzioni di diritto tributario*, Milan, 1938,

found discussed in terms that place it within the scope of the more general regime on double taxation. (3)

It is important to note how some extremely particular aspects of this complex phenomenon have failed to receive more in-depth study. However, one must not forget, that the peculiarity of the subject has meant that only towards the end of the 1800s/beginning of the 1900s did a significant jurisprudential course start to develop, and obviously, it still merely addressed shipping. (4)

It is clear that the *ratio* for this different approach is precisely the fact that conventional rules on the subject (made necessary by the increase in sea and air traffic which meant that an ordered structure by means of a conventional regime was inevitable) have steadily accrued starting with the second decade of the 1900s. (5)

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p.19 ff.; BLUMENSTEIN, *Sistema di diritto delle imposte*, Milan, 1954, p.94 ff.; HENSEL, *Diritto tributario*, Milano, 1956, p.32 ff.; INGROSSO, *Istituzioni di diritto finanziario, II, Le entrate dello Stato, imposte e tasse, entrate patrimoniali*, Naples, 1937, p.115 ff.

(3) See SALVIOLI, in the work cited, p.44 e p.65 ff.; COLARUSSO,in the work cited, p.83; UDINA, in the work cited, p.118 e p.279 ff.; PUGLIESE, *L'imposizione delle imprese di carattere internazionale*, Padua, 1930, p.101 ff.; UCKMAR, in the work cited, p.172 ff.; CROXATTO, *La imposizione delle imprese con attività internazionale*, as cited, p.39; CHRÉTIEN, in the work cited, p.222 ff.; MIRAULO, in the work cited, p. 306 ff.- The issue has also been examined by the scholars who have commented the single bilateral conventions. Refer to: ANTONINI, *Le doppie imposizioni nei rapporti italo-americani*, in *Riv. Guardia fin.*, 1955, 677 ff.; UCKMAR V., *La convenzione fra Italia e Stati Uniti d'America in tema di imposte sul reddito*, in *Arch.fin.*, 1956, 555 ff.; DI PAOLO, *La convenzione Italo-Americana contro le doppie imposizioni*, in *Imp.dir.*, 1956, 174 ff.; RADO, *The tax conventions between the United States and Italy*, in *Tax law review*, 1959, 203 ff.; UCKMAR V., *La convenzione fra l'Italia ed il Regno Unito sulle imposte dirette*, in *Dir.prat.trib.*, 1961, I, 187 ff.; KOCH, *L'ordinamento tributario del Regno Unito e la convenzione con l'talia, ibidem*, 1961, I, 249 ff.; UCKMAR V., *La convenzione fra l'Italia e la Svezia sulle imposte dirette*, in *Riv.soc.*, 1958, 635 ff.; CROXATTO, *Le convenzioni fra Italia e Svezia al fine di evitare le doppie imposizioni*, in *Dir.prat.trib.*, 1959, I, 26 ff.; UCKMAR V., *La convenzione fra l'Italia e i Paesi Bassi sulle imposte dirette*, in *Riv.soc.*, 1957, 957 ff.-

Obviously, there have been analytical studies covering issues connected with the taxation of shipping and air transport (please refer to footnote no. 42).

(4) See the case-law referred to *postea sub* footnote no. 13

(5) The first agreement in this respect was stipulated between Italy, Austria, Poland, Romania and Hungary (that is, the former countries of the Austro-Hungarian Empire) on the 6th of April 1922, agreement which became effective only with Austria.

The case-law and the literature have then had less opportunity to cover a subject the structure of which has been sufficiently traced out by means of international treaties.

The opportunity referred to in the above has only recently presented itself in connection with another kind of debate; the debate revolving around environmental issues (6) and the sup-

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Subsequently, conventions were stipulated with Czechoslavakia (R.D. L. August 28, 1924, no. 182) and Germany (on the 31st of October 1925 and enacted by R.D. L. December 13, 1925, no. 2162. Article 4 set down that: 'the schedular tax levied on the income of sea navigation enterprises will be applied solely in the state in which the effective place of management of the enterprise is situated.' Refer to FUCHS, *L'applicazione dell'imposta sul patrimonio in base alla Convenzione italo-germanica del 31 ottobre 1925 per impedire doppie imposizioni*, in *Giur. comp.dir.int.priv.*, 1939, 125 ff.. for details on this convention. Further changes were then introduced in 1938 leaving provisions in matter of navigation intact, on this point see GIANNINI A., *La Convenzione italo-germanica sull'assistenza amministrativa e giudiziaria in materia tributaria*, in *Riv.dir.fin.*, 1938, I, 211 ff.), with the Kingdom of Hungary (R.D. L. September 3, 1926, no.2307), with the Kingdom of the Serbian, Croatian and Slovene people (R.D. L. January 28, 1928, no.182), with France (L. December 30 1931, no.1576 and L. December 14, 1933, no.1738) with Belgium (L. March 31, 1932, no.456) and with Romania (L. May 15, 1939, no.953).

Further treaties were later drafted (for an outline on this point, see UNITED NATIONS, *International tax agreements*, New York, 1948-1951, three volumes, until we come to the current set-up (to have a complete picture of conventions stipulated by Italy see BORIO, *Guida alle convenzioni internazionali contro le doppie imposizioni*, Milan, 1998).

(6) The author wishes to refer back to the introduction, in our legal system, of taxes clearly preoccupied with the environment, such as the tax on the noise pollution generated by air carriers. This tax was set down with article 10 of D.L. April 27 1990, no. 90, amended and converted in L. June 26 1990, no.165 (brought up to date with regard to the terms for assessment and collection with D.P.R August 26, 1993, no. 434. Additionally, there is a similar regional tax introduced with article 18 of L. December 27, 1997, no.449) directed at penalising sound emissions in those areas affected by the noise produced by air carriers around airports (on these aspects see PICCIAREDDA, *I singoli tributi con caratteristiche ambientali*, in PICCIAREDDA-SELICATO, *I tributi e l'ambiente – Profili ricostruttivi*, Milan, 1996, p.169 ff. and see IVI for bibliographic references). After all, we emphasised earlier how the development of air traffic: 'has created the serious need to seek tools that will ensure adequate order in the use of air space; a demand that has been met by radically innovating the codified system used to regulate this asset over which the state exercises its territorial sovereignty and, by acting in accordance with the peculiarities of a policy that reflected the former unlimitedness of this natural resource. Therefore, the use of this natural resource has seen an extremely detailed regulating activity being undertaken as part of the restructuring of air navigation services according to D.R. July 27 1981, no. 484; rules that have been followed by the levying of a tax in respect of the use of installations and that of route air navigation services '. (thus GRIGOLI in, *Il diritto della navigazione*

ply of services pertaining to this sector. (7)

nella nuova realtà normativa e sistematica, in *Studi in onore di P.RESCIGNO, IV, Diritto Privato, 3, Impresa, società e lavoro,* Milan, 1998, p.245. By the same author, see also *Introduzione al nuovo volto del diritto della navigazione,* Turin, 1995, p.273).

(7) A brief mention regarding a particular type of air tax is in order for the transnational interrelations that characterise it (in other words, to investigate those that are the terms adopted by the different states in which it has been applied).

With law July 11 1977, no.411 – partially amended by law February 15 1985, no.25 – a tax was established on use of installations and route air navigation services; the tax levied on international flights for the part of flight taking place in national air space (on this point see POTITO, *L'ordinamento tributario,* Milan, 1978, p.470; GAETA, *Tasse aeronautiche,* in *Enc.dir.,* XLIV, Milan, 1992, p.28 ff.).

According to article 2 of this provision, the tax for each flight (T) was obtained by multiplying the unitary coefficient of taxation by the number of service units produced by the same flight (U).

Then with the 1st paragraph of article 3, it was established that the unitary coefficient of taxation (t) be calculated in the following manner: by dividing the cost borne by the state to supply the control service - for international route air navigation services - by the total number of service units produced by this type of activity, referring to the previous solar year and, it was also laid down that this coefficient be determined by decree of the Minister of Transport together with the Ministers for Defence and for the Treasury (this criterion moreover, has been censured from a case-law point of view for the retroactive effects that result from its application): Council of State, Section-VI, September 15, 1986, no.670, in *Cons.Stato,* 1986, I, 1301; similarly, see TAR Lazio, Section. III, March 5, 1985, no.229, in *Comm.trib.centr.,* 1985, II, 733; TAR Lazio, Section. III, May 16 maggio 1988, no.634, in *Trib.amm.reg.,* 1988, I, 2050; TAR Lazio, Section. III, July 16, 1988, no. 846, in *Foro amm.,* 1989, 286).

The following aeronautical charges were introduced in chronological order: *'tassa di assistenza'* (an air navigation service charge) on national flights for route air navigation services and a *'tassa di terminale'* applicable to both national and international flights (with D.L. March 4th 1989, no.77 converted to L. May 5, 1989, no.160); (see on this matter GALASSO, *Politica di recupero dei costi ed efficienza del servizio di assistenza al volo,* in *Dir.prat.av.civ.,* 1982, 112 ff.)

The structure of the payment in question is made interesting by the fact that the rule has been set down that provides for route air navigation service costs to be attributed to the airline companies each time they use this service, through specific taxes, aimed at covering the cost of service rendered.

At European level, the levying and the collection of similar taxes has been assigned to EUROCONTROL (European Organization for the Safety of Air Navigation, established with the Convention of Bruxelles of December 13, 1960), whereas, in Italy, it was assigned to AAAVTAG (*Azienda autonoma di assistenza al volo per il traffico aeroportuale*; currently ENAV, the Italian air traffic control agency).

This form of taxation, also re-looked at in relation to the taxing authority (for the various issues raised in the legal literature, refer to the contributions of BULIN, *The European Organization for the Safety of air Navigation,* in *Eur.yearb.,* 1976, 137 ff.; MAJID, *The new face of EUROCONTROL – Scaling down of the integration system,* in *Legal issues of european integration,* 1988/1, 87 ff.; DIEDERIKS-ZERSCHOOR, *La nais-*

A recent judgement of the Court of Cassation – in fact, its *obiter dicta* rather than its actual enunciations – raises a lot of questions connect-

sance d'EUROCONTROL et les développements à propos des tarifs de cette organisation, in *European transport law*, 1976, 842 ff.; SILINGARDI, *Attività di trasporto aereo e controlli pubblici*, Padua, 1984, p.27 ff.; CHRISTOPHERSON-BAX, *EUROCONTROL: UK detention rights*, in *Air & Space law*, 1992, 2 ff.; HUGHES, *EUROCONTROL and airport liens and some other rights of detention/forfeiture of aircraft, ibidem*, 1992, 137 ff.; LAMBERT, *EUROCONTROL et l'OACI*, in *Annals of Air & Space law*, 1994, 349 ff.; COMENALE PINTO, *L'assistenza al volo. Evoluzione; problemi attuali; prospettive*, Padua, 1999, p.262 ff.), has caused some perplexity, since the question was raised whether such Authority should be regarded as a business (under articles 86 and 90 of the EU Treaty) or as a public enterprise assigned the running of a service of a general economic interest and therefore in charge of controlling air navigation and as such then, comparable to a Public Authority (an explanation of the air navigation service and of the way in which control is carried out can be found in: LEFEBVRE D'OVIDIO–PESCATORE-TULLIO, *Manuale di diritto della navigazione*, Milan, 2000, p.210 ff.; CAMARDA, *Fonti e strutture organizzatorie nel diritto della navigazione*, Turin, 1988, p.280 ff. A phenomenon we also find with reference to the broad category of the Italian *prestazioni patrimoniali imposte*. So for example, for a definition of the radio and television licence fee as payment in respect of a service supplied by a public authority with the power to control and set down a regime for use of the ether, please refer to FANTOZZI, *Brevi note sulla qualificazione tributaria del canone radiotelevisivo*, in *Giur.cost.*, 1988, I, 2535 ff.; ID, *Natura e disciplina iva del canone di abbonamento radiotelevisivo – Disciplina attuale e progetti di riforma*, in *Riv.trim.dir.pubbl.*, 1988, 584 ff.). A question resolved by the EC Court of Justice, with judgement January 19, 1994, which excluded the status of business enterprise as is derived from articles 86 and 90 of the Treaty of Rome (the text of the judgement can be found in *Diritto trasporti*, 1994, 937 ff. And see in the same volume comment by COMENALE PINTO, *In margine ad assistenza al volo e riscossione dei contributi di rotta, tra esercizio di pubblici poteri ed attività d'impresa*, 941 ff.; see *etiam* SARDELLA, *EUROCONTROL non è un'impresa secondo le norme di diritto comunitario*, in *Giust.civ.*, 1995, I, 12 ff.).

Well-founded doubts had been expressed in connection with the nature of these *prestazioni patrimoniali* (literally *payments for a service)*; setting aside the semantic issue (the fact that the law-maker used the term 'tax' in lieu of 'charge', the Italian is 'tassa' and 'tariffa', respectively), the question was seen as relevant on purely nominalistic grounds, in that they seemed to refer to payments for services but of a of a privatistic kind, rather than falling within the same orbit as taxes (see in this respect ROMANELLI, *Assistenza al volo: da attività di polizia della navigazione a prestazione di servizio*, various authors, *Spunti di studio su l'attività di assistenza al volo*, Cagliari, 1994, p.5 ff.; COMENALE PINTO, *L'assistenza al volo, cit.*, p.239 ff.- For issues of comparative law see GOY, *Le régime internationale des redevances de route*, in *Revue generale de l'air*, 1972, 257 ff.; MOUSSÉ, *Legal aspects of the new international regime for the operation of air navigation services by EUROCONTROL. The Maastricht area control centre*, in *Air law*, 1987, 187 ff.; ID, *Le régime juridique des redevances de route et la Cour de justice des Communautés européennes*, in *Revue francaise de droit aérien et spatial*, 1994, 7 ff.; HEILBRONN-BONSALL, *Aeronautical charges: the need for a more specific legislative context*, in *Air & space law*, 1995, 125 ff.; MOUSSÉ, *Les redevances de route: de l'ab-*

ed with issues of international double taxation that the most distinguished legal literature has long since been sounding out. (8)

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sence de contradiction entre la jurisprudence du Conseil d'État et celle de la Cour de Justice des Communautés, in *Revue francaise de droit aérien et spatial,* 1995, 29 ff.).

With article 7 of L. December 21, 1996, no.665 the tax established with L. no.411, 1977, and those other taxes regulated with L. no.160 of 1989, were turned into charges with the resulting elimination of surtaxes charged for failing to pay instalments or delaying payments. Surtaxes that were substituted by the application of the legal rate of interest provided for in article 1284 of the Italian civil code (see. Caff. FF.UU., June 15, 1996, no.5521, in *Maff.Foro it.*, 1996).

This different classification seems to drive the legislative activity to a sharper distinction between revenue of a private law kind and that carrying a more distinctive public connotation, even if not necessarily forming part of revenue intended in its strictest sense (this point regarding the transformation of the TARSU in tariff has been covered by: PETRONI, *Da tassa a tariffa nell'evoluzione prevista dal d.leg. 5 febbraio 1997, n.22,* in *il fisco,* 1997, 2699 ff.; ROVATTI, *Dal 1 gennaio 1999 la tassa smaltimento rifiuti diventa tariffa (commento al d.leg. 5 febbraio 1997, n.22),* in *Corr.trib.*, 1997, 797 ff.; URICCHIO, *La trasformazione della tassa rifiuti in tariffa nel decreto <<Ronchi>>,* in *Boll.trib.*, 1997, 204 ff.- These aspects are covered in the thorough analysis by FEDELE, *La distinzione dei tributi dalle entrate di diritto privato e la competenza del Tribunale,* in *Dir.prat.trib.*, 1969, II, 3 ff.; ID, *Corrispettivi di pubblici servizi, prestazioni imposte, tributi,* in *Riv.dir.fin.*, 1971, II, 3 ff.).

As is well-known, the etymology of the expression, though used to refer to a heterogeneous category of fees (toll, professional services, payments in respect of services rendered by public enterprises) has been commonly adopted in tax matters (see ZINGALI, *Tariffa,* in *Novissimo Dig.It.*, XIX, Turin, 1973 ff., p.1044; ESPOSITO, *Tariffa,* in *Enc.dir.*, XLIV, Milan, 1992, p.1 ff.; SCHINAIA, *Tariffe dei servizi pubblici,* in *Enc.giur. Treccani,* XXX, Rome, 1993 *ad vocem.* The ambiguity of the term is clearly highlighted by DEL FEDERICO, *Il finanziamento delle autonomie locali: linee di tendenza e principi generali tra dettato costituzionale e legislazione ordinaria,* in *L'autonomia finanziaria degli enti locali territoriali - Ricerca diretta da LECCISOTTI-MARINO-PERRONE,* Rome-Milan, 1994, p.170 ff.; a similar line is followed in *Commissione di studio per il decentramento fiscale (chaired by F.GALLO), Proposte per la realizzazione del federalismo fiscale, I, Relazione finale,* , Rome, 1996, p.199 ff.).

(8) The following was established: 'the obligation concerning the filing of yearly tax returns for air navigation companies operating in France and having in Italy a 'permanent establishment' follows from the qualification of taxable person and, therefore, from the fact that the income is thus taxable (thus article 5 of the convention between Italy and France enacted in Italy by L. February 9, 1963, no.469); under article 1 D.P.R. no.600/73 qualifying as taxable subject is sufficient and necessary condition for the obligation to file a tax return to arise and that under article 4, second paragraph, of the same decree, companies not having their registered or administrative office within the State are to indicate the address of the permanent establishment in the same; once ascertained that the air navigation company operating in France and having in Italy a permanent establishment qualifies as taxable person, the fact that the income from the business is not taxable does not remove the obligation to file the yearly in-

The question raised concerns international air transport taxation; this matter was specifically addressed as long ago as when the first bilateral tax conventions were drafted to be then followed by a systematic process of implementation (9).

Then before sifting the facts and analysing conventional provisions as they appear in the single conventions regulating the matter in hand, one needs to place them in a larger framework.

And in actual fact, the problem connected with the taxation of air transport in international traffic follows the same path as that of shipping and the two categories are consequently regarded and discussed by the more recent legal literature as being part of the same phenomenon. (10)

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come tax return (even if registering a loss); (thus article 7 of the Convention between Italy and France enacted in Italy by L. February 9, 1963, no.469), and this is both because article 7 just quoted establishes exemption with respect to taxable profits, but not with respect to the tax return, and because the foreign company – according to article 1, first paragraph, second period, D.P.R. no.600/1973 – is under the obligation to keep accounts (year contested: 1974)'; thus Cassation, September 1, 1994, no.7609, in *il fisco,* 1994, 9479.

(9) For an analytical study of the first treaties setting down rules for the avoidance of double taxation of air and shipping companies see CHRÉTIEN, *Une espèce originale de traités fiscaux: les conventions internationales sur la double imposition des entreprises maritimes ou aériennes*, in *Revue de science et de legislation financieres*, 1951, 513 ff., and 713 ff.; BALTIC AND INTERNATIONAL MARITIME CONFERENCE, *Double taxation of non-residential shipping*, Copenhagen, 1968; NEWNS, *Double taxation relief for shipping*, London, 1988.

It is interesting to note how the problem – even if still in embryonic form and set in a rather different context – had become an object of reflection in Great Britain as long ago as the first half of the 1800s: see on this point MACKENZIE, *Letter to the members (of) both Houses of Parliament, on the resources of the country: machinery, currency, taxation, the corn laws, English and Scotch banking, the navigation law, the silk trade, and the commercial system generally*, London, 1826 (the text is available for reference at the University of London Library).

(10) Please refer to SCIALOJA, *Sistema del diritto della navigazione*, Rome, 1933, p.12 ff.; BUSTAMANTE Y SIRVEN, *Droit international public*, Paris, 1934, III, p.141 e p.158 ff.; ROCCO di TORRE PADULA, *Il diritto aeronautico in rapporto al diritto marittimo*, in *Studi di diritto aeronautico*, Rome, 1934, VII, p. 39 ff.; AMBROSINI, *Corso di diritto aeronautico*, Rome, 1933, I, p.115 ff.; and for a more systematic approach one can look in ID, *Législation et jurisdiction competente en matière de navigation aérienne internationale*, in *Revue juridique internationale de la locomotion aérienne*, 1923, 97 ff.; ID, *Le régime juridique des lignes aériennes*, in *Revue generale de droit aérien*, 1934, 459 ff.; MONACO, *La disciplina giuridica internazionale dell'aviazione civile*, in *Riv.dir.nav.*, 1956, I, 99 ff.- For a summary of the questions raised in the literature see: BALLARINO-BUSTI, *Diritto aeronautico e spaziale*, Milan, 1988, p.18 ff. e p. 75 ff.; BALLARINO, *Diritto aeronautico*, in *Digesto – Quarta edizione – Disc. priv. – commercial section*, Turin, 1989, p.312 ff.-

The reason for this analogous treatment (even if any aprioristic identification of a ship with an air carrier is to be excluded) is explained by the situations common to both maritime and air navigation. (11)

The *eadem causa* justifying the exemption from taxation can be found in the conventional codification between states that since the drafting of the convention between Italy and Romania of December 3, 1938 (aimed at avoiding double taxation in matter of direct taxes and enacted in Italy by L. 15 May 1939, no. 953 – which, in article 4, groups together shipping, inland waterways and air navigation companies) has become a constant characteristic of all subsequent treaties on the matter. (12)

The issue relating to income taxation for foreign navigation companies had been the object of numerous judgements involving the Central Tax Commission (The Italian *'Commissione Centrale Tributaria)* the Courts of Appeal and of Cassation; judgements concerned both miscellaneous

(11) See CASANOVA, *La disciplina giuridica della navigazione aerea internazionale*, in *Riv.dir.comm.*, 1932, I, 735 ff.; GIULIANO, *La navigazione aerea nel diritto internazionale generale*, Milan, 1941, p.216 text and comment. On this point see works by the following: GAETA, *Le fonti del diritto della navigazione*, Milan, 1965, p.240 ff. and p.258 ff.; ROMANELLI, *Diritto aereo, diritto della navigazione e diritto dei trasporti*, in *Riv.trim.dir.proc.civ.*, 1975, 1331 ff.; RINALDI BACCELLI, *Studi di diritto aeronautico*, Milan, 1977; ROMANELLI, *Contributo della dottrina italiana all'unificazione del diritto della navigazione aerea*, in *Arch.giur.*, 1986, 261 ff.; GIARDINA, *La disciplina comunitaria del trasporto aereo: gli sviluppi a seguito della sentenza nel caso Saeed*, in *Dir.comm.int.*, 1989, 77 ff.; SILINGARDI, *L'incidenza sul codice della navigazione della normativa comunitaria sul trasporto aereo*, in *Dir.trasp.*, 1997, 343 ff.; SERRA, *Dal codice di commercio al codice della navigazione*, in *Il cinquantenario del codice della navigazione (Cagliari, March 28-30, 1992), edited by L.TULLIO e M.DEIANA*, Cagliari, 1993, p.5 ff.; TULLIO, *Il codice della navigazione del 1942 e la mancata applicazione regolamentare per la navigazione aerea*, in *Dir.prat.av.civ.*, 1998, 71 ff.-

(12) The text of article 10 of the convention between Italy and Romania read as follows: *"Dans la mesure où les revenus spécifiés dans les articles 2 jusqu'à 9 ont été soumis à la surtaxe en Roumanie, ils ne pourront plus être fapprès à titre d'impôt personnel en Italie. Néammoins ils pourront être taxés à titre d'impôt personnel en Italie pour la différence éventuelle"*. Article 4 then discussed income from shipping, inland waterways and air navigation and set down that:*"Les impôt prélevés sur les revenus provenant de l'exploitation d'entreprises de navigation maritime, fluviale ou aérienne, y compris ceux qui proviennent de la vente des billets de passage pour les lignes desservies par lesdites entreprises, ne sont perçus que dans l'Etat sur le territoire duquel se trouve le siège de la direction effective de l'enterprise à condition toutefois que les navires ou les aéronefs possedent la nationalité dudit Etat"*. More information on this matter can be found in DI PAOLO, *La convenzione italo-romena contro le doppie imposizioni – Il regolamento della imposta sui redditi del lavoro e dell'imposta personale*, in *Riv.dir.fin.*, 1939, I, 180 ff.; ID, *Il regolamento della doppia imposizione sui redditi industriali e commerciali nella Convenzione italo-romena*, in *Riv.pol. economica*, 1939, 356 ff.-

taxes and the Italian '*imposta sulla ricchezza mobile*', tax on personal property. (13)

It was held that income taxation for the purposes of the tax on personal property should not take into consideration the company's foreign office and the legal status of the means (freighters) used to carry out the activity, but should instead be used as connection criterion to establish the place where the income was being generated.

So, a foreign navigation company, though not having a specific permanent business organization in our country, but docking regularly at an Italian port to load and unload passengers and goods: 'if, through an agent, concludes contracts, receives commissions, and fixes and collects

(13) A vast florilegium of case-law is available on the subject, concerning both navigation companies and foreign companies in general, however, the grounds in both respects seem to be inspired by the same *ratio decidendi*.

The following judgements rate among the most significant in this respect: Central Commission for direct taxes, June 20, 1871, no. 15169, in VANNUCCINI, *La giurisprudenza delle imposte dirette*, Rome, 1929, p.309, n.1731; Central Tax Commission for direct taxes, April 22, 1872, no.18245, in VANNUCCINI, last work cited., p. 920, no. 5049; Genoa Court of Appeal, February 14, 1874, in *Boll.giur.amm.fin.*, 1881, 131; Court of Appeal of Naples, July 17 1874, in *Gazz.proc.*, 1874-1875, 131; Court of Cassation of Turin, June 23, 1875, in *Boll.giur.amm.fin.*, 1875, 331; Central Commission for direct taxes, December 11, 1879, in *Annuario giur.contemp.amm.fin.*, 1880, IV, 189; Tribunal of Genoa, December 27, 1879, *IVI*, 1880, IV, 189; Central Commission for direct taxes, December 17, 1907, in *Riv.leg.fisc.*, 1908, 165; Venice Court of Appeal , January 14, 1908, in *Foro it.*, 1908, I, 1071; Central Commission for direct taxes, February 27, 1909, in *Giur.it.*, 1909, III, 353; Central Commission for direct taxes, March 30, 1909, in *Riv.leg.fisc.*, 1909, 345; Central Commission for direct taxes, July 18, 1911, in *Riv.trib.*, 1912, 620; Court of Appeal of Milan, June 13, 1913, in *Riv.trib.*, 1913, 521; Court of Cassation of Rome, July 23, 1913, in *Imp.dir.*, 1913, 306; Central Commission for direct taxes, November 22, 1915, no.74309, in *Imp.dir.*, 1916, 149; Court of Appeal of Genoa, March 20, 1916, in *Giur.it.*, 1916, I, 2, 200; Court of Appeal of Milan, June 7, 1916, in *Foro it.*, 1916, I, 1498; Court of Cassation of Rome, March 3, 1917, *IVI*, 1917, I, 646. Aspects of particular interest are discussed by SALVIOLI, *Le doppie imposte in diritto internazionale*, in the work cited , p. 44 footnote 2. After all, with reference to the unavoidable condition of double taxation on income as a result of the levying of taxes, both in the state of the company's head office and in the one where the branch was located, the following reasoning was perfectly consistent: 'from an international law point of view (the double tax, editor's note) in virtue of the sovereignty right the state enjoys over its citizens and public authorities' (thus DIENA, *Trattato di diritto commerciale internazionale, ossia, Il diritto internazionale privato commerciale, I, general overview*, Florence, 1900, p. 365 ff. in part. p. 370). Related financial issues are discussed by: MARCHESANO, *Gli investimenti internazionali*, in *Riv.pol. economica*, 1954, 469 ff.; CARANO DONVITO, *Appunti per una finanza e diritto finanziario internazionale*, in *Finanza pubblica contemporanea – In onore di J.TIVARONI*, Bari, 1950, p.79 ff.

freight', could only be seen as a company that was: 'carrying on a business in the state and through this activity obtaining an income from property, and therefore, the company was subject to the payment of the personal property tax'. (14)

The income taxation regime for foreign navigation companies carrying on international transport of cargo and passengers, with ships carrying a non-Italian flag, but operating by also calling at Italian ports, represents a paradigmatic case when considering double taxation issues. One should note in this respect (and we shall be looking at this later and in more detail, when we address international air transport taxation) how the particular type of income generated is mainly, though not exclusively, constituted by the functional auxiliarity of the principal industrial goods (ships or air carriers), by means of which income is generated. (15)

(14) Thus the Court of Cassation of Turin, June 23 1875, in the work cited, which can be looked up in *La giurisprudenza di diritto amministrativo e tributario internazionale, edited by R. BARSOTTI and A: CASSESE*, I: 1861-1879 Naples, 1973, page 357 ff.

(15) The issue (which had prompted the thoughts of EINAUDI), seen in the context of personal property taxation, was particularly relevant when pinpointing the 'territory where the thing generating income is located. The distinguished scholar pointed out that the head office of a navigation company may be in Italy, but it may also be that the company simply does not operate any transport between Italian ports, between Italian ports and foreign ports, and operates instead exclusively, in the period considered, between foreign ports.'

In these cases, 'the case-law has it that the income, though obtained by operating between foreign ports, is produced in Italy, because it is here the company has its centre of management. The ship has made a profit going from Buenos Aires to Rio de Janeiro, but if this is an advantageous operation of transport it is because it has relied on the organization work carried out within the national territory.'

It therefore seems necessary to examine where the combinations and arrangements of capital and labour have been performed, where risks have been taken, where executive decisions have been made; therein income will be considered as produced, and the state, the province and the town wherein the income originated has the right to impose taxation.' (thus EINAUDI, *Corso di scienza della finanza*, Turin, 1926, p.132-133).

In actual fact, this issue had already been amply discussed by the scholars and had formed the object of analysis of study groups and tax committees appointed by the League of Nations to look into international double taxation (see in this respect observations in the work of BAR, *Les doubles impositions. Rapport et projet des conclusions preliminaires*, in *Annuaire de l'Institute de droit international*, 1900, 52).

And with reference to the specific maritime navigation, see clashes emerging in the debate within the League of Nations Committee, *Comité fiscal. Première session. Proces – verbal de la huitième sèance*, Geneva, 1929, p.13 ff.- See also in this respect, *Rapport sur la double imposition presenté au Comité financier par Mr. Bruins, Einaudi, Seligman et Sir Josiah Stamp*, Geneva, 1923; *Rapport presenté par la reunion générale d'experts gouvernamentaux en matière de double imposition et d'evasion fiscale*, Gene-

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The main characteristic in this case is not so much represented by the legal status of the air carrier (attributable to the flag they fly) as it is by its industrial quality linked for the most part to the productive process, and this distinctive feature makes the air carrier imputable in full to the foreign parent company's balance.

This indissoluble interconnection between the industrial goods of the air navigation company, to be intended as fulcrum and centre to which the various assets and liabilities are imputed, has on several occasions been highlighted by both case-law and academic writings as being the reason for the inadequacy inherent in the taxation methodology. (16)

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va, 1928; and MICHEL, *La notion de filiale au point de vue fiscal international*, in *Travaux du Comité Français de droit international privé*, Paris, I, 1935, p.101 ff.; ID, La *notion d'établissement stable de droit fiscal international*, in *Cahiers de droit fiscal international*, I, 1939, 213 ff.; CHRÉTIEN, *Les recueils fiscaux de S.D.N. et de l'ONU*, in *Revue générale de droit international public*, 1952, 4 ff.-

A general overview concerning these same isssues can be found in the works of: ANZILOTTI, *Le navi mercantili estere e la tassa sul consumo dell'energia elettrica*, in *Giur.it.*, 1908, I, 2, 701 ff.; ESPERSON, *La legislazione fiscale italiana nei suoi rapporti con il diritto internazionale*, in *Riv.dir.pubbl.*, 1914, II, 353 ff.; McNAIR, *Double taxation on shipping*, in *American juournal of international law*, 1925, 569 ff.; COATES, *Double taxation and tax evasion (Report and Resolutions submitted by Technical Experts to the Financial Committee of the League of Nations)*, in *Journal of the royal statistical society*, 1925, 403 ff.; HOLMES, *Federal income tax*, Indianapolis, 1927, p.448 ff.; GRIZIOTTI, *L'imposition fiscale des étrangers*, in *Recueil des Cours*, in the work cited, 1926, III, 5 ff. in part. 59 and 109; CARROLL, *The development of international tax law: franco-american treaty on double taxation. Draft convention on allocation of business income*, in *American journal of international law*, 1935, 586 ff.; BÜHLER, *Les accords internationaux concernant la double imposition et l'évasion fiscale*, in the work cited, 465 ff.; LIPPERT, *Handbuch des internationales Finanzrechts*, Wien, 1928, 605 ff.; VERDROSS, *Les règles internationales concernant le traitement des étrangerès*, in *Recueil des Cours, cit.*, 1931, II, 403 ff.; DI PAOLO, *Le doppie imposizioni e la nostra espansione commerciale*, in *Riv.pol.economica*, 1930, 960 ff.; PUGLIESE, *L'imposizione delle imprese di carattere internazionale, cit*, p.101 ff.; McKINLEY, *Aircraft taxation*, Berkeley (CA), 1948; ICAO - INTERNATIONAL CIVIL AVIATION ORGANIZATION, *The economic implications of the introduction into service of long-range jet aircraft*, Montreal, 1958.

(16) On the subject, see EINAUDI, *Corso di scienza della finanza*, in the work cited, p.132, ID, Principi di scienza della finanza, Turin, 1948, p.136 ff.; GRIZIOTTI, *L'imposition fiscale des étrangers, Recueil des Cours*, in the work cited, 1926, III, 59 ff. and 109 ff.; BÜHLER, *Les accords internationaux concernant la double imposition et l'évasion fiscale*, in *Recueil des Cours*, in the work cited, 1936, I, 465 ff.; ALLIX, *La condition des étrangers au point de vue fiscal*, in *Recueil des Cours*, in the work cited, 1937, III, 582 ff.; McNAIR, *Double taxation on shipping*, in the work cited., 569 ff.; COATES, *Double taxation and tax evasion*, in the work cited, 403 ff.; CARROL, *The development*

This issue, on the threshold of the general questions raised in study projects on double taxation, as well as being specifically contemplated in some bilateral conventions (17), was also specifically addressed and codified by our law - maker.

Article 1, Royal Decree L. May 7, 1925, no. 587, established a rule according to which the government: 'had the power to grant foreign navigation companies having their head office and the principal base of their business abroad and having in Italy, their own branches, agencies, exemption from personal property tax on the part of income obtained from traffic in Italian ports, on condition that the source states of the above mentioned companies grant Italian navigation companies, in fact and in law, the same treatment. The exemption would be granted by Royal Decree and will be subject to the Council of Ministers's opinion'. (18)

This particular regime, based on mutual treatment, found actual implementation solely with reference to ships under an American or Cana-

of international tax law:Franco-American treaty on double taxation-draft convention on allocation of business income, in the work cited, p. 586 ff.-

On issues of a more general nature see: QUARTA, *Commento alla legge sulla imposta di ricchezza mobile*, Milan, 1917, I, p.166 ff.; LEROY-BEAULIEU, *Trattato teorico-pratico di economia politica*, Turin, 1917, I, p. 204 ff., in *Biblioteca dell'economista, 4 serie*, Vol. IX, Part I; CLEMENTINI-BERTELLI, *Commento alle leggi sulla ricchezza mobile*, Turin, 1934, I, p.39 ff.; SAMPIERI MANGANO, *L'imposta di ricchezza mobile e le società commerciali per azioni*, Milan, 1935, I, p.731 ff.; UDINA, *Il diritto internazionale tributario*, in the work cited, p.285 ff.-

(17) So for example, article 3 of the treaty on trade between Italy and Austria/Hungary dated February 11, 1906 (which, except for the substitution of the French word *ressortissants* with *sujets*, is literally identical to article 2 of the Treaty dated December 6, 1891) set down that: *'Les ressortisssants de l'une des Hautes Parties contractantes, qui exercent le métier de charretier, ainsi que le transport de personnes par voiture entre les divers points des territoires respectifs, ou qui se livrent à la navigation, soit maritime, soit fluviale, ne seront soumis, par rapport à l'exercice de ce métier et de ces industries, à aucune taxe industrielle sur les territoires de l'autre'.*

With reference to the non applicability of this Treaty in respect of other taxes (in this specific case, the tax paid on the consumption of electricity) see Venice Court of Appeal, January 14, 1908, in *Foro it.*, 1908, I, 1071.

(18) On the scope and actual applicability of this provision see DI PAOLO, *Esenzioni ed agevolazioni nel sistema dell'imposizione diretta erariale e della finanza locale*, Rome, 1934, p.141 ff.; BIAMONTI, *La tassazione dei profitti delle società per azioni aventi interessi internazionali*, in *Riv.dir.fin.*, 1939, I, 290 ff.; UDINA, *Il diritto internazionale tributario*, in the work cited., p.172 ff.; CROXATTO, *Le Convenzioni fra Italia e Svezia al fine di evitare le doppie imposizioni*, in the work cited, 26 ff., particularly 36 ff.

dian flag. (19) Instead, the provision according to which income of navigation companies would be taxed in the state where the place of effective management was located, providing the ship had that state's nationality, remained part of the general conventions against double taxation (20).

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(19) The delegation of authority (enabling act) to government was actually applied solely to income of American navigation companies, first by Royal Decree June 11, 1925, no.81 and later (following the interpretation intended by the law-maker) by Royal Decree March 4, 1926, no. 240 and then, with Canada, by Royal Decree August 25, 1932, no.126 to make profits from navigation mutually exempt from personal property tax – In all other cases, special agreements concerning mutual exemption from this income tax, the power given to the executive by Royal Decree L. May 7 1925, no.587 was not used, but the matter was regulated *ex novo* (see for example L. June 3, 1932, no.853 with Greece, L. November 26, 1951, no.1612 with Argentina, L. August 9, 1954, no. 873 with South Africa and L. April 25, 1957, no.359 with Israel).

The need was felt, in the sector in question, to sign limited agreements in lieu of general conventions. In some cases, this was the result of the need to calibrate existing treaties (through exchange of notes) with amendments in tax laws introduced *medio tempore* in the single states and in other cases, it was the result of the request for adjustment prompted by the circumstance of having to regulate relations involving, as persons liable for collection, the navigation agencies or companies owned (directly or through mediation) by the same States.

For a thorough analysis of agreements concluded by Italy and other countries with specific reference to air navigation, see the reconstruction offered in the work by ANDRIOLI, *Sui metodi diretti a impedire la doppia imposizione* in *Raccolta di scritti in memoria di A.LENER, edited by B.CARPINO,* Naples, 1989, p.41 ff. spec. p. 66 ff.- This author also stresses that: 'the Agreements and conventions examined are brought to notice since they remove from the government of the Italian Republic the power to levy taxes on income that ends up going to one of the contracting states. Because most of the agreements and conventions have been ratified with laws subsequent to September 1, 1974 (the date in which the legislation on the 1973 tax reform came into force) *lex posterior derogat priori,* but the above formulated conclusion applies also with reference to agreements and conventions ratified by laws prior to January 1, 1974 in virtue of article 82 D.P.R. 597/1973 on Irpef (income taxation for natural persons) referred to in article 26 D.P.R. 598/1973 on Irpeg (income taxation for legal persons).' (to be found in the work cited last, p.71).

(20) This qualification constitutes the common denominator of the majority of agreements on the subject (see on this point UDINA, *Il diritto internazionale tributario,* in the work cited, p. 272 ff.; UCKMAR V., *La tassazione degli stranieri in Italia,* in the work cited, p.172 ff. and p.191 ff. CROXATTO, *La imposizione delle imprese con attività internazionale,* in the work cited, p.38 ff.) even if this connotation is not always true of all Conventions. So for example in the convention between Italy and Sweden, which came into force on June 3rd 1958 (L. March 1958, no. 280), differently to what was established in agreements with the United States (L. July 19, 1956, no. 943) and with the Netherlands (L. June 18, 1960, no.704) the rule was set down according to which exemption from income taxation depended solely on where the navigation company was situated. The requisite of the flag was thought to be irrelevant, seen that the on-

2 – Except for its own special characteristics in matter of determining income (an aspect we will be examining later in this study) the requirement connected with identifying the source of the income derived from air navigation, is not set in terms that are different to other cases of cross-border economic activities (*lato sensu*) – and relevant for the purposes of taxation -.

Private law considerations necessarily come to bear upon the regime (often resulting in clashes) of the single legal systems.

Both international tax law experts and scholars have been examining the issue in detail; clearly, while this is not right forum to take such arguments further, one can still consider the question in relation to the conclusions that have been reached by the most accredited doctrinal exegesis. (21)

With reference to this latter aspect, in the context of international conventions addressing tax

issues, one finds a *summa divisio* between those known in German as *Verteilungsnormen, distributive rules,* and those being given the name of *Grenznormen*. (22)

ly criterion of connection would be constituted by the administrative and management offices being located in the territory of the other contracting state (a broad application of the maxim *mobilia personam sequuntur*). Under this agreement, therefore, a navigation company having its head office in Sweden and carrying on its activity using a ship or air carriers under a third state's flag, would not be taxed in Italy (on this point see CROXATTO, *Le Convenzioni fra Italia e Svezia al fine di evitare le doppie imposizioni,* in the work cited, 36 ff.- A more detailed discussion on this subject can also be found in UCKMAR V., *La Convenzione fra l'Italia e i Paesi Bassi sulle imposte dirette,* in the work cited, 957 ff.; ID, *La Convenzione fra l'Italia e la Svezia sulle imposte dirette,* in the work cited, 635; ANTONINI, *Le doppie imposizioni nei rapporti italo-americani,*in the work cited., 677 ff.).

(21) See KELSEN, *Contribution à la théorie du traité international,* in *Rev.int. de la théorie du droit,* 1936, 253 ff.; ID, *Principles of international law,* New York, 1952, p.262 ff.; ID, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto, edited by A.CARRINO,* Milan, 1989; VITTA, *La validité des traités internationaux,* Leiden, 1940; UDINA, in the work cited, p.264; ID, *Sulle partizioni scientifiche del diritto internazionale,* in *Scritti giuridici in onore di S.ROMANO,* III, Padua, 1940, 49 ff.; MARESCA, *Il diritto dei trattati,* Milan, 1971; PAU, *Considerazioni sul valore dei Trattati internazionali nell'ordinamento italiano,* in *Riv.dir.int.*, 1984, 741 ff.; CROXATTO, *Le norme di diritto internazionale tributario, in the work cited,* p.2221 ff.-

(22) For a discussion on such distinction see the study by FANTOZZI-VOGEL, *Doppia imposizione internazionale,* in *Digesto, Quarta Edizione – Disc.priv. – Sez. commerciale, V,* Turin, 1990, p.181 ff., especially 190 ff.; VOGEL, *Il diritto tributario internazionale,* in *Trattato di diritto tributario, Diretto da A.AMATUCCI,* I, *Il diritto tributario*

As for the aspects that concern us here, we should highlight the characteristics of these norms (setting aside the no longer topical lengthy examinations concerning the search for common principles of income taxation applied internationally) in terms that address the internal legal system and the international limits to the taxing power as derived from conventional international law; limits the expression of which is at its most evident in the direct agreements for the avoidance of international double taxation and in those treaties containing the concept of the most favoured nation. (23)

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e le sue fonti, t. II, Padua, 1994, p.692 ff.; VOGEL *et alii*, *Klaus Vogel on Double Taxation Conventions – A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice*, London - The Hague - Boston, 1997, p.27 ff.; FANTOZZI, *Diritto tributario*, Turin, 1998, p.164 ff.-

(23) Not enough words have been spent in the legal literature on the line between *Grenznormen* and *Verteilungsnormen (distributive rules)* - with the exception of distinguished scholars FANTOZZI and VOGEL, whose work on the subject, though a little dated by now, was mentioned in the previous footnote and, MICHELI whose work also deserves a mention, *Problemi attuali di diritto tributario nei rapporti internazionali*, in the work cited, 41 ff., - with the result that one often finds heterogeneous references on the subject. Indeed, save for the case of legislative self-limitation of a state, to each agreed decision between two or more international parties, or to each agreement imposed by an international authority to its members, there necessarily corresponds a distribution of national legislative competencies in that sector of 'legal commerce', except when a fact or relation (or even a series of facts and relations) result as being legally derelict, in other words are left unregulated, with no advantage being gained by any of the national partners. Moreover, *Grenznormen* and *Verteilungsnormen* are, from an etiological point of view, related to each other, being that they are both the result of the need to resolve general issues of juxtaposition caused by *Normenkonkurrenz* phenomena.

It is rather with respect to the genesis and the related teleological aspect that a case for distinction becomes practicable. In point of fact, delimitation of norms is a phenomenon typical of public international law (especially of the international organisation), since it is delimitation of a country's internal taxing power operated on an international level; in other words, the states, by accepting to take part in a phenomenon of international association, delegate the latter the task of reconciling the various and competing demands for the exercise of legislative sovereignty. One should consider that it would not be logical, in the presence of an international *Normenkonkurrenz* phenomenon, for a state to decide on legislative self-limitation to the advantage of a foreign rule uncompromisingly requiring effectiveness: especially if the case is one of norms of 'necessary application' (as a great many tax rules are) and if to the economic inconvenience suffered by the self-limiting state corresponded only an economic benefit for the claiming state.

This is the reason why limits need to be agreed upon by means of a treaty or through supranational mediation carried out by an international authority. Thus the

Now, 'competing' tax rules attributable to two different national legal systems and linking to the same fact the emerging of the basis for taxa-

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Grenznormen would seem to be directed at regulating a kind of 'competition of legislation', by means of delimitation of national tax demands. But if there were delimitation, without the corresponding 'sharing out' of national legislative demands, no economically advantageous result would be reached, since, to the sacrifice suffered by a state, there would be no balancing economic benefit for another state.

Having stated the facts in these terms, it should follow that a legislative delimitation can only be justified if accompanied by a distribution of legislative competencies among different international parties (*Distributive rules*), which underpins the very existence of the international organisation. This explains how, with the intensifying of activities of international co-operation since World War II, the trend has been that of gradually substituting the concept of *Grenznormen* with that of *Verteilungsnormen*.

Now, international competition of legislation of this kind does not generate a situation of clashes *in re ipsa* (as is the case with internal law forbidding the duplication of a tax, see on the subject: MARELLO, *Il divieto di doppia imposizione come principio generale del sistema tributario*, in *Giur.cost.*, 1997, 412 ff.; CONSOLO, *La duplicazione d'imposta ed i possibili correttivi nel procedimento di imposizione*, in *Riv.dir.trib.*, 1993, I, 943 f; FREGNI, *Appunti in tema di doppia imposizione interna*, in *Riv.dir.fin.*, 1993, II, 14 ff.; ARDIZZONE, *Doppia imposizione interna*, in *Digesto, Quarta edizione, Disc.priv. – Sez. commerciale* – V, Turin, 1990, 181 ff.), being possible for a same party to be taxed in a country, as a result of the principle of territoriality and again in another country on application of the worldwide income principle, with respect to the same fact or relation (see on the subject FANTOZZI, *Diritto tributario*, in the work cited., p.164 ff.). It is clear that the need for regulation, of a two-way kind (at least) originates, in these cases, in considerations of an equitable type that would protect the party from the different states' concurrent and demands for tax, and also in the national economic parties' shared business advantage, especially when considering that this is the era of the globalisation of economies.

It is also true, however, that a state would not find it convenient (or not always, in any case) that the equitable effects of the *'Verteilungsnormen'* be extended indiscriminately, preferring instead, to come to an agreement each time with its national partners that will be consider the adjustment and distribution of the respective tax demands. Thus, bilateral tax conventions are born. It is just that these conventions, once exclusively intended for settling a clash (the function proper to international private law rules) by choosing each time the rule (internationally agreed upon) to apply to that situation or relation, now tend to establish a distribution of competencies that will be as uniform as possible, something which is obtained through the application of the rule of the most favoured nation (see on the subject: PANICO, *Clausola della nazione più favorita*, in *Enc.giur. Treccani*, VI, Rome, 1988 *ad vocem*; TRIGGIANI, *Il trattamento della nazione più favorita*, Naples, 1984) and also through the adoption of a model (OECD, ONU, Andean Pact, etc.) recommended by such international organisations (see on the subject GONZALES CANO, *Le caratteristiche e l'evoluzione dei modelli di convenzione: il modello "andino" e il modello "Onu"*, in *Quaderni*, 1995, 30 ff.).

In other words, it was formerly a conflict to be avoided, whereas today, it is mainly tax equity that is being pursued (see on this point the observations by AMATUCCI A., *Il conflitto tra norme internazionali ed interne tributarie*, in *Studi in onore di V.UCKMAR*, t. I, Padua, 1997, p.81 ff.).

tion, find their reconciliation in the rules of international law which set the limits to the internal jurisdiction of the single states. (24)

These conventional rules, which we can define as belonging to international tax law, are merely the contents of the taxing power of the single states (in the sense of a conventional distribution of the respective regimes), the legislative competency remaining, as far as the bases for taxation are concerned, a matter for domestic law provisions to regulate (25).

As for the rules of delimitation, the less recent academic writings include, as well as references by FANTOZZI and VOGEL in the works cited, also: BERGBOHM, *Staatsvertrage und Gesetze als Quellen des Völkerrechts*, Dorpat, 1877; NIPPOLD, *Die Völkerrechtliche Vertrag, seine Stellung im Rechtssystem und seine Bedeutung für das internationales Recht*, Bern, 1894; BÜHLER, *Prinzipien des Internationalen Steurrechts*, Amsterdam, 1964.

The issue has not been specifically examined further, therefore a general list would include – as well as the classic text by KELSEN, *General Theory of Law and State*, Cambridge, 1949 (available for reference in its Italian translation by S.COTTA e G.TREVES, *Teoria generale del diritto e dello Stato*, Milan, 1984) ID, *Théorie du droit international public*, in *Recueil des Cours*, already listed, 1953, II, 5 ff.- BARILE, *Diritto internazionale e diritto interno*, in *Riv.dir.int.*, 1956, 448 ff.; GIULIANO, *Diritto internazionale. La società internazionale e il diritto*, Milan, 1974; BARILE, *La structure de l'ordre juridique international*, in *Recueil des Cours*, already listed, 1978, III, 13 ff.; and more recently, though the texts are less detailed, GIULIANO-SCOVAZZI-TREVES, *Diritto internazionale. Parte generale*, Milan, 1991, p.41 ff.-

(24) See in particular FEDOZZI, *Corso di diritto internazionale*, Padua, 1931, p. 35 ff.; RAPISARDI MIRABELLI, *Diritto internazionale e diritto interno in ordine alle loro reciproche influenze*, in *Scritti in onore di P.ROSSI*, Siena, 1931, p.7 ff.; CAVAGLIERI, *Corso di diritto internazionale*, Naples, 1932, p. 28; PERASSI, *Lezioni di diritto internazionale*, II, p.12; BALLADORE PALLIERI, *Diritto internazionale pubblico*, Milan, 1962, p.50 ff.; HEILBORN, *Grundbegriffe des Völkerrechts*, Stoccarda, 1912, p.59 ff.; MORELLI, *Nozioni di diritto internazionale*, Milan, 1967; SERENI, *Diritto internazionale*, 4 vol., Milan, 1956-65, I, p.195 ff.; BARILE, *Diritto internazionale e diritto interno*, alreadyt cited, 448 ff.; ID, *Diritto internazionale diritto interno: rapporti fra sistemi omogenei ed eterogenei di norme giuridiche*, Milan, 1960; SPERDUTI, *Diritto internazionale e diritto interno*, in *Riv.dir.int.*, 1958, 188 ff.; ID, *Dualism and Monism. A confrontation to be overcome*, in *Italian Yearbook Intern. Law*, 1977, 31 ff.; GIULIANO-SCOVAZZI-TREVES, *Diritto internazionale (Parte generale), already listed*, p.539 ff.; CARBONE, *Le norme di diritto internazionale convenzionale, il loro rapporto con le norme di diritto internazionale privato e la loro interpretazione*, in *Studi in onore di V.UCKMAR*, t. I°, already listed, p.183 ff.- For an overview of the various questions raised in the legal literature see SORRENTI, *La conformità dell'ordinamento italiano alle "norme di diritto internazionale generalmente riconosciute" e il giudizio di costituzionalità delle leggi*, in *Dir.soc.*, 1999, 287 ff.-

(25) Refer to CROXATTO for observations on the subject, *Le norme di diritto internazionale tributario*, in the work cited, p. 2227 ff. and AMATUCCI A., *Il conflitto tra norme internazionali ed interne tributarie*, in *Studi in onore di V.UCKMAR*, t. I°, in the

So ultimately, the real effects of the convention are carried out by means of a self-executing act of the same treaty, which does not touch the tax regime in force. (26)

As for the special provisions contained in double taxation conventions,

work cited, p. 81 ff.- An overview is offered in BARILE, *Tendenze e sviluppi della recente dottrina italiana di diritto internazionale pubblico (1944-1951)*, in *Comunicazioni e studi dell'Istituto di diritto internazionale della Università di Milan*, IV, Milan, 1952, p.475 ff.; MONACO, *I Trattati internazionali e la nuova Costituzione*, in *Raff.dir.pubbl.*, 1949, 197; MIELE, *La Costituzione italiana e il diritto internazionale*, Milan, 1951, p.12; MIGLIAZZA, *Convenzioni internazionali e costituzione*, in *Giurispr. Completa della Corte di Cassazione*, civil section, 1949, II, 177; MARMO, *Alcuni rilievi sugli effetti della nuova costituzione italiana sui trattati internazionali*, in *Foro pad.*, 1949, IV, 211; BISCOTTINI, *Diritto amministrativo internazionale*, in the work cited, p. 365 ff.; GIULIANO-SCOVAZZI-TREVES, in the work cited last, p. 553 ff:, BARILE, *Principi fondamentali dell'ordinamento costituzionale e principi di ordine pubblico internazionale*, in *Riv.dir.internaz. privato e proc.*, 1986, 5 ff.; GARBARINO, *Alcune considerazioni sulle Convenzioni per evitare le doppie imposizioni*, in *Dir.comm.int.*, 1989, 51 ff.; MARSONER, *Un importante convegno su "Costituzione dello Stato e norme internazionali"*, in *Dir. comunitario scambi internaz.*, 1989, 211 ff.-

(26) Refer to: FABOZZI, *L'attuazione dei trattati internazionali mediante l'ordine di esecuzione*, Milan, 1961; CONDORELLI, *Il giudice italiano e i trattati internazionali: gli accordi self-executing e non self-executing nell'ottica della giurisprudenza*, Padua, 1974; MORELLI, *Ordine di esecuzione ed adattamento del diritto internazionale al diritto interno*, in *Riv.dir.internaz.*, 1979, 220 ff.; SPERDUTI, *Vicende parlamentari sull'ordine di esecuzione dei trattati. Una pratica da riconsiderare*, in *Riv.internaz. privato e proc.*, 1982, p.421 ff.; GIULIANO, *E' emendabile o inemendabile l'ordine di esecuzione di trattati internazionali?*, *IVI*, 1982, 209 ff.; GIULIANO-SCOVAZZI-TREVES, *op.loco ult.cit.*, p. 578; GARBARINO, *Adattamento del diritto tributario interno alle Convenzioni contro le doppie imposizioni*, in *Dir.prat.trib.*, 1987, II, 3 ff.; BERNARDINI, *Norme italiane e diritto interno. Formazione e adattamento*, Pescara, 1989; CONFORTI, *Cours général de droit international public*, in *Recueil des Cours, cited*, 1988, p.13; VAZQUEZ, *The four doctrines of self-executing treaties*, in *American Journal of International Law*, 1995, 695 ff.; BUERGENTHAL, *Self-executing and non self-executing treaties in national and international law*, in *Recueil des Cours*, in the work cited., 1993, 303 ff.; PAUST, *Self-executing treaties*, in *American Journal of International Law*, 1988, 760 ff.; CATALDI, *In tema di rapporti tra autorizzazione alla ratifica e ordine di esecuzione del trattato*, in *Riv.dir.internaz.*, 1985, 520; GIULIANO, *Una recente sentenza della corte costituzionale e l'ordine di esecuzione di trattati internazionali*, in *Riv.dir.internaz. privato e proc.*, 1985, 225; LOTITO, *Corte costituzionale e direttive self-executing*, in *Quaderni costituzionali*, 1991, 613; ALBERGHINI, *A proposito di convenzioni internazionali e parametri di costituzionalità*, in *Giur.cost.*, 1999, 339 ff.- The questions raised in relation to self-executing Community acts are discussed by AMATUCCI A. in *La normativa comunitaria quale fonte per l'ordinamento tributario interno*, in *Corso di diritto tributario internazionale - Coordinato da V.UCKMAR*, Padua, 1999, p.717 ff.-

mainly standardised according to the OECD model (27), the most distinguished legal literature, classifies as distributive rules those concerning income taxation and, among them, it singles out four distinct groups. (28) Now – keeping to the question being addressed in this study – one can observe that the first group concerns income from activities directed towards generating revenue. Among these categories of income, the activity that an enterprise carries on is of fundamental importance (art. 7) in that it represents the *genus* in the context of which we find the *species* that is constituted by the activities shipping and air transport. (article 8). (29)

(27) For a more updated version, with the accompanying model and commentary see OECD, *Model tax Convention on income and on capital* (loose-leaf), I e II, Paris, 1997. On this subject see also, *amplius*: VOGEL *et alii*, in the last work cited; ID, *Changes to the OECD model treaty and commentary since 1992*, in *Bulletin for international fiscal documentation*, 1997, 532 ff.; LANG *et alii*, *Multilateral tax treaties: new developments in international tax law*, London, 1998; BERMAN-LEIMONE, *Current issues in United States and OECD model tax treaties*, in *Tax management international journal*, 1998, 163 ff.; OECD, *Tax treaties: Linkages between OECD member countries and dynamic non – member economies (prepared by VANN R.)*, Paris, 1996; PALUMBO, *Considerazioni in margine alla <<Convenzione-tipo>> OCSE del 1992*, in *Riv.dir.trib.*, 1993, I, 237 ff.; EDWARDES-KER, *Tax treaty interpretation*, London, 1995; DOERNBERG, *Amending the OECD model treaty and commentary in response to corporate tax integration*, in *Intertax*, 1995, 3 ff.; HUND, *Towards a revised OECD-model tax treaty?*, in *Intertax*, 1989, 212 ff.; GRAVELLE, *Tax treaties: concepts, objectives and types*, in *Bulletin for international fiscal documentation*, 1988, 522 ff.; DIAMOND W. – DIAMOND D., *International tax treaties of all nation: cumulative index*, New York, 1978; PEARSON, *The OECD draft double taxation Convention and recent United States treaties*, in *Taxes*, 1976, 426 ff.-

For the Italian legal literature, among the most recent contributions we can suggest the following: UCKMAR, *I trattati internazionali in materia tributaria*, in *Trattato di diritto tributario, Diretto da A.AMATUCCI, I, Il diritto tributario e le sue fonti*, t.II, *cited*, p.727 ff. in part. 742 ff.; MIRAULO, *Doppia imposizione internazionale, cited*, p.152 ff.; DEL GIUDICE, *La doppia imposizione internazionale sul reddito e sul patrimonio, cited*, p.24 ff.; FIOCCA, *Le convenzioni internazionali contro le doppie imposizioni*, in *Nuova raff.*, 1997, I, 798 ff.; GONZALES CANO, *Le caratteristiche e l'evoluzione dei modelli di convenzione: il modello "Andino" e il modello "ONU", cited*, 30 ff.; MELIS, *L'interpretazione delle convenzioni internazionali in materia di imposte sul reddito e sul patrimonio*, in *Raff.trib.*, 1995, 1966 ff., nonché *ibidem*, 1996, 88 ff.; MAYR, *La doppia imposizione fiscale nelle convenzioni contro le doppie imposizioni*, in *Corr.trib.*, 1990, 905 ff.; DEL GIUDICE, *Le convenzioni internazionali*, in *il Fisco*, 1987, 4085 ff.-.

(28) Thus FANTOZZI-VOGEL,in the work cited., p.191 ff.

(29) Art.8 of the OECD model, in its current version, (see text in OECD, *Model tax Convention*, I, in the work cited.) reads as follows: "Shipping, Inland Waterways Transport and Air Transport:

1. Profits from the operation of ships or aircraft in international traffic shall be

Choosing to follow the method of exemption on income for this type of activity, instead of using the tax credit method, would seem to make irrelevant the existence of a permanent establishment as imputation centre liable to tax. (30)

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taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

(30) From this point of view, we have the failing of the *vis atractiva* of the permanent establishment which, according to the prevailing legal literature, on the basis of the Grenznormen would allow this entity to be attributed positive and negative components of income identified therein. Being that the exemption involves profits from air navigation in 'international traffic', it follows that we are in the presence of an exemption of an objective kind, and therefore, that the potentially different income-generating categories obtained, and even the very type of activity (air transport) that may be on the threshold of being considered 'international traffic', exclude *di per se* the possibility of benefiting from the exemption as it is carried in the conventions (see on the subject footnote no.46. On this point see also comments by CROXATTO, *La imposizione delle imprese con attività internazionale, cited*, p.38 ff. and page 132 of the text and footnote 74, which also contains a reference to the following publication: *International chamber of shipping, Double taxation of shipping profits*, 1953, which, alas, was not available for consultation).

It is important to stress how around the concept of force of attraction of the permanent establishment, differing opinions have developed which distinguish between limited force of attraction (otherwise known as analytical) and full force of attraction; other tendencies of thought are also found in the literature.

Essentially, the various theories consider the permanent establishment an entity attracting all income produced by the same, income that can be seen as being generated within the territory of the state and applied the business income tax regime. Conversely, limited polarisation would mean distinguishing between the activities carried on in order to verify whether they are attributable to the business activity; a separate tax regime would then be applied on income not attributable to the business enterprise. (see LOVISOLO, *La <<stabile organizzazione>>*, in *Corso di diritto tributario internazionale, cited*, p.233 ff.; GARBARINO, *La tassazione del reddito transnazionale, cited*, 192 ff.; ID, *Forza di attrazione della stabile organizzazione e trattamento isolato dei redditi*, in *Raff.trib.*, 1990, I, 427 ff.; GIORGI, *Il principio del trattamento isolato dei redditi e la cd <<forza di attrazione>> della stabile organizzazione: problemi e proposte di soluzione*, in *Aspetti fiscali delle operazioni internazionali, edited by V.UCKMAR e C.GARBARINO*, Milan, 1995, 25 ff.).

3 – If one is to look at income of this kind as being simply exempt, then it would seem that further details become necessary, both with ref-

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In actual fact, this conceptual formulation, which leads to income being re-qualified through a *reductio ad unum* (obtained when referring to prescriptions contained in articles 40, first paragraph, 45, first parapragh and 81, first paragraph of the TUIR, Unified Code for Income Taxation) seems to overlook what is laid down in article 112, second paragraph of the Unified Code for Income Taxation TUIR, according to which: 'Income as established in article 20 is considered as produced in the state, and within this category of business income fall unearned increments and capital losses on goods used for or involved in the commercial activities carried on in the territory of the state, even when such proceeds are not obtained through permanent establishments, and also profits distributed by companies or agencies as in letters a) and b) of the first paragraph of article 87 and unearned increments listed in article 20, paragraph 1, letter f)" and again in article 113, first paragraph, of the TUIR, according to which: 'For companies and commercial agencies with a permanent establishment within the State, except for ordinary partnerships, overall income is determined following provisions in item II on the basis of a special profit and loss account relative to the permanent establishment and to the other activities generating taxable income in Italy' (see on the subject observations by PERRONE, *L'imposizione del reddito delle società e degli enti non residenti, dal decreto delegato IRPEG al testo unico delle imposte sui redditi*, in *Commentario al Testo Unico delle imposte sui redditi ed altri scritti – Studi in memoria di A.E.GRANELLI*, Rome-Milan, 1990, p.565 ff.; MANGANELLI, *Territorialità dell'imposta*, in *Digesto, Fourth Edition – Disc.priv. – Commercial Section*, XV, Turin, 1998, p. 366 ff. and find therein references to the legal literature and to the case-law).

In the economy of international air transport, especially when the interplay between the different parts of its system is considered in the light of Conventions stipulated and in particular of article 8 of the OECD model, a lengthy examination would seem to become irrelevant, if the situation that emerges is one of exempt income (obviously only when the activity is referable to the formula adopted by the conventional rule) and – even if this may appear as a vicious circle – this fact does not exhaust the aspects that are linked to the formal obligations that would still be ascribable to the foreign navigation company's Italian agency. (see *infra* footnote no. 63).

This reconstructive polysemy around the notion of permanent establishment has been carried out by means of a complex comparative histological work of the dictates derived from international conventions and the principles explained in the Italian positive legal system, since the legislative anomy has brought to the notion being continually adjusted to an ever changing legislative and factual reality. (on this particular point please refer to the straightforward analysis conducted by GALLO, *Contributo all'elaborazione del concetto di "stabile organizzazione" secondo il diritto interno*, in *Riv.dir.fin.*, 1985, I, 385 ff.).

Furthermore, one should not forget that the notion of permanent establishment born and developed, what's more, on theoretical models the background of which had been outlined keeping as benchmark the regime of income taxes, later found application for VAT purposes - even if it considers a rather particular aspect -. It has been noted by the most distinguished scholars that in article 7 D.P.R. no. 633/1972: 'the permanent establishment does not appear to be considered as organisational structure that only enterprises undertake (as with the regime of direct taxes), instead it is conceived as referable to all those providing services and, therefore, theoretically even to

erence to identifying the activities and the services that can be referred to the special conventional provision and to pinpointing the reasons that led to such rules being established. (31)

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those performing services related to the arts and professions. One should therefore be clear on whether this determines a variation of the notion of 'permanent establishment' that is being developed, with respect to the direct tax regime, in international conventions, in the legal literature and in the case-law. (for example, one could ask whether there are interferences between 'permanent establishment as in article 7 and the 'fixed base' as in article 11, no. 3, D.P.R. no. 599' (thus FEDELE, *Struttura dell'impresa e vicende dell'azienda nell'IVA e nell'imposta di registro,* in *La struttura dell'impresa e l'imposizione fiscale – Proceedings of the Conference of San Remo (March 21-23, 1980)*, Padua, 1981, p.143 ff. in part. p.161). On permanent establishments and interconnections between VAT and income taxes see FIORELLI-SANTI, *Specificità del concetto di <<stabile organizzazione>> ai fini dell'imposta sul valore aggiunto,* in *Raff.trib.*, 1998, 367 ff.; FANELLI, *Individuazione della stabile organizzazione ai fini iva,* in *Riv.giur.trib.*, 1998, 260 ff.; CERRATO, *Considerazioni in tema di stabile organizzazione ai fini dell'iva e delle imposte sui redditi,* in *Giur.it.*, 1998, 829 ff.; LUDOVICI, *Il regime impositivo della stabile organizzazione agli effetti dell'imposta sul valore aggiunto,* in *Riv.dir.trib.*, 1998, I, 67 ff.; POZZO, *Requisiti necessari per la sussistenza di una stabile organizzazione di soggetti non residenti,* in *Riv.giur.trib.*, 1998, 266 ff.

(31) In order to precisely identify the definition of those special or concessional provisions excluding taxation on profits derived from air navigation in international traffic, and reserving it for the state where the company has its main office, the method of exemption is normally referred to (see in this respect: FANTOZZI-VOGEL, *Doppia imposizione internazionale, cited.*, p. 191; MIRAULO, *Doppia imposizione internazionale, cited,* p.225 ff.; VOGEL *et alii*, in the work last cited., p. 9 ff. and see IVI *amplius* for references of the legal literature on the subject).

The scholars that have examined this matter in-depth suggest – by following a carving–out process from the *magna pars* of tax relief - distinct categories for exemption and exclusion, therefore, they attribute to each typology a different scope and different effects. The fact that in practice the terms are often used in a fungible manner has meant that the legal literature – even if within the legal academic world scholars take a different stance – has pinpointed the features that characterise (for a discussion on the ways in which this distinction would not be relevant, see also Constitutional Court, December 6, 1984, no.277, in *Giur.cost.*, 1984, I, 2082; *ibidem*, July 11, 1989, n.387, in *Foro it.*, 1989, I, 3029) the function of which is to limit (in the negative, in other words, in the opposite direction) the basis for taxation, to pursue a tax policy that will encourage or protect certain activities in need of special protection (on the subject see: FEDELE, *Profilo dell'imposta sugli incrementi di valore delle aree fabbricabili*, Naples, 1966, p.81 ff.; LA ROSA, *Eguaglianza tributaria ed esenzioni fiscali*, Milan, 1968, p.125 ff.; ID, *Esenzioni e agevolazioni tributarie*, in *Enc.giur.Treccani*, XIII, Rome, 1989, *ad vocem*; D'AMATI, *Agevolazioni ed esenzioni tributarie,* in *Novissimo Dig.It., Appendice*, I, Turin, 1980, p.153 ff.; MOSCHETTI, *Agevolazioni fiscali – II – Problemi di legittimità costituzionale e principi interpretativi,* in *Digesto – Quarta edizione – Disc.priv. – Commercial Section* , I, Turin, 1987,

This apparent linearity of the solution adopted, leaves three questions open: the first question is to do with the hypothetical case of a convention failing to include each and every tax on income (just think of the 1956 Convention between Italy and the USA in force until 1985, that did

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p. 73 ff.; ZENNARO, *Agevolazioni fiscali – I -Tipi agevolativi e problemi procedurali, IVI,* p.64 ff.).

If, technically speaking, we can talk of exemptions (from which it should follow that the taxpayer is relieved of 'formal obligations', (to quote FANTOZZI, *Diritto tributario, cited.*, p.142) in the sense of the taxpayer's income not resulting in taxable income (see on this point CICOGNANI, *Appunti sulle fonti dell'obbligazione tributaria*, in *Riv.dir.fin.*, 1966, I, 627 ff. footnote 54), we should also not loose sight of the fact that the function of a conventional rule, implying the special treatment *(lato sensu)*, is merely suspensive of taxation that will be effected (in all probability) in the state of which the company is a resident.

Therefore, we do not have before us a case of exemption from taxation, in other words, this treatment does not simply 'remove'; income will be taxed (following the dictates establishing procedures for application) in the state where the conventional rule identifies the source to be (*lex rei sitae*).

This case seems to fall within the category that places the special treatment with that which: 'serves the purpose of avoiding that different legislative rules regulating a same case be juxtaposed or with the one that removes a model fact situation from a certain regime (only to refer it to another regime) and normally, such treatment is known as *exclusion*' (thus FICHERA, *Le agevolazioni fiscali*, Padua, 1992, p.41).

When referring to this concession (the foundation for which is carried in an international treaty; see on this point MOSCHETTI, in the last work cited, p. 83 and MICHELI, *Problemi attuali di diritto tributario nei rapporti internazionali, cited*, 41 ff.) to use the definition of 'non taxable income' would seem a more consistent choice; despite the semantic ambiguities caused by such a definition, the expression does in fact qualify a group of operations (defined as 'non taxable') in the context of value added tax. Operations (found quoted in articles 8, 8 *bis*, 9 and 72 of D.P.R. no.633/72), that mainly concern export activities or international activities that are based on a presumption of taxation in the country of destination. If one considers the matter carefully, it turns out that the method adopted by the law-maker has ended up with including within this non-taxable sphere miscelleaneous activities, regardless of the requisite of destination and of the related taxation on introduction in the foreign country, referring them instead to a wide-spectrum relief framework (these issues are discussed by: FANTOZZI, *Operazioni imponibili, non imponibili ed esenti nel procedimento di applicazione dell'IVA*, in *Riv.dir.fin..*, 1973, I, 138 ff.; FEDELE, *Esenzioni ed esclusioni nella disciplina dell'IVA*, IVI, 1973, I, 147 ff.; FILIPPI, *L'imposta sul valore aggiunto nei rapporti internazionali*, in *Corso di diritto tributario internazionale, cited*, p.157 ff.; PERRONE CAPANO, *L'imposta sul valore aggiunto*, Naples, 1977, p. 257 ff.; PARLATO, *Fattispecie e rapporti giuridici nel meccanismo impositivo dell'iva*, in *Scritti in onore di S.PUGLIATTI, III, Diritto Pubblico*, Milan, 1978, p.1069 ff., LA ROSA, *Esclusioni tributarie*, in *Enc.giur. Treccani*, XIII, Rome, 1989, *ad vocem*; SAMMARTINO-COPPA, *Valore aggiunto imposta sul (IVA)*, in *Novissimo Dig.It., Appendice*, VII, Turin, 1987, p.1066 ff.).

not contemplate the ILOR, the local income tax (32)); in this case the need arises to procure a rule that will point to the criteria to adopt for determining income. The second question addresses the need for due recognition of internal law rules and specifically, of obligations of a formal kind (33) (even when the conventional rule excluding income taxation com-

(32) The original convention for avoiding double taxation, Law July 19, 1956, no. 943 (which obviously did not contemplate the local income tax ILOR), following the entry into force of the tax reform and, particularly, the 1973 D.P.R.s numbered 597, 598 and 599, was adjusted to the new legislative set-up through an exchange of notes, positively enacted by Law April 6, 1977, no.233, which limited application to IRPEF and IRPEG (income tax for natural and juridical persons respectively) and did not contemplate the local income tax ILOR. Only with the Convention introduced by Law December 11, 1985, no.763 (in force starting December 30, 1985) was the treatment extended to all income taxes. A new convention (that once it has been enacted will then replace the 1985 Convention currently in force) was signed by Italy and the USA on August 1999 (the text can be looked up in *il fisco*, 1999, 10693 ff.) with the aim of including among the taxes considered (art.2), the regional tax on productive activities (IRAP), but only the portion of this tax, which according to provisions laid down in article 23, paragraph 2 (c) of the same Convention counting as income tax. (see FORT, *La nuova Convenzione Italia-Stati Uniti: le principali novità*, in *Corr.trib.*, 1999, 3529 ff.).

On the impact of the provision as carried in article 8 of the 1985 Convention and on clashes with the OECD model, article 8, see comments by MAISTO, *The 'shipping and air transport' provision (art.8) in the Italia-Usa double taxation agreement*, in *Intertax*, 1995, 145 ff.

(33) The most authoritative legal literature has stressed how extremely rare it is to find provisions within international tax law that limit to non resident subjects, obligations of a formal and or instrumental kind such as the keeping of accounts (thus LUPI, *Territorialità del tributo*, in *Enc.giur.Treccani*, XXXI, Rome, 1994, *ad vocem*, 4; FANTOZZI, *Diritto tributario, cited*, p.172). This aspect becomes more relevant when considering the case of an entity whose activity, though referable to a business enterprise, is exempt from income tax - as is the case with profits from air navigation in international traffic -.

Now, Conventions on double taxation enacted in Italy (and indeed the OECD model type convention) do not regulate the formal aspects, such as book-keeping obligations, thus leaving room for the national laws of the single countries to regulate tax issues by specifying those that are the obligations to fulfil if you are a company establishing a fixed base abroad (see on the subject in *postea* text and footnote no.63).

It is interesting to note how in the Convention stipulated with Germany, aimed at avoiding double taxation (R.D.L. December 13 1925, no.2161 – on the subject see FUCHS, *L'applicazione dell'imposta sul patrimonio in base alla Convenzione italo-germanica del 31 ottobre 1925 per impedire doppie imposizioni, cited*, 125 ff.), and considered the father of all Treaties on which all further conventional provisions are modelled, the following was expressly established in article 3 (third and fourth paragraphs): ' If the enterprise has bases in both contracting countries, each state shall tax the part of income produced through the activity carried on by the bases situated in its own

pletely penetrates internal legislation); and lastly, the third question refers to the type of income the company derives from air navigation (the main

territory. As for allocation of income in the cases provided for in paragraph 3 of this same article, the financial authorities of the two contracting states will be entitled to ask the taxpayer to submit special balance sheets and any other document provided for by the law of the respective states.'

However, it does not appear that such a provision was either followed in administrative praxis or that it found application in treaties subsequently stipulated.

An emblematic case, the terms are roughly those of the issue above mentioned, is a recent judgement of the European Court of Justice – Plenary Sitting – May 15, 1997, in Case C-250/95 (in *Riv.giur.trib.*, 1998, 418 ff.). See Italian version of this article for references and comments on the violation of the Treaty in Rome.

The Community Court, by invoking the principle of non discrimination, often invoked when addressing the issue of non-harmonization of the taxation systems of the different Member States (see in this respect *ex plurimis*: European Court of Justice, December 15, 1995, C-415/93, in *Foro it.*, 1996, IV, 1 ff.; ID, November 30, 1995, C-55/94, *IVI*, 1996, IV, 265 ff.; ID, March 31, 1993, C-19/92, in *Dir. comunitario scambi internaz.*, 1995, 87 ff.- Refer to the following authors' academic legal writings ADONNINO, *Il principio di non discriminazione nei rapporti tributari fra paesi membri secondo le norme della CEE e la giurisprudenza della Corte di giustizia delle Comunità*, in *Riv.dir.fin.*, 1993, I, 63 ff.; ID, *Il principio di divieto di discriminazione nella fiscalità internazionale*, in *Dir.prat.trib.*, 1999, III, 173 ff.; SACCHETTO, *I divieti di discriminazione contenuti nell'art.95 CEE – L'evoluzione dell'interpretazione della Corte di giustizia CEE e l'applicazione nell'ordinamento italiano*, *IVI*, 1984, I, 499 ff.; AMATUCCI F., *Il principio di non discriminazione fiscale*, Padua, 1998), dwelled on the question of whether it was admissible for a non resident taxable subject to deduct losses from previous accounting periods, provided that the same could prove the existence of a an economic link between profits and losses occurring within the state in which the permanent representative operates (in this specific case, Luxembourg). The proof was to be supplied by means of special, separate accounts in line with the provisions set down for the treatment of residents. According to Luxembourgian law, failure to fulfil these formal obligations would lead to the deduction of previous losses not being granted.

The core issue centred on the keeping of separate accounts (according to the rules of the state in which the establishment was based) which should allow the state concerned to take advantage of the methodology of tax control which uses the accounts as probative material.

However, this ECJ judgement is at its most interesting in the passage that considers the discriminatory nature of the provision which sets an onus that while being, in the abstract, justifibiale for the purposes of verifying the existence of an etiological nexus of an economic type, such as additional book-keeping obligations for the branch (additional compared to those that may be set in the state of the company's head office) should be regarded as a violation of art. 52 of the EC Treaty (after all, the case-law of the European Court of Justice has had the opportunity of weighing up, on different occasions, whether the internal tax legislation of the single Member States complies with the provisions laid down in the EC Treaty, censuring non compatability whenever situations lacked homogeneity; see European Communities Court of Justice, June 27, 1996, C-107/94, in *Comm.trib.*, 1996, II, 524 ff.; ID, No-

objective being that of verifying if the same may or may not be ascribable to the special treatment as carried in the conventional rule). (34)

As for the criterion applied when assessing income, the matter, at this present stage of conventional legislation, would seem to be more academic and less practical, since current agreements, in the main, make exempt all income taxes, including for example the new regional tax on productive activities (IRAP), under article 44 of legislative decree December 15, 1997, no. 446. (35)

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vember 14, 1995, C-484/93, in *Raccolta*, 1995, I, 3955 ff.; ID, October 26, 1995, C-151/94, *IVI*, 1995, I, 3685 ff.; ID, August 11, 1995, C-80/94, *IVI*, 1995, I, 2493 ff., ID, February 14, 1995, C-279/93, *IVI*, 1995, I, 225 ff.; ID, April 12, 1994, C-1/93, *IVI*, 1994, I, 1137 ff.; ID, July 13, 1993, C-330/91, in *Dir.prat.trib.*, 1994, II, 439 ff.; ID, January 28, 1992, C-300/90, in *Raccolta*, 1992, I, 305 ff.; ID, January 28, 1992, C-204/90, *IVI*, 1992, I, 249 ff.).

The imposition of an onus such as the keeping of additional accounts – though analogous to the treatment of residents – for the activity of the branch might result in an increase of costs for: 'non resident companies that are often encouraged to operate in a different Member State through a simple branch, the extreme convenience of such a set-up being a crucial deciding factor'. (thus MEDICI, *I criteri di determinazione del reddito imponibile per le società non residenti*, in *Le società*, 1997, 1351 ff.- Again with reference to the implications carried in the cited judgement of the European Judges, May 15, 1997, refer to GRATTANI, *Società madre e succursale: è necessaria una contabilità separata?*, in *Riv.giur.trib.*, 1998, 423 ff.; MELIS, *Stabili organizzazioni, obblighi contabili e riporto delle perdite: un'occasione perduta*, in *Riv.dir.trib.*, 1998, III, 22 ff.; LOMBARDI, *Riporto di perdite per stabili organizzazioni di non residenti*, in *Corr.trib.*, 1997, 2813 ff.; ROLLE, *Mercato interno e fiscalità diretta nel Trattato di Roma e nelle recenti iniziative della Commissione europea*, in *Dir.prat.trib.*, 1999, III, 5 ff. in part.29 ff.).

(34) For an analysis of cases covering the subject see VOGEL *et alii*, in the work cited , p.475 ff.- Refer also to *infra sub* footnote no.42.

(35) Distinguished tax experts have commented thus: "the express purpose of article 44 is to make the relation of 'subrogation' between legal institutes relevant in terms of law; therefore, article 44 provides that IRAP (tax on productive activities) be 'levelled' to the revenue taxes abolished for the purposes of application of international treaties addressing tax matters.' Moreover, there are doubts as to the effectiveness of the provision: 'since the law of the state cannot, obviously, affect the regime as it emerges from international conventions, nor can it do so with reference to an evaluation of the consequences of a change in the tax system of one of the Contracting states, that would in any case need to be submitted for interpretation of the single convention or of possible subsequent agreements, constituting additions or amendments to the former. But even in the domestic legal system, despite the legislative decree being formally levelled to the law introducing international conventions, legal effectiveness with respect to the Italian Public Administration and the single taxpayers might be compromised as a result of the need to interpret and apply conventions according

It is interesting to note how the question – though our present purpose in this study is to consider the aspect referable to taxes of a schedular type – formed the object of an analysis carried out by the Ministry of Finance and focusing on the Convention against double taxation on income with the United States (Law July 19, 1956, no. 953), clearly serving as reference point for similar Treaties already regulating the same subject. (36)

By examining the salient points of the reasoning followed by the Ministry and concerning the methodology of taxation, we can infer that, in a number of ways, certain requests that had already emerged in studies devoted to the subject, were being assimilated. (37)

The Italian Financial Admistration noted that the provision as in art. V, no. 1 of the Convention, according to which: 'income which an enterprise of one of the contracting States derives from the operation of ships or aircraft registered in that State shall be exempt from taxation in the other contracting State' meant that US shipping and air navigation enterprises, even in the case of permanent establishments in our territory, would be made exempt from personal property tax on income generated in Italy, and, in some cases would also be made exempt from the complementary tax and the company tax. Exemption from company tax, in conformity with the following article VI, would only consider the part based on income.

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to the effectiveness and scope the international legal system recognises upon them' (thus FEDELE, *Prime osservazioni in tema di IRAP*, in *Riv.dir.trib*, 1998, I, 453 ff.). On issues connected with the introduction of IRAP in relation to international conventions see contributions by GALLO, *Ratio e struttura dell'IRAP*, in *Raff.trib.*, 1998, 627 ff.; LUPI, *L'IRAP tra giustificazioni costituzionali e problemi applicativi*, in *Raff.trib.*, 1997, 1407 ff. in part.1409 footnote no.6; MAYR, *IRAP per i non residenti: considerazioni contro corrente*, in *Corr.trib.*, 1998, 11 ff., VALENTE-SMITH, *IRAP e rischi di doppia imposizione in ambito internazionale, IVI*, 1998, 161 ff.; VALENTE, *IRAP e soggetti non residenti: collegamento con il territorio dello Stato, IVI*, 1998, 728 ff.- As to aspects concerning the determination of the taxable basis in respect of the business exercised by non residents and the obligations – such as book-keeping - related thereof see PORCARO, *Riflessioni sulla soggettività passiva dell'IRAP. In particolare, i casi del non residente, degli enti non commerciali e delle "amministrazioni pubbliche"*, in *Raff.trib.*, 1997, 902 ff. in part. 914 ff.-

(36) See Ministry of Finance Dir.Gen. II.DD. Circular January 21, 1957, no. 350300, in *Boll.trib.*, 1957, 420 ff. offering a detailed analysis on the procedure to follow for the application of the Convention for the avoidance of double taxation with the USA and referring in particular to international air transport.

(37) See authors cited *retro sub* footnote no.16, and *infra sub* footnote no.42.

In all events, the exemption was conditional upon the ships or aircraft being registered in the United States and upon profits being generated from the operation of ships or aircraft. Therefore, neither profits derived from the sale of tickets of passage on behalf of other transport enterprises or from other ancillary activities carried out by permanent establishments nor, profits regulated by the other articles of the Convention (38) could be considered as deriving from the operation of ships or aircraft.

For the purposes of the payment of the *'tassa sulle società'*, literally company tax (to be calculated in proportion to the capital) the *quantum* to subject to taxation was to be determined according to those that were the existing provisions.

The value of ships and aircraft did not go towards forming the taxable capital used for operations, or in any event, capital invested in Italy.

Article VI of the Convention laid down that: 'if one of the Contracting States imposes a tax based on property and income, an enterprise of the other Contracting State:

a) shall be subject to such tax for the part which is based on property used or employed in the former State in the activity of such enterprise and

b) shall be exempt from such tax for the part based on income, if the enterprise is exempt from tax on income according to article 3 or article 5 of this Convention'.

Following the entry into force of the 1974 tax reform, there was a Diplomatic Exchange of Notes with the United States and it concerned the application of IRPEF and IRPEG to the 1956 Convention. Such exchange

(38) The broad formulation of article V of the 1956 Convention had, moreover, rendered necessary a further specification (realized through an informal agreement with the American Revenue Authorities) the purpose being that of defining its scope.

In particular, it was confirmed that profits derived from the sale of tickets of passage on behalf of other transport enterprises could not be considered as deriving from the operation of ships or aircraft and that article V of the Convention was to be interpreted: 'in the sense that together with profits that an enterprise of one of the two Contracting states derives from the operation of ships and aircraft, one had to include income received in the form of commissions on the sale of tickets of transportation effected by other shipping or air navigation enterprises. In this respect, however, it has been underlined that profits derived from the operation of hotels, buses, for excursions and sightseeing tours, of places of entertainment and other related activities not directly connected with the transport service are not to be considered as included in the exempt income category and therefore do not come under exempt income in the two Contracting states according to the cited art. V of the Convention' (thus Ministry of Finance, Dir.Gen. II.DD. Circular October 20, 1962, no. 351470, in *Boll.trib.*,1963, 50).

of Notes, ratified by Law April 6, 1977, no. 233 involved the application of the local income tax ILOR in lieu of the abrogated company tax.

Basically, by using the ministerial method just mentioned, the logical result drawn was that both the company tax and the local income tax ILOR were not to refer – when taxing an enterprise with effective management in the USA in respect of air transport services in international traffic – to the normal income components as when applying the customary ratio of costs/profits, but instead the only parameter to be used was capital.

Indeed, no indication of actual taxable capacity in Italy could be obtained from simply comparing positive and negative components of the profit and loss account and the reason for this is twofold:

I – the non correspondence of proceeds from the sale of tickets with the amount due to the enterprise for the transport operated.

Commercial practice and the rules outlined by the IATA on air transport in international traffic provided for (and still provide for) the possibility of using the transport ticket, issued by an air navigation enterprise even when travelling with a different air carrier. Thus the considerable difficulty of allocating income, for each taxing jurisdiction;

II – the lack of a specific rule for allocating expenses, again for each taxing jurisdiction, seen the difficulty in identifying what expenses incurred abroad actually fall within a certain jurisdiction.

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In such a context, the criterion used, would adopt the ratio between overall capital and capital materially present within the state, according to precepts that the Revenue Authorities set down as being the only method for determining the intrinsic taxable capacity. On the basis of the natural application of tax collection, this ratio would then become relevant only in the presence of an effective income determined by the enterprise in relation to its activities considered as a whole. (39)

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(39) Practically speaking, the determination of income or that of a tax loss used to be carried out by using investments in capital, and disregarding the classic system based on the synallagmatic relation of costs to proceeds.

To apply a pragmatic approach, (and according to consolidated practice) a proportioning system that would take into account sure elements of property in Italy and the overall property of the enterprise, was seen as a more reliable way of attributing to our territory the share of income generated or a loss sustained with reference to the activity considered as a whole (on a worldwide basis) and deriving from the operation of air transport, according to the so-called *formula Massachussets*. Percentages attributable to Italy were essentially applied on worldwide income, being considered inconsistent to impute to the Italian agency all proceeds obtained within the territory; so, instead, the Italian establishment was imputed an amount calculated in proportion to the income generated worldwide. The need to operate in such a manner

Indeed, it was precisely this difficulty of effectively identifying taxable profits in the single states where the companies operated that eventually led to the matter being regulated by conventional means, in virtue of which profits would be taxed in the state of the effective management of the enterprise – which is what happens now – (40)

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stemmed from the fact that other sums to attribute to other air carriers would end up forming part of the proceeds (and in many cases these sums would be in respect of services on extraterritorial distances). Combinations in this respect are numerous. To provide some examples: a passenger might purchase a ticket for distances that might not necessarily be covered by the same air carrier and, similarly, a passenger might purchase a ticket from an airline and then use it on other airlines. In all of these cases the proceeds would need to be debited – save for a portion - to the air carriers operating the transport. Besides, the worldwide profits represented solely the consideration for the air transport and not the actual takings.
Imputation of costs was also not free from drawbacks and these inconeveniences are similar to the ones outlined above. It should suffice to mention the cost of aircraft – starting with acquisition, then maintenance costs, technical assistance, depreciation and crew members – imputable almost entirely to the head office in the state of effective management of the enterprise.
It is obvious therefore that using a criterion that merely compares proceeds obtained and costs sustained in Italy would have led to an inexact representation of the air navigation company's tax situation.

On these particular aspects see TEMPESTA, *Note in tema di accordi bilaterali per evitare la doppia imposizione fiscale sui redditi derivanti dall'esercizio del trasporto aereo internazionale*, in *Dir. aereo*, 1978, 1 ff.- On the subject see also, though with different slants: FASOLIS, *Finanza e trasporti aerei*, in *Riv.pol. economica*, 1927, 636 ff., GIUDICE, *La disciplina fiscale nella navigazione aerea*, in *Riv. aeronautica*, 1928, 53 ff.; SCHMID, *Considerazioni economiche sui trasporti aerei*, in *Riv.dir. aeronautico*, 1939, 252 ff.; DI PAOLO, *Il sistema italiano di imposizione diretta nei rapporti internazionali*, in *Giur.imp.dir.*, 1948, 175 ff.

(40) Both ICAO (International Civil Aviation Organization) and IATA (International Air Transport Association) had drawn up a a project for a clause which was to be introduced in the general bilateral agreement and which read as follows:

In accordance with the International Civil Aviation Organization's Policies on Taxation in the Field of International Air Transport:

a) Income and profits obtained by an airline of one Contracting Party in the territory of the other Contracting Party, derived from the operation of aircraft in international traffic, shall be exempt from any income tax imposed by the government of that other Contracting Party. The exemption provided above shall apply to partecipation in pool or joint business;

b) Each Contracting Party shall exempt an airline of the other Contracting Party from all forms of taxation on the sale or use of international air transportation including taxes on gross receipts of operators and taxes levied directly on passengers and shippers; and

c) Each Contracting Party shall exempt an airline of the other Contracting Party from import restrictions, customs duties, excise taxes, inspection fees and other na-

Besides, the very nature of the business means that profits of this kind are generated over an area that necessarily involves two or more ju-

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tional duties and charges, property taxes and capital levies on aircraft, fuel, lubricating oils, consumable technical supplies, spare parts including engines, regular aircraft equipment, aircraft stores (including drinks, tobacco and other products destined for sale to passengers in limited quantities during the flight) and other items intended for or used solely in connection with the operation or servicing of aircraft in international traffic of an airline of such other Contracting Party.

The exemptions provided by this paragraph shall apply to the items referred to above:

i. introduced into the territory of one Contracting Party by or on behalf of an airline of the other Contracting Party;

ii. retained on board aircraft of an airline of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;

iii. taken on board aircraft of an airline of one Contracting Party in the territory of the other Contracting Party and intended for use in international traffic.

For the purposes of this study, we do not wish to address the doubts raised in the legal literature concerning the procedures for assimilating the ICAO Annexes in Italy and those for their immediate application, however it is important here to stress how there do not appear to be any doubts as to the important application value being attributed to these Annexes (refer to *I.C.A.O. in Italia: un obiettivo raggiunto?*, in *Dir.trasporti*, 1994, 441 ff.; TULLIO, *La normativa regolamentare dell'aviazione civile*, in *Cinquant'anni di codice della navigazione: profili di responsabilità degli operatori del settore aereo, Proceedings of the Conference (Rome, December 2-3, 1992)*, s.l., s.d. (but Rome, 1993), p.11 ff.; ZYLICZ, *International air transport law*, Dordrecht, 1992; TURCO BULGHERINI, address at the round table, *L'adeguamento dell'ordinamento italiano agli annessi tecnici dell'OACI*, in *Dir.prat.av.civ.*, 1987, 73 ff.; LATTANZI, *Organizzazione dell'aviazione civile internazionale (ICAO)*, in *Enc.dir.*, XXXI, Milan, 1981, 228 ff.- Lastly, for a summary of the various issues raised on this subject, please refer in particular to the address given by ROMANELLI, RINALDI BACCELLI, GRIGOLI and TURCO BULGHERINI during the *Convegno celebrativo del cinquantesimo anniversario della Convenzione di Chicago "gli annessi tecnici alla Convenzione sull'aviazione civile internazionale"*, in *Dir.prat.av.civ.*, 1995, 3 ff.), (see on this point CAMARDA, *Fonti e strutture organizzatorie nel diritto della navigazione*, Turin, 1988, p.231 ff.). In this respect it is important to note the recommendations proposed in the Conferences, and the Resolutions adopted by the ICAO Council at the various meetings.

In particular the Resolution adopted by the 1966 Council was revisited on December 14, 1993 (see in this respect, Doc. 8632-C/968 in *ICAO'S policies on taxation in the field of international air transport*, Montreal, 1994, *sub section* III) and further examined by the Council on February 24, 1999 (the text and particularly the *attachment to Council Resolution on taxation of international air transport and commentary on the Resolution, state letter* EC2/10-99/52, can be consulted on the ICAO web page) which, on the subject of international double taxation, put forward the following recommendation:

Whereas with respect to the taxation of income of international air transport enterprises and aircraft and other movable property:

- multiple taxation of the earnings of international air transport enterprises and of aircraft and other movable property associated with the operation of aircraft engaged in international air transport can be effectively prevented by the reciprocal

risdictions and as a consequence of this multiple taxation may be involved, depending on the principle adopted by the single states (41) (taxation on a territorial basis or according to the worldwide principle).

4 – As for the type of operations and *additional activities* which come under the broad definition of air transport, the legal literature, as well as the OECD commentary, has supplied a wide range of cases (among

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agreement of States to limit taxation in these two fields to the State in which any such enterprise has its fiscal domicile;

- for international air transport enterprises lack of implementation of this rule of reciprocal exemption involves either multiple taxation or considerable difficulties of income allocation in a very large number of taxing jurisdictions; and

- such exemptions have already been widely obtained, for example, through the inclusion of appropriate provisions in bilateral agreements aimed at avoidance of multiple taxation generally or in those dealing with the exchange of commercial air transport rights or through individual States adopting legislation which grants the exemption to any other State that provides reciprocity.

(41) With regard to the particularity of tax agreements in matter of maritime and air navigation see *amplius:* TURCO BULGHERINI, *La disciplina giuridica degli accordi aerei bilaterali,* Padua, 1984, p.47 ff.; SILINGARDI, *Attività di trasporto aereo e controlli pubblici, cited,* p.235 ff.- RINALDI BACCELLI, *Studi di diritto aeronautico, cited,* p.49 ff.; DEL GIUDICE, *La doppia imposizione internazionale sul reddito e sul patrimonio, cited,* p.53 ff.; LICCARDI, *La normativa internazionale,* in *L'ordinamento tributario, edited by A.PISTONE, III, Diritto tributario internazionale,* Padua, 1986, 297 ff.; MIRAULO, *Doppia imposizione internazionale, cited,* p.306 ff.; for an overview see ROMANELLI, *Principi comuni nelle Convenzioni internazionali in materia di trasporto,* in *Dir.mar.,* 1999, 197 ff.-Italy has signed numerous Agreements with specific and limited reference to the regulations on income deriving from maritime and/or air navigation, which in many cases were later included in the general Conventions against double taxation.

What follows is a list of treaties appearing in alphabetical order: *Algeria,* L. July 26, 1978, no.573; *Argentina,* L. November 26, 1951, no.1612; *Australia,* L. October 8, 1974, no.535; *Brazil,* L. August 12, 1962, no.1371; *Canada,* R.D. August 25, 1932, no.1265, and L. May 2, 1977, no.347; *Czechoslovakia,* L. February, 1975, no.107; *Colombia,* L. May 25, 1981, no.412; *Ethiopia,* L. February 24, 1975, no.107; *Germany,* L. May 8, 1971, no.798; *Ghana,* L. December 12, 1973, no. 979; *Jordan,* L. April 12, 1973, no.209; *India,* L. April 12, 1973, no. 210; *Iran,* L. March 20, 1973, no.152; *Iraq,* L. May 23, 1980, no.333; *Israel,* L. April 25, 1957, no.359; *Jugoslavia,* L. May 26, 1965, no. 920; *Lebanon,* L. February 13, 1968, no. 301, and L. October 15, 1975, no. 646; *Libya,* L. May 9, 1977, no. 626; *Nigeria,* L. December 9, 1977, no. 1002; *Pakistan,* L. May 23, 1980, no. 334; *Panama,* L. February 13, 1968, no. 308; *Poland,* L. May 5, 1976, no. 402; *Senegal,* L. April 23, 1991, no. 148; *Syria,* L. October 15, 1975, no. 645; *South Africa,* L. August 9, 1954, no. 873; *Sudan,* L. may 8, 1971, no. 800; *Switzerland,* L. December 2, 1960, no. 1588; *Tunisia,* L. October 22, 1973, no.751; *Turkey,* L. December 3, 1982, no. 913; *former USSR,* L. May 22, 1974, no.297; *Venezuela,* L. July 23, 1980, no. 513, *Zaïre,* L. December 9, 1977, no.1063.

which, for example, we can mention: the sale of passage tickets on behalf of other companies, the operation of a bus service connecting a town with its airport, advertising and commercial propaganda, transportation of goods by truck connecting a depot with a port or airport, storing of goods in transit and the keeping of a hotel for no other business than to provide transit passengers night accomodation) the conventional application procedure in these matters being now settled practice within the single domestic legal systems. (42)

(42) A wide range of situations has been examined within the case-law and praxis; an in-depth analysis can be found in the following: VOGEL *et alii*, *Klaus Vogel on Double Taxation Conventions – A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice, cited,* p.482 ff-. On this subject see also contributions by: IMBRECQ, *L'aviation et le fisc,* in *Revue juridique internationale de la locomotion aérienne,* 1924, 145 ff.; COATES, *Double taxation and tax evasion, (Report and Resolutions submitted by Technical Experts to the Financial Committee of the League of Nations), cited,* 403 ff.; McNAIR, *Double taxation on shipping, cited.,* 569 ff.; CARROLL, *The development of international tax law: Franco-American treaty on double taxation – Draft convention on allocation of business income, cited,* 586 ff.; HINSHAW, *The protection of aviation from inequitable taxation,* in *Journal of air law,* 1938, 81 ff.; ACIOCIOC, *Sulla procedura di modificazione dell'Allegato H della Convenzione di Parigi,* in *Riv.dir. aeronautico,* 1939, 315 ff.; TERNES, *Aviation taxation,* in *Michigan State bar journal,* 1946, 23 ff.; WELCH, *The taxation of air carriers,* in *Law and contemporary problems,* 1946, 584 ff.; McKINLEY, *Aircraft taxation, cited;* CHRÉTIEN, *Une espèce originale de traités fiscaux: les conventions internationales sur la double imposition des entreprises maritimes ou aériennes, cited.,* 513 ff., and 715 ff.; DESMYTTERE-HUTCHINGS, *Imposition des trasports maritimes ou aériens internationaux,* in *Cahiers de droit fiscal international,* XXII, 1952, 11 ff.; TROTABAS, *Les "taxes" dans le domaine de l'aviation civile,* in *Revue générale de l'air,* 1952, 259 ff.; GORECKI, *Le impots et redevances des compagnies internationales,* in *Interavia,* 1958, 1031 ff.; various authoers (study), *State taxation of international air transportation,* in *Stanford law review,* 1959, 518 ff.; DÉNORÉAZ, *De la double imposition des sociétés de navigation maritime ou aérienne,* in *Revue fiscale,* 1959, 395 ff.; PHILIPPE, *L'incidence des conventions suisses de double imposition sur les entreprises de navigation maritime ou aérienne, IVI,* 1960, 465 ff.; VERPLAETSE, *Fiscalité internationale en matière aérienne,* in *Revue française de droit aérien,* 1963, 164 ff.; OYEVAAR, *Development in world shipping and the Dutch mercantile marine,* in *Cahiers de droit fiscal international,* LIVc, 1969, 19 ff.; SMEETS, *Special provisions for the taxation of Netherlands Antilles shipping and aviation companies,* in *Bulletin for international fiscal documentation,* 1972, 311 ff.; GUINCHARD, *Le statut juridique et fiscal en France des transporteurs aériens étrangers,* in *Le trentenaire de la Revue française de droit aérien,* 1976, 177 ff.; STOLL, *Effect of selected income tax treaties and sections 872 (b) (1) and 883 (a) (1) on income taxation of shipping activities of United States and foreign persons,* in *Income tax treaties, ed. J.E.BISCHEL,* New York, 1978, p.359 ff.; HARSTAD, *Airline prompts delay of Philippines tax treaty,* in *Tax notes,* 1981, 1198 ff., nonché 1275 ff.; HUND, *The development of double taxation conventions with particular reference to taxation of international air transport,* in *Bulletin*

Extending the range of additional services so that they come to be considered operations related to air transport – the idea being one that would tend to channel these operations in an adjacent sector, which would necessarily be integrated with the activity of the air navigation enterprise – is by now a situation that simply cannot be disregarded. One cannot operate a separation between a composite sequence of essential services serving as frame around the activity of air transport (just think of the computerised booking systems for additional packages including hotels, car hire, excursions etc., as well as for booking flights *et similia*) and the actual transport carried out by the airline, seen that the complexity of the phenomenon requires that users be offered an increasingly multi-levelled supply of services that can rightly be considered - broadly speaking - as the natural *continuum* to air transport. (43)

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for international fiscal documentation, 1982, 111 ff.; LASSILA, *The China shipping and aircraft tax treaty*, in *International tax journal*, 1982, 120 ff.; TORKILDSON, *The economic recovery tax act: safe harbor rules for leases*, in *Journal of air law and commerce*, 1982, 565 ff.; KELLY, *Reciprocal exemption: a regime to treasure*, in *Bulletin for international fiscal documentation*, 1985, 267 ff.; LEVINE-BERGER, *Changes in the U.S. taxation of income from ships and aircraft*, in *Canadian tax journal*, 1986, 1215 ff.; BENDER, *Property tax. Congressional limitations on state taxation of air transportation*, in *Journal of air law and commerce*, 1988, 1041 ff.; ABEYRATNE, *Taxation in the field of international air transport. Legal aspects*, in *Air law*, 1991, 106 ff.; LANG, *Taxation of international aviation: a Canadian perspective*, in *Canadian tax journal*, 1992, 881 ff.; GOLDING, *Cleared for take-off: various tax implications concerning flying and the operation of aircraft*, in *Taxation (UK)*, 1993, 216 ff.; ABEYRATNE, *Recent developments in the taxation of air transport. The ICAO-IATA symbiosis*, in *Air and space law*, 1995, 125 ff.; HOFLAND, *Recent developments in tax law*, in *Aircraft finance: recent developments & prospects, ed. B.J.H. CRANS*, The Hague-London-Boston, 1995, 95 ff.; EKBOM, *Legal aspects of aircraft finance in Sweden, IVI*, 103 ff.; LE GALL-REEB, *Higlinghting various tax and security law aspects of aircraft financing - France, IVI*, 109 ff.; MAISTO, *The 'shipping and air transport' provision (art.8) in the Italia-Usa double taxation agreement, cited.*, 145 ff.; ZEEHANDELAAR, *Recent developments in aviation law*, in *The journal of air and commerce*, 1996, 15 ff. in part. 89 ff.; SOLLUND-TALMO-HØYLAND, *New tax regime for shipping companies*, in *European taxation*, 1997, 438 ff. -

(43) On the implications resulting from the computerization of the sector refer to the recent essays by TURCO BULGHERINI: *La prenotazione dei servizi di trasporto, turistici ed alberghieri, in Studi in memoria di M.L.CORBINO*, Milan, 1999, p. 857 ff.; ID, *Informatica ed automazione nel settore della navigazione aerea, in Studi in onore di G.ROMANELLI*, Milan, 1997, p.1211 ff.- On this same subject see also, DIEDERIKS-VERSCHOOR, *Automation and air law*, in *Annals of air and space law*, 1987, 15 ff.; EHLERS, *Computerized reservations systems in the air transport industry: how to optimize the passengers' benefits*, London - The Haugue – Boston, 1988; BUSTI, *I sistemi telematici di prenotazione per il trasporto aereo nella disciplina comunitaria*, in *Dir.trasporti*, 1992, 15 ff.; CAVANI, *Linee e sviluppi della disciplina comunitaria sui sis-*

In this last respect, a helpful and interesting fact comes from the work and activities of the Anti-Trust Authority which has examined certain issues linked to a separate section of the industry - even if contiguous to that of air transport seen the synergies at work in this sense – and namely, from handling, supplied - in a monopolistic context - by the airport enterprise. (44)

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temi telematici di prenotazione per il trasporto aereo, in *Dir.informazione e informatica*, 1992, 613 ff.; KAISER, *Infrastructure, airspace and automation: air navigation issues for the 21st century*, in *Annals of air and space law*, 1995, 447 ff.; ABEYRATNE, *The role of automation in facilitation of air transport into the 21st century, ibidem*, 259 ff.-

(44) Refer to the judgements of IBAR/Aeroporti di Roma, no.1017 March 17, 1993, in *Bollettino dell'Autorità Garante della Concorrenza e del Mercato*, 6/1993, 6 ff.; IBAR/Società per azioni Esercizi Aeroportuali – Milan, provv. no. 1845, March 16, 1994, *IVI*, 11/1994, 5 ss; references in the legal literature: ROMANELLI, *Il vigente sistema normativo aeroportuale italiano in rapporto con la disciplina anti-trust*, in *Archivio giuridico*, 1995, 451 ff.; LANZALONE, *L'orientamento dell'Autorità Garante della Concorrenza e del Mercato nel settore dei servizi aeroportuali: analisi di due leading cases*, in *Dir.mar.*, 1995, 468 ff.; LUCENTE-SENSI, *La gestione dei servizi aeroportuali di terra. Orientamenti normativi e giurisprudenziali in materia di concorrenza*, in *Riv.amm.*, 1995, 881 ff.; ANTONIOLI, *L'abuso di posizione dominante nella gestione dei servizi aeroportuali: interpretazione comunitaria dei monopoli legali e regime di autoproduzione dinanzi alla giurisdizione cautelare del giudice amministrativo*, in *Riv.it.dir.pubbl. comunitario*, 1995, 1396 ff.; BUBBI, *La gestione dei servizi aeroportuali*, in various authors, *Concorrenza e mercato*, Milan, 2/1994, 292 ff.; MAFFEO, *Normativa antitrust e responsabilità del gestore aeroportuale*, in *Gli operatori aeroportuali – Competenze e responsabilità – Proceedings of the Conference in Modena, May 9, 1996, edited by G. SILINGARDI-A.ANTONINI-B.FRANCHI*, Milan, 1996, p.35 ff.-

One should note - adding *ad colorandum* – how a branch of the legal literature going back some years now, saw in taxes a tool for altering the regime of free competition, which is the main characteristic of this kind of revenue which distinguishes it from a collection of a private law extraction (thus CAMMEO, *Le tasse e la loro costituzionalità*, in *Giur.it.*, 1889, IV, 193 ff.; ID, *Della manifestazione della volontà dello Stato in campo amministrativo*, in *Primo trattato completo di diritto amministrativo italiano, edited by V.E. ORLANDO*, III, Milan, 1901, p.151 ff.- On these aspects refer to FEDELE, *La tassa* (temporary edition), Siena, 1974, p.18 ff.). Indeed, the issue relating to competition between nations, carried out by means of the tax instrument also (in an altogether different context), is advanced in the most notable academic writings, see on this point TREMONTI, *Completamento del mercato interno europeo e sistema fiscale italiano*, in *Riv.dir.fin.*, 1989, I, 419 ff.; CROXATTO, *Armonizzazione fiscale e mercato unico europeo*, in *Società*, 1990, 105; RINALDI, *La tassazione dei dividendi e degli interessi e le Convenzioni contro le doppie imposizioni*, in *RINALDI-GUERRA-BOFFANO, Sistemi fiscali e integrazione europea – Prodotti, intermediari e mercati finanziari tra concorrenza e armonizzazione*, Bologna, 1991, p.29 ff.- This issue is rather important when set in the context of: 'the distorted effects brought on by competition resulting from the difference in countries' legislation and in the tax practices of Mem-

The Antitrust Authority (having identified an illegal situation in which the airport management had abused its position of power) has moreover allowed the airlines concerned to provide handling services themselves, which means that these operations come to be classified as being strictly linked to air transport. (45)

In these cases, speaking strictly from a tax point of view, though there is no synallagmatic relation between the two categories of services, it still follows that costs for the air navigation enterprise resorting to self-handling could be considerably reduced, which would bring a more favourable economic result and, therefore, a smaller tax load.

The same will obviously also apply when the airline uses airport services provided by third parties, since in this hypothesis one would need to consider – as is the case with any other enterprise – the principle of *inherence* (46) –

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ber States', therefore, the aim should be: 'to prevent production from going elsewhere as a result of unfavourable taxation' (thus SACCHETTO-CASERTANO, *Tributi*, in *Trattato di diritto amministrativo europeo, diretto da M.P.CHITI e G.GRECO, Parte speciale*, t.II, Milan, 1997, p.1283 in part.p.1308 ff.) the matter clearly concerns the NEUMARK Report on Community harmonization.

(45) The concept of *handling* can be looked up in: LEFEBVRE-D'OVIDIO-PESCATORE-TULLIO, *Manuale di diritto della navigazione, cited*, p.191 ff., GAETA, *Il regime giuridico degli aerodromi*, in *Trasporti*, 1974, 55 ff.; QUERCI, *Profili critici in tema di aeroporti statali e privati*, in *Giur.it.*, 1965, I, no.2, 3 ff.; RIGUZZI, *L'impresa aeroportuale, cited*, p.106 ff., GIUSTI, *Osservazioni sulle tariffe aeroportuali e sui c.d. <<diritti di handling>>*, in *Riv.dir.nav.*, 1964, II, 299 ff.; ID. *Prestazioni di handling e tariffe corrispettive*, in *Trasporti*, 1976, 92 ff.; CROXATTO, *Tasse aeroportuali*, in *Novissimo Dig.It.*, XVIII, Turin, 1971, 1085 ff.; GAETA, *Tasse aeronautiche*, in *Enc.dir.*, XLIV, Milan, 1992, 28 ff.; TURCO BULGHERINI, *Impresa di navigazione e servizi aerei di linea*, Rome, 1984, p.107. See also *amplius* PIRAS, *L'assistenza a terra nel trasporto aereo. Profili privatistici*, Turino, 1999.

(46) The principle set down in article 75, fifth paragraph, of Unified Code on Income Taxes no. 917/1986 carries the rule of, literally, 'inherence', meaning that, if one is to benefit from deductibility, expenses and other negative components need to refer to business or assets generating proceeds that contribute to the formation of income (on this concept refer to the recent work by: TESAURO, *Esegesi delle regole sul calcolo del reddito d'impresa*, in *Commentario al Testo Unico delle imposte sui redditi, cited*, p.217 ff. in part.p.229 ff.; TINELLI, *Il reddito d'impresa nel diritto tributario. Principi generali*, Milan, 1991, p. 246 ff., GRAZIANI, *L'evoluzione del concetto di inerenza e il trattamento fiscale dei finanziamenti ad enti esterni di ricerca*, in *I costi di ricerca scientifica nell'evoluzione del concetto di inerenza, edited by G.FALSITTA and F.MOSCHETTI*, Milan, 1988, p.45 ff.; ZIZZO, *Regole generali nella determinazione del reddito d'impresa*, in various authors, *L'imposta sul reddito delle persone fisiche, edited by F.TESAURO*, Turin, t.II, 1994, p.556 ff.; ROSA, *Il principio di inerenza*, in *Il reddito d'im-*

This situation which has been mentioned simply to provide a hypothetical case, is part of business economics and is relevant for tax pruposes only in terms of imputation of costs and for their identification, and therefore, in terms of the backing elements concerning obligations of a formal and instrumental kind.

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presa, edited G.TABET, I – Saggi, Padua, 1997, p.137 ff.; PANIZZOLO, *Inerenza ed atti erogativi nel sistema delle regole di determinazione del reddito d'impresa*, in *Riv.dir.trib.*, 1999, I, 675 ff.; SILVESTRI, *Destinazione a finalità estranee all'impresa e principio di inerenza nelle imposte sui redditi*, *Riv.dir.fin.*, I, 1998, 475 ff.; BORIA, *Il concetto di inerenza e le spese promozionali*, in *Riv.dir.trib.*, 1992, I, 413 ff.).

There is no doubt that in the hypothesis advanced in the text (both when stopover services are arranged by the airline itself in agreement with the airport management and, when one uses the organization set up by the airport management) the supply of auxiliary services, such as airport services, should be considered a *unicum* strictly connected with the business carried on by the airline (even though nowadays the qualification of the airport management as business enterprise is a fact recognised by all, on this point QUERCI F.A., *Impresa aeroportuale e servizio di handling*, in *Studi in onore di A.LEFEBVRE-D'OVIDIO, In occasione dei cinquant'anni del diritto della navigazione, edited by E.TURCO BULGHERINI*, t.II, Milan, 1995, p.951 ff.; RIGUZZI, *L'impresa aeroportuale*, Padua, 1984; DOMINICI, *La gestione aeroportuale nel sistema del trasporto aereo*, Milan, 1982; COLLINI, *Le facilitazioni aeronautiche*, in *Dir.prat.av.civ.*, 1979, 9 ff.- On the development of air transport and its policies, see moreover, OECD, *The future of international air transport policy: responding to global change*, Paris, 1997; GULDIMANN *et alii*, *Future air navigation systems: legal and institutional aspects*, Dordrecht, 1993).

It should, however, be pointed out that it is precisely this subjective autonomy accorded to the airport enterprise that leads to non application of Conventions, should the airline supply handling services, or technical assistance, to other airlines. Indeed, should this be the case, the *ratio* underpinning the aim of making the business proper to the air navigation enterprise non taxable would come to be annulled.

Practically speaking, the ground for non taxation – introduced in matter of conventional provisions – in order for it to be consistent, must find its logic in those services that have a uniform quality about them. A uniformity that is realised in practice when the services provided have a link and are therefore interdependent with the activity proper of the airline.

Should this necessary correlation be split, then internal legislation on taxation shall be applied, taxation first compressed by conventional provisions.

Moreover, it should be pointed out that self-production of services of this kind may, therefore, from a 'non- parcelled-out' view of the business proper to the airline (in the sense outlined in the text), be considered directly imputable together with transport, save when it is carried out by an autonomous business enterprise, since in this case, the favourable provisions carried in the double taxation Treaties do not appear to be invokable. On implications connected with this last condition, please refer to the clear description given by: FANTOZZI, *Imprenditore e impresa. Nelle imposte sui redditi e nell'IVA*, Milan, 1982, p.73 ff.- See also MICHELI, *Reddito d'impresa e imprenditore commerciale*, in *Riv.dir.fin.*, 1974, I, 396 ff. and now in *Opere minori di diritto tributario*, II, *cited*, p.297 ff.; FILIPPI, *Riflessioni sulla individuazione del reddito d'impresa ai fini tributari*, in *Giur.comm.*, 1976, I, 103 ff.-

The friction point in these hypotheses involves the nexus of interdependence between main office and branch (and, as we shall later address in more detail) and the possibility of deducting, normally, costs as negative income components. (47)

5 – An element of real interest can be found in the definition of 'international traffic' which represents the keystone on which the whole structure of this special provision rests.

It does not seem that by resorting to the interpretation of Conventions introduced on the subject, as well as to references contained in articles 3 and 8 of the OECD model, one may arrive at definitions that differ from those reached by the scholars of navigation law in matter of international air transport, except for some precise definitions available, seen the specificity of issues emerging with reference to tax rules. (48)

(47) See *postea sub* footnote no.78.

(48) In spite of the many writings outlining the concept of international air traffic, the legal literature has mainly dwelled on pinpointing, either the code and conventional rules applicable to the transport contract, or the issues related to liabilities and limits on compensation for damages (studies in this respect are numerous and extremely detailed, therefore it is deemed sufficient to point out the most recent works of an encyclopaedic kind wherein one finds a discussion of the most important aspects and, the detailed bibliographic references of material on the subject, in particular: SILINGARDI, *Trasporto aereo (contratto di)*, in *Digesto – Quarta edizione – Disc.priv. – Sez. commerciale*, XVI, Turin, 1999, p.57 ff.; ROMANELLI-SILINGARDI, *Trasporto, II) Trasporto nella navigazione marittima e aerea*, in *Enc.giur.Treccani*, Rome, 1994, XXXI, *ad vocem*; SILINGARDI, *Trasporto (contratto di): Diritto della navigazione: a) Trasporto aereo*, in *Enc.dir.*, Milan, 1992, XLIV, 1175 ff., GIRARDI, *Politiche comunitarie (politica dei trasporti aerei), (new entry – 1996)*, in *Enc.giur.Treccani*, Rome, XXIII).

The concept of international air transport is linked to the stance that the various members of the international community take with reference to sovereignty and the use of the air space and it implies: 'not just the crossing of at least one frontier dividing two Sates, but also the use of air space and airport and traffic control installations of at least two states.' (thus SCIOLLA LAGRANGE, *Trasporto, IV) Trasporti aerei – Dir. Int.*, in *Enc.giur.Treccani*, Rome, 1994, XXXI, *ad vocem*).

As well as the basic text by ROMANELLI, *Il trasporto aereo di persone – Nozione e disciplina*, Padua, 1966, see the following works: AMBROSINI, *Ordinamento giuridico della navigazione aerea*, in *Nuovo Dig.It.*, IX, Turin, 1938, p.254 ff.; BENTIVOGLIO, *Sull'applicazione dell'art.28 della Convenzione di Varsavia 1929 nell'ordinamento giuridico italiano*, in *Riv.dir.intern.priv.proc.*, 1969, 424 ff., FOLLIOT, *Le transport aérien international. Evolution et perspectives*, Paris, 1977; GIULIANO, *La navigazione aerea nel diritto internazionale generale, cited*; LASSANDRO, *L'ordinamento del trasporto aereo internazionale*, in *Trasporti*, 1984, 63 ff., MARTINI, *Il servizio di trasporto aereo di linea*, Milan, 1976; LEMOINE, *La recherche du droit international aérien*, Paris, 1951; NAVEAU, *Droit du transport aérien international*, Brusells, 1980; RINALDI BACCELLI, *Studi di diritto aeronautico, cited*, p.30 ff.; TURCO BULGHERINI, *La disciplina*

In particular, in article 3, first paragraph, *sub* d), the definition 'international traffic' is given as any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places of a third Contracting State. (49)

With this provision one usually includes transport involving the connections between territories subject to the sovereignty of different states in relation to the place of effective management.

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giuridica degli accordi aerei bilaterali, cited, p.3 ff.; WASSENBERGH, *The "right to fly" and the "right to carry traffic by air", in international air transportation, after 40 years*, in *Air worthy – Liber amicorum honouring I.H.Ph. Diederiks-Verschoor, eds. J.W.E. STORM VAN'S GRAVESANDE - VAN DER VEEN VONK*, London - The Haugue – Boston, 1985, p.215 ff.; PANNONE, *Il contratto di trasporto aereo internazionale*, in *Riv.giur.turismo*, 1991, 32 ff.; ZYLICZ, *International air transport law, cited*, p.115 ff.).

(49) Article 3, first paragraph, *sub* d), lays down that: the term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State. The accompanying Commentary specifies moreover that, sub § 5: 'the definition of the term "international traffic" is based on the principle as set forth in paragraph 1 of Article 8 that the right to tax profits from the operation of ships or aircraft in international traffic resides only in the Contracting State in which the place of effective management is situated in view of the special nature of the international business. However, as stated in the Commentary on paragraph 1 of Article 8, the Contracting States are free on a bilateral basis to insert in sub-paragraph d) the reference to residence, in order to be consistent with the general pattern of the other Articles. In such a case, the words: "an enterprise that has its place of effective management in a Contracting State" should be replaced by "an enterprise of a Contracting State" or "a resident of a Contracting State" (see OECD, *Model tax convention on income and on capital*, I, *cited*).

The OECD's role of preferred interpretative tool with reference to double taxation conventions, is a well-established fact, accepted by both the *doctrine* and the case-law (references on the subject in GIULIANI, *La interpretazione delle Convenzioni internazionali contro le doppie imposizioni sui redditi*, in *Corso di diritto tributario internazionale, cited*, p.288 ff. especially 294 ff.- This of course is not tantamount to saying that, especially with reference to a series of definitions adopted in the Treaties, it is a balanced and well-organised whole, in this respect see *funditus* XAVIER, *Il problema delle qualificazioni nel diritto tributario internazionale*, in *Riv.dir.trib.*, 1994, I, 523 ff. See also: AVERY JONES *et alii*, *The interpretation of tax traties with particular referenfce to article 3 (2) of the OECD Model*, in *Dir.prat.trib.*, 1984, I, 1625 ff., AULT, *The role of the OECD commentaries in the interpretation of tax treaties*, in *Essays on international taxation, eds. H.H.ALPERT – K. VAN RAAD*, London, The Haugue-Boston, 1993, p.61 ff.; LANG *et alii*, *Multilateral tax treaties. New developments in international tax law*, London - The Haugue – Boston, 1998; in this last text see in particular essays by: WASSERMEYER, *Does the EC treaty force the EU member States to conclude a multilateral tax treaty* (*sub* § 2); LANG, *The concept of a multilateral tax treaty* (*sub* § 10).

Thus, the criterion behind the rule that is carried in the OECD model convention, implemented in the single Treaties *sub* article 8, is constituted by the non taxability of transport beginning within a certain State and having as destination the other Contracting State, regardless of possible stopovers (also internal) made on the way (consecutive cabotage), on an international flight.

This aspect has remained in actual fact regressive, in that only recently (beginning April 1st 1997) 'the home trade reservation' was annulled; transport for a valuable consideration of passengers and/or cargo, both scheduled and charter and carried out within the EU has been deregulated.

What this means in practice is that all Community air carriers can operate (within the limits specifically provided for by law) traffic between different stopovers within the European Community, even if not registered in the state of the flag they fly, thus permitting a substantial inter-Community opening to cabotage traffic. (50)

(50) Community legislation, acting on the basis of a similar experience the USA carried through and, in line with the principles informing the Treaty of Rome, has started a process of liberalisation in the aereonautical sector.

The last phase (the so-called third package) was characterised by the issuing of five Regulations (and, therefore, of direct and immediate application, since as it is well-known, in the majority of cases they do not need internal legislative acts in order to be assimilated) by the European Union Council of Ministers.

The following regulations make up the so-called Third Package:

- no.2407/92 of July 23, 1992 on the issue of licences to European air carriers (in the European Community Official Gazette August. 24, 1992, no.L.240);
- no. 2408/92 dated July 23, 1992 on allowing Community air carriers access to intraCommunity air-lanes (in European Community Official Gazette, August 24, 1992, no.L.240);
- no. 2409/92 July 23, 1992 on aeronautical charges on transport of passengers and cargo (in the European Union Official Gazette, August 24, 1992, no.L.240);
- no. 2410/92 July 23, 1992 amending the EEC regulation no.3975/87 relative to the rules of competition and the terms of their application to air transport enterprises (in. 24 agosto 1992, n.L.240);
- no.2411/92 dated July 23, 1992 amending the EEC regulation no.3976/87 concerning the application of article 85, pararagraph 3 of the Treaty to certain categories of agreements and practices agreed on with reference to the air transport sector (in European Union Official Gazette August 24, 1992, no.L.240).

Moreover, regulation no.95/93 dated January 18, 1993 should be considered an integral part of the package; it refers to the common rules for the assignment of slots in Community airports (in European Union Official Gazette, January 22, 1993, no.L.14/1).

The regulation that is particularly relevant to us at this point is no.2408/92, concerning access to traffic on intraCommunity air-lanes by European air carriers, since

Now, if we turn our attention to the observations - on this same subject - carried in the OECD Commentary (1) (d) *sub § 6*, one can infer that the expression 'international traffic' is used in a broader sense than the one normally attributed to the same. (51)

It is indeed held that the interpretation that would attribute taxing power to the State in which one finds the place of effective management of the enterprise, referring to both domestic traffic and that operated between third states, (52) is the one which comes the closest to the objectives pursued by this kind of conventional provisions.

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it carries in particular the principle according to which all European air carriers meeting the conditions set in the previous regulation no. 2407/92 can operate traffic on intraCommunity air-lanes. This means that all European air carriers can operate traffic between different Community stops even those that do not come under their flag.

On aspects and specific issues that characterise this new set-up refer to: *Spunti di studio su: aspetti della normativa comunitaria sui servizi aerei c.d. terzo pacchetto, edited by G.ROMANELLI-L.TULLIO*, Cagliari, 1999 and in particular to: ROMANELLI-TULLIO, *Presentazione*, p.7 ff.; SANTINI-ZEGRETTI, *La liberalizzazione del trasporto aereo intracomunitario: rapporti tra normativa comunitaria e disciplina nazionale*, p.61 ff., ITALIANO-PANETTA, *La riserva di cabotaggio nei trasporti intracomunitari*, p.85 ff.- See also SILINGARDI, *L'incidenza della normativa comunitaria sul codice della navigazione*, in *L'attività di trasporto aereo dopo la liberalizzazione del cabotaggio. Conference proceedings, Modena, April 4 1997, edited by G.SILINGARDI-A.ANTONINI-B.FRANCHI*, Milan, 1998, p.21 ff.; ANTONINI, *Attività di trasporto aereo dopo la liberalizzazione del cabotaggio*, in *Resp.civ.*, 1998, 518 ff.; SILINGARDI, *Il completamento delle misure di liberalizzazione del trasporto aereo*, in *Riv.giur.circolaz. e trasp.*, 1997, 505 ff.; GIRARDI, *La terza fase della liberalizzazione del trasporto aereo in Europa: contenuti e problemi applicativi*, in *Dir.trasporti*, 1993, 39 ff.; GRIGOLI, *Liberalizzazione e sicurezza nel trasporto aereo comunitario*, in *Trasporti*, 1993, 3 ff.; RINALDI BACCELLI, *La terza fase della liberalizzazione del trasporto aereo nella comunità economica europea, ibidem*, 35 ff.-

(51) In this respect the Commentary points out that: " the definition of the term "international traffic" is broader than the term normally signifies. However, this has been deliberate in order to preserve for the State of the place of effective management the right to tax purely domestic traffic as well as international traffic between third States, and to allow the other Contracting State to tax traffic solely within its borders. This intention may be clarified by the following illustration. Suppose an enterprise of a Contracting State or an enterprise which has its place of effective management in a Contracting State, through an agent in the other Contracting State, sells tickets for a passage which is confined wholly within the first-mentioned State or, alternatively, within a third State. The Article does not permit the other State to tax the profits of either voyage. The other State is allowed to tax such an enterprise of the first-mentioned State only where the operations are confined solely to places in that other State" (see OECD, *Model tax convention on income and on capital*, I, *cited).*

(52) See together with the authors above mentioned *sub* footnote no.42, GRIGOLI, *L'esercizio dell'aeromobile*, Milan, 1988, p.668 ff. -

Conversely, the *ius impositionis* should be exercised by the other Contracting State in respect of traffic confined 'exclusively'within its borders. Therefore, it has been held that the sale of tickets for a passage provided by a permanent establishment or by an agency within a Contracting State to travel within the State of effective management or within a third state, should be made to refer to the notion of 'international traffic' and therefore, that taxation of profits should emerge in the state of the flag carried. (53)

The new situation of intraCommunity transport, which has meant liberalisation of internal air-lanes within the single States, brings with it the need for a change in the cognitive style of the legal palimpsest made up of Conventions on the matter and, in particular, this new set-up calls for a change in the OECD model and its accompanying Commentary.

Having reached this point, the interpretation that is the most consistent with the *ratio* of conventional provisions, seems to be the one which would consider as exempt air transport activity operated between two places situated within the territory of one of the Contracting States, by an airline of the other State, where transport can be considered consecutive, since part of a wider international itinerary.

A different interpretation might consider the adverb 'exclusively' as taking on a wider ranging meaning, which would mean only the services rendered by a navigation enterprise with the effective management situated in one of the Contracting States would be taxable; however, such enterprise would need to carry on its activity by operating transport 'exclusively' between places situated within the other State.

The 'exclusivity' of transport – should one adopt this sort of hermeneutic criterion – would thus become an element serving the purpose of distinguishing taxation, should transport within another State be

(53) These concepts are examined in detail by DEL GIUDICE, *La doppia imposizione internazionale sul reddito e sul patrimonio, cited,* p.53 ff.- See aloso, GHERARDUCCI, *I Trattati contro le doppie imposizioni,* Milan, 1984, p.52 and as for the foreign legal literature see: VOGEL *et alii*, in the work last cited, p.39 ff.; QURESHI, *The public international law of taxation: text, cases and materials*, London-Dordrecht-Boston, 1994, p.106 ff.; MARTHA, *The jurisdiction to tax in international law: theory and practice of legislative fiscal jurisdiction*, London - The Haugue – Boston, 1989, p.138 ff.; MEYER-MARSILIUS *et alii, Doppelbesteuerungsabkommen Deutschland-Schweiz: texte, kommentare, materialien (u.a. Aussensteuergesetz, Erlasse, Entscheidungen)* looseleaf, Zürich, see in this work *Kommentar zu artikel 8,* the 1974 edition written by WETZEL and the 1986 edition written by ROHLS.

operated by a foreign air carrier, through the branch, acting basically as a national airline operating within the domestic territory. (54)

(54) In this respect, it might be useful to mention the issue as it emerges for VAT purposes. Though the issue here is a little different, one can suggest reference to article 9, first paragraph, no. 1 of D.P.R. October 26, 1972, no. 633 – in the text amended by D.P.R. no.24/1979 and further amended by D.P.R. no. 897/1980 – that considers: 'transport of persons operated in part in the state and for the other part in foreign territory and under a single contract as 'non taxable', since falling within the category of international services (following adjustment to the sixth Community Directive enacted with the above mentioned 1979 D.P.R. no.24).

Under this category falls transport of a mixed kind, providing that the contract relation is a single one (even if different air carriers are used) and that the transport does not continue from the domestic territory to outside the customs area. (see on the subject, Ministry of Finance, Circular November 3, 1973, no.62 in *Boll.trib.*, 1974, 35 ff.; ID, Circular August 3, 1979, no.26, *IVI*, 1979, 1333 ff.). VAT is instead due when the transport service is carried out autonomously and wholly within the State; regardless of whether it is carried out on behalf of a foreign agency which would itself see to the trasport from the foreign place to the Italian departure point (see Ministry of Finance Resolution, December 4, 1973, no. 548195, in *Dir.prat.trib.*, 1974, I, 462). Similarly, the Italian Financial Administration (Revenue Authority) holds that transport between national stops by air carriers operating an international service, even in the case of an intermediary stopover at an airport outside the territory, should be subject to VAT (thus Ministry of Finance Circular no.62/1973, *cited*).

Even the ECJ, as far as shipping is concerned, has remarked that: 'for cruises using ships carrying the flag of a Member State and not calling at a foreign port (so-called circular cruises) these are transport services that can be subject to VAT for the distance situated within the territorial waters of the state according to the combined provisions of art.2 and 9, no.2), lett.b), of the sixth Council directive, May 17, 1977, no.77/388/EEC; they can be made exempt from the tax only under provisions departing from the sixth directive, such as art. 28, no.3), lett.b), which on a temporary basis, allows for the transport of passengers to continue being exempt, under the conditions existing in the Member State (see European Communities Court of Justice, May 23, 1996, C-331/1994, in *il fisco*, 1996, 10850).

On these aspects see LUPI, *Imposta sul valore aggiunto (IVA)*, in *Enc.giur.Treccani*, Rome, 1989, XVI, *ad vocem*, *sub* §7; BOSELLO, *L'imposta sul valore aggiunto. Aspetti giuridici*, Bologna, 1979, p.45 ff.; FAZZINI, *Il principio di territorialità nel tributo sul valore aggiunto*, Padua, 1995, p.118 ff.; CINCOTTI, *Esportazioni e servizi internazionali nell'IVA*, Milan, 1975, p.46 ff.-

A special case according to the Ministry's orientation is international air transport services (of Community and non- Community persons) carried out in the air space over the national territory, which can be calculated on average by applying a flat-rate of 38% on the single international flight (thus Ministry of Finance Resolution April 23, 1997, no.89, in *Corr.trib.*, 1997, 2380, previously the percentage had been fixed at 42; Resolution April 18, 1990, no.470035, in *Boll.trib.*, 1990, 922; and on shipping 5% with Circular March 7, 1980, n.11, *IVI*, 541).

This interpretation aims at operating a distinction – in the context of a single concept of international transport– between the track effected over the Italian territory, which would take into account only the consideration referable to the national terri-

So essentially, transport operations would be considered relevant for tax purposes in the State in which this transport is carried out, should the services of the foreign enterprise result as identical or comparable to those of national air carriers operating on internal routes.

Even if a solution of this kind can be assumed (providing that there is no clash with the Community regulations just mentioned, which set down conditions for the liberalisation of air transport) it would still lead to a dissociation of the biunique relation between permanent establishment and territory in which the activity is carried on, a correspondence which constitutes the fulcrum of the methodology of taxation as can be derived both from conventional rules and from the regime carried in the Unified Code of Income Taxation no. 917/1986. (55)

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tory (to consider non taxable ex article 9) and the consideration referable to the journey over the foreign territory (which would not come under VAT application in virtue of article 7, fourth paragraph, letter c.).

It is the Ministry's view that this clear-cut dichotomy operated with reference to a single international transport service would mean that, for the purposes of the *plafond* for acquisitions on which tax is suspended (second paragraph article 9) only consideration referable to the national distance would be considered, with the exclusion of those attributable to the distance covered outside the territory (see on the subject FAZZINI, *in the last work cited*, p.115 ff.; ARMELLA, *Regime IVA delle prestazioni di trasporto di beni e di persone in ambito internazionale e comunitario*, in *Dir.prat.trib.*, 1997, III, 402 ff.). Such a thesis is evidently based on an ambivalent reading of the legislative provisions we have just mentioned (in particular those of art. 7, fourth paragraph, lett. c), and according to which: ' transport services are considered as taking place within the State in proportion to the distance covered therein'. See also the Proposal submitted by the European Communities Commission – by application of article 189 A, paragraph 2 of the EC Treaty, September 7, 1994, amending Directive 77/388/EEC on the VAT regime applicable to the trasport of persons, in the European Community Official Gazette, September 23, 1994, 94/C 266/02 – according to which it is the place of departure that is relevant, to be intended as the place where the voyage starts as indicated in the transport document; this method does somewhat perplex, since it relies on an empirical criterion for the quantification of the distance to attribute to the respective tracks (domestic and abroad) leading to a dualistic legal qualification of a same operation (non taxable in part and excluded from VAT application for the other) which involves application of a different tax regime.

Refer for general issues on VAT within international air transport to: SILINGARDI, *Attività di trasporto aereo e controllo pubblici, cited*, p.236 footnote no.16, and GRIGOLI, *in thye work last cited*, p.667 ff.-

(55) After all, this definition goes with each and every study conducted on the concept of permanent establishment (see retro footnote no. 30) and is also accepted by those authors who doubt – on the basis of strong arguments centring on an analysis of the current positive tax system – that said entities are independently liable to tax, and argue instead that, for tax purposes, they should be considered as centre to which

6 – We now come to analysing the aspect concerning the formal obligations to be fulfilled, obligations which we skimmed over at the beginning of this work. It is important to stress how in this respect guidelines have been followed and tested over time (above all, in the period following the tax reform brought about in the 1970s and assimilating the world wide income principle) with the result that with respect to branches of foreign companies, having in Italy a permanent establishment and carrying out commercial activities, business income is determined by applying the rules laid down in Title I, Item VI, of the Unified Code on Income Taxation no. 917/1986. (56)

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one can legitimately link certain legal effects (of less importance) in the presence of categories of income, since the non resident is still a taxable subject (see MICHELI, *Soggettività tributaria e categorie civilistiche*, in *Riv.dir.fin.*, 1977, I, 419 ff. And now in *Opere minori di diritto tributario, II, cited*, p.321 ff.; ANTONINI, *La soggettività tributaria*, Naples, 1965, p.135 ff.; GALLO, *Contributo all'elaborazione del concetto di "stabile organizzazione", in the work in the work cited.*, 385 ff.; **ID**, *La stabile organizzazione*, in *Il diritto tributario nei rapporti internazionali, I quaderni di Rassegna tributaria*, no.2/1986, 149 ff.; FANTOZZI, *Diritto tributario, cited*, p.244 ff.; CROXATTO, *Reddito delle persone giuridiche (imposta sul) (IRPEG), Novissimo Dig.It., Appendice*, VI, Turin, 1986, p.420 ff.; POTITO, *Soggetto passivo d'imposta*, in *Enc.dir.*, XLII, Milan, 1990, p.1248 ff., and lastly, *amplius* GIOVANNINI, *Soggettività tributaria e fattispecie impositiva*, Padua, 1996, p.204 ff.- Opposite viewpoints in NUZZO, *Questioni in tema di tassazione di enti non economici*, in *Raff.trib.*, 1985, I, 128 ff.; LOVISOLO, *Ancora a margine del concetto di stabile organizzazione, anche in riferimento alla riforma tributaria delle imposte dirette*, in *Dir.prat.trib.*, 1973, II, 292 ff.).

(56) As well as the treatise by GARBARINO, *La tassazione del reddito trasnazionale, cited*, see observations by: UCKMAR V., *L'evoluzione, con particolare riguardo all'ordinamento italiano, del concetto di "stabile organizzazione" delle imprese operanti nell'ambito di più Stati*, in *L'ordinamento tributario e la politica di stabilizzazione – L'evoluzione del concetto di stabile organizzazione – Proceedings of the Ivth conference on studies – Rome June 19-20, 1967*, Milan, 1967, p.129 ff.; MICHELI, *Il regime fiscale delle imprese multinazionali*, in *Imp.amb. e pubbl.amm.*, 1974, I, 317 ff. And currently in *Opere minori di diritto tributario*, II, *cited*, p.375 ff.; FANTOZZI, *Il trattamento fiscale, dal punto di vista italiano, delle imprese multinazionali, IVI*, 1974, 337 ff.; **ID**, *La determinazione del reddito imponibile nei rapporti fra società italiane e collegate all'estero*, in *Riv.notariato*, 1979, I, 790 ff.; various authors, *L'impresa multinazionale e gli ordinamenti giuridici nazionali*, in *Notiziario della Scuola di Polizia Tributaria della Guardia di Finanza*, 1978, II, 1 ff.; GRANELLI, *Imprese multinazionali e legislazione tributaria italiana*, in *Le imprese multinazionali e l'Europa, a cura di A.GRISOLI*, Padua, 1978, p.321 ff.; CROXATTO, *Problemi fiscali delle società multinazionali, IVI*, p.305 ff.; ID, *La tassazione del reddito dei residenti con attività all'estero e dei non residenti operanti in Italia*, in *Riv.dott.comm.*, 1974, 832 ff.; **ID**, *La tassazione del reddito derivante da attività internazionale nel quadro della riforma tributaria*, in *Studi in onore di E.D'ALBERGO*, Milan, 1977, p.241 ff.

It was earlier stressed (57) that the specificity of the question regarding income taxation of international air traport and the characteristics of its conventional rules, aimed at avoiding double taxation, is necessarily conceived by looking at the thing-asset (aircarrier) as a whole, generating income in the single places in which the transport is carried out; thus, importance is mainly attributed to the *res*, as distinctive economic feature - rather than to the conceptual paradigm enterprise-business – to which one attributes an economic result, relevant for tax purposes (58).

This is definitely not the *sedes materiae* for a theoretical construction that might attempt to settle this complex issue in law, however, it might be useful to remind the reader of the well-known fact that among man's activities considered with reference to the thing as asset, the most distinguished legal literature normally locates three different fundamental moments: production, appropriation of the utilities produced for their enjoyment and, lastly, the use of the asset for the production of further activities. (59)

(57) See *retro* text and footnotes nos. 15 and 16

(58) A great many doctrinal studies have focused on this theme, though with different nuances, see in particular studies by: CASANOVA, *Note sulla natura giuridica della nave*, in *Studi in memoria di B.SCORZA*, Rome, 1940, p.15 ff.; FERRARINI, *L'impresa e il lavoro nella navigazione*, I, Milan, 1945; ID, *Impresa di navigazione ed impresa commerciale*, in *Dir.mar.*, 1948, 1 ff.; PUGLIATTI, *Codice della navigazione e codice civile*, in *Riv.dir.nav.*, 1943-48, 7 ff. And currently in *Diritto civile – Metodo – Teoria – Pratica – Saggi*, Milan, 1951, p.135 ff.; DOMINEDO', *Sul concetto dell'impresa di navigazione*, in *Riv.dir.nav.*, 1951, I, 216 ff.; SPASIANO, *Esercizio della nave o dell'aeromobile ed impresa*, in *Riv.dir.nav.*, 1950, I, 182 ff.; PESCATORE, *Oggetto e limiti del diritto della navigazione*, in *Scritti giuridici in onore di A.SCIALOJA: per il suo 45° anno d'insegnamento, edited by A.LEFEBVRE D'OVIDIO e F.MESSINEO, I, Diritto della navigazione*, Bologna 1952, p.202 ff.; MARINO, *L'individuazione dell'esercente di aeromobile*, in *Riv.dir.nav.*, 1955, I, 194 ff., TORRENTE, *L'impresa e il lavoro nella navigazione. I contratti di utilizzazione della nave o dell'aeromobile*, Milan, 1964; GRIGOLI, *Profili in tema di esercizio ed impresa nel diritto della navigazione*, in *Annali Univ.Catania*, 1976, 275 ff.; ID, *L'esercizio dell'aeromobile, cited*, p.65 ff.; GAETA, *L'impresa di navigazione*, in *Dir.mar.*, 1981, 513 ff., OPPO, *L'impresa di navigazione (cinquant'anni dopo)*, in *Riv.dir.civ.*, 1992, I, 239 ff.- Of encyclopaedic entries see contributions by: TULLIO, *Responsabilità per danni a terzi sulla superficie*, in *Enc.dir.*, XXXIX, Milan, 1988, p.1426 ff.; MEDINA, *Aeromobile*, in *Digesto – Fourth Edition – Disc.priv. – Sez. commerciale*, I, Torin, 1987, p.25 ff.; BERLINGIERI, *Armatore ed esercente di aeromobile, IVI*, 225 ff., PESCATORE, *Aeromobile: I) Diritto della navigazione, ad vocem*, in *Enc.giur.Treccani*, I, Roma, 1988; GAETA, *Proprietà della nave e dell'aeromobile*, in *Enc.dir.*, XXXVII, Milan, 1988, 389 ff.

(59) See on the subject VERMIGLIO, *La nave e l'aeromobile*, in *Il cinquantenario del codice della navigazione, cited*, p.133 ff. especially p.117.

This latter aspect is responsible for excluding any atomistic construction of the phenomenon, in other words, a construction that would locate in just the air carrier the income-generating source, and that would isolate it from the context of an organization used for the exercise of the economic and productive activity. It is to such an activity that the ensemble of legal and economic relations should be referred, and from the result of the activity expressed in an algebraic sum, one derives the application or non application, as the case may be, of tax. (60)

As is well-known, income referable to stock companies (in the same way as that attributable to unincorporated business associations under Italian law) is considered *juris et de jure* a business income (articles 77 and 95 of the Unified Code for Income Taxation no. 917/1986). This is the definition one considers in connection with industrial goods or auxiliary capital (which cannot directly generate an autonomous income since they are inserted in the business complex) capital used within the productive circuit (refer to CICOGNANI, *Beni strumentali (dir. trib.)*, in *Enc.giur.Treccani*, V, Rome, 1988, *ad vocem*; also ID, *Beni strumentali (dir. trib.)*, updated entry, 1994, *ibidem*. See also BRACCINI, *Forma commerciale e disciplina tributaria del reddito d'impresa: trasformazione in società semplice e decommercializzazione*, in *Dir.prat.trib.*, 1983, II, 398 ff.; D'AMATI, *I beni dell'impresa: categorie normative e disciplina tributaria*, in *Boll.trib.*, 1986, 1621; MOSCHETTI, *I beni relativi all'impresa*, in *Il reddito di impresa nel nuovo Testo Unico*, Padua, 1988, p.615 ff.), which therefore contributes to generating a business income, definition which serves to distinguish said goods from the Italian 'beni d'impresa' (literally, goods of the company, of the business) the tax regime of which is different. The latter regime being characterised by the potential of said goods of generating: 'positive and negative income components; this can happen through transfer, loss followed by compensation, or assignment to shareholders, etc.' (thus FANTOZZI-LUPI, *Le società per azioni nella disciplina tributaria*, in *Trattato delle società per azioni, diretto da C.E.COLOMBO e G.B.PORTALE, 9**, Profili tributari e profili concorsuali*, Turin, 1993, p.34 ff.- See *etiam* FALSITTA, *La tassazione delle plusvalenze e delle sopravvenienze nelle imposte sui redditi*, Padua, 1978, p.59 ff.; FANTOZZI, *Imprenditore e impresa, in the work cited*, p.217 ff.; FEDELE, *Profilo fiscale delle società di persone*, in *Riv.notariato*, 1988, 549 ff.; LUPI, *Profili tributari della fusione di società*, Padua, 1989, p.15 ff., p.53 ff.-

(60) It might prove useful in this respect to mention the issue raised in connection with the notion of the Italin 'opificio' (the works), as technically organised structure of industrial goods, only material goods, their function being pre-eminent compared to the immovable property on which the source of income stands (an overview of this subject can be found in STANZANI, *Opificio*, in *Novissimo Dig.It.*, XI, Turin, 1965, p.1031 ff.; TABET A., *La locazione-conduzione*, Milan, 1972, p.247 ff.; DE CUPIS, *L'affitto di opificio industriale*, in *Riv.trim.dir.proc.civ.*, 1987, 465 ff.). Now, setting aside the obvious ontological differences that distinguish the two categories of goods (the works and the air carrier), the only real aspect worth pointing out in this respect is the peculiarity of the good, the objective instrumentality of which means that, as *opus unicum*, it can be used to create economically relevant *utilitas*, which constitute, as such, taxable material (this subject has been examined from a tax point of view, the

Having defined the situation in these terms – terms that can be de-

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treatise by FERLAZZO NATOLI-PANUCCIO, *Opificio*, in *Enc.dir.*, XXX, Milan 1980, p.377 ff. is an in-depth study, but refer also to: LICCARDO, *Concetto di opificio industriale agli effetti tributari*, in *Riv.trib.*, 1954, 866 ff.; ID, *Ancora sul concetto di opificio industriale, IVI*, 1956, 450 ff.; NAPOLITANO, *Immobili assimilabili agli opifici industriali ai fini dell'applicazione dell'art.28 della legge 8 giugno 1936, n.1231*, in *Riv.dir.fin.*, II, 145 ff.; PARLATO, *Opificio industriale ed agevolazioni tributarie*, in *Raff.fin.pubbl.*, 1959, 64 ff.)-

The air carrier as industrial good (see on this point PETTINATO, *Aeromobile. III) Diritto tributario*, in *Enc.giur. Treccani*, I, Rome, 1988, *ad vocem*) – in this context – is therefore in a way reminiscent of the notion of the 'works', open to a separate and autonomous qualification as juridical *res* (on these points, see the precise and clear definitions provided by PUGLIATTI, *Beni e cose in senso giuridico*, Milan, 1962, p.15 ff.; ID, *Riflessioni in tema di universitas*, in *Riv.trim.dir.proc.civ.*, 1955, 955 ff., and, by the same author: *Beni immobili per destinazione e tassa di registro*, in *Foro it.*, 1932 and now found in *S.PUGLIATTI, Scritti di diritto tributario,edited byi L.FERLAZZO NATOLI*, Messina, 1992, p. 9 ff.).

In actual fact, it has been noted (see also *retro footnote* no.58) that though the obvious function of these industrial goods (to be intended as objective instrumentality) is linked to the production of income, they still do not emerge differently in structure and, therefore, no independent abridged *universitas* is derived here; instead, these goods remain linked to the broadest notion of business *universitas* that is the navigation enterprise. Enterprise that is conceived (in dynamic terms) in the widest sense of economically organised activities (the sense we have outlined in this text). After all, the phenomenon, though from a slightly different angle, has been examined by navigation law scholars with reference to the different transactions concerning the use of the ship or carrier.

In these cases, from a tax point of view, an invariance emerges when there is a subjective change in the use of the air carrier (a change based in the adopted contractual models) seen that the goods (as "machine used for transport", art. 743 cod.nav.) keep their originally intended use.

This rule applies in the classic hypotheses of lease and chartering; here the air carrier is made available for enjoyment – so, even when there is a separate situation and the terms for the enjoyment of the goods are different - there is a common substratum to the two contracts. (thus TULLIO, *I contratti di utilizzazione della nave e dell'aeromobile come categoria generale*, in *Studi in onore di G.ROMANELLI, cited*, p.1195 ff.- On this point refer to the work by ROMANELLI and particularly to: *I contratti di utilizzazione della nave e dell'aeromobile*, in *Il cinquantenario del codice della navigazione, cited*, p.221 ff., and to *La locazione di nave e di aeromobile*, Milan, 1965. Lastly, refer to encyclopaedic works: MEDINA, *Locazione di nave e di aeromobile*, in *Digesto – Quarta edizione – Disc.priv. – Sez. commerciale*, IX, Turin, 1993, p.153 ff.; ROMANELLI-SILINGARDI, *Locazione. III) Locazione di nave o di aeromobile*, in *Enc.giur. Treccani*, XIX, Rome, 1990, *ad vocem*; ID, *Noleggio. II) Noleggio di nave o di aeromobile, ibidem*, XX, Rome, 1990, *ad vocem*).

However, situations can emerge where the activity being carried on and in particular the moment in which the goods are technically employed is not necessarily linked to the business of the navigation enterprise (see in this respect GRIGOLI, *L'esercizio dell'aeromobile, cited*, p.329 ff.; ID, *L'aeromobile nella giurisprudenza*, in

rived from the decisions of the courts earlier mentioned (61) - it follows that in the presence of income that conventions against double taxation exclude from the taxable category, the obligations regarding the keeping of accounts are to be fulfilled. (62)

Dir.prat.av.civ., 1990, 154 ff.), if for example there is a complete transformation of the morphological characteristics of the goods, or even when there is a structural modification in which the goods are employed for a different purpose to the one they were originally intended for (think of cases where the goods welcome play activities, restaurant services, gambling house *et similia*).

(61) As well as the judgements just mentioned (*sub* footnote no.13) that in a variety of ways consider the situation of foreign companies in Italy, and particularly that of navigation companies, one can also mention other decisions that had dwelled on the formal obligations incumbent on permanent establishments, see in particular Central Commission Direct Taxes, April 19, 1885, no.79307, in *La giurisprudenza di diritto amministrativo e tributario internazionale, edited by R.BARSOTTI-A.CASSESE, II*: 1880-1890, Naples, 1973, p.960; ID, December 3, 1911, no.44640, in *La giurisprudenza di diritto amministrativo e tributario internazionale – Parte seconda – Diritto tributario, edited by R.BRACCINI-V.UCKMAR*, Naples, 1975, p.345; Court of Appeal of Rome, January 25, 1913, in *Imp.dir.*, 1913, 153 ff.; Court of Appeal of Milan, May 21, 1913, *IVI*, 293; Court of Appeal of Genoa, April 24, 1914, in *Foro it.*, 1914, I, 939 ff.; Court of Cassation of Rome, April 7, 1914, in *IVI*, 1914, I, 524; Central Commission Direct Taxes, May 17, 1916, no. 77624, in *Diz.amm.fin.trib.*, 1917, 168;, Central Commission Direct Taxes, December 10, 1923, no. 29332, in *Imp.dir.*, 1924, 137.

(62) Though this is not a case which can be referred to the category of legal gap that a careful *doctrine* has identified in connection also with the implementation (*rectius* failed implementation) of conventional provisions from which tax consequences derive (see in this respect CARDIA, *L'articolo 6 del Trattato del Laterano – Un caso di amnesia giuridica*, in *Dir.eccles.*, 1997, I, 25 ff.), in other words it is not referrable to those vague notions the meaning of which still needs to be defined, to concepts the precise contents of which are difficult to extrapolate in relation to certain conventional obligations to be ascribed to a contracting State, (see in this respect, MOSCONI, *Norme vaghe e diritto internazionale pubblico: il diritto pattizio – A quali soggetti spetta il compito di determinare ciò che nella norma è indeterminato*, in *Jus*, 1999, 33 ff.), the fact remains that the non harmonization of tax legislation (within the Community), and in particular the non introduction of specific prescriptions in internal laws that would semplify accounts obligations for foreign companies' permanent establishments still constitutes a deterrent to the right of establishment (on questions concerning this right see: NUZZO, *Libertà di stabilimento e perdite fiscali: il caso Imperial Chemical Industries plc (ICI)*, in *Raff.trib.*, 1999, 1814 ff.; BIZIOLI, *Evoluzione del diritto di stabilimento nella giurisprudenza in materia fiscale della Corte di Giustizia*, in *Riv.it.dir.pubbl.comunitario*, 1999, 381 ff.; ID, *Il rapporto tra libertà di stabilimento e principio di non discriminazione in materia fiscale: una applicazione nel recente caso Imperial Chemical Industries*, in *Dir.prat.trib.*, 1999, III, 323 ff.) pursued by the EC Treaty (Title III, paragraph 2).

Having adopted as proposition this binary system, (with distributive rules on one side and *Grenznormen* on the other) followed with reference

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It seems worth to underline that, in the light of what has been stated by the above mentioned European Court of Justice judgement of May 15, 1997 (see *retro* footnote no.33), the obligation to keep accounts, set down in the differentnational legal systems, implies that the tax authorities of the single states can at any time inspect documentation for the purpose of assessing income components.

In this sense, the same Community judge has on more than one occasion: 'maintained that the effectiveness of tax controls is an imperative motivation of public interest that can therefore justify a restriction on the exercise of the fundamental freedoms guaranteed in the Treaty (see, for example, judgement February 20, 1979, case 120/78, Rewe-Zentral- so-called <<*Cassis de Dijon*>> judgement - Racc., 649, punto 8). Therefore, a Member State has the authority to apply measures that will serve to verify in a clear and precise manner the amount both of income taxable in its state and of losses that can be carried forward'.

The EC Court, however, reminds that: 'the competent authorities of a Member State, (under *Council Directive December 19, 1977, no.* 77/799, editor's note) can always ask the authorities of another Member State for any information that might assist them in correctly determining, in the light of the legislation they need to apply, the amount of income tax on a taxpayer resident in the other State mentioned'.

This seems to be the path to follow in order to arrive at a semplification of the formal obligations to fulfil where it is possible for the financial administration of the single states to resort to exchange of information. Clearly, the problem does not solely concern the Community states for which directives on the matter already exist (nos. 77/799, 79/1071 and 92/108), but from a *de iure condendo* point of view, the problem also arises in relation to international Conventions. It was indeed observed that the interpretative evolution in matter of double taxation treaties is characterised by a clearly expanding phenomenon, that can be noticed and confirmed in the greater care being applied at the stage of assessment compared to that of collection (which, moreover, has constituted a *punctum dolens* and reason for clashes between states'. See on the subject *amplius* SACCHETTO, *Tutela all'estero dei crediti tributari, cited,* and STEVE, *Sulla tutela internazionale della pretesa tributaria, cited,*, 241 ff.). In this *new deal,* based on a different method to be applied in relations of international collaboration, one soon notices the deeper interest in exchange of information, that is no longer intended as a means to prevent or limit the phenomenon against double taxation, but as tool for the correct application of the single states' tax systems, to prevent evasion, tax frauds, tax avoidance: the institute is 'released' from issues of double taxation'. (thus FEDELE, *Prospettive e sviluppi della disciplina dello "scambio di informazioni" fra amministrazioni finanziarie,* in *Raff.trib.*, 1999, 49 ff.- On these aspects see also, works by: ROSEMBUJ, *Harmful tax competition,* in *Intertax*, 1999, 316 ff.; TOSI, *L'attività istruttoria amministrativa in ambito comunitario (con particolare riferimento agli illeciti nel campo dell'Iva),* in *Riv.dir.trib.*, 1996, I, 633 ff.; ADONNINO, *Cooperazione amministrativa e modalità di scambio di informazioni tra amministrazioni fiscali nazionali,* in *Quaderni*, 1995, 52 ff.; SACCHETTO, *Armonizzazione fiscale nella comunità europea (voce aggiornata-1994),* in *Enc.giur.Treccani*, Rome, II; ID, *L'evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di iva ed imposte dirette: scambio di informazioni e verifiche <<incrociate>> internazionali,* in *Boll.trib.*, 1990, 487 ff. and 563 ff.; ID, *L'armonizzazione fiscale nella comunità europea,*

to the ontological characteristics of Conventions and to the levels of influence between conventional and internal law, one must infer that the effectiveness of domestic legislation does not admit solutions that differ from what has been stated on the matter even by the Court of Cassation with judgement no. 7609 of 1994, even if this leads to clear aporias. (63)

On the other hand, the reading of articles 7, 8 and 24 of the OECD model Convention and accompanying Commentary (as also the double

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in *Dir.prat.trib.*, 1989, I, 281 ff.; CROXATTO, *Integrazione economica europea ed armonizzazione delle imposte sui redditi*, in *Riv.dott.comm.*, 1991, 685 ff.- An overview of these issues is offered in COSCIANI, *La politica di armonizzazione fiscale delle comunità economiche europee*, in *Tributi*, 1980, 5 ff.).

On the need for co-ordination between Community states as far as clauses are concerned (and especially in respect of notions such as tax fraud) carried in the most recent treaties against double taxation stipulated by Italy, consider the following: GALLO-CASERTANO, *The anti-abuse clause in the Italian double tax treaties and their compatibility with the EC law*, in *Intertax*, 1995, 649 ff.-

(63) The authors commenting the judgement in question, Cassation no. 7609/94, have recognised the linearity of the logical *iter* followed to reach such conclusion in the light of the positive legislation in force (see in this respect CERIANA, *Obblighi della società con una stabile organizzazione in Italia*, in *Dir.prat.trib.*, 1995, 791 ff.; TIOZZO, *Gli obblighi contabili delle società non residenti*, *ibidem*, 1378 ff.).

The *leitmotiv* of the Financial Administration is a rigorous reading of provisions in matter of the accounts obligations that foreign companies with a permanent establishment in Italy are to fulfil (see Circular April 30 1977, no.7/1499 *sub* § 38, in *Boll.trib.*, 1977, 1251 ff.; Note July 15, 1980, n.9/428, *IVI*, 1980, 1324; Res. January 31, 1981, no.9/25555, in *Dir.prat.trib.*, 1981, I, 741; Res. February 1, 1983, no.9/2398, in *Boll.trib.*, 1983, 418).

As far as the specific sector of air navigation is concerned, the need was clearly stated to have all accounts obligations performed, with the filing of a tax return, with a balance sheet attached, even in the presence of income made exempt by conventions, books for Vat and those for withholding agents not being considered sufficient to the purpose (articles 13 and 21 of D.P.R. no. 600/73). The *ratio* justifying this treatment is to be located in the advisability of conducting a *screening* that will operate a distinction between non taxable income and income potentially subject to taxation (see Res. October 21, 1982, no.12/659, in *il fisco*, 1982, 4592, again confirmed with Circular November 4, 1982, no.44, in *Tributi*, 1982, 81 ff.). Similar concepts are applied also in connection with the opening in Italy of a foreign airline public relations office, should the airline operate in international traffic flights that do not stop over within our state. It is the Ministry's view that such offices should fulfill the formal accounting obligations of withholding agents and IRPEG subjects, and this would include submitting the balance sheet for the activity carried on in Italy (see Note May 18, 1978, no.9/724, in *Boll.trib.*, 1978, 1838. On specific tax issues connected with public relations offices see UCKMAR V., *Tassabilità delle società straniere rappresentate in Italia da un agente*, in *Riv.dir.fin.*, 1951, II, 305 ff.; LOVISOLO, *Raccomandatario marittimo e Stabile Organizzazione*, in *Dir.prat.trib.*, 1977, II, 693 ff.; ARAGNO, *Brevi note in tema di residenza fiscale e stabile organizzazione di società estera di navigazione*, *IVI*, 1999, II, 87 ff.).

taxation conventions, that is, the single agreements regulating the matter) does not sanction a different interpretative criterion. (64)

It is undeniable that with income derived (*stricto iure*) from operating an activity of air navigation (which qualifies as non taxable in Italy, under conventional law) a binding scheme sets in which is based on procedures that are typical of the sector; the subjective dimensions of these rules being directed at regulating practices that are merely formal, therefore with no substantive obligations to match (65).

After all, the function of accounts is to assist and control the assessment activity carried out by the financial administration, therefore, keep-

(64) Incidentally, this issue is examined in the OECD Commentary *sub* art. 7, § 3, point 24, where it is specified that:'It is usually found that there are, or there can be constructed, adequate accounts for each part or section of an enterprise so that profits and expenses, adjusted as may be necessary, can be allocated to a particular part of the enterprise with a considerable degree of precision. This method of allocation is, it is thought, to be preferred in general wherever it is reasonably practicable to adopt it. There are, however, circumstances in which this may not be the case and paragraphs 2 and 3 are in no way intended to imply that other methods cannot properly be adopted where appropriate in order to arrive at the profits of a permanent establishment, on a "separate enterprise" footing. It may well be, for example, that profits of insurance enterprises can most conveniently be ascertained by special methods of computation, e.g. by applying appropriate coefficients to gross premiums received from policy holders in the country concerned. Again, in the case of a relatively small enterprise operating on both sides of the border between two countries, there may be no proper accounts for the permanent establishment nor means of constructing them. There may, too, be other cases where the affairs of the permanent establisment are so closely bound up with those of the head office that it would be impossible to disentangle them on any strict basis of branch accounts. Where it has been customary in such cases to estimate the arm's length profit of a permanent establishment by reference to suitable criteria, it may well be reasonable that that method should continue to be followed, notwithstanding that the estimate thus made may not achieve as high a degree of accurate measurement of the profit as adequate accounts. Even where such a course has not been customary, it may, exceptionally, be necessary for practical reasons to estimate the arm's length profits" (see OECD, *Model tax Convention, in the work cited*, I). See on the subject MELIS, *Stabile organizzazione, in the work cited*, 22 ff.; CARBONE, *Stabile organizzazione e gruppo di imprese nel diritto internazionale tributario*, in *La struttura dell'impresa e l'imposizione fiscale, cited*, p.231 ff.; DEZZANI, *Contabilità separata – Attività esenti e stabili organizzazioni*, in *il fisco*, 1982, 2932 ff.; BETTI, *Le problematiche amministrativo-fiscali delle stabili organizzazioni all'estero*, in *Corr.trib.*, 1984, 235 ff.; HOLZER, *Le aziende divise con filiali all'estero*, Rome, 1979.

(65) On this subject it is perhaps sufficient to mention studies by OTTAVIANO, *Sulla nozione di ordinamento amministrativo e di alcune sue applicazioni*, in *Riv.trim.dir.pubbl.*, 1958, 848 ff.; SAITTA, *Premesse per uno studio delle norme di organizzazione*, Milan, 1965. For an institutional text see for all aspects GIANNINI M.S., *Diritto aministrativo*, I, Milan, 1970, p.103 ff.-

ing such accounts and correctly filling them in is tantamount to protecting the tax request and ensuring that the collection of taxes will be smooth, swift and of the correct amount. (66)

In some cases, judges have deemed the imposing of specific onuses (with a probative function) as essential if one is to deduct debit items from the business income, considering that to abide by certain rules concerning the keeping of accounts which are neither excessive nor wearying is something which all business owners should do, in line with article 53 of the Constitution, since the determination of the tax *quantum* can legitimately be subordinated to fulfilling an obligation of a formal kind. (67)

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(66) In this respect see judgement of the Costitutional Court, December 28, 1970, no.201, in *Foro it.*, 1971, I, 329, which deemed legitimate art.109 lett.c) of the Unified Code of Direct Taxation no.645/1958 setting limitations to deductions for expenses which failed to be registered in the accounts. On the remittal of the case to the 'Council Judges' see PUOTI, *Appunti sulla pretesa costituzionalità dell'art.109 lett.c) T.U. imposte dirette,* in *Riv.dir.fin.*, 1970, II, 10 ff.- See also FALSITTA, *L'onere di esibizione delle scritture contabili obbligatorie degli ordinari imprenditori commerciali con speciale riguardo al problema della loro efficacia probatoria nell'accertamento del reddito mobiliare*, in *Riv.dir.fin.*, 1962, I, 60 ff.-

The principal function of the accounts can be expressed as the following: ' it is an instrument used to investigate the various elements constituting accounting results, and in connection with the latter, the result liable to tax reflects the lawmaker's pursued objective of basing on declarations of truth the whole set of rules established in order to learn the results of the business activity' (Thus NUZZO, *Libri di commercio e scritture contabili delle imprese commerciali nel diritto tributario*, in *Digesto – Quarta edizione – Disc.priv. – Sez. commerciale*, IX, Turin, 1993, p.37 ff. in particular p.41). The objective pursued by the law-maker, seen from a tax point of view, is to arrive at a precise application of tax by using objective criteria to measure values. (see NUZZO, in the last work cited., p.41).

The question, though considered in the legal literature from a variety of angles, does not lead, on a reconstructive level, to a different methodological definition. See on the subject: D'AMATI, *Libri di commercio e scritture contabili delle imprese commerciali (diritto tributario)*, in *Novissino Dig.It., Appendice*, IV, Turin, 1983, p.935 ff.; FANTOZZI-ALDERIGHI, *Il bilancio e la normativa tributaria*, in *Raff.trib.*, 1984, I, 117 ff.; LA ROSA, *Scritture contabili e giustizia tributaria*, in *il fisco*, 1986, 7073 ff.; NUZZO, *Procedure di accertamento dei redditi determinati in base a scritture contabili*, in *Raff.trib.*, 1986, I, 147 ff.; TESAURO, *Conseguenze sostanziali delle irregolarità contabili*, in *Raff.imp.*, 1987, 751 ff.; COCCHI, *Le scritture contabili: bibliografia ragionata*, in *Dir.prat.trib.*, 1989, I, 1180 ff.-

(67) This is the stance taken by the Judges of Law with judgement November 17, 1982, no.186 (in *Giur.cost.*,1982, 2027) when they rejected the question of constitutionality of article 74, second and third paragraph, D.P.R. no.597/73 (rule derived from article 109 of the Unified Code of Direct Taxes no. 645/1958 which was later revised with article 75, fifth paragraph of the Unified Code for Income Taxation no. 917/1986 and then expunged with article 5, D.P.R. December 9 1996, no.695).

However, the most relevant factor here is the alteration of the principle of taxable capacity in correlation to certain aspects of a purely procedural kind that represent a *unicum* proper to tax law; the authoritative *doctrine* outlines certain *'sanzioni improprie'* (literally improper/not typical sanctions) consisting in the unfavourable position the taxpayer will find himself or herself in, if failing to perform certain duties. (68)

On the nature of the legislative rule in question, there is a variety of different opinions (the substantive and procedural aspects within the structure of assessment are also examined) see: GAFFURI, *La documentazione contabile delle passività fiscali relative all'esercizio dell'impresa*, in *Impresa ambiente e p.a.*, 1978, I, 569 ff.; TESAURO, *Appunti sulle procedure di accertamento dei redditi d'impresa, ibidem*, I, 459 ff.; DE MITA, *L'influsso della giurisprudenza della Corte Costituzionale sul diritto tributario*, in *Riv.dir.fin.*, 1981, I, 594; LA ROSA, *La indeducibilità dei costi ed oneri non registrati avanti la Corte Costituzionale*, in *Dir.prat.trib.*, 1983, II, 3 ff., LUPI, *Sulla legittimità costituzionale del secondo e del terzo comma dell'art.74 del D.P.R. 29 settembre 1973, n.597*, in *Riv.dir.fin.*, 1983, II, 97 ff.-

(68) Such are the thoughts of DE MITA, *(Appunti di diritto tributario*, Milan, 1997, p.84 ff.) who reconstructs the event just mentioned by pointing out that there is an alteration of the rules on taxable capacity, a change that finds its justification in the existence of situations of a procedural drawback such as when there is default on the part of the taxable subject (for example, 'if the taxpayer does not keep accounts it is right that he/she should not be allowed to prove in a different manner expenses incurred, and that if he/she fails to produce the documentation of such costs it is right that they should not be calculated').

The formula of 'non-typical sanctions' is mentioned in order to describe the particular situation highlighted in the text, which translates in an advantage, from a procedural point of view, for the revenue offices and at the same time produces probative preclusions to the detriment of the taxpayer (in this sense see GAFFURI, *I metodi di accertamento fiscale e le regole costituzionali*, in *Studi in onore di V.UCKMAR, t.I,in the work cited*, p.539 ff.).

The broader question on the nature of the penalty system linked to the extra-accounts inductive assessment is covered in the legal literature that also offers further distinction. Opinions vary greatly in fact. It is not the aim of this study to take a stance in this respect, seen both the limits of this work and the space that would be required if one were to properly address the subject. On the other hand, one should note that this particular question has deeply involved the most distinguished and accredited of law scholars. See on the subject of penalties: ANTONINI, *Studi di diritto tributario*, Milan, 1959, p.12; D'AMATI, *Il tenore di vita del contribuente e la determinazione sintetica del diritto complessivo*, in *Dir.prat.trib.*, 1968, II, 873 ff.; MICHELI, *Le presunzioni e la frode alla legge nel diritto tributario*, in *Riv.dir.fin.*, 1976, I, 396 ff. And now in *Opere minori di diritto tributario*, I, *in the work cited.*, p.253 ff.; MOSCHETTI, *Avviso di accertamento tributario e garanzie del cittadino*, in *Dir.prat.trib.*, 1983, I, 1911 ff.- Expressing opposite views: FANTOZZI, *I presupposti dell'accertamento sintetico e induttivo*, in *Riv.notariato*, 1977, 887 ff.; PERRONE, *Evoluzione e prospettive dell'accertamento tributario*, in *Riv.dir.fin.*, 1982, I, 79 ff.; LUPI, *Metodi induttivi e presunzioni nel-*

In these cases, as well as the regular sanction connected *sic et sempliciter* with the omission (article 9, legislative decree December 18, 1997, no. 471), there are further effects connected with non observance of accounts obligations; such effects would involve a thinning out of the probative elements in favour of the taxable subject, which would, practically speaking, refer to the possibility of using less rigorous assessment methodologies and different conditions concerning presumptions, in the presence of which one may appeal for the taxable basis to be reconstructed.

The entire assessment procedure undergoes an alteration in virtue of the fact that non observance of the complex molecular structure based on fulfilling such formal obligations (keeping of accounts, filing of tax returns, etc., representing the supporting elements that provide an accurate picture of the effective taxable capacity of the liable subject) would render legitimate resorting to other assessment tools, such as the method, not based on account books, which would reconstruct income via an inductive route. A method that mainly resorts to presumptions of greater flexibility, seen that it lacks the condition of *gravity, precision and concordance* (article 39, second paragraph, D.P.R. no. 600/1973). (69)

l'accertamento tributario, Milan, 1988, p.254 ff.; FEDELE, *L'accertamento tributario ed i principi costituzionali*, in *L'accertamento tributario. Principi, metodi, funzioni (Giornata di studi per A.BERLIRI) edited by A.DI PIETRO*, Milan, 1994, p.13 ff.-

(69) The lack or inaccuracy of the set of accounts are essential facts if the revenue authorities are to proceed with using: 'an assessment method which would centre on the global reconstruction of income and do this equipped with a probative apparatus the evidence force of which is diminished or weakened; as is the case when the determination of a higher income is based on presumptions lacking the characteristic of gravity, precision and concordance, that is, when their probative value is attenuated.' (thus RUSSO, *La tutela del contribuente nel processo sui redditi virtuali o presunti: problemi generali*, in *Il nuovo accertamento tributario tra teoria e processo, edited by C.PREZIOSI*, Rome-Milan, 1996, p.53 ff. in particular p.59).

This issue is widely discussed in the legal literature and examined from different angles, see in this respect: FANTOZZI, *I presupposti, in the last work cited*, 887 ff.; ID, *Prospettive dell'accertamento sulla riforma tributaria*, in *Riv. Guardia Fin.*, 1981, 6 ff.; LA ROSA, *Metodi di accertamento e riforma tributaria*, in *Riv.dir.fin*, 1978, I, 263 ff.; ID, *L'amministrazione finanziaria*, Turin, 1995, p.100 ff.; TESAURO, *Appunti sulle procedure di accertamento, in the work cited*, 459 ff., ID, *Le presunzioni nel processo tributario*, in *Riv.dir.fin.*, 1986, I, 202 ff.; GAFFURI, *Sull'accertamento tributario, IVI*, 1981, I, 532 ff.; PERRONE, *in the last work cited*, 93 ff.; LUPI, *Metodi induttivi, op.cit.*, p.253 ff.; MOSCHETTI, *Evoluzione e prospettive dell'accertamento dei redditi determinati su base contabile*, in *Il nuovo accertamento tributario tra teoria e processo, in the work cited*, p.121 ff.-

Now, if we turn our attention to the case in question, it is easy to understand that we are in the presence of a completely 'unimplemented' regime, since, should there be omissions of a formal kind those norms structured with the purpose of arriving at the quantification of an income would not be made effective.

What happens in practice is what scholars of general law theory define as *'praxeological discordance'*, antinomy between rules, an expression used to describe that relation between norms for which: 'the realisation of one annihilates completely or partly the effects of realisation of the other'; in this case, one cannot talk of real contradiction emerging, but of incoherence, in the sense of practical impossibility of achieving the objectives the law-maker intended to pursue. (70)

(70) Thus ZIEMBINSKI, *Kinds of discordance of norms*, in *Theorie der normen. Festgabe für O.Weinberger zum 65. Geburstag, eds. KRAWIETZ-SCHELSKY-WINKLER-SCHRAMM*, Berlin, 1994, p.473 ff. in part.p.483.

The problem with relations of contrariety-inconsistency, from a logical-syntactical point of view, between norms that are part of a legal system has been the object of classical studies on antinomies (it is sufficient to mention in this respect the following works: GAVAZZI, *Delle antinomie*, Turin, 1959; BOBBIO, *Teoria dell'ordinamento giuridico*, Turin, 1960; KELSEN, *Derogation*, in *Essays in jurisprudence in honor of R.POUND, ed.* A.NEWMAN, Indianapolis, 1962, p.339 ff.; ROSS, *Diritto e giustizia, edited by G.GAVAZZI*, Turin, 1965; MAZZARESE, *Antinomia*, in *Digesto, Fourth Edition – Disc.priv. – Civil Section*, I, Turin, 1987, p.347 ff.).

The focus has recently shifted on the practical aspects linked to the above and, particularly on an analysis identifying the conditions of *coherence* of a legal system, in other words on its instrumental rationality which cannot obviously be judged solely on the basis of formal data, but should instead consider its pragmatic aspect (see MacCORMICK, *La congruenza nella giustificazione giuridica*, in *L'analisi del ragionamento giuridico – Materiali ad uso degli studenti, edited by P.COMANDUCCI-R.GUASTINI*, Turin, 1987, p.243 ff.). In these cases, the term commonly used is that of "paranomies" to point to those legislative clashes that do not necessarily arise out of formal data. So basically, one can talk of 'paranomy' *stricto sensu* when two norms, apparently compatible, diverge in the presence of a (accidental) real situation. Hence, one can hypothesise a wide-ranging category of cases, and the case outlined in the text can be made to refer to such a category; what we are dealing with in practical terms is a treatment which according to pragmatic logic should be considered as producing no further effects (and therefore, ultimately, permitted), but one which, inconsistently, another norm would consider as having been violated *(praexeological discordance)*. The issue is essentially a conflict between legal rules which does not originate in formal elements. On these isues see the works of: CONTE, *Codici deontici*, in *Intorno al "codice", Proceedings of the IIIrd Conference of the Associazione italiana di studi semotici (AISS)*, Pavia, September 26-27, 1975, Florence, 1976, p.13 ff.; MAZZARESE, *Antinomie, paradossi, logica deontica*, in *Riv.int.fil.dir.*, 1984, 419 ff., AZZONI, *Il concetto di condizione nella tipologia delle regole*, Padua, 1988, p.40 ff.; COSTANZO, *Condizioni di incoerenza – Un'analisi dei discorsi giuridici*, Milan, 1992, p.XXIII ff.; PINTORE, *Il diritto senza verità*, Turin, 1996, p.156, footnote no.38. On the same subject though, from

On the one hand, in fact, conventional rules exclude from taxation income derived from the activity of air navigation and, on the other, internal law provisions (carried in articles 13 and ff. and, in particular, in article 14, fifth paragraph, D.P.R. no. 600/73) impose obligations and onuses that cannot really involve an income dimension. And from this encumbrance another obligation follows: the filing of a tax return, according to provision in article 1, first paragraph, second clause, of the same D.P.R. 600/73, according to which those under the obligation to keep accounts are to file a tax return, even if they do not generate an income. (71)

In conclusion, not being possible to exploit this induced effect that would derive from the lack or irregular keeping of accounts, we are left with a weakening of precisely that function of privileged instrument for control and therefore, with an attenuation of that more penetrating assessment procedure based outside the accounts which, according to the *mens legis*, underpins the *ratio* which imposes in the first place the observance of obligations concerning accounts. (72)

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a different viewpoint, refer to BERTI, *Le antinomie del diritto pubblico*, in *Dir.pubbl.*, 1996, 273 ff., also ATIYAH-SUMMERS, *Form and substance in Anglo-American law: a comparative study of legal reasoning, legal theory, and legal institutions*, Oxford, 1987, p.75 ff.-

(71) There is an isolated judgement of the Central Tax Commission which should be mentioned since it expressely deals with a foreign airline company: ' *there is no obligation for a foreign company operating in Italy to file a tax return if according to the Convention for the avoidance of double taxation stipulated between Italy and the foreign State, identical treatment is provided for Italian companies operating within the foreign State – in this specific case article 22 Convention between Italy and Morocco*' - (thus Central Tax Commission, September 10, 1998, no. 4318, in *Riv.dir.trib.*, 1999, IV, 127).

In actual fact, this judgement is based on a debatable reading of article 22, third paragraph of the Convention between Italy and Morocco (L. August 5, 1981, no. 504), and essentially omologous to art. 24 § 3 of the OECD model, and concerning the non discrimination clause when considering the taxation of permanent establishments. If we look into this matter carefully, we soon see that the aim of this rule is to balance the tax load of foreign enterprises so that it is no heavier than the burden on national enterprises carrying on the same activity (in this sense see criticism on the decision of the Central Tax Commission as expressed by PIAZZA in *Dichiarazione dei redditi delle imprese di navigazione marittima ed aerea esentate da imposizione in Italia per effetto di Convenzioni internazionali per evitare le doppie imposizioni sul reddito, IVI*, 128 ff.).

(72) This is the intention that clearly emerges in the Government Report to the bill brought before Parliament on July 1 1969, and concerning the delegation of legislative authority for tax reform, L. October 9, 1971, no.825 in which *sub* no.19 such purposes are expressed. The text, together with the Parliamentary Commissions Proceedings can be looked up in *Delega al Governo per la riforma tributaria – Testo e Relazioni Parlamentari*, Bologna, 1971, in part. p.80 ff. and p.89 ff.- On these aspects see

It seems apposite to consider how the performance of the obligations in question are set apart from any procedural scheme the non observance of which necessarily involves proper penalties as a result of the violation of typical procedural rules. An infringement to such rules is generally seen as a tort, though not on the level of natural law, since it does not go against moral conscience. (73)

The tax law system does contemplate certain cases that make certain situations exonerate from the keeping of accounts, situations that are quite similar to the circumstances of navigation enterprises that, by making profits solely from this specific activity, do not generate income that is taxable in Italy.

Indeed, article 20, paragraph 1, of D.P.R. no. 600/73, with an *inverse* formulation, provides that the obligations concerning the keeping of accounts for corporations subject to IRPEG (income tax on juridical persons) which do not have as exclusive or principal object the carrying on of business activities, will only arise should such activities be carried on. (74)

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also LUPI, *La partita doppia nella fiscalità aziendale – Contabilità per tributaristi e giuristi d'impresa*, in *La contabilità aziendale spiegata ai giuristi, edited by R.LUPI*, Padua, 1995, p.131 ff.-

(73) Thus CAPACCIOLI, *Principi in tema di sanzioni amministrative: considerazioni introduttive*, in *Le sanzioni in materia tributaria, Conference Proceeding*, Milan, 1979, p.143. These particular aspects regarding administrative sanctions are discussed in OTTAVIANO, *Sulla nozione di ordinamento amministrativo e di alcune sue applicazioni, in the work cited*, 848 ff.; MORETTI, *Profili del procedimento sanzionatorio in materia finanziaria*, in *Studi sul procedimento amministrativo tributario*, Milan, 1971, p.191 ff.; PALIERO-TRAVI, *La sanzione amministrativa*, Milan, 1989, p.217 ff.; COPPA-SAMMARTINO, *Sanzioni tributarie*, in *Enc.dir.*, XLI, 1989, p.415 ff.; DEL FEDERICO, *Le sanzioni amministrative nel diritto tributario*, Milan, 1993, p.41 ff., BATISTONI FERRARA, *Le sanzioni tributarie nell'esperienza italiana*, in *Raff.trib.*, 1996, 1159 ff.; CORDEIRO GUERRA, *Illecito tributario e sanzioni amministrative*, Milan, 1996, p.19 ff. and p.51 ff.; GIOVANNINI, *Sui principi del nuovo sistema sanzionatorio non penale in materia tributaria*, in *Dir.prat.trib.*, 1997, I, 1188 ff.-

(74) The non-profit aspect represents the threshold on which taxability is measured. The most distinguished legal literature tends to stress the need to carry out an evaluation of the nature (business or non business) of the activity – therefore dropping issues relating to aspects of tax liability – which would consider whether an economic character can be attached to it: 'according to criteria programmatically modelled for profit-making'. (thus CASTALDI, *Gli enti non commerciali nelle imposte sui redditi*, Turin, 1999, p.239 ff.- See on this subject, NUZZO, *Questioni in tema di tassazione di enti non economici, in the work cited*, 105 ff.; GALLO, *La soggettività ai fini IRPEG*, in *Commentario al Testo Unico (Unified Code), in the work cited*, p.517 ff., ID, *I soggetti del primo libro del codice civile e l'IRPEG: problematiche e possibili evoluzioni*, in *Riv.dir.trib.*, 1993, I, 354 ff.; PROTO, *Brevi considerazioni sulla nozione di attività com-*

Relying on this definition means that cases of income not covered in the conventions (in other words, in the absence of a similar regulating instrument) are obviously left out, both when the transport effected does not fall within the notion of 'international traffic' and when there are other activites taking place which are different to those typical of a navigation enterprise. (75)

In these cases, the issue does not display features that are different to the rules that govern the determination of the business income attributable to a permanent establishment of a foreign company carrying on its activity within the State. (76)

- To complete this investigation, one can point out that the question would be one of allocation of expenses between head office and branch and determination of income in the single states.

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merciale, IVI, 1992, I, 882 ff.; TABET, *Verso una nuova tassazione degli enti non profit*, in *Raff.trib.*, 1997, 573 ff.; FICARI, *Strumentalità dell'attività commerciale e fine non lucrativo nella tassazione delle associazioni, ibidem*, 808 ff.- Lastly, for an overview of the subject refer to LOFFREDO, *Econominicità e impresa*, Turin, 1999).

Now, fully cognizant of the fact that to attempt to place certain cases on the same level is an exercise which does not easily lend itself to conceptual homologation, it serves our purpose to say that if we look at this question from a source-activity viewpoint (in one case, as a result of the lack of an economic character and in the other, as a result of non taxation of income) the question will come to take on common assonances, at least with regard to the dissociation between the collection of the tax and the formal obligations (in this last respect see *Enti non commerciali*, in A.FANTOZZI, *Guida fiscale italiana – Imposte dirette*, I, Turin, 1980, p.407 ff.; GHIGLIONE, *Obblighi contabili degli enti non commerciali ai fini dell'imposizione diretta*, in *Dir.prat.trib.*, 1985, I, 631 ff.).

Neither has this semplified regime undergone any changes as a result of amendments introduced for anti-avoidance purposes on art. 109, second paragraph of the Unified Code on Income Taxation no. 917/86 (in virtue of art.3, first paragraph, lett.a) of legislative decree December 4, 1997, no. 460), in matter of determining the income of non profit corporations.

Under this legislative precept:'non profit corporations are under the obligation to keep separate accounts for the business activities they carry on'.

In actual fact, such a rule does not introduce *à rebours* the obligation to keep accounts for non business activities, but merely serves to reiterate the need to keep accounts should there be business activities involved (thus LEO-MONACCHI-SCHIAVO, *Le imposte sui redditi nel Testo Unico*, II, Milan, 1999, p.1467 ff.- On this same subject see also FICARI, *La disciplina fiscale degli enti non commerciali nel D.L.vo 4 dicembre 1997, n.460,* in *Commento agli interventi di riforma tributaria, a cura di M.MICCINESI*, Padua, 1999, p.657 ff. in part. p.680).

(75) In this respect see *retro sub* footnotes nos. 46 and 48.

(76) In this respect please refer to authors mentioned in *ante sub* footnote no.56 in whose works methodologies applicable in the allocation of income between parent company and permanent establishment are discussed in great detail.

Article 7 of the OECD model outlines the general criteria whereby costs may be allocated and income quantified between parent company and permanent establishment abroad (77).

From this point of view, the *punctum puncti* is to be found in the provision (art.7, § 3) setting down the rule according to which in determining the profits: 'there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.' (78)

(77) Please refer to studies conducted by the *International Fiscal Association* (IFA) which formed the object of special conferences and in particular: *Criteria for the allocation of items of income and expenses between related corporations in different States whether of not parties of tax conventions,* in *Cahiers de droit fiscal international,* LVIb, 1971; *Allocation of expenses in international arms' length transactions of related companies, IVI,* LXb, 1975; *Rules for determining income and expenses as domestic or foreign, IVI,* LXVb, 1980, 15 ff.; *Tranfer of assets into and out of a taxing jurisdiction, IVI,* LXXIa, 1986, 15 ff.; *Taxation of cross border leasing, IVI,* LXXVa, 1990, 21 ff.; *Principles for the determination of the income and capital of permanent establishments and their applications to banks, insurance companies and other financial institutions, IVI,* LXXXIa, 1996, 69 ff.- Per la letteratura straniera si veda inoltre: DEXTER, *Attribution of a multinational corporation's net income: the position of unitary states regarding combined reporting,* in *Vanderbilt journal of transnational law,* 1985, 311 ff.; INSTITUT DER WIRTSCHAFT-SPRÜFER, *Determination of profits of permanent establishments,* in *Intertax,* 1988, 427 ff.; BECKER, *The determination of income of a permanent establishment or branch, IVI,* 1989, 12 ff.; MEIJER, *Attribution of profit to foreign sales operation, permanent establishment or subsidiary,* in *Tax planning international,* 1991, 17 ff.; BIERLAAGH, *Permanent establishments, the separate enterprise fiction: is it a fact?,* in *Intertax,* 1992, 156 ff.; LEARY-GARLETT, *Final regulations under section 267(a)(3): timing of deductions for amounts owed to foreign related persons,* in *Tax management international journal,* 1993, 303 ff.; OECD, *Issues in international taxation. Model tax convention: attribution of income to permanent establishments,* (No.5), Paris, 1994; BURGERS, *The OECD report "attribution of income to permanent establishments": a commentary,* in *Bulletin for international fiscal documentation,* 1995, 137 ff.; VOGEL *et alii, in the work cited,* p.399 ff.; van RAAD, *Deemed expenses of a permanent establishment under article 7 OECD model;* in *International studies in taxation: law and economics. Liber amicorum L.MUTE', eds. G.LINDERCRONA-S.O.LODIN-B.WIMAN,* 1999, § 19, p.230 ff.-

(78) The author GALLO focuses on this subject (*Contributo, in the work cited,* 409 footnote no.24), when referring to the adoption of an 'assessment' *(lato sensu)* rule on which to measure taxable income, and in this respect the author mentions the results of the technical committee group for tax reform with the task of drafting a unified code on assessment. On this occasion, some members of the group put forward this proposal: 'that the relevant substantial legislation should provide for the possibility of having the income of permanent establishments abroad, *defined under the foreign tax laws,* for IRPEG (income taxation on juridical persons) purposes, merge in its synthesis (that is, in its final balance) in the worldwide taxable income upon the issuing

A similar method, introducing the deduction (both of specific expenses attributable directly to the foreign office, and of general expenses which represent a common onus for both offices) emerges as particular important in view of the typology of income formation of navigation enterprises.

The fact needs to be stressed that this ambulatory production of income (seen also on a factual level) derived from the use of the air carri-

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of a <<certificate of conformity >> by the foreign taxing corporation". A thesis, moreover, wished for *de lege ferenda*, seen that it was not actually implemented, leaving therefore the criterion pointed out in article 7 § 4 of the OECD model convention, according to which: 'Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionmentof the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article' (see OECD, *Model tax Convention, in the work cited*, I).

On a pragmatic level, the following division in three macrocategories is employed: a) a system founded on the profits of the enterprise, category in which one can place methodologies concerning turnover and commissions; b) a method centring on expenses (for example, personnel costs); c) criterion based on the capital structure of the enterprise (for example, on the working capital attributed to the *branch*). See in this respect TUNDO, *I redditi d'impresa nel Modello di Convenzione OCSE (art.7)*, in *Corso di diritto tributario internazionale,in the work cited*, p.307 ff. in part. p.325.

See also works by: UCKMAR V., *La tassazione degli stranieri in Italia, in the work cited*, p.183 ff.; HOLZER, *Le aziende divise, in the work cited*, p.36 ff.; MAISTO, *Le spese deducibili nella determinazione del reddito della stabile organizzazione all'estero*, in *Dir.prat.trib.*, 1979, I, 1204 ff., DEL GIUDICE, *La stabile organizzazione elemento determinante per la tassazione del reddito d'impresa di soggetti non residenti*, in *il fisco*, 1983, 1241 ff.; NUZZO, *In tema di tassazione dell'impresa multinazionale*, in *Giur.comm.*, 1986, I, 578 ff.; ID, *Libertà di stabilimento e perdite fiscali,in the work cited*, 1814 ff.; GARBARINO, *La tassazione del reddito transnazionale, in the work cited*, p.219 ff.; LOMBARDI, *Riporto di perdite per stabili organizzazioni non residenti*, in *Corr.trib.*, 2809 ff.; MEDICI, *Criteri di determinazione, in the work cited*, 1351 ff.; ZAMBON, *Ripartizione degli oneri finanziari tra stabile organizzazione e casa madre*, in *Dir.prat.trib.*, 1997, III, 149 ff.; CALCAGNO, *Costi deducibili e stabile organizzazione all'estero, IVI*, 1998 ff.; MELIS, *Stabili organizzazioni, in the work cited*, 22 ff.-

Obviously, the compatibility of the system for apportioning income between parent company and permanent establishment is often limited by the different methodologies (for determining the income) adopted by the single States (see for an overview of the subject: CROXATTO, *Divergenze tra reddito contabile e reddito fiscale di impresa: una comparazione con le legislazioni straniere*, in *Problemi societari e fiscali di attualità. Scritti in memoria di L.ANTONELLI*, Milan, 1974, p.263 ff.; ID, *Esperienze straniere reperibili nell'ordinamento tributario italiano. Il reddito d'impresa attese e proposte (Conference Proceedings, Rome, July 6, 1994)*, in *il fisco* (attached to no.36) 1996, 8683).

er used in an international context, brings up the problem of imputation and allocation of costs and proceeds, especially those linked to the so-called management fees. (79) It has already been pointed out that the greater part of expenses is referable to the parent company, considering that the heavier expenses, constituted by the aircraft, the crew *et similia*, are incurred by the head office, therefore, a rule for the deduction of management fees is made necessary. (80)

This scheme, that admits pro-quota deduction of management expenses, takes into account the parent company's total profits in determining the income of the permanent establishment.

The cases and extremely varied situations that can be hypothesised on the subject go beyond the scope of this study; these cases are not regulated by conventions and would concern general aspects of internal taxation methodologies to apply to permanent establishments operating abroad but maintaining a close economic and juridical link with the company's effective place of management.

(79) On the concept of management fees (general administrative and management expenses) see: MAISTO, *Le spese deducibili, in the work last cited*, 1204 ff.; MAYR, *"Spese di regia" addebitate alla stabile organizzazione in Italia*, in *Corr.trib.*, 1991, 2150 ff., CALORI-BOLELLI, *Le spese di regia sostenute da società e i criteri di addebito alle filiali estere*, in *Riv.dott.comm.*, 1996, 653 ff.-

(80) See for example what was stated in *sub* footnote no. 39 in relation to the methodology that was adopted for determining the income of air navigation enterprises when the 1958 Unified Code on Direct Taxes was in force, no. 645.

Domestic Anti-Abuse Provisions and Tax Treaties: A Comparative Analysis between Italy and Belgium (*)

Pasquale Pistone (1)

Introduction; 1. Is There a Treaty Concept of Tax Avoidance?; 2. Treaty Regime and Domestic Law; 3. Controlled-Foreign-Corporation Regime and Tax Treaties; 4. Tax Avoidance Schemes, Tax Treaties and Community Law.

Introduction

International Tax Avoidance and Evasion were first thoroughly analysed at the 1983 IFA Congress held in Venice (2). Further studies have followed since then both in the framework of international organisations (3) and in the academic context (4). Despite no single definition of tax

(*) This Article is the outcome of study carried out for a report at the Belgian-Italian IFA Branches Joint Meeting, held in Venice on 12-13.5.2000.

(1) Edited by the author

(2) Uckmar, V., *International Tax Avoidance and Evasion*, General Report at the XXXVII IFA Congress, in *Cahiers de droit fiscal international*, vol. LXVIIIa, Kluwer, Deventer, 1983, at 15 and ff.

(3) See IBA, *Tax Avoidance and Evasion*, London 1984 and 1987; OCDE, *L'évasion et la fraude fiscales internationales*, Paris, 1987.

(4) Several studies have been published in different languages. In Italian see Di Pietro, A. (a cura di), *L'elusione fiscale nell'esperienza europea*, Milan, 1999; Fiorentino, S., *L'elusione fiscale*, Naples, 1996; Nuzzo, E., *Elusione. Casi materiali*, in *Quaderno n. 1/1998 di Rassegna Tributaria*, Rome, 1998; Pistone, P., *Abuso del diritto ed elusione fiscale*, Padua, 1995; Pistone, P., *L'abuso delle convenzioni internazionali in materia fiscale*, in Uckmar, V. (coord.), *Corso di diritto tributario internazionale*, Padua, 1999, I, at 483-541; Tabellini, P.M., *L'elusione fiscale*, Milan, 1988, Tabellini, P.M., *Libertà negoziale ed elusione d'imposta*, Padua, 1996, as well as many other articles; in Dutch see Ghyselen, M., *Fiscale gevolgen van nietige rechtshandelingen*, Kalmthout, 1996; IJzerman, R.L.H., *Het leerstuk de wetsontduiking in het belastingrecht*, Deventer, 1991, as well as many other articles; in French Deboissy, F., *La simulation en droit fiscal*, Paris, 1997; Afschrift, T., *L'évitement licit de l'impôt et la réalité économique*, Brussels, 1994, Levine, P., *La lutte contre l'évasion fiscale en absence et en présence de conventions internationales*, Paris, 1988, as well as many other articles.

avoidance being yet available at the international level and despite the fact that the conditions for countering it vary according to the applicable domestic and treaty law, basic structural issues seem now less obscure (5).

IFA itself has further analysed specific issues raised by domestic anti-avoidance provisions in a Seminar held at the 1994 Toronto Congress (6). This study evaluates the conclusions reached in that occasion and aims at ascertaining how such issues have evolved since then.

Looking back at the Venice 1983 IFA Congress three preliminar remarks are needed.

Firstly, unlike in the '80s and most of the '90s, compliance with Community law should be now ensured by Member States also with respect to their tax treaties. However, development of the New Community Tax Order, following the terminology first used by prof. Frans Vanistendael in 1994 (7), shall only incidentally be referred to in this report (8).

Secondly, hereby I shall rather deal with such issues from the perspective of the bilateral Belgium-Italy double tax treaty (9). However, this circumstance does not significantly affect the main problems raised by tax avoidance, but only leads us to refer also to domestic law of the above two countries.

Thirdly, unlike in 1983, scholars and practitioners of most countries seem now to prefer using the term 'tax avoidance' with reference to 'tax abuse'. Possibly, this is due to their dissatisfaction with an abstract concept which could find no homogeneous definition at the international level despite studies by the OECD in 1984. Personally, in two studies, cur-

(5) Nevertheless, further discussion at the IFA level on such issues will take place in the framework of topic 1 (Form and Substance in Tax Law) of the IFA 2002 Oslo Congress.

(6) IFA Seminar Series, *How Domestic Anti-Avoidance Rules Affect Double Taxation Conventions*, Toronto 1994 Congress, Deventer, 1995.

(7) Vanistendael, F., *The New Community Tax Order*, in *Common Market Law Review*, 1994, at 293 and ff.

(8) For a more detailed study of such issues see Pistone, P., *The Impact of Community Law on Tax Treaties*, in *Eucotax Series*, London-The Hague-Boston, 2000.

(9) The treaty in force has been signed on 29.4.1983 in Rome in Dutch, French and Italian original languages, with a final protocol signed on 29.4.1983 and a further protocol added on 19.12.1984. For an unofficial translation see IBFD, *European Taxation, Supplementary Service to European Taxation*, Section C-2.

rently only available in Italian (10), I have supported the view that the second term provides for a more precise separation of cases of legitimate tax saving from the remaining cases, i.e. tax avoidance and evasion.

My analysis of issues raised by the application of domestic anti-avoidance provisions to tax treaties shall be divided into four main parts, respectively the concept of tax avoidance (I), the application of domestic anti-abuse provisions to tax treaties (II), the impact of CFC regimes on tax treaties (III) and finally tax avoidance schemes, tax treaties and Community law (IV).

1. Is There a Treaty Concept of Tax Avoidance?

This question normally receives a negative answer for at least two main reasons.

Neither does the OECD Model hor its Commentary provide for a definition of international tax avoidance, nor can this otherwise be achieved for treaty purposes. Accordingly, also the Belgium-Italy double tax treaty has included a definition of international tax avoidance.

Nevertheless, five paragraphs of the OECD Commentary on Article 1 deal with tax avoidance (7-11) and fifteen paragraphs (12-26) with how to counter it.

The 1995 amendments to the Commentary have not substantially affected its limits, so that this only specifically addresses the two main groups of tax abuse, respectively base companies and conduit companies.

A first question arises as to what value should be reserved to paragraphs 7-11 of the Commentary on Article 1. More in particular, can we consider cases included therein as the only situations where for treaty purposes abuse may be deemed to exist?

Though neither the OECD Model nor the Belgium-Italy double tax treaty provide for an explicit definition of tax avoidance, one may support the view that the Commentary does so. However, in a recent study it has been highlighted that, according to the Vienna Convention on the Law of Treaties, Commentaries should only confirm an interpretation which could otherwise be obtained by making direct reference to the plain wording of the law (11). Both in the 1998 London IFA Seminar A

(10) Pistone, P., *Abuso del diritto ed elusione fiscale*, Padua, 1995, at 1-19; Pistone, P., *L'abuso delle convenzioni internazionali in materia fiscale*, in Uckmar, V. (coord.), *Corso di diritto tributario internazionale*, Padua, 1999, I, at 483-490.

(11) Du Toit, C., *The Concept of Beneficial Ownership in International Tax Law*, Amsterdam, 2000.

and in the 1999 IFA Eilat Seminar F on Beneficial Ownership significantly differing opinions have been held with this respect. Some authors have argued that a treaty concept of abuse is needed. Further authors have instead objected that some kind of treaty concept of abuse already exists. Finally, many others consider that since no treaty concept of tax abuse exists, Member States should be left free to apply *lex fori* based on Article 3 (2). Although the third mentioned opinion is fully justified in the light of the actual treaty regime, I think that the first mentioned opinion should be supported for the purpose of achieving better results. Indeed, especially within the EU a clear, precise and homogeneous concept of tax abuse is needed for the purpose of providing a proportionate solution to restrictions of fundamental freedoms for anti-avoidance purposes and removing the actual discrepancies derived by *lex fori* and Article 3 (2). Accordingly, an independent concept of tax abuse in the EC Model Convention has been recently proposed as the solution to the conflict between tax treaties and Community Law (12).

More in particular, this concept of abuse of tax treaty purposes could be as follows:

"For the purposes of this Convention all acts or series of acts aimed at reducing taxes, insofar as they are not supported by valid economic reasons or cannot otherwise be justified on grounds other than tax minimisation shall be considered as abusive".

Nevertheless, insofar as tax abuse is to be regarded as the unintended or improper application of treaty benefits, further cases of tax abuse may arise beyond those referred to by paragraphs 7-11 of the Commentary (13), such as for instance rule shopping and possibly also some triangular situations involving a PE.

A second question could be raised on tax avoidance with respect to treaty clauses, such as *beneficial ownership*, which, according to some authors and national courts have an anti-abuse function (14). In this respect

(12) A provision on abuse of tax treaties has been included in Article 8 of the Draft for an EC Model Tax Treaty, developed for my doctoral thesis at the University of Genoa and recently presented at the 1999/2000 Leiden LLM in International Tax Law.

(13) See on this Vogel, K., *Klaus Vogel on Double Taxation Conventions*, III ed., London-The Hague-Boston, 1998 at 115 and ff.; Weeghel, S. van, *The Improper Use of Tax Treaties*, London-The Hague-Boston, 1998, at 119 and ff.; Xavier, A., *Direito tributario internacional*, Coimbra, 1993, at 296 and ff.; Pistone, P., *L'abuso delle convenzioni internazionali in materia fiscale*, in Uckmar, V. (coord.), *Corso di diritto tributario internazionale*, Padua, 1999, I, at 506-518.

(14) See in particular Killius, J., *The concept of "beneficial ownership" of items of income under German tax treaties*, in *Intertax*, 1989, at 340. Also see the position of US

one may wonder whether they may express a more general relevance beyond cases where it is explicitly mentioned, such as in Articles 10 (4), 11 (5) and 12 (4) and (6) of the Belgium-Italy double tax treaty. Indeed, the conclusions reached in the mentioned IFA Seminars seemed to question such function and to exclude that beneficial ownership may affect treaty clauses not specifically referring to it.

2. Treaty Regime and Domestic Law

Since no treaty definition of tax avoidance exists, we should now focus on whether and to what extent domestic law may affect the treaty regime. Scholars have particularly analysed such issues in the various countries, though especially in Germany and the US, without reaching substantial consensus on them.

According to Article 3 (2) of the 1983 Belgium-Italy DTC *"As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning that it has under the law of that State concerning the taxes to which the Convention applies"*.

This clause follows that contained in Article 3 (2) of the 1977 OECD Model.

According to Vogel, Article 3 (2) OECD Model eliminates the characterisation problem (15). However, in the specific case of tax avoidance and anti-avoidance techniques, discrepancies between domestic legislation of the two Contracting States may affect characterisation of income in the treaty regime.

We may better understand this situation by looking at the situation of Belgium and Italy, so that the former may consider tax avoidance what the latter regards as tax saving and viceversa.

I shall first describe the Italian situation.

The actual regime is the outcome of a long and difficult process of evolution started in the early 1960s when the tax burden was remarkably lower than at present (16). Lenience towards taxpayers in a climate

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scholars and French Courts reported by Walser, H. and by Gouthière, B. at the Seminar A, 1998 IFA Congress.

(15) Vogel, K., at 208.

(16) See the Report by the Cosciani Commission, *Stato dei lavori della Commissione per lo studio della riforma tributaria*, Milan, 1964, in particular (on tax avoidance) at 145.

of absolute discretionary powers by tax administration led to exclude that a general anti-abuse clause should be introduced in the field of income taxes. Possibly, Italy was not alone in holding such opinion, though it certainly became such in the 80s when even the United Kingdom in the *Ramsay* case [1981] came to the conclusion that the right to minimize taxes as stated in *IRC vs. Duke of Westminster* in the 1930s was to be limited under some circumstances. Indeed, the Italian tax scenario in the 1980s on the one hand provided for more and more complicate tax rules in the false belief that detailed rules can reduce or remove the scope for interpretation (while only *in claris non fit interpretatio*), while on the other it maintained unaltered the adversity for a general anti-abuse clause. One may in principle agree on the circumstance that caution was required in the past with respect to powers of tax administration. However, it also seems appropriate to stress that the 1980s represented the heyday of legal tax uncertainty, as well as of wild tax planning in Italy. Possibly, as a result of the IFA Congress in Venice, tax avoidance was more clearly defined, though it still remained for some years a mere exercise for scholars. Many Italian practitioners have supported their views against a stronger approach to tax avoidance also in the following years (17).

A first broader measure for countering tax avoidance in the field of direct taxes was introduced in 1990. Two revisions in 1994 and 1998 have transformed this clause into a substitute for a general anti-abuse clause (Article 37-bis of the Tax Assessment Act - Decree 600/73 as amended in 1997) (18). Possibly because of legal uncertainty and continuous changes in legislation, neither case-law, nor scholars have so far managed to achieve an independent structure for the concept of tax avoidance, so that this is still defined in Italy by making reference to the existing anti-tax avoidance measures.

Accordingly, tax saving becomes tax avoidance only insofar as it has been the decisive reason why a taxpayer entered a certain transaction, or series of acts, without valid economic reasons. This provision puts together many different anti-avoidance techniques, mostly derived from those judicially developed in *common law* countries, such as substance

(17) See Trivoli, A., *Contro l'introduzione di una clausola general antielusiva nell'ordinamento tributario vigente*, in *Diritto e Pratica Tributaria*, 1992, I, at 1337 and ff.

(18) For a general commentary on Article 37-bis see Piccone Ferrarotti, P., *Riflessioni sulla norma antielusiva introdotta dall'art. 7 del D.P.R. n. 358/1997 (art. 37-bis del D.P.R. n. 600/1973)*, in *Rassegna* Tributaria, 1997/5, at 1147 and ff.

over form and the step transaction, as well as the need to prove the outcome of such approaches in the light of the business purpose test. Surprisingly, it refrains from using general techniques based on interpretation, *fraus legi(s)* or abuse of law, as instead suggested by tax scholars and regulated for civil law purposes. Nevertheless, none of the anti-avoidance techniques contained in Article 37-bis (1) are granted a general application (19). Because of the wording of its paragraph 3, Article 37-bis only applies to transactions explicitly listed by it. In this sense, rather than a general anti-avoidance clause, this provision should be regarded as a sectorial anti-abuse clause, i.e. as a hybrid between broad scope of a general anti-avoidance clause and narrow structure of an *ad hoc* anti-avoidance clause. Accordingly, beyond the scope of Article 37-bis and where no other *ad hoc* clauses are provided by domestic law, transactions may still be regarded as perfectly legitimate tax savings schemes.

A similar provision to that contained in Article 37-bis (1) of the Italian Tax Assessment Act was introduced in Belgium five years before. I refer to Article 344 (1) of the Income Tax Code (20), which is accompanied by Article 344 (2), disposing a reversal of the burden of proof.

Despite similar wording of Article 37-bis (1) and Article 344 (1), the latter has both the structure and form of a general anti-avoidance clause. Furthermore, this provision could be interpreted in the light of the case-law on tax avoidance developed since the early 1960s by Belgian Courts or just be added to them as an alternative tool to effectively counter tax avoidance (21). Scholars and Courts seem divided on whether to interpret this provision in the light of the fraus legi(s) doctrine (22) or according to the 'multiple qualification' doctrine (23), whereby the latter

(19) The text of Article 37-bis in Italian and English is provided under Annex 1.

(20) The text of Article 344 (1) in French and English is provided under Annex 2.

(21) See on this Malherbe, J., Afschrift, T., De Roeck, A., Rombouts, A., Lawton, A., *Requalification of Transactions for Tax Purposes under Section 344, § 1 of the Belgian Income Tax Code – Potential Application to Coordination Centers*, in *Intertax*, 1994/8-9, at 381 and ff., in particular at 383-391.

(22) Crombrugge, S. van, *De invoering van het leerstelling van fraus legis of wetsontduiking in het Belgisch fiscaal recht*, in *Tijdschrift voor Rechtspersonen en Vennootschappen*, 1993 at 271-286.

(23) See Afschrift, T., *L'évitement licite de l'impôt et la réalite juridique*, at 375.

seems in fact to contradict the taxpayer's right of minimizing the tax burden where more than one qualification is possible to his act or series of acts (24). Consistent case-law exists in Belgium on economic reality and sham as general anti-avoidance techniques. A similar opinion has been held in France (25). However, from the perspective of other European tax scholars, sham should rather lead to tax evasion (26). Indeed, the friction between form and substance (27) has a different structure in sham, where form with no substance arises. By contrast, avoidance presents a problem of form with a different substance. Neither could cases of relative sham change this situation where parties simulate the form of a transaction, but provide it with a substance. Indeed, also in the latter situation the parties do not want the form to produce any effect other than its appearance.

For better understanding the difference we may consider the case of two related companies A and B, whereby a certain price is fixed for a service which one is to render the other. Furthermore, both agree in their contract on a heavy penalty for failure to do so. If we add to this neutral framework that company B is located in a high-tax country and that company A, which is to provide the service, is based in a low-tax jurisdiction, we may start wondering whether there could be some sham problems if Company A refrains from providing the service. The obligation to pay the penalty will indeed imply a tax-free flow of money out of the high-tax jurisdiction.

In the light of German doctrine developed on the application of § 41 to the *Scheingeschäft* and of § 42 to the *Mißbrauch der rechtlichen Gestaltungsmöglichkeiten* (28) it could be argued that, regardless of whether it

(24) For an interpretation of this principle see Scailteur, C., *le choix de la voie la moins imposée. Reflexions à propos d'un arrêt de cassation récent*, in AA.VV., *Réflexions offertes à Paul Sibille*, 1981 at 808 and ff.

(25) David, C., *L'abus de droit en Allemagne, en France, en Italie, aux Pays-Bas et au Royaume-Uni*, in *Rivista di diritto finanziario e scienza delle finanze*, 1993/2, I, at 230 and ff.

(26) So Gallo, F., *Elusione senza rischio: il Fisco indifeso di fronte ad un fenomeno tutto italiano*, in *Diritto e Pratica Tributaria*, 1991, I, at 257.

(27) On the legal relations between form and substance see Atiyah, P.S., Summers, R., *Form and Substance in Anglo-American Law, A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions*, Oxford, 1991.

(28) See on this Pistone, P., *Abuso del diritto ed elusione fiscale*, at 105 and ff.

is a sham for private law purposes, the contract exists and has an effect for taxing purposes (29).

We should now focus on the impact of such a situation on the treaty.

Again the OECD Commentary does not provide for a solution, but rather describes the different views of OECD Member States (30). On the one hand "substance-over-form rules are regarded in some countries as part of the domestic rules set by national tax law for determining which facts give rise to a tax liability", while on the other "such rules are subject to the general provisions of tax treaties against double taxation" and may undermine the spirit of the treaty.

Substantial analysis of such issues has been carried out in Germany and the US in the past years.

Since the *Aiken* case (31) the application of domestic anti-abuse provisions is supported at all levels in the US, regardless of possible treaty override effects (32). By contrast, German scholars have come to different conclusions, often reflected in case-law. Some authors, as well as the Supreme Tax Court have argued that the general anti-abuse clause takes a logical priority (*logischer Vorrang*) on other anti-abuse clauses contained in the External Tax Law (*Außensteuergesetz*), such as *CFC-legislation*, and that both do so with respect to tax treaties. Accordingly, it is not much a problem of treaty override, but rather of properly interpreting situations referred to in tax treaties (33). This opinion seems to prevail over that excluding interference of domestic anti-abuse clauses *ratione materiae* in the fields regulated by tax treaties.

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(29) Different conclusions are mainly reached by French authors, which would regard this as sham. See further on such issues Deboissy, F., *La simulation en droit fiscal*, Paris, 1997.

(30) See OECD, *Commentary on Article 1*, at para. 22-26.

(31) *Aiken Industries vs. CIR*, 56 Tax Court 925 (1971).

(32) For an overview see Weeghel, S. van, *The Improper Use of Tax Treaties*, at 191 and ff.

(33) This doctrine, originally elaborated by Helmut Debatin, has been carried through by Fischer-Zernin, J., *Mißbrauch von Doppelbesteuerungsabkommen*, in *Recht der Internationalen Wirtschaft*, 1987, at 368. For dissenting opinions see Vogel, K., *Steuerumgehung nach innerstaatlichem Recht und nach Abkommensrecht*, in *Steuer und Wirtschaft*, 1985/4 at 369 and ff.; Mössner, J.-M., *Selbständigkeit jurisischer Personen und Kapitalgesellschaften im Internationalen Steuerrecht*, in *Recht der Internationalen Wirtschaft*, 1986, at 213.

In an actual case the German Supreme Tax Court dealt with a company, not resident in Germany, whose shareholder was resident in a third State. The company received most of its revenue (almost 90%) in Germany, then paid it out to third parties as operating expenses or charges for secondment services. The *Bundesfinanzhof* did not consider the existence of a DTC sufficient to exclude the application of the GAAR contained in § 42 AO (*Abgabenordnung*) (34).

Should such case involve the Belgium-Italy treaty, one may first seriously doubt that this may be abuse on the Italian side, though possibly come to different conclusions with respect to § 344 of the Belgian Income Tax Code and/or in the light of case-law developed by Belgian domestic Courts.

However, when anti-abuse provisions are included in tax treaties (which is not the case for the existing Belgium-Italy treaty), such clauses determine whether and how for that specific purpose the treaty itself can be affected by limitations for countering tax abuse.

One may further wonder about the possible impact on tax treaties of domestic measures extending income tax liability in the emigration country after the transfer of residence towards low-tax jurisdiction. A few years ago the Italian tax administration decided to increase tax assessments on individuals included on the General List of Non-resident Italian Nationals (*Anagrafe Italiana Residenti all'Estero* – AIRE), so as to ascertain whether they have in fact ceased a substantial link with Italy or by contrast have to be regarded as Italian residents for taxing purposes (35). Accordingly, a new anti-avoidance provision following the designated jurisdiction approach (thus requiring a black list) was introduced in the Italian Income Tax Act for the purpose of avoiding fictitious transfers of residence into tax havens (36).

(34) BFH 29.10.1997 I R 35/96, in *Recht der Internationalen Wirtschaft*, 1998, at 415 and ff.

(35) For an analysis of such issues, as well as of the new regulation to counter the fictitious transfer of residence into tax havens see Maisto, G., *La residenza fiscale delle persone fisiche emigrate in Stati o territori aventi regime tributario privilegiato*, in *Rivista di Diritto Tributario*, 1999/2, IV, at 55 and ff.; and Pistone, P., *Aspetti tributari del trasferimento di residenza all'estero delle persone fisiche*, in *Rivista di diritto finanziario e scienza delle finanze*, 2000/1, I, at 1 and ff., also with reference (in paragraph 6) to the Pavarotti case (Court of First Instance of Modena, sez. 3, n. 986, dep. 9.2.1999, in *Rivista di diritto tributario internazionale*, 1999/2, at 155 and ff.).

(36) I refer hereby to Article 2 (2-bis) of the Italian Income Tax Act (*Testo Unico delle Imposte sui Redditi*), introduced by Law 23.12.1998, n. 448 and in force since 1.1.1999. See Annex 3 for the text in English and Italian.

I May refer to a further possible case. An Italian national may transfer his residence to Belgium in the month of November and then to a tax haven, for example Monaco, at the beginning of the following tax year. Unlike Italy, Belgium does not follow the 183 days rule, but applies income tax on a daily basis. Several tax problems may arise in such a case.

Firstly, a possible problem of dual residence would occur with respect to the last two months of the tax year, whereby both Belgium and Italy regard the individual as their resident.

Secondly, for the same problem the entity paying the Belgian-source income would have to find out whether or not he has to apply the benefits of the Italy-Belgium tax treaty.

Thirdly, it should be ascertained whether or not the domestic anti-emigration rule contained in Article 2 (2-bis) of the Italian Income Tax Act (*Testo Unico delle Imposte sui Redditi*) may apply in this case (37). Indeed, for the purpose of application of Italian domestic law the taxpayer has never been a Belgian resident for a taxable year. Furthermore, it could be argued that the taxpayer may have aimed at circumventing the application of the specific anti-abuse provision by first moving to a non-blacklisted tax jurisdiction and then to a tax haven. Despite the following emigration to a tax haven, applying Article 2 (2-bis) to emigration from Italy into Belgium would represent a restriction on fundamental freedoms, whose compatibility with Community law depends on whether or not it is proportionate. In the light of the recent case-law on procedural discrimination by the European Court of Justice (38), it seems questionable that also rebuttable presumptions can be acceptable from the perspective of Community law whenever they are not based on substantial grounds. Since this is not normally the case for transfers of residence into Belgium, it seems appropriate to conclude that the Italian tax authorities may not claim the reversal of the burden of proof without violating Community law.

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3. The Proposed Controlled-Foreign-Corporation Regime

While no CFC-legislation exists in Belgium, Italy is currently intro-

(37) See further on this Maisto, G., *La residenza fiscale delle persone fisiche emigrate in Stati o territori aventi regime fiscale privilegiato*, in *Rivista di diritto tributario*, 1999/2, IV at 57; Pistone, P., *Aspetti fiscali del trasferimento di residenza delle persone fisiche*, in *Rivista di diritto finanziario e scienza delle finanze*, 2000, 1, I, at 50-55.

(38) 28.10.1999, C-55/98, *Skatteministeriet ./. Bent Vestergaard*, not yet reported, at para. 22.

ducing this regime so as to comply with the recommendations by the OECD in both the 1996 and 1998 Reports against tax avoidance.

The proposed regime for Italy follows the general structure of the existing CFC-legislation in most EU Member States. Rather than applying a substance over form approach, CFC regimes impose form on a different substance. Accordingly, they provide for a different solution to the typical tax avoidance problem of form on a different substance. Therefore, some separate remarks are required in order to ascertain the effects of this imposed form on tax treaties.

The initial draft limited the application of the regime to substantial participations, i.e. those above 25%, while this threshold has been reduced to 10% in the actual proposed regime. Insofar as this condition is met by a resident Italian, either directly or indirectly, in a company which is a resident of low-tax countries, then income derived therefrom is immediately taxed in the hands of the shareholder.

The question in this case is the extent to which the fiction imposed by Italian CFC legislation is compatible with the allocation rules of the treaty applicable to the legal form chosen by the taxpayer. It has been argued that the degree of compatibility depends on the particular fiction chosen; in other words whether the parent-company country chooses to tax the fictitious distribution of the dividends or whether it includes elements of CFC's profit in the taxable base of the parent-company (39). Certainly, where the two countries hold different views on the subsidiary, then international double taxation is likely to arise from the application of CFC legislation in Italy. In such a case this would possibly represent a restriction on the freedom of establishment, which I doubt could be regarded as proportionate in the light of the extension that this principle has been granted for anti-abuse purposes by the European Court of Justice in the *Leur-Bloem* (40) and *Centros* (41) cases.

(39) Sandler, P., *Tax Treaties and Controlled Foreign Company Legislation*, II ed., London-The Hague-Boston, 1998, at 19-20.

(40) ECJ 17.7.1997, case C-28/95, *A. Leur-Bloem ./. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, in *ECR*, 1998, at I-4161 and ff., in particular para. 44, where the Court underlines that incompatibility with Community law was not removed by the circumstance that Article 11, para. 1, lett. a) of the directive permitted Member States to enact measures that were needed to prevent any abuse with respect to the application of the common regime contained therein.

(41) ECJ 9.3.1999, case C-212/97, *Centros Ltd. ./. Erhvervs- og Selskabsstyrelsen*, not yet reported.

4. Tax Avoidance Schemes, Tax Treaties and Community Law

According to the OECD Commentary on Article 1, treaties are mainly abused in two groups of cases, respectively through base companies and conduit companies (42). While in the former case tax treaties are instruments to carry out abuse against the State of which the parent company is a resident, in the latter tax treaties themselves are abused, as the taxpayer seeks lower treaty withholding tax rates by interposing a company in the country with a more favourable regime. Countries like the US limit in such cases treaty benefits so as to effectively counter tax abuse.

Two further possible cases of abuse of tax treaties should be mentioned, respectively rule shopping and triangular cases. The former refers to avoidance of a specific treaty clause and the latter to a situation involving a PE in the relation with a different country from that of its home-office.

According to the traditional view, in all four cases entitlement to treaty benefits can be questioned or denied by both domestic and treaty provisions.

However, for both Belgium and Italy it is important to ascertain whether or not this view is acceptable from the perspective of Community law.

Indeed, no definition of abuse has so far been provided for Community law purposes and terminology used to refer to it both in the directives and case-law has been rather inconsistent, especially in Italian and Spanish. However, the ECJ has so far provided some explicit criteria with this respect. Since the *Futura* and *Leur-Bloem* cases, the principle of proportionality has become the main axe of anti-abuse legislation within the Community, so that restrictions on fundamental freedoms are admitted insofar as they are strictly necessary for the purpose of preventing or countering abuse.

Furthermore, recent case-law may lead to reach some revolutionary conclusions or at least to stimulate the debate among scholars.

More in particular, in the *Saint-Gobain* decision the ECJ has stated that insofar as a permanent establishment is denied entitlement to treaty benefits in triangular cases and thus is precluded from national treatment (43),

(42) See further on these issues Weeghel, S. van, *The Improper Use of Tax Treaties*, London-The Hague-Boston, 1998; as well as in Italian Pistone, P., *L'abuso delle convenzioni internazionali in materia fiscale*, in Uckmar, V. (coord.), *Corso di diritto tributario internazionale*, Padua, 1999, I, at 483-541.

tax treaties may determine non-neutral treatment with respect to the one applicable with respect to subsidiaries which are residents of the PE-State, thus restricting the right of establishment.

In the *Centros* decision the Court has accepted that the freedom of establishment confers the right to set up a branch in another EU country even if the branch carries on the entire business (44).

Can or should we come to the conclusion that the combination of these two decisions may imply the need to accept treaty shopping? Personally, I would consider it appropriate to submit that Community law as it stands may require a different and more proportionate solution from that provided by Article 1 OECD Model and by all tax treaties based on it, such as the Italy-Belgium double tax treaty. Also for this purpose an EC Model Tax Convention is required, so that compatibility with Community law can always be ensured.

(43) 21.9.1999, case C-307/97, *Compagnie de Saint-Gobain Zweigniederlassung Deutschland ./. Finanzamt Aachen-Innenstadt*, not yet reported. For commentaries on this decision see Kemmeren, E.C.C.M., *Verdragsvoordelen niet alleen meer voor inwoners maar ook voor vaste inrichtingen*, in *Weekblad voor fiscaal recht*, 1999/6361, at 1434 and ff.; Offermans, R., Romano, C., *Treaty Benefits for Permanent Establishments: the Saint-Gobain*, in *European Taxation*, 2000/5; Romano, C., *La stabile organizzazione si avvicina ai soggetti residenti nel diritto tributario internazionale di origine convenzionale*, in *Bollettino tributario*, 2000/5, at 328 and ff.

(44) See 9.3.1999, case C-212/97, *Centros Ltd. ./. Erhvervs- og Selskabsstyrelsen*, not yet reported, at para. 28-30.

Annex 1

Article 37-bis, introduced on 8.10.1997 into the Tax Assessment Decree n. 600/73

Anti-avoidance measures

1. All acts, facts and transactions, also linked with each other, carried out without valid economic reasons and aimed at circumventing obligations or prohibitions of tax law and at obtaining undue reductions of taxes or reimbursements cannot be opposed to tax administration.
2. Tax administration disregards all tax advantages derived from acts, facts and transactions mentioned in paragraph 1 and applies the circumvented tax provisions, net of taxes that have been paid.
3. Provisions of paragraphs 1 and 2 apply under the condition that the taxpayer has carried out one of the following operations:
   a) Reorganisations, mergers, demergers, voluntary winding-up and distributions of assets to shareholders other than those created out of profits.
   b) Contribution to the capital or other acts implying transfer to it, or the enjoyment of a business;
   c) Assignation of debts;
   d) Assignation of overdue payments of taxes;
   e) Operations included in the decree implementing the merger directive (d. lgs. 30.12.1992, n. 544);
   f) Operations related to capital gains falling under Article 81 (1) (c) to (c-quinquies) of the Income Tax Act (TUIR, Decree 22.12.196, n. 917)

Disposizioni antielusive

1. *Sono inopponibili all'amministrazione finanziaria gli atti, i fatti e i negozi, anche collegati tra loro, privi di valide ragioni economiche, diretti ad aggirare obblighi o divieti previsti dall'ordinamento tributario e ad ottenere riduzioni di imposte o rimborsi, altrimenti indebiti.*
2. *L'amministrazione finanziaria disconosce i vantaggi tributari conseguiti mediante gli atti, i fatti e i negozi di cui al comma 1, applicando le imposte determinate in base alle disposizioni eluse, al netto delle imposte dovute per effetto del comportamento inopponibile all'amministrazione.*

3. *Le disposizioni dei commi 1 e 2 si applicano a condizione che, nell'ambito del comportamento di cui al comma 2, siano utilizzate una o più delle seguenti operazioni:*
   a) *trasformazioni, fusioni, scissioni, liquidazioni volontarie e distribuzioni ai soci di somme prelevate da voci del patrimonio netto diverse da quelle formate con utili;*
   b) *conferimenti in società, nonché negozi aventi ad oggetto il trasferimento o il godimento di aziende;*
   c) *cessioni di crediti*
   d) *cessioni di eccedenze d'imposta*
   e) *operazioni di cui al d. lgs. 30.12.1992, n. 544, recante disposizioni per l'adeguamento alle direttive comunitarie relative al regime fiscale di fusioni, scissioni, conferimenti d'attivo e scambi di azioni;*
   f) *operazioni, da chiunque effettuate, incluse le valutazioni, aventi ad oggetto i beni ed i rapporti di cui all'art. 81, co. 1 lettere da c) a c-quinquies), del testo unico delle imposte sui redditi, approvato con d.p.r. 22.12.1986, n. 917.*

Annex 2

Article 344 (1) of the Belgian Income Tax Act (*Code des Impôts sur le Revenu/Inkomstenbelasting Wet*)

Legal characterisation provided by the parties to acts or series of acts pertaining to the same operation cannot be opposed to tax administration when this ascertains by means of presumption or other instruments included in Article 340 that such characterisation was aimed at circumventing tax, unless the taxpayer proves that it corresponds to legitimate business or economic needs.

N'est pas opposable à l'Administration des contributions directes la qualification juridique donnée par les parties a un acte ainsi qu'à des actes distincts réalisant une même opération lorsque l'Administration constate par présomption ou par d'autres moyens de preuves visés à l'Article 340, que cette qualification a pour but d'éviter l'impôt, à moins que le contribuable ne preuve que cette qualification réponde à des besoins légitimes de caractère financier ou économique.

Annex 3

Article 2 (2-bis) of the Italian Income Tax Act (Testo Unico delle Imposte sui Redditi), introduced by Article 10 (1) of the Law 23.12.1998, n. 448.

Unless different evidence is provided, Italian nationals who have been removed from the Register of residents and have emigrated to countries or territories having a preferential tax regime, determined according to a ministerial decree to be published in the Official Journal shall be considered as resident.

2-bis Si considerano altresì residenti, salvo prova contraria, i cittadini italiani cancellati dalle anagrafi della popolazione residente ed emigrati in Stati o territori aventi un regime fiscale privilegiato, individuati con decreto del Ministro delle finanze da pubblicare in Gazzetta Ufficiale.

Taxation of cross-border income derived from dependent personal services, international conventions against double taxation and *worldwide principle.*

Gemma Carallo

1 The issue concerning application of the worldwide principle: criteria for determining income generated outside the territory and international double taxation.

The application of the worldwide principle of taxation, which characterises contemporary tax systems, including that of Italy, was at the peak of its expansion in the second half of the 1900s, the years when it started to be generally recognised that the obligation to contribute to the public expenses of a State could only be imposed to those 'connected' with that state's community, and that this same obligation should be calibrated according to the subject's global capacity. (1)

The rigorous application of the worldwide principle of taxation would obviously lead to the subject being penalised since, the income generated in the state of residence and in other states would be taxed both in the state of residence (income generated worldwide) and in the source states (only the part of income produced therein); this situation constitutes the well-known issue of international double taxation for which the stipulation of international bilateral conventions tries to find a remedy. (2)

In these conventions, the drafting of which is nearly always based on the OECD model (3), we find that the tax systems in use in the different sub-

(1) V. Vogel, *'World wide or source taxation of Income?'*, in Rass. Trib., 1988, I, pag. 259, 260. On the general issue regarding effectiveness of tax law and on identifying connection criteria, see Lupi, *'Territorialità del tributo'*, in Enc. Giur., vol. XXXI, and Sacchetto, *'Territorialità (dir. Trib.)'*, in Enc. Dir., vol. XLIV.

(2) On international double taxation see Miraulo, *Doppia imposizione internazionale'*, Milano, Giuffrè, 1990, Adonnino, *'Doppia imposizione'*, in Enc. Dir. And in Enc. Giur., XII, see also Fantozzi, Vogel, *'Doppia imposizione internazionale,* in Dig., IV.

(3) See PALUMBO, *'Considerazioni in margine alla Convenzione tipo OCSE del 1992'*, in Riv. Dir. Trib., 1993, I, page 237, ff.; PUOTI, *'I redditi di lavoro nel Modello OCSE'*,

scribing States are pinpointed for the purposes of direct taxation and, to each category of income, the criterion of territoriality of taxation is identified, so in some cases, it is to the state of residence of the subject that the tax is due, and, in others, to the state where the income was generated (state of source, where the income-generating property or activity is located).

Once this distribution has been carried out, the criteria for effectively reducing double taxation may consist in the exclusion of income (taxed abroad) from the taxable basis of the income tax applied in the state of residence, or in the recognition of a tax credit for what was paid abroad, to be validated when paying the tax in the state of residence. (4)

One cannot fail to observe, furthermore, that the tax credit method has spread more widely than the exemption criterion, seen that the state of residence has an interest 'in knowing' about the income produced abroad by its resident – so that it can be included in the taxable basis -; in such a way, one can also 'check' that the taxation has actually taken place abroad (5).

It should also be added that, in spite of the provision on the *world wide principle,* the domestic law-maker in the majority of cases abstains from setting down particular provisions for the taxation of income generated abroad, leaving the interpreter the arduous and thankless task of identifying the criteria for determining income generated abroad.

In this respect, the most important problem is that of identifying, from a legal point of view, the case that has emerged abroad, so that it may be included in this or that category of income formulated and drafted by the domestic law-maker.

Such identifying is by no means easy, considering that domestic legal systems, seen from a formal point of view, may have different regimes for identical situations; for example, a work relation with the same factual

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in *'Corso di diritto tributario internazionale'* , co-ordinated by Victor Uckmar, CEDAM, Padua, 1999, page 331 ff.

(4) The methods for diminishing or limiting international double taxation, be they unilateral measures of domestic law or those provided for by international conventions, have the same configuration. On the subject see GARBARINO, *'Di alcuni principi che informano le norme interne in materia di tassazione del reddito prodotto su base internazionale,'* in Riv. Dir. Fin., 1989, I, page 44 ff.

(5) See in this respect INGROSSO, *'Il credito d'imposta'*, Milan, 1984, page 214 ff; see also MELIS, *'L'interpretazione delle Convenzioni internazionali in materia di imposte sul reddito e sul patrimonio'*, in Rass. Trib., 1995, page 1966 ff., and COCO, *'La delega bancaria nel sistema della riscossione e l'attuazione del credito tributario'*, Bari, 2000, page 21 ff.

connotations may be considered self-employment, and in another State it may be regarded as subordinate work. And the same can happen with other cases, with business enterprises for example, or self-employment, and again, with reference to activities carried on by a number of subjects who have set up a business or partnership.

There is no doubt, however, that the legal literature has left such issues largely unexplored, perhaps taking it for granted that such situations should be resolved by applying the rule according to which income generated abroad should in all cases be determined on the basis of Italian legislation (of revenue law or of extra-fiscal legislation). (6)

The observations we have developed can serve as a starting point for examining this theme. The subject of income generated abroad has recently been enriched with a debate among operators that focused on the possibility of issuing legislation of so-called unification of the social security and fiscal taxable basis of income from dependent personal services, and on the cancelling of the principle of exclusion, from the taxable basis, of income from subordinate work for services provided abroad (legislative decree, September 2, 1997, no. 314). (7)

2 The regime of the 1971 tax reform: the exclusion from the taxable basis of income from dependent personal services generated abroad by 'expatriates'.

This subject is best analysed by focusing on the regime set down in the so-called 1971 tax reform. Indeed, the D.P.R. 1973, no. 597, estab-

(6) On this question refer to CROXATTO, *'Diritto internazionale tributario'*, in Dig. Disc. Priv., Sez. Comm., IV, page 645; PUOTI, *'Riflessioni sulla nozione e sull'autonomia del diritto tributario internazionale'*, in various authors, *'L'evoluzione dell'ordinamento tributario italiano'*, CEDAM, 2000, page 791ff.

(7) Legislative decree of September 2 1997 has been issued, in compliance with the delegation given to government as in the 1997 Financial law, aimed at harmonising, rationalising and simplifying of the tax and social security provisions regarding income from dependent services and of the relevant performance of employers' obligations and also directed at simplifying the performance of taxpayers' obligations concerning the filing of tax returns. For a first comment see CROVATO, *'La riforma dei redditi di lavoro dipendente'*, in Corr. Trib., 1997, no. 46 and PURI, *'Armonizzazione, razionalizzazione e semplificazione delle disposizioni fiscali e previdenziali concernenti I redditi di lavoro dipendente'*, in various authors, *'Commento agli interventi di riforma tributaria. I decreti legislativi di attuazione delle deleghe contenute nell'art. 3 della legge 26 Dicembre 1996, no. 662*, edited by MICCINESI, Padua, 1999.

lishing Irpef (income tax on natural persons) expressly excluded from the taxable basis not just exempt income and income subject to stoppage at source by way of tax, but also: 'income from dependent personal services provided abroad by emigrant Italian citizens still registered with the general registry office of the resident population'. (art. 3, second paragraph).

It emerges clearly on a first reading of the above mentioned provision that the condition for exclusion from the taxable basis was of a subjective and formal kind, in the sense that it addressed 'Italian citizens' (and not simply a subject who was already resident within the State) emigrated abroad, and therefore, subjects who had definitely abandoned the State.

The formal situation had to consist of permanent registration at the general registry office of the resident population; therefore, a contrast between substantive situation and formal situation, that is, between residence abroad (as a result of emigration) and registration in Italy had to emerge.

To better understand the purport of the rule being examined, it would serve our purpose to refer to the interpretations offered in the legal literature and addressing the concept of dependent personal services in the context of income taxation.

It was held that the concept of dependent personal services could be found within and not externally to the tax system, and that the same should be referred to the exercise of employment characterised by the absence of a preordained arrangement of facilities, tools and materials for the exercise of employment. (8)

Subordination of the wage earner to the employer, a typical condition – within employment law *doctrine* – for identifying an employment relation was therefore considered anew by privileging an economically-based dimension rather than a legal one, so that even if on the level of form an employment relation could be said to be lacking, from a strictly civil law viewpoint, the real and practical characteristic of the activity carried out could still be point to dependent personal services status.

The obvious objective being pursued through this doctrinal line of thinking, stemming from a genuine *favor* for the employee as defined within our legal system, was to refer to even marginal situations - if from the viewpoint of the organisation of the means – those tools for reducing the tax load such as tax relief or exclusion from the Ilor (local income tax), typically reserved for dependent labour. (9)

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(8) PUOTI, *'Il lavoro dipendente nel diritto tributario'*, Milan, 1975.

(9) CESSARI, *'Il favor verso il prestatore di lavoro subordinato'*, Milan, 1966; SIMI, *?Il favore dell'ordinamento giuridico per i lavoratori'*, Milan, 1967; PUOTI, *'Lavoro dipendente (dir. trib.)'*, in Enc. Dir., Giuffrè, Milan, XXIII.

Reading therefore the provision of exclusion from the taxable basis, carried in article 3, D.P.R. 1973, no. 597, and relying on the above mention definition of the concept of subordinate employment within tax law, one could reach the conclusion that the tax reform law-maker intended to exclude from taxation in Italy income generated abroad and falling within the category of income from subordinate employment, when the employment exercised outside the State was imputable to a subject resident abroad and only formally registered at the general registry office of the population resident in Italy.

The literal tenor of the provision in hand did not obviously allow one to reach interpretations of a 'manipulative' kind, in the sense of interpretations that would insert and use elements non expressly provided for in the legislative norm.

So, first of all, the employer's residence was considered absolutely irrelevant for the purposes of excluding from the taxable basis the employee's remuneration, and therefore such exclusion could not be denied on the grounds that the wages were paid by a resident, on whom a withholding obligation to be operated on the remuneration for subordinate employment is enforced. (10)

In this respect and *incidenter tantum*, one should note how a good number of times a common faulty assessment has brought both the revenue authorities and tax judges to consider the obligation of withholding out of its context of actual existence of the *an debeatur*, forgetting that the provisions carried in articles 23 ff., d.P.R. 1973, no. 600, are provisions concerning the levying of the tax and not, as would appear to be obvious, the determining of the taxable basis. (11) 12

In other words, while it is true that, where income is to be taxed in the hands of the drawer, withholding obligations may be enforced on the employer, the opposite is definitely not true, seen that if the amount is, in the abstract, provided for as falling within the category of income for which there is an obligation of withholding, this circumstance determines that taxation of the said amount be effected in Italy.

However, as mentioned in the above, the revenue authorities followed a substantially extensive interpretation of the provision of exclusion, both when attributing the qualification of 'emigrant' to subjects leaving only

(10) V. TINELLI, *'La nuova disciplina fiscale del reddito di lavoro dipendente prodotto all'estero'*, in Riv. Dir. trib., 2000, page 277, and ministerial resolutions cited herein.

(11) V. PUOTI, *'Il lavoro dipendente ...', in the work cited*, page 244.

for a limited period of time the Italian State to provide subordinate employment abroad, and by requiring certain formal conditions not provided for by the norm and which concerned only the type of employment exercised and not the dependent worker's status.

When the Unified Code of Income Taxes - introduced by d.P.R. December 22 1986, no. 917 – became effective, the formulation by the revenue authorities was for the greater part assimilated by the rule of law, and the exclusion from the taxable basis was provided for thus: 'for income deriving from subordinate employment provided abroad in a continuative manner and exercised as exclusive object of the relation.'

Let us now proceed with an examination of the most relevant aspects of the amendment thus introduced.

First of all, it should be noted that the subjective aspect, in other words, the condition that the employment exercised abroad be provided by an 'emigrant', is missing completely.

For the purposes of exclusion, therefore, the fact that the income is generated by a resident or by a non resident, from a point of view of substance and form, is no longer relevant; which means that the emigrant keeping his name with the general registry office of the resident population, the one who instead has seen to its cancellation and, lastly, the 'non emigrant' subject, have all equally the right to invoke applicability of the provision of exclusion.

Moreover, in spite of this general tenor in the TUIR article 3, third §, letter c), that we might even call 'generic', one can proceed with a few specifications, that are possible by virtue of the fact that there exists a connection with the legislative context in which the mentioned norm is found.

The combination of the worldwide principle and of the source precept, otherwise known as of 'limited territoriality', lead one to state that taxation in Italy of income on activities exercised abroad (*rectius:* on dependent personal services exercised abroad) definitely cannot be assumed with reference to non residents (case in which the connection with the state of an objective and subjective kind would be missing) but only with reference to residents.

It follows that the wage earner, who is abroad to exercise subordinate employment, must be resident in Italy for fiscal purposes, and must be therefore registered with the general registry office, which of course means having fiscal domicile or residence in Italy.

From this observation it can be argued that the purport of the tax provision carried in the Unified Code of Income Taxes, in other words, the 'new' exclusion from the taxable basis of income generated abroad and deriving from dependent personal services, is greatly different to the previous one.

Indeed, before the TUIR, the tax provision almost exclusively referred to those subjects who had definitely left the State, who had 'emigrated' but kept (nearly always by sheer forgetfulness) their name at the registrar; subjects who could essentially be viewed as non residents.

With the provision carried in letter c), third paragraph, article 3, reference is only to subjects actually residing in Italy, and not emigrated abroad, for whom the exclusion from the taxable basis of income generated abroad is applicable when employment exercised is of a continuative kind and is intended as exclusive object of the employment relation.

At this point it serves our purpose to consider, always with reference to the issuance of the Unified Code for Income Taxes, that there was a profound change in the concept of subordinate employment within tax law.

As pointed out in the legal literature on the subject, with the issuance of the new provisions, all possibility of identifying a unitary and independent notion of subordinate employment within the tax system in force was lost and, by expressly referring to income deriving from: ' being employed under someone whose authority it is to instruct the employee', one had to rely once more on the interpretative procedure used before the entry into force of d.P.R. 1973, no. 597, based on the need of immediate reference to extra-fiscal provisions, in particular to article 2094 of the civil code. (12)

What has been highlighted in the above lead us to hold that the services provided abroad should in any case be considered from a formal point of view and not just from the point of view of substance, seen that what needs to be assessed is whether in the foreign State there exists a relation that qualifies as 'subordinate employment.'

It could happen, of course, that the work relation between resident employee and resident employer began or rather was set up within the Italian State; in which case, there do not appear to be any doubts as to how such relation is to be viewed within the Italian legal system.

Instead, it could happen that the subordinate employment is set up abroad with the employer who is, likewise, resident abroad and that one applies the law of the State in which the employment is exercised.

In the latter case, one would need to verify compatibility of the foreign law with Italian tax law, in particular, with article 46 of the Unified Code of Income Taxes and ask whether a relation that, though having as object dependent services, on the basis of the law of the foreign State, is

(12) V. PUOTI, item: *'Lavoro subordinato'*, II, dir. trib., in Enc. Giur.

defined as self-employed work, can nonetheless involve exclusion from the taxable basis of the remuneration received by the employee resident in Italy.

3. Income from dependent personal services generated abroad and international double taxation

Another facet of particular importance, and stemming from the formulation of article 3, third paragraph, letter c) of the Unified Code of Income Taxes, is that concerning double taxation of income.

It is a well-known fact that in view of the taxation at source principle, income produced abroad by the Italian resident can be taxed in the State where the income was generated; nearly all tax systems provide for taxation of income derived from employment exercised within the State (as happens in Italy with article 20 of the Unified Code of Income Taxes).

In order to avoid double taxation, international conventions establish that, in this case, it is the State in which the activity is exercised that has taxing jurisdiction.

This criterion after all corresponds to the general criterion formulated in the OECD model and reproduced in all the conventions stipulated by Italy.

In the light of the above observation, the scope of article 3 of the Unified Code of Income Taxes appears considerably altered, if not completely eliminated.

There is no doubt in fact that even if the above mentioned provision were missing, income from dependent personal services produced abroad would still not be taxed in Italy, but only in the foreign State, as a result of double taxation conventions.

Moreover, it should be noted that generally the system for the elimination of double taxation in conventions stipulated by Italy is not that of exemption but that of tax credit; in the sense that the beneficiary of income produced abroad must declare it in the tax return filed in Italy, by eliminating the tax load through a tax credit deduction.

Consequently, as far as dependent personal services are concerned, article 3 of the Unified Code of Income Taxes, creates a mechanism that does away with the need to resort to the tax credit, and also abolishes all other obligations connected with generating income inasmuch that the exclusion of this income from the taxable basis means that it need not appear in an income-tax return.

From this point of view, the role of this norm is of a special, concessional type, not in relation to the tax obligation or of the actual payment

of the tax, but in terms of the instrumental obligations established by law and to be fulfilled by the taxable person.

It should not be overlooked that there may be cases where the employment activity is exercised and the income is generated in a State lacking a convention against double taxation.

In this case, if the provision in hand were missing, income would be taxable in full in Italy, seen that taxation would not be levied in the foreign State, save for the application of domestic law remedies for double taxation (such as the tax credit for taxes paid abroad established in article 15 of the Unified Code of Income taxes, within the limits provided for herein).

In conclusion, the purport of the provision carried in the Unified Code of Income Taxes (which is different to that carried in the previous d.P.R. 1973, no. 597) would seem to be one of precise adjustment of domestic law to conventional legislation, with tax relief granted only when international legislation is not applicable.

The reconstruction carried out would seem to form the basis of the legislative evolution that followed, culminating in the abolition of the third paragraph, letter c) of the Unified Code of Income Taxes, in virtue of article 5, first §, letter a), no. 1 of Legislative Decree of 2 September 1997, no. 314, with effect from the fiscal year following the one current at 31 December 2000.

In the government Report to this legislative decree one reads that the abolished provision did not obviously exclude taxation of income in the State where the same was generated and the provision therefore appeared redundant in the light of the current conventions for the avoidance of double taxation: it was also held, according to what was expressed in the Report, that the tax treatment of all other income categories would refer to conventions for the avoidance of double taxation and that the abolition provided for would involve, also with reference to dependent personal services, the need to refer to the conventions in force.

Judging by the wording in the Report, it would therefore appear that the deleting of the provision of exclusion from the taxable basis of income from dependent personal services provided abroad has been conceived in order to harmonize the treatment of the said income with that of other cross-border income categories, also considering the currency of conventions against double taxation.

If from a legal and formal point of view, one may agree with what has been declared in the government report, one cannot underestimate the fact that in such a way Italian employers might find it difficult to find labour to employ abroad and to use the services provided by employees

of all levels and qualifications including the services of those covering managerial positions.

A clear sign of the hardship caused can be seen in the rapid succession of legislative interventions to mitigate the scope of the abolition of article 3, paragraph 3, Unified Code of Income Tax.

Thus, article 15, legislative decree of 13 December 1999, no. 505 establishing the abolition – which becomes effective as from 1 January 2001 - of the exclusion from the taxable basis carried in article 3, §3, letter c), Unified Code of Income Tax, grants employers (resident and non resident) using employees who provide their services abroad in a continuative fashion and as exclusive object of the work relation, a tax credit for the withholdings on the relevant income from subordinate employment.

This obscure and muddled provision, which is essentially aimed at allowing the employer to transfer to the employee the financial benefit - since the remuneration of the latter turns out to be higher – has not seen the light in terms of effectiveness inasmuch that it has been abolished by the tax schedule attached to the 1999 financial law, and substituted by a provision which sets down that cross-border income from subordinate employment provided by the resident who has stayed outside the State for over 183 days a year is taxed in Italy not on the amount effectively received, but only on that which refers to the so-called 'conventional remuneration', that which is determined yearly on an administrative basis (by the Minister of Labour, in concert with the ministers of the Treasury and of Finance) and according to categories of employees.

The above mentioned provision inserts a new paragraph, the 8 bis, under article 48 of the Unified Code of Income Taxes, thus introducing a conventional criterion, departing from the principle of income effectively received by the employee; the result of this is that benefits would seem to be excluded from taxation in Italy, together with all that does not fall within the conventional retribution, such as special emoluments, bonuses received for a variety of reasons, and services provided as overtime.

By inserting a new paragraph (1 bis) under article 23, D.p.r. of 29 September 1973 no. 600, article 36 also establishes the enforcing of withholding obligation on persons fulfilling their tax obligations in respect of subordinate employment exercised abroad, under paragraph 8 bis of article 48 of the Unified Code for Income Taxes.

This is not the right forum to proceed with a detailed analysis of the new provisions, but it does seem that these would involve tax obligations to be enforced on those not having a connection with Italy; and more in detail, when the paying employer is resident abroad and is withholding for social security purposes, being under the obligation of transferring these sums to national insurance, on the said employer a withholding

obligation is also enforced, which is to be paid to the Italian revenue authorities.

If the above constitutes the meaning of this provision, then one is to ask how would sanctions (for failing or delaying payment of withholdings) be applicable to non residents and if, constitutionally, it can be deemed legitimate to enforce this financial request (though not a definitive one, seen the obligation of recovery of tax) on those who are extraneous to the Italian legal system.

Tassazione dei redditi di lavoro dipendente prodotti all'estero, convenzioni internazionali contro la doppia imposizione e *worldwide principle*.

Gemma Carallo

1. La problematica concernente l'applicazione del principio di universalità della tassazione: i criteri di determinazione del reddito prodotto all'estero e la doppia imposizione internazionale.

L'applicazione del principio dell'universalità della tassazione, principio che caratterizza i sistemi tributari contemporanei, tra cui quello italiano, ha trovato la massima espansione nella seconda parte del Novecento, con il riconoscimento generale del fatto che l'obbligo di contribuzione alle spese pubbliche di un determinato Paese può imporsi solamente a coloro che si trovino in un rapporto di "collegamento" con tale comunità statuale, e che l'obbligo stesso debba essere calibrato in relazione alla capacità globale del soggetto (1).

La rigorosa applicazione del principio di universalità della tassazione comporterebbe, ovviamente, una penalizzazione per quel soggetto che, producendo i propri redditi sia nel Paese in cui risiede, sia in altri Paesi, verrebbe sottoposto a tassazione tanto nel Paese di residenza (per i redditi ovunque prodotti), quanto nel Paese di produzione del reddito (limitatamente al reddito ivi prodotto); di qui, la ben nota problematica della doppia imposizione internazionale, alla quale si tenta di porre rimedio attraverso la stipula di convenzioni internazionali di tipo bilaterale (2).

(1) V. VOGEL, *"World wide or source taxation of Income?"*, in Rass. trib., 1988, I, pag. 259, 260. Per la generale problematica dell'efficacia della norma tributaria nello spazio, e per l'individuazione dei criteri di collegamento, v. LUPI, *"Territorialità del tributo"*, in Enc. giur., vol. XXXI, e SACCHETTO, *"Territorialità (dir. trib.)"*, in Enc. dir., vol. XLIV.

(2) Sulla doppia imposizione internazionale v. MIRAULO, *"Doppia imposizione internazionale"*, Milano, Giuffrè, 1990, ADONNINO, *"Doppia imposizione"*, in Enc. dir. e in Enc. giur., XII, nonché FANTOZZI, VOGEL, *"Doppia imposizione internazionale"*, in Dig., IV.

In tali convenzioni, per la cui redazione si fa riferimento quasi sempre al modello OCSE (3), si provvede ad identificare i sistemi fiscali, per il settore le imposte sui redditi, vigenti negli Stati firmatari e, quindi, si individua, per ciascuna categoria di reddito, il criterio di territorialità della tassazione, di modo che la legittimazione alla percezione del tributo spetti in alcuni casi allo Stato di residenza del soggetto che produce reddito, in altri casi allo Stato nel quale la fattispecie si è realizzata (vale a dire, nel quale si trova il bene o si svolge l'attività che produce reddito).

Una volta effettuata tale ripartizione, i criteri per la concreta attenuazione della doppia imposizione possono consistere nell'esclusione del reddito (tassato all'estero) dalla base imponibile dell'imposta sul reddito applicata nello Stato di residenza, ovvero nel riconoscimento di un credito di imposta, per l'ammontare pagato all'estero, da farsi valere in sede di pagamento dell'imposta allo Stato di residenza (4).

Non può non osservarsi, peraltro, che il criterio del credito d'imposta ha trovato maggiore diffusione rispetto a quello dell'esenzione, dal momento che lo Stato di residenza ha interesse a "conoscere", ai fini della sua inclusione nella base imponibile, il reddito prodotto all'estero dal suo residente, avendo in tal modo anche la possibilità di "controllare" che l'imposizione sia effettivamente avvenuta all'estero (5).

Deve aggiungersi che, nonostante la previsione del *world wide principle*, il legislatore nazionale si astiene, nella generalità dei casi, a dettare particolari disposizioni per la tassazione dei redditi prodotti all'estero, lasciando normalmente all'interprete l'arduo, ed ingrato, compito di individuare i criteri di determinazione dei redditi prodotti all'estero.

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(3) V. PALUMBO, *"Considerazioni in margine alla Convenzione tipo OCSE del 1992"*, in Riv. dir. trib., 1993, I, pag. 237 e ss.; PUOTI, *"I redditi di lavoro nel Modello OCSE"*, in *"Corso di diritto tributario internazionale"* coordinato da Victor Uckmar, CEDAM, Padova, 1999, pag. 331 e ss..

(4) I metodi per l'attenuazione o la limitazione della doppia imposizione internazionale hanno la stessa configurazione, siano essi misure unilaterali di diritto interno, ovvero strumenti previsti dalle Convenzioni internazionali. In argomento, v. GARBARINO, *"Di alcuni principi che informano le norme interne in materia di tassazione del reddito prodotto su base internazionale"*, in Riv. dir. fin., 1989, I, pag. 44 e ss..

(5) Per l'applicazione del metodo d'imposta v. INGROSSO, *"Il credito d'imposta"*, Milano, 1984, pag. 214 e ss.; v. anche MELIS, *"L'interpretazione delle Convenzioni internazionali in materia di imposte sul reddito e sul patrimonio"*, in Rass. Trib., 1995, pag. 1966 e ss., nonché COCO, *"La delega bancaria nel sistema della riscossione e l'attuazione del credito tributario"*, Bari, 2000, pag. 21 e ss..

In tal senso il problema di maggior rilievo è quello dell'individuazione, sotto il profilo giuridico, della fattispecie realizzata all'estero, ai fini dell'inclusione della stessa in una delle categorie di reddito elaborate dal legislatore nazionale.

Tale individuazione non è affatto agevole, dal momento che le legislazioni nazionali possono disciplinare in modo diverso, sotto il profilo formale, identiche realtà sostanziali; così, per esempio, un rapporto di lavoro avente gli stessi connotati di fatto può essere considerato in uno Stato come rapporto di lavoro autonomo, e in un altro Stato come rapporto di lavoro dipendente. Lo stesso può avvenire per altre ipotesi, ad esempio per l'attività d'impresa e per quella di lavoro autonomo, come pure per la configurazione dello svolgimento di attività da parte di più soggetti nel quadro di un fenomeno societario o associativo.

Non v'è dubbio, comunque, che la dottrina non abbia dedicato mai grande spazio a tale problematica, forse dando per scontato che essa dovesse risolversi applicando la regola secondo cui i redditi prodotti all'estero devono in ogni caso determinarsi sulla base della normativa italiana (tributaria ed extratributaria) (6).

Le considerazioni fin qui svolte ci consentono di delineare un punto di partenza per l'esame dell'argomento che ci siamo proposti di sviluppare, e cioè quello della tassazione dei redditi prodotti all'estero. Tale questione, di recente, si è arricchita di un dibattito tra gli operatori sull'eventualità dell'emanazione di una normativa c.d. di unificazione della base imponibile previdenziale e fiscale del reddito di lavoro dipendente, e sulla soppressione del principio di esclusione, dalla base imponibile, dei redditi di lavoro dipendente derivanti da attività prestata all'estero (D.Lgs. 2 settembre 1997, n. 314) (7).

(6) Sulla questione v. CROXATTO, *"Diritto internazionale tributario"*, in Dig. disc. priv., Sez. comm., IV, pag. 645; PUOTI, *"Riflessioni sulla nozione e sull'autonomia del diritto tributario internazionale"*, in AA.VV., *"L'evoluzione dell'ordinamento tributario italiano"*, CEDAM, 2000, pag. 791 e ss..

(7) In attuazione della delega conferita al Governo dalla legge Finanziaria 1997, finalizzata ad armonizzare, razionalizzare e semplificare le disposizioni fiscali e previdenziali concernenti i redditi di lavoro dipendente ed i relativi adempimenti da parte dei datori di lavoro, nonché a semplificare gli adempimenti dei contribuenti riguardanti la dichiarazione dei redditi, è stato emanato il D.Lgs. 2 settembre 1997 n. 314. Per un primo commento v. CROVATO, *"La riforma dei redditi di lavoro dipendente"*, in Corr. trib., 1997, n. 46, nonché PURI, *"Armonizzazione, razionalizzazione e semplificazione delle disposizioni fiscali e previdenziali concernenti i redditi di lavoro dipendente"*, in AA.VV., *"Commento agli interventi di riforma tributaria. I decreti legislativi di attuazione delle deleghe contenute nell'art. 3 della legge 26 dicembre 1996, n. 662"*, a cura di MICCINESI, Padova, 1999.

2. La disciplina della Riforma tributaria del 1971: l'esclusione dalla base imponibile dei redditi di lavoro dipendente prodotti all'estero dagli "emigrati".

È opportuno iniziare l'esame dell'argomento in questione concentrando l'attenzione sulla disciplina dettata dalla c.d. Riforma tributaria del 1971.

Invero, nel d.P.R. 1973, n. 597, istitutivo dell'Irpef, si escludevano espressamente dalla base imponibile non solo i redditi esenti e quelli assoggettati a ritenuta alla fonte a titolo di imposta, ma anche "i redditi di lavoro dipendente prestato all'estero da cittadini italiani emigrati che sono rimasti iscritti nelle anagrafi della popolazione residente" (art. 3, secondo comma).

Come appare evidente dalla prima lettura della disposizione richiamata, la condizione per l'esclusione dalla base imponibile era di carattere soggettivo e di tipo formale, nel senso che doveva trattarsi di un "cittadino italiano" (e non, semplicemente, di soggetto già residente nel territorio dello Stato) emigrato all'estero, e cioè di un soggetto che avesse abbandonato definitivamente il territorio dello Stato.

La situazione formale doveva consistere nella permanente iscrizione nell'anagrafe della popolazione residente; doveva quindi evidenziarsi una discrasia tra situazione sostanziale e situazione formale, tra residenza all'estero (per effetto dell'emigrazione) e iscrizione anagrafica in Italia.

Per meglio comprendere la portata della norma in esame, è bene rifarsi alle interpretazioni della dottrina in tema di nozione di lavoro dipendente nell'ambito dell'imposizione sul reddito.

Si riteneva, infatti, che la nozione di lavoro dipendente potesse rinvenirsi all'interno e non all'esterno del sistema tributario, e che dovesse essere riferita allo svolgimento di un'attività lavorativa caratterizzata dall'assenza della preordinazione dei mezzi di carattere patrimoniale per lo svolgimento della stessa (8).

La subordinazione al datore di lavoro, requisito tipico – per la dottrina giuslavoristica – per l'individuazione di un rapporto di lavoro veniva così riconsiderata privilegiandosi una dimensione di tipo economico piuttosto che giuridico, di modo che, anche in assenza di un formale rapporto di lavoro, ed in un'ottica squisitamente civilistica, poteva comunque dirsi esistente un'attività di lavoro dipendente per le caratteristiche concrete dell'attività svolta.

(8) Puoti, *"Il lavoro dipendente nel diritto tributario"*, Milano, 1975.

L'intento evidente di tale orientamento dottrinario, che comunque muoveva dall'identificazione di un vero e proprio *favor* per il lavoratore dipendente nell'ambito del nostro ordinamento giuridico, era quello di riferire anche a realtà di tipo marginale, quanto meno sotto il profilo dell'organizzazione dei mezzi, quegli strumenti di attenuazione del carico fiscale quali le detrazioni dall'imposta o l'esclusione da Ilor, tipicamente dedicati al lavoro dipendente (9).

Leggendo, dunque, la disposizione di esclusione dalla base imponibile, recata dall'art. 3 del D.P.R. 1973, n. 597, alla luce dell'individuazione del concetto di lavoro dipendente nel diritto tributario, come sopra evidenziato, poteva giungersi alla conclusione che il legislatore della riforma tributaria aveva voluto escludere dalla tassazione in Italia tutte quelle fattispecie reddituali realizzate all'estero e caratterizzate dalla comune appartenenza alla categoria dei redditi di lavoro dipendente, quando l'attività posta in essere fuori del territorio dello Stato era imputabile ad un soggetto residente all'estero, ma solo formalmente iscritto nell'anagrafe della popolazione residente in Italia.

Il tenore letterale della disposizione in argomento non consentiva, evidentemente, di giungere ad interpretazioni di tipo "manipolativo", che venivano cioè ad inserire ed utilizzare elementi non previsti espressamente nella fattispecie normativa.

Così, in primo luogo, la residenza del datore di lavoro non era in alcun modo presa in considerazione ai fini dell'esclusione dalla base imponibile del compenso percepito dal lavoratore, e non poteva dunque negarsi tale esclusione in base alla circostanza che lo stipendio fosse erogato da un soggetto residente, tenuto quindi ad operare la ritenuta alla fonte a titolo di acconto sulle somme costituenti retribuzioni di lavoro dipendente (10).

A tal proposito, ed *incidenter tantum*, può rilevarsi come una comune deformazione prospettica abbia tante volte spinto sia l'Amministrazione finanziaria, sia taluni giudici tributari, a considerare l'obbligo di ritenuta in modo avulso dall'effettiva esistenza dell'*an debeatur*, dimenticando che le disposizioni recate dagli artt. 23 e ss., D.P.R. 1973, n. 600, sono disposizioni concernenti la riscossione del tributo e non, come appare ovvio, la determinazione della base imponibile (11).

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(9) CESSARI, *"Il* favor *verso il prestatore di lavoro subordinato"*, Milano, 1966; SIMI, *"Il favore dell'ordinamento giuridico per i lavoratori"*, Milano, 1967; PUOTI, *"Lavoro dipendente (dir. trib.)"*, in Enc. dir., Giuffrè, Milano, XXIII.

(10) V. TINELLI, *"La nuova disciplina fiscale del reddito di lavoro dipendente prodotto all'estero"*, in Riv. dir. trib., 2000, pag. 277, e Risoluzioni ministeriali ivi citate.

(11) V. PUOTI, *"Il lavoro dipendente..."*, cit., pag. 244.

In altri termini, se è vero che, ove la somma erogata costituisca reddito tassabile in capo al percipiente, può sorgere l'obbligo per il soggetto che la corrisponde di effettuare la ritenuta alla fonte, non è certamente vero il contrario, poiché se la somma è astrattamente prevista tra quei redditi per i quali vi è l'obbligo di ritenuta, questa circostanza determina l'assoggettamento ad imposizione in Italia della somma stessa.

Comunque, come è stato osservato, l'Amministrazione finanziaria ha proceduto ad un'interpretazione sostanzialmente estensiva della disposizione di esclusione, sia con l'attribuzione della qualifica di "emigrante" a soggetti che solo temporaneamente lasciavano il territorio italiano per prestare la propria attività lavorativa all'estero, sia richiedendo talune condizioni formali non previste dalla norma che riguardavano esclusivamente la tipologia dell'attività e non lo *status* del prestatore.

Con l'entrata in vigore del T.U. delle imposte sui redditi, introdotto con D.P.R. 22 dicembre 1986, n. 917, l'elaborazione amministrativa veniva in gran parte recepita dalla norma di legge, e l'esclusione dalla base imponibile era così disposta per "i redditi derivanti da lavoro dipendente prestato all'estero in via continuativa e come oggetto esclusivo del rapporto".

Procediamo all'esame degli aspetti più rilevanti della modifica così introdotta.

In primo luogo, occorre osservare come l'aspetto soggettivo, cioè la condizione che l'attività lavorativa sia prestata da un soggetto "emigrato" all'estero, sia completamente assente. 13

Ai fini dell'esclusione, quindi, la circostanza che il reddito sia prodotto da un residente o da un non residente, sotto un profilo formale o sostanziale, non rileva più; ciò vuol dire che l'emigrato che sia rimasto iscritto all'anagrafe della popolazione residente, quello che invece abbia proceduto alla cancellazione ed, infine, il residente "non emigrato", hanno tutti egualmente titolo per invocare l'applicabilità dell'esclusione dalla base imponibile.

Peraltro, nonostante il tenore così generale, e potremmo forse dire "generico", dell'art. 3, 3° comma , lett. *c*) del T.u.i.r, può procedersi ad alcune precisazioni, possibili in virtù di un collegamento con il contesto normativo nel quale la richiamata norma si inserisce.

La combinazione dei principi di universalità (*worldwide principle*) e della fonte (*source principle*), o di territorialità ristretta, portano ad affermare che l'assoggettamento ad imposizione sul reddito in Italia per attività svolte all'estero (*rectius*: per attività di lavoro dipendente svolto all'estero) non può essere ipotizzato certamente nei confronti del soggetto non residente (mancando, in tal caso, ogni collegamento, oggettivo e soggettivo, con il territorio dello Stato), ma solo nei confronti del soggetto residente.

Ne deriva che il lavoratore dipendente, che si trovi all'estero per la prestazione dell'attività lavorativa, deve in ogni caso essere fiscalmente residente in Italia, e quindi avere l'iscrizione anagrafica, ovvero il domicilio o la residenza in Italia.

Da tale osservazione può arguirsi che la portata della disposizione tributaria recata dal T.u.i.r., vale a dire la "nuova" esclusione dalla base imponibile dei redditi di lavoro dipendente prodotti all'estero, è assai diversa da quella della norma precedente.

Prima del T.u.i.r., infatti, la disposizione tributaria si rivolgeva, pressoché esclusivamente, a quei soggetti che avevano definitivamente abbandonato il territorio dello Stato, erano "emigrati" all'estero, ma avevano conservato (quasi sempre per dimenticanza) l'iscrizione anagrafica; soggetti che potevano comunque, nella sostanza, essere assimilati ai soggetti non residenti.

Con la disposizione della lett. *c*), 3° comma, dell'art. 3, ci si riferisce invece esclusivamente a soggetti effettivamente residenti in Italia, e comunque non emigrati all'estero, nei confronti dei quali si dispone l'esclusione dalla base imponibile del reddito prodotto all'estero, all'unica condizione che si tratti di attività prestata in via continuativa e come oggetto esclusivo del rapporto.

Torna utile, a questo punto, considerare che, sempre con l'emanazione del T.u.i.r., si era proceduto anche ad una profonda modifica nella nozione del lavoro dipendente nell'ambito del diritto tributario.

Come la dottrina ha rilevato, con l'emanazione delle nuove disposizioni si è eliminata ogni possibilità di identificare una nozione unitaria ed autonoma di lavoro dipendente nell'ambito del sistema tributario vigente e, richiamandosi espressamente la derivazione del reddito dai "rapporti aventi per oggetto la prestazione di lavoro ... alle dipendenze e sotto la direzione di altri" si è di nuovo reso necessario il ricorso al procedimento interpretativo utilizzato anteriormente all'entrata in vigore del D.P.R. 1973, n. 597, imperniato sulla necessità dell'immediato rinvio alle disposizioni extratributarie, in particolare all'art. 2094 cod. civ. (12).

Quanto ora sottolineato conduce a ritenere che l'attività svolta all'estero debba in ogni caso essere considerata sotto un profilo formale e non esclusivamente sostanziale, dovendosi verificare quindi se si sia in presenza, in territorio estero, di un rapporto qualificabile come "di lavoro dipendente".

Può avvenire, beninteso, che il rapporto di lavoro sia stato instaurato in Italia, tra lavoratore dipendente residente e datore di lavoro egual-

(12) V. Puoti, voce *"Lavoro subordinato"*, II, dir. trib., in Enc. giur.

mente residente; nel qual caso, non sembrano esservi dubbi in ordine all'individuazione del rapporto, nell'ambito dell'ordinamento giuridico italiano.

Può avvenire, invece, che il rapporto di lavoro dipendente sorga all'estero con datore di lavoro residente all'estero, e che il rapporto di lavoro sia disciplinato dalla legge del Paese in cui l'attività è prestata.

In quest'ultimo caso si tratta di verificare la compatibilità tra la legislazione straniera e la norma tributaria italiana, in particolare con l'art. 46 del T.u.i.r., dovendo chiedersi se un rapporto che, sulla base della legislazione estera, pur avendo ad oggetto la prestazione di lavoro alle dipendenze e sotto la direzione di altri, sia qualificato come di lavoro autonomo, possa comunque comportare l'esclusione dalla base imponibile dei compensi percepiti dal prestatore residente in Italia.

3. Redditi di lavoro dipendente prodotti all'estero e doppia imposizione internazionale.

Altro aspetto di particolare rilievo, che deriva dalla formulazione dell'art. 3, 3° comma, lett. *c*) del T.u.i.r., è quello concernente la doppia imposizione sul reddito.

Com'è noto, per il principio della stretta territorialità, i redditi prodotti all'estero dal residente italiano possono essere assoggettati a tassazione nello Stato nel quale il reddito è prodotto; generalmente, quasi tutte le legislazioni fiscali prevedono (come avviene anche per l'Italia, con l'art. 20 del T.u.i.r.), che sia tassato il reddito derivante dal lavoro dipendente prestato nello Stato.

Per evitare la doppia imposizione, le Convenzioni internazionali stabiliscono che, in questo caso, è legittimato ad applicare l'imposta lo Stato nel quale l'attività lavorativa viene svolta.

Tale criterio corrisponde, del resto, al criterio generale elaborato nel Modello OCSE, e riprodotto in tutte le convenzioni stipulate dall'Italia.

Alla luce di tale considerazione, la portata dell'art. 3 del T.u.i.r. sembra essere molto ridimensionata, se non addirittura eliminata.

Non v'è dubbio, infatti, che se anche non vi fosse la disposizione ora richiamata, il reddito di lavoro dipendente prodotto all'estero non verrebbe assoggettato a tassazione in Italia, ma solo nello Stato estero, per effetto delle convenzioni contro la doppia imposizione.

Occorre peraltro ricordare che, generalmente, il sistema di eliminazione della doppia imposizione nelle convenzioni stipulate dall'Italia non è quello dell'esenzione ma quello del credito d'imposta; nel senso cioè che il titolare del reddito prodotto all'estero deve inserirlo nella propria di-

chiarazione dei redditi in Italia, eliminando tuttavia il carico tributario attraverso la detrazione del credito d'imposta.

Di conseguenza, limitatamente al reddito di lavoro dipendente, l'art. 3 del T.u.i.r. crea un meccanismo che elimina la necessità di ricorso al credito d'imposta, ed elimina altresì tutti gli obblighi connessi alla produzione del reddito, poiché quest'ultimo, essendo escluso dalla base imponibile, non deve neppure essere dichiarato.

Da questo punto di vista, la funzione della norma è di carattere agevolativo, non già con riferimento all'obbligazione tributaria o al pagamento del tributo, quanto piuttosto agli obblighi strumentali posti dalla legge a carico del soggetto passivo.

Non va dimenticato, poi, che possono esservi delle ipotesi in cui l'attività lavorativa venga prestata ed il reddito venga prodotto in uno Stato con il quale non sia intervenuta una convenzione contro la doppia imposizione.

In tal caso, se non vi fosse la disposizione *de qua*, il reddito sarebbe integralmente assoggettabile a tassazione sia in Italia che all'estero, salva poi l'applicazione dei rimedi di diritto interno contro la doppia imposizione (come il credito d'imposta per le imposte pagate all'estero, di cui all'art. 15 T.u.i.r., con i limiti ivi previsti).

In conclusione, la portata della disposizione recata dal T.U. (comunque differente da quella contenuta nel precedente D.P.R. 1973, n. 597), sembra essere quella di un puntuale adeguamento della normativa interna alla normativa convenzionale, con esonero dalla tassazione nei soli casi in cui non sia applicabile la normativa internazionale.

La ricostruzione operata sembra essere alla base della successiva evoluzione normativa, che è culminata nell'abolizione del terzo comma, lett. *c*) del T.u.i.r., in virtù dell'art. 5, 1° comma, lett. *a*), n. 1, del D.Lgs. 2 settembre 1997, n. 314, con decorrenza dal periodo d'imposta successivo a quello in corso al 31 dicembre 2000.

Nella relazione governativa a tale Decreto Legislativo si legge infatti che la disposizione abolita non escludeva, ovviamente, la tassazione del reddito nello Stato in cui il reddito era prodotto, e appariva, dunque, superflua alla luce delle convenzioni contro la doppia imposizione: si è anche tenuto, secondo quanto espresso dalla Relazione, che per tutte le altre categorie di reddito il trattamento fiscale è rimesso alle convenzioni per evitare le doppie imposizioni, e che la disposta soppressione comporterà, anche in materia di reddito di lavoro dipendente, la necessità di fare riferimento alle vigenti convenzioni.

Dalle parole della Relazione sembra, dunque, che la soppressione della disposizione di esclusione, dalla base imponibile, dei redditi di lavoro dipendente prestato all'estero sia stata concepita per armonizzare il trattamento di tali redditi a quelli di altre categorie pure prodotti all'estero,

tenuto anche conto della generalizzata vigenza delle convenzioni contro le doppie imposizioni.

Se sotto il profilo giuridico formale può anche convenirsi con quanto espresso dalla relazione governativa, non può sottovalutarsi la circostanza che, in tal modo, i datori di lavoro italiani potrebbero avere maggiori difficoltà per l'acquisizione di manodopera da impiegare all'estero, nonché per l'utilizzazione di prestazioni lavorative all'estero da parte di dipendenti di qualsiasi qualifica e livello, compresi quelli con funzioni dirigenziali.

Segno evidente di tale disagio è il susseguirsi di interventi legislativi per "mitigare" la portata dell'abolizione dell'art. 3, 3° comma, T.u.i.r.

Così l'art. 15 del D.Lgs. 23 dicembre 1999, n. 505 ha disposto che, a decorrere dal 1° gennaio 2001, data di entrata in vigore dell'abolizione dell'esclusione dalla base imponibile recata dall'art. 3, 3° comma, lett. *c*), T.u.i.r., ai datori di lavoro (residenti e non residenti) che utilizzano lavoratori dipendenti che prestano la loro attività all'estero in via continuativa e come oggetto esclusivo del rapporto, è attribuito un credito d'imposta pari all'ammontare delle ritenute gravanti sul relativo reddito di lavoro dipendente.

Tale disposizione, oscura e farraginosa, con la quale in sostanza si vorrebbe consentire al datore di lavoro di traslare al dipendente il beneficio, sotto il profilo economico (cioè con un aumento della retribuzione), non ha visto la luce, in termini di efficacia, essendo stato già soppresso dal collegato fiscale alla finanziaria 1999, e sostituito con una disposizione che prevede che il reddito di lavoro dipendente prestato all'estero dal residente che sia rimasto fuori del territorio dello Stato per oltre 183 giorni all'anno viene assoggettato ad imposizione in Italia con riferimento non all'ammontare effettivamente percepito, ma solo in relazione alla c.d. retribuzione convenzionale, cioè a quella determinata in via amministrativa per categorie di dipendenti.

La richiamata disposizione inserisce un nuovo comma, l'8 *bis*, nell'art. 48 del T.u.i.r., introducendo quindi un criterio convenzionale, in deroga al principio della tassazione del reddito effettivamente percepito dal dipendente: con la conseguenza che sembrerebbero esclusi dall'imposizione in Italia i benefits, e tutto ciò che comunque non rientra nella retribuzione convenzionale, come gli emolumenti straordinari, le indennità a vario titolo percepite, le prestazioni rese al di là del normale orario di lavoro.

L'art. 36 stabilisce inoltre, inserendo un nuovo comma (1 *bis*) nell'art. 23 del D.P.R. 29 settembre 1973 n. 600, che i soggetti che adempiono agli obblighi contributivi in relazione ai redditi di lavoro dipendente prestato all'estero, di cui al comma 8 *bis* dell'art. 48 T.u.i.r., devono in ogni caso operare anche le ritenute alla fonte.

Non è questa la sede per procedere ad un approfondito esame delle nuove disposizioni, ma sembra che da esse discenda la previsione di obblighi tributari anche a carico di soggetti che non abbiano alcun collegamento con il territorio dello Stato italiano: così, in particolare, quando la erogazione del compenso venga effettuata da un datore di lavoro residente all'estero, e questo operi le trattenute previdenziali, con obbligo di versamento all'ente di previdenza nazionale, sarebbe poi tenuto anche alle ritenute fiscali, con obbligo di versamento all'amministrazione finanziaria italiana.

Se questa è la portata della disposizione, è da chiedersi come siano applicabili nei confronti del soggetto non residente le sanzioni per l'omessa effettuazione della ritenuta fiscale, o per l'omesso o ritardato versamento degli importi trattenuti, e se sia costituzionalmente legittimo imporre una prestazione patrimoniale (sia pure in modo non definitivo, stante l'obbligo della rivalsa) a soggetti comunque estranei all'ordinamento giuridico italiano.

Gemma Carallo

Sezione II - Giurisprudenza

Section II - Decisions of the Courts

II – A) Giurisprudenza dell'Unione Europea
EU Case-Law

Corte di Giustizia delle Comunità Europee

1A) EC COURT OF JUSTICE, IST CHAMBER, JUDGEMENT 29 JUNE 2000, C-455/98. PRESIDENT OF THE CHAMBER L. SEVÓN, RAPPORTEUR P. JANN, TULLIHALLITUS VERSUS KAUPO SALUMETS AND OTHERS.

Unlawful introduction of ethyl alcohol in the customs territory of the Community - Application of provisions of the customs code and of Directives 77/388/EEC, 92/12/EEC, 92/83/EEC to ethyl alcohol of contraband - Liability to payment of customs duties, VAT and excise duty - Applies.

When a lawful market for products of unlawful origin exists, such unlawful introduction (contraband) cannot preclude payment of taxes that would normally be charged at the moment of release of products in the customs territory of the Community. (*)

1B) CORTE DI GIUSTIZIA CE, SEZ. I, SENT. 29 GIUGNO 2000, C-455/98 (PRES. L. SEVON, REL. P. JANN) *Tullihallitus c/o Kaupo Salumets e altri.*

Introduzione illegale di alcol etilico nel territorio doganale comunitario - Applicazione delle disposizioni del codice doganale e delle Direttive 77/388/CEE, 92/12/CEE, 92/83/CEE all'alcol etilico introdotto di contrabbando - Assoggettabilità al pagamento dei dazi doganali, dell'IVA, delle accise -Sussiste.

Nella misura in cui sia ipotizzabile un mercato lecito per la commercializzazione dei prodotti di provenienza illecita, l'immissione fraudolenta (contrabbando) in esso non può configurarsi quale motivo di non assoggettabilità alle imposte normalmente dovute all'atto dell'immissione del prodotto nel territorio doganale comunitario (**).

SENTENZA

1. Con ordinanza 8 dicembre 1998, pervenuta nella cancelleria della Corte il 14 dicembre successivo, il Tampereen käräjäoikeus ha sottoposto

alla Corte di giustizia delle Comunità europee, a norma dell'art. 177 del Trattato CE (divenuto art. 234 CE), una questione pregiudiziale relativa all'interpretazione della sesta direttiva del Consiglio 17 maggio 1977, 77/388/CEE, in materia di armonizzazione delle legislazioni degli Stati membri relative alle imposte sulla cifra di affari - Sistema comune di imposta sul valore aggiunto: base imponibile uniforme (GU L 145, pag. 1; in prosieguo: la "sesta direttiva"), delle direttive del Consiglio 25 febbraio 1992, 92/12/CEE, relativa al regime generale, alla detenzione, alla circolazione ed ai controlli dei prodotti soggetti ad accisa (GU L 76, pag. 1), e del Consiglio 19 ottobre 1992, 92/83/CEE, relativa all'armonizzazione delle strutture delle accise sull'alcole e sulle bevande alcoliche (GU L 316, pag. 21), nonché del regolamento (CEE) del Consiglio 12 ottobre 1992, n. 2913, che istituisce un codice doganale comunitario (GU L 302, pag. 1; in prosieguo: il "codice doganale").

2. Tale questione è stata sollevata nell'ambito di un procedimento tra il tullihallitus (amministrazione delle dogane finlandese) e il signor Salumets e altri che sono stati perseguiti per avere importato di contrabbando in Finlandia alcol etilico proveniente da uno Stato terzo.

La normativa comunitaria

3. L'art. 202 del codice doganale dispone:

"1. L'obbligazione doganale all'importazione sorge in seguito:

a) all'irregolare introduzione nel territorio della Comunità di una merce soggetta a dazi all'importazione, (...)

2. L'obbligazione doganale sorge al momento dell'introduzione irregolare. (...)".

L'art. 212 dello stesso codice dispone:

"L'obbligazione doganale di cui agli articoli da 201 a 205 e da 209 a 211 sorge anche se riguarda una merce che ha formato oggetto di una misura, di qualunque specie, che ne vieti o limiti l'importazione o l'esportazione. Tuttavia, l'introduzione irregolare nel territorio doganale della Comunità di moneta falsa e di stupefacenti e sostanze psicotrope non compresi nel circuito economico strettamente controllato dalle autorità competenti per essere destinati ad uso medico e scientifico non comporta il sorgere di un'obbligazione doganale (...)".

4. A tenore dell'art. 2 della sesta direttiva:

"Sono soggette all'imposta sul valore aggiunto: (...)

2. le importazioni di beni".

5. L'art. 1, n. 1, della direttiva 92/12 dispone:

"La presente direttiva stabilisce il regime dei prodotti sottoposti alle accise e ad altre imposte indirette gravanti, direttamente o indirettamente, sul consumo di questi prodotti, ad esclusione dell'imposta sul valore aggiunto e delle imposte stabilite dalla Comunità".

L'art. 3, n. 1, della stessa direttiva prevede:

"La presente direttiva è applicabile, a livello comunitario, ai prodotti seguenti, come definiti nelle direttive ad essi relative: (...)

- l'alcole e le bevande alcoliche, (...)".

Secondo l'art. 6, n. 1, della detta direttiva:

"L'accisa diviene esigibile all'atto dell'immissione in consumo o della constatazione degli ammanchi che dovranno essere soggetti ad accisa ai sensi dell'articolo 14, paragrafo 3.

Si considera immissione in consumo di prodotti soggetti ad accisa: (...)

c) l'importazione, anche irregolare, dei prodotti in questione, quando essi non sono vincolati a un regime sospensivo".

6. L'art. 19, n. 1, della direttiva 92/83 dispone:

"Gli Stati membri applicano un'accisa sull'alcole etilico conformemente alla presente direttiva".

L'art. 27, n. 1, della stessa direttiva prevede:

"Gli Stati membri esentano i prodotti previsti dalla presente direttiva dall'accisa armonizzata alle condizioni da essi stabilite per assicurare l'applicazione agevole e corretta di tali esenzioni e per prevenire qualsiasi evasione, frode o abuso quando sono:

a) distribuiti sotto forma di alcole completamente denaturato in conformità dei requisiti previsti dagli Stati membri, sempreché tali requisiti siano

stati debitamente notificati ed accettati conformemente ai paragrafi 3 e 4. Questa esenzione è subordinata all'applicazione della direttiva 92/12/CEE ai movimenti commerciali di alcole completamente denaturato; (...)".

La normativa nazionale

7. Conformemente all'alkoholilaki (legge sull'alcol) n. 1143/1994, soltanto i commercianti in possesso di una licenza d'importazione o i titolari di una licenza di utilizzazione per il proprio uso personale sono autorizzati ad importare l'alcol nel territorio finlandese.

8. Ai sensi della valmisteverotuslaki (legge sull'imposta di fabbricazione) n. 1469/1994, sono soggetti ad accisa l'alcol e le bevande alcoliche che sono introdotti in Finlandia in provenienza da un altro Stato membro o importati da paesi terzi.

9. Inoltre, secondo l'arvonlisäverolaki (legge relativa all'imposta sul valore aggiunto; in prosieguo: l'"IVA") n. 1501/1995, le merci importate nel territorio finlandese e provenienti da uno Stato che non è membro della Comunità sono soggette all'IVA.

La controversia nella causa principale e la questione pregiudiziale

10. Emerge dagli atti di causa che i convenuti nella causa principale sono stati condannati dal giudice nazionale a pene detentive e pecuniarie per aver fatto entrare di contrabbando in Finlandia, nel corso degli anni 1996/1997, circa 100.000 litri di alcol etilico proveniente dall'Estonia. E' certo che una parte di tale alcol, conseguentemente importato di frodo, era già imbottigliata, mentre la rimanente veniva imbottigliata nel detto Stato membro, in una vecchia stalla, in spregio per le norme igieniche.

11. Il giudice nazionale ha disgiunto dal procedimento penale la domanda della tullihallitus diretta alla condanna del signor Salumets e dei suoi complici, in conformità dell'alkoholijuomaverosta säädetty laki (legge sulla tassazione dell'alcol e delle bevande alcoliche) n. 1471/1994, al pagamento dei dazi doganali, dell'IVA, delle accise e dell'imposta sull'alcol che avrebbero dovuto essere assolti dagli importatori all'atto dell'introduzione della merce nel territorio comunitario e che ammonterebbero a circa 38 milioni di FIM.

12. Il giudice nazionale, adito con tale domanda, ha formulato dubbi sul punto se le disposizioni del codice doganale e delle direttive in materia fi-

scale di cui al punto 1 della presente sentenza si applichino anche all'alcol etilico, quando quest'ultimo sia stato introdotto di contrabbando.

13. In particolare, esso solleva la questione se l'importazione fraudolenta in Finlandia di alcol etilico che, in quanto tale, non sarebbe destinato al consumo umano ed avrebbe un mercato considerevolmente più ristretto delle altre bevande alcoliche in ragione del regime autorizzatorio cui un'importazione siffatta è assoggettata in tale Stato membro, non dovrebbe venire assimilata alle operazioni di smercio illegale di stupefacenti ed importazione di denaro falso che, secondo la giurisprudenza della Corte, non sarebbero sottoposte ai dazi doganali o all'IVA.

14. Alla luce di quanto precede, il Tampereen käräjäoikeus ha deciso di sospendere il procedimento e di sottoporre alla Corte di giustizia la seguente questione pregiudiziale:

"Se le direttive comunitarie in materia fiscale del Consiglio 25 febbraio 1992, 92/12/CEE, del Consiglio 19 ottobre 1992, 92/83/CEE, e del Consiglio 17 maggio 1977, 77/388/CEE, nonché il codice doganale comunitario [regolamento (CEE) del Consiglio 12 ottobre 1992, n. 2913], vadano interpretati nel senso che le rispettive disposizioni in materia di obbligazioni tributarie e di debiti doganali sono applicabili al contrabbando di alcol". 14

15. I convenuti nella causa principale sostengono che le dette direttive ed il codice doganale non sono applicabili in occasione di un'operazione d'importazione di contrabbando di alcol etilico. Infatti, quest'ultimo non potrebbe considerarsi una bevanda alcolica destinata al consumo a causa del forte tenore di alcol. Un'operazione siffatta dovrebbe quindi ricevere il medesimo trattamento dell'importazione di stupefacenti, che non sono idonei ad essere smerciati e, quindi, non sono soggetti ai dazi doganali o all'IVA. Peraltro, il contrabbando di alcol non costituirebbe un'attività economica ai sensi delle disposizioni del Trattato CE e sfuggirebbe dunque completamente alla normativa comunitaria.

16. In proposito, i convenuti nella causa principale si riferiscono alle sentenze della Corte 5 febbraio 1981, causa 50/80, Horvath (Racc. pag. 385); 26 ottobre 1982, causa 221/81, Wolf (Racc. pag. 3681); 28 febbraio 1984, causa 294/82, Einberger (Racc. pag. 1177); 5 luglio 1988, causa 269/86, Mol (Racc. pag. 3627), e 5 luglio 1988, causa 289/86, Happy Family (Racc. pag. 3655), rispettivamente relative ad importazioni illegali di stupefacenti nella Comunità e allo smercio illegale dei medesimi prodotti effettuato a titolo oneroso all'interno di uno Stato membro. Essi sostengono che, in tali sentenze, la Corte ha dichiarato che nessun debito doganale o nessuna imposta sulla cifra d'affari sorge all'atto dell'importazione illegale nella Comunità o dello

smercio illegale di stupefacenti effettuato a titolo oneroso all'interno del territorio di uno Stato membro, quando tali prodotti non facciano parte del circuito economico rigorosamente sorvegliato dalle competenti autorità in vista dell'uso per scopi medici e scientifici. Tale giurisprudenza sarebbe stata estesa al caso di importazione di denaro falso dalla sentenza 6 dicembre 1990, causa C-343/89, Witzemann, Racc. pag. I-4477, punto 20).

17. I governi finlandese, ellenico e italiano nonché la Commissione invocano tuttavia altre sentenze in cui la Corte ha dichiarato che l'IVA è normalmente dovuta quando si instauri una concorrenza tra merci immesse fraudolentemente in commercio e prodotti che costituiscono oggetto di operazioni effettuate nell'ambito di un circuito legale. Ciò si verificherebbe per quanto riguarda i profumi contraffatti (sentenza 28 maggio 1998, causa C-3/97, Goodwin e Unstead, Racc. pag. I-3257), l'esercizio illecito dei giochi d'azzardo (sentenza 11 giugno 1998, causa C-283/95, Fischer, Racc. pag. I-3369) e l'esportazione in condizioni illecite di sistemi informatici (sentenza 2 agosto 1993, causa C-111/92, Lange, Racc. pag. I-4677). In particolare, risulterebbe dal punto 16 di quest'ultima sentenza che il principio della neutralità fiscale non consente una distinzione generale fra le operazioni lecite e le operazioni illecite, fatta eccezione per i casi in cui, date le particolari caratteristiche di alcune merci, è esclusa qualsiasi concorrenza tra un settore economico lecito ed uno illecito.

18. Secondo i detti governi e la Commissione, gli stupefacenti ed il denaro falso sono prodotti che non possono essere inseriti nel circuito economico in ragione del loro carattere intrinseco di merci illecite. Tuttavia, l'alcol etilico non presenterebbe tale carattere, benché l'importazione e vendita siano soggette ad autorizzazione in Finlandia. Infatti, esso potrebbe essere venduto in condizioni illecite a un prezzo molto più basso che le bevande alcoliche lecite ai medesimi fini di consumo. Pertanto, l'alcol importato di contrabbando sarebbe del tutto in concorrenza con i prodotti alcolici legalmente venduti, di modo che esso farebbe sorgere un debito doganale e d'imposta. Infatti, nelle sentenze menzionate al punto precedente, la Corte avrebbe adottato un'interpretazione molto restrittiva delle eccezioni al principio della neutralità fiscale.

19. Va preliminarmente constatato che le citate sentenze Horvath, Wolf, Einberger, Mol, Happy Family e Witzemann, pronunciate nelle cause relative agli stupefacenti e al denaro falso, hanno ad oggetto merci che, a causa della loro natura stessa e delle loro particolari caratteristiche, non sono idonee ad essere immesse lecitamente in commercio né inserite nel circuito economico. Risulta inoltre dalla costante giurisprudenza che il principio del-

la neutralità fiscale non consente una distinzione generale fra le operazioni lecite e le operazioni illecite. Ne deriva che la qualificazione di un comportamento come riprovevole non comporta, di per sé, una deroga all'imposizione, ma una tale deroga entra in considerazione solo in situazioni specifiche nelle quali, a causa delle caratteristiche particolari di talune merci o di talune prestazioni, è esclusa qualsiasi concorrenza tra un settore economico lecito e un settore illecito (v. le citate sentenze Lange, punto 19; Fischer, punto 28, Goodwin e Unstead, punto 9, nonché la sentenza 29 giugno 1999, causa C-158/98, Coffeeshop "Siberië", Racc. pag. I-3971, punti 14 e 21).

20. Orbene, ciò non si verifica per l'alcol etilico di cui trattasi nella causa principale. Come hanno fatto valere i governi che hanno presentato osservazioni scritte e la Commissione, non si è in presenza di una merce la cui immissione in commercio sia vietata a causa della sua stessa natura o delle sue particolari caratteristiche.

21. Le condizioni in cui è avvenuta l'importazione non possono modificare tale giudizio. In effetti, un prodotto intrinsecamente lecito come l'alcol etilico non può essere assimilato ad uno stupefacente per motivi connessi alla sua provenienza, alla sua qualità o alla sua purezza.

22. E' del pari ininfluente la circostanza che l'alcol etilico allo stato puro sia soggetto nello Stato membro in questione ad un regime speciale autorizzatorio per quanto riguarda sia la produzione e lo smercio, sia l'importazione e l'esportazione di tale prodotto (v., in tal senso, sentenza Lange, citata, punto 17).

23. Peraltro, come ugualmente ha rilevato la Commissione, la concorrenza tra l'alcol importato di contrabbando e quello che è oggetto di operazioni realizzate in un circuito legale non è esclusa nella misura in cui esiste un mercato lecito dell'alcol che è proprio quello di approdo dei prodotti di contrabbando. Ne risulta che l'alcol etilico non può considerarsi come un prodotto escluso dal circuito economico. Esso è quindi soggetto alle imposte ed ai dazi doganali normalmente dovuti ai sensi della normativa comunitaria.

24. Dal complesso delle precedenti considerazioni deriva che la questione sollevata va risolta dichiarando che la sesta direttiva, le direttive 92/12 e 92/83, nonché il codice doganale, vanno interpretati nel senso che le rispettive disposizioni in materia di obbligazioni tributarie e di debiti doganali sono applicabili anche all'importazione di contrabbando sul territorio doganale comunitario di alcol etilico proveniente da Paesi terzi.

Sulle spese

25. Le spese sostenute dai governi finlandese, ellenico ed italiano, nonché dalla Commissione delle Comunità europee, che hanno presentato osservazioni alla Corte, non possono dar luogo a rifusione. Nei confronti delle parti nella causa principale il presente procedimento costituisce un incidente sollevato dinanzi al giudice nazionale, cui spetta quindi statuire sulle spese.

P.Q.M.

LA CORTE (Prima Sezione), pronunciandosi sulla questione sottopostale dal Tampereen käräjäoikeus con ordinanza 8 dicembre 1998, dichiara: **La sesta direttiva del Consiglio 17 maggio 1977, 77/388/CEE, in materia di armonizzazione delle legislazioni degli Stati membri relative alle imposte sulla cifra di affari - Sistema comune di imposta sul valore aggiunto: base imponibile uniforme, le direttive del Consiglio 25 febbraio 1992, 92/12/CEE, relativa al regime generale, alla detenzione, alla circolazione ed ai controlli dei prodotti soggetti ad accisa, e del Consiglio 19 ottobre 1992, 92/83/CEE, relativa all'armonizzazione delle strutture delle accise sull'alcole e sulle bevande alcoliche, nonché il regolamento (CEE) del Consiglio 12 ottobre 1992, n. 2913, che istituisce un codice doganale comunitario, devono essere interpretati nel senso che le rispettive disposizioni in materia di obbligazioni tributarie e di debiti doganali sono applicabili anche all'importazione di contrabbando sul territorio doganale comunitario di alcol etilico proveniente da paesi terzi.**

(*) The influence in terms of law of the principle of fiscal neutrality.

The Court's reasoning supporting the decision in question is founded on some considerations that are worth highlighting.

First of all, it is important to stress that the Court views as immaterial, for the purposes of resolving the preliminary question referred to it (1), the fact that the products which unlawfully entered the customs territory of the Com-

(1) With reference to the case in question, the Tampere District Court of Finland referred to the Court, by order of 8 December 1998, for a preliminary ruling: the question referred to the Court concerned whether the provisions carried in Council Regulation 2913/92 establishing the Community customs code, in directives 92/12/EEC, 92/83/EEC and in the Sixth directive (77/388/EEC) are to be interpreted as meaning that importation of smuggled ethyl alcohol is subject to customs duty, excise duty and VAT.

munity (contraband), constitute unlawful products for reasons connected with their origin. The Court holds that a certain conduct defined as 'unlawful' does not in itself imply a derogation to the tax liability that arises in respect of these goods when there exists a lawful market in which that same type of product can be marketed. (2)

Having stated such a principle and proceeding with tackling the preliminary question the Court can then draw as logical consequence that the only possible assessment to be made in respect of the smuggled products is one which would consider their specific characteristics, in order to establish if the marketing of such products can be considered unlawful.

By relying on the above line of thinking the Court affirms that a product entering a market where the same type of product is available on lawful sale will be in full competition with the latter and therefore the former, once its intrinsic characteristic is equated with the product being lawfully marketed, will need to be referred to as taxable economic transaction. A transaction that

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Some interpretative problems arose in connection with the case at issue, specifically: articles 202, no. 1, letter a) and 212, of EEC Council regulation no. 2913/92 (in European Communities Official Gazette, set L 30), establishing that: *'customs debts shall be incurred on the unlawful introduction into the customs territory of the Community of goods liable to import duties'*, even if *', no customs debt shall be incurred on the unlawful introduction of counterfeit currency or of narcotic drugs and psychotropic drugs which do not enter into the economic circuit strictly supervised by the competent authorities with a view to their use for medical and scientific purposes';* article 6, no. 1, letter c), Council Directive of 25 February 1992, 92/12/EEC (in the Official Gazette of the European Community, set L 76) in virtue of which: *'excise duty shall become chargeable at the time of release for consumption'; release for consumption of products subject to excise duty shall mean* and include: *'regular importation'* of the products in question; article 19, Council directive October 19, 1992, 92/83/EEC (in the European Communities' Official Gazette, set L 316) providing that Member States: '*shall apply excise duty to ethyl alcohol according to the harmonised excise duty* and, under art. 27, no. 1, letters a) and b) exemption from the harmonised excise duty shall concern completely denatured alcohol.

(2) This derogation, as emerges from the Court's case-law, is applied only in specific circumstances where: '*owing to the special characteristics of certain goods* or services, any competition between a lawful economic sector and an unlawful sector is precluded. In this respect see judgement of 5 February 1981, case 50/89, *Horvath* (Racc. page 385); judgement 26 October 1982, case 221/81, *Wolf* (Racc. p. 3681); judg. October 26, 1982, case 240/81, *Einberger* I (Racc. page 3699); judgement of 5 July 1988, case 269/86, Mol (Racc. p. 3627), case 289/86, Happy family (Racc. p. 3655); 29 June 1999, case C-158/98, *Coffeeshop Siberie*"(to be published shortly in the Raccolta). For a comment to case C-158/98 please refer to MARINELLO A., "*Principio di neutralità fiscale e tassazione dei proventi illeciti*", Dir. prat. trib, II parte, 1998, pp. 632 ff. And to PROTO A.M., *"L'orientamento della Corte di Giustizia U.E. e la tassazione delle attività illecite*", Rass. trib., no. 4, 1999, pp. 1292 ff..

under article 4 of the Sixth Directive (3), needs to be correctly assessed in its own right, regardless of the purposes and results of the said transaction and regardless of any other factor relating to the origin of the products. (4)

In the Court judges' opinion, whenever a tax debt for VAT arises (the exercise of an economic activity) it is not correct in terms of law to refer to the unlawful purpose of the transaction, seen that the smuggled goods are to be fiscally levelled to all others present on a lawful market, once they have entered the customs territory of the Community. (5)

This interesting judgement puts forward, for the purposes of resolving the case in hand, some general considerations on how the principle of fiscal neutrality is to be read and understood and on the effects - in a competitive market - deriving thereof.

The principle of fiscal neutrality is normally viewed as an economic principle according to which economic decisions should be taken regardless of their consequences in tax terms. In other words, considerations relating to taxation should not influence choices of investment and organisation of bu-

(3) See Art. 4, first paragraph of the Sixth Council Directive.

(4) This would seem to be the settled case-law of this Court. See in particular, judg. of 26 March 1987, case 235/85, *Commissione/Paesi Bassi* (Racc. p. 1471, point 8); judg. of 20 February 1997, case C-260/95, *DFDS* (Racc., I-1005, point 23).

(5) As regards customs duties, the arising of the tax debt at the moment when the ethyl alcohol is introduced in the customs territory of the Community is to be found in the fact that the 'intrinsically lawful' characteristic of the product precludes that it be equated with a narcotic drug for reasons connected with its origin, quality or purity. On this point see judgement of 5 February 1981, case 50/89, *Horvath* (Racc. pag. 385); judg. 26 October 1982, case 221/81, *Wolf* (Racc. p. 3681); judg. 26 October 1982, case 240/81, *Einberger* I (Racc. pag. 3699); judgs. of 5 July 1988, case 269/86, *Mol* (Racc. p. 3627), case 289/86, *Happy family* (Racc. p. 3655); 29 June 1999, case C-158/98, *Coffeeshop Siberie*"(not yet published in the Raccolta at the time of writing this comment to the case). The same argument followed with reference to VAT and customs duties applies to excise duty which includes the tax on alcohol. In actual fact, there is no specific case-law dealing with the application of excise duties on narcotics, though in this respect one can apply the same jurisprudential course followed with reference to customs duties and VAT. It is true that Member States are to exempt from the harmonised excise duty, Directive 92/83/EEC, denatured alcohol, as well as that imported for medical and scientific purposes; but the case in hand concerns ethyl alcohol imported from Estonia which had not been subjected to any denaturing process that would have rendered it unsuitable for consumption and it was not meant for medical or scientific purposes. On this point the Advocate General states in conclusion, in point 17, that derogations on payment of customs duties, excise duty and VAT provided for narcotics are not applicable to ethyl alcohol of contraband, the duties above mentioned being based on the idea that the marketing of goods such as narcotics is prohibited by reason of their unlawful characteristics'.

siness activities; from a tax point of view, therefore, there should be no difference between different forms inasmuch that the income generated would be taxed for the same amount. (6)

From the above, and from a first reading, we can infer then that the principle of fiscal neutrality is essentially intended for the avoidance of economic distortions – for reasons relating to tax matters - between domestic and imported products that can cause obstacles to the free circulation of goods. (7)

With this in mind, the Court duly assesses the question referred to it. And the decision to tax the smuggled goods does not follow from an aprioristic assessment of lawfulness but is the result of having analysed the effects of an exception in terms of tax on the competitive working of a market on which similar products are to be found.

It follows that each time that unlawful products emerge on a market and compete with similar goods, free competition may be damaged by it and therefore, with due pragmatism the Court considers it advisable and opportune that such goods be taxed so as to avoid a discriminating regime which would otherwise privilege precisely those products whose origin is unlawful. Thus, the principle of competition, having priority over all doubts of a moral character, is what makes the arising of the tax (8) debt straightforward and right.

(6) In this respect, IBFD, *Dizionario di fiscalità internazionale*, Ipsoa, Milan, 1992. R. MUSGRAVE, has showed a particular interest in the principle of fiscal neutrality, foreseeing how it could operate in the internazional field and giving life to a series of observations which later served to develop economic and financial academic writings on the subject. On this point see in particular, AMATUCCI F., "*Il principio di non discriminazione fiscale*", CEDAM, 1998 p. 25.

(7) Pace E., *Le distorsioni economiche di origine fiscale*, comment to the volume by M. Laurè, *Les distorsions économiques d'origine fiscale*, in "Boll. bibl. istit. giur", Naples, 1959. pp. 237 ff.

Going a little more in-depth, the legal literature has formulated various categories, distinguishing between: domestic neutrality, Community neutrality and international neutrality and world neutrality On these specific definitions see in particular: MARCHESE S., VISENTIN G., BALESTRA M., BARBARO M., BETTINI A., D'AMBROSIO B., FATTACCIO M., PICCOLOTTI B., *Integrazione economica e convergenza dei sistemi fiscali nei paesi UE*, 30° National Conference of Chartered Accountants, Rome March 9-11, 2000, Giuffrè, Milan, 2000, pp. 43 ff..

(8) In this respect, MARINELLO A., *Principio di neutralità fiscale e tassazione dei proventi da attività illecita*, Dir. prat. trib., parte II, 1998, p. 640. This author writes that: '*reference to the criterion of economic competition between a lawful and unlawful sector constitutes a clear sign of the more exhaustive interpretative efforts with which the principle of fiscal neutrality is being considered. The author argues in particular that:' anyone interested in a' philosophical' perspective when interpreting tax law cannot have missed the reference of a definite economic character which is found in the principle of fiscal neutrality and the*

The Court, by following such a course in the decision in hand, confirms the crucial importance that is attached – in Europe - to the competition principle no difference of tax shall damage.

Daniela Conte

(**) **Riflessi giuridici del principio di neutralità fiscale**

Le argomentazioni portate dalla Corte a sostegno della decisione in commento si basano su alcuni elementi valutativi che postulano significative riflessioni a riguardo.

In via preliminare, occorre mettere in evidenza che, secondo la Corte, ai fini della soluzione della questione pregiudiziale dedotta nel giudizio (1), non acquista alcun rilievo decisivo la circostanza che la merce immessa fraudolentemente (contrabbando) nel territorio doganale comunitario abbia prove-

assessment of the Court on the practical and even hypothetical consequences that a different tax regime might produce on a competitive market. These are assessments typical of American case-law that are rooted in the teachings of the "economic analysis of law" and that are rarely made use of by the judges of the Old World.'

(1) Nell'ambito della controversia in questione, il Tribunale di primo grado di Tampere (Finlandia), con ordinanza in data 8 dicembre 1998, rimetteva alla Corte la seguente questione pregiudiziale: se le disposizioni riguardanti la materia controversa contenute nel Regolamento del Consiglio (CEE) n. 2913/92, che istituisce il codice doganale comunitario, nelle direttive 92/12/CEE, 92/83/CEE e nella Sesta direttiva (77/388/CEE) debbano essere interpretate nel senso che l'importazione di alcol etilico di contrabbando vada assoggettata al pagamento dei dazi doganali, delle accise e dell'IVA.

Più specificamente, il caso di cui si controverte poneva problemi di interpretazione: degli artt. 202, n.1, lett. *a*), e 212 del Regolamento del Consiglio (CEE) n. 2913/92 (in GUCE serie L 30), i quali stabiliscono che *l'obbligo di pagare i dazi sorge in seguito "all'irregolare introduzione nel territorio doganale della Comunità di una merce soggetta a dazi all'importazione", anche se "l'introduzione irregolare di moneta falsa e di stupefacenti e sostanze psicotrope non compresi nel circuito economico strettamente controllato dalle autorità competenti per essere destinati ad uso medico o scientifico non comporta il sorgere di un'obbligazione doganale;* dell'art. 6, n. 1, lettera *c*), della Direttiva del Consiglio del 25 febbraio 1992, 92/12/CEE (in GUCE serie L 76) in virtù del quale "*l'accisa diviene esigibile all'atto dell'immissione in consumo" dei prodotti interessati intendendosi per "immissione in consumo" anche l'importazione "irregolare" dei prodotti in questione;* dell'art. 19 della Direttiva del Consiglio del 19 ottobre 1992, 92/83/CEE (in GUCE serie L 316), il quale impone agli "*Stati membri di applicare un'accisa sull'alcol etilico secondo aliquote armonizzate e consente loro, sulla base dell'art. 27, n. 1, lett.* a) *e* b), *di esentare dall'accisa armonizzata solo l'alcol denaturato*"; dell'art. 2 della Sesta direttiva del Consiglio del 17 maggio 1977, 77/388/CEE (in GUCE serie L 145), secondo il quale *sono soggette a tale imposta le "importazioni di beni di qualsiasi natura".*

nienza illecita. Infatti, la Corte sostiene che la qualificazione di un comportamento come "illecito" non implica di per sé deroga all'assoggettabilità ad imposizione della merce che vi è coinvolta, purché si possa ipotizzare l'esistenza, per quello stesso tipo di merce, di un mercato "lecito" nel quale anche i prodotti di provenienza illecita trovino la possibilità di essere commercializzati (2).

Affermato tale principio riesce possibile alla Corte, nell'affrontare la questione pregiudiziale, trarne, come logica conseguenza, che l'unica valutazione da fare sulla merce introdotta di contrabbando è quella di valutare le specifiche caratteristiche e la natura intrinseca della merce, al fine di verificare se trattasi di merce di cui sarebbe illecito il commercio.

Pertanto, la Corte fa derivare da ciò l'affermazione che, laddove esista un prodotto dello stesso genere immesso in libera pratica sul mercato e, quindi, capace di entrare in concorrenza con quello di provenienza illecita, per quest'ultimo, constatatene la natura intrinseca come tale non distinguibile da quella del prodotto legittimamente commercializzato, bisognerà prevederne il suo inserimento come oggetto di un'attività economica tassabile. Una attività economica che, a termini dell'art. 4 della Sesta direttiva (3), va correttamente valutata di per sé stessa, indipendentemente dalle finalità o dai risultati cui è rivolta e indipendentemente da ogni altro fattore relativo alla provenienza della merce (4).

Secondo i giudici della Corte, perciò, ogni qual volta si realizza il presupposto per l'applicazione dell'IVA (esercizio dell'attività economica) non è

(2) Tale deroga, come emerge dalla giurisprudenza della Corte, trova applicazione solo in particolari situazioni nelle quali, a causa delle caratteristiche particolari di talune merci o di talune prestazioni, è esclusa qualsiasi concorrenza tra un settore economico lecito ed un settore illecito. In tal senso v. sent. 5 febbraio 1981, causa 50/89, *Horvath* (Racc. pag. 385); sent. 26 ottobre 1982, causa 221/81, *Wolf* (Racc. p. 3681); sent. 26 ottobre 1982, causa 240/81, *Einberger* I (Racc. pag. 3699); sentenze 5 luglio 1988, causa 269/86, Mol (Racc. p. 3627), causa 289/86, Happy family (Racc. p. 3655); 29 giugno 1999, causa C-158/98, *Coffeeshop Siberie*"(non ancora pubblicata nella Raccolta). Per un commento alla causa C-158/98 si rimanda a MARINELLO A., "*Principio di neutralità fiscale e tassazione dei proventi illeciti*", Dir. prat. trib., II parte, 1998, pp. 632 e ss., e a PROTO A.M., *"L'orientamento della Corte di Giustizia U.E. e la tassazione delle attività illecite*", Rass. trib., n. 4, 1999, pp. 1292 e ss..

(3) L'art. 4, primo comma, della Sesta direttiva recita: "*Si considera soggetto passivo chiunque esercita in modo indipendente e in qualsiasi luogo una delle attività economiche di cui al paragrafo 2, indipendentemente dallo scopo o dai risultati di detta attività*".

(4) In tal senso tende a consolidarsi la giurisprudenza della Corte. In particolare, v. sent. 26 marzo 1987, causa 235/85, *Commissione/Paesi Bassi* (Racc. p. 1471, punto 8); sent. 20 febbraio 1997, causa C-260/95, *DFDS* (Racc., I-1005, punto 23).

corretto giuridicamente far riferimento al fine illecito in quanto le merci immesse clandestinamente vanno fiscalmente pareggiate, sul mercato concorrenziale, a tutte le altre, una volta che sono entrate nel territorio doganale comunitario (5).

Questa interessante pronuncia, nel risolvere il caso concreto, suggerisce alcune considerazioni di carattere generale sulla lettura del "principio di neutralità fiscale" e sugli effetti che da esso derivano nel funzionamento del mercato concorrenziale.

Per "principio di neutralità fiscale" normalmente si è inteso un principio a valenza economica secondo il quale le decisioni economiche dovrebbero essere prese indipendentemente dalle loro conseguenze in termini fiscali. In altre parole, le considerazioni di ordine fiscale dovrebbero essere ininfluenti nelle scelte tra diverse forme di investimento o di organizzazione delle attività imprenditoriali; da un punto di vista fiscale, quindi, non ci dovrebbe essere nessuna differenza tra una forma e l'altra dal momento che sul reddito prodotto graverebbe il medesimo ammontare di imposta (6).

(5) Relativamente, poi, ai dazi doganali, il motivo della loro applicabilità all'immissione di alcol etilico nel territorio doganale comunitario è da ricercare nel fatto che la natura "intrinsecamente legale" del prodotto esclude che esso possa essere assimilato agli stupefacenti per motivi legati alla sua provenienza, qualità o purezza. Sul punto v. sent. 5 febbraio 1981, causa 50/89, *Horvath* (Racc. pag. 385); sent. 26 ottobre 1982, causa 221/81, *Wolf* (Racc. p. 3681); sent. 26 ottobre 1982, causa 240/81, *Einberger* I (Racc. pag. 3699); sentenze 5 luglio 1988, causa 269/86, *Mol* (Racc. p. 3627), causa 289/86, *Happy family* (Racc. p. 3655); 29 giugno 1999, causa C-158/98, *Coffeeshop Siberie*"(non ancora pubblicata nella Raccolta). Lo stesso ragionamento esposto con riferimento all'IVA e ai dazi doganali vale anche per le accise, nel cui ambito rientrano l'imposta di fabbricazione e la tassa sull'alcol, che vengono in considerazione nel caso di specie. In effetti manca una giurisprudenza specifica sull'applicabilità delle accise agli stupefacenti, anche se in materia possono valere gli stessi indirizzi giurisprudenziali elaborati con riguardo ai dazi doganali e all'IVA. E' vero che gli Stati membri devono esentare dall'accisa armonizzata, di cui alla direttiva 92/83/CEE, l'alcol denaturato, così come quello importato a fini medici o di ricerca scientifica; ma nel caso in esame l'alcol etilico importato dall'Estonia non era stato sottoposto ad alcun procedimento di denaturazione per renderlo inadatto al consumo e non aveva alcuna destinazione di tipo medico o scientifico. Sulla questione, l'Avvocato generale, nelle sue conclusioni, al punto 17, afferma che "*non sono applicabili all'importazione di contrabbando di alcol etilico le deroghe previste per gli stupefacenti in ordine al pagamento dei dazi doganali, delle accise e dell'IVA, le quali sono tutte basate sull'idea che gli stupefacenti siano merci la cui commercializzazione è vietata in ragione della loro stessa natura illecita*".

(6) In tal senso, IBFD, *Dizionario di fiscalità internazionale*, Ipsoa, Milano, 1992. Del principio di neutralità fiscale si è occupato, in particolare, R. MUSGRAVE, il quale ne intravvide l'operatività in campo internazionale dando origine a tutta una serie di riflessioni che, successivamente, la dottrina economica e finanziaria ha inteso sviluppare in materia. Sul punto v., in particolare, AMATUCCI F., "*Il principio di non discriminazione fiscale*", CEDAM, 1998, p. 25.

Da ciò deriva, in una prima lettura, che il 'principio di neutralità fiscale' consiste, essenzialmente, nell'evitare distorsioni economiche di origine fiscale tra prodotti nazionali e prodotti importati, capaci di provocare ostacoli alla libera circolazione delle merci (7).

Facendo tesoro di tanto, la Corte, nella decisione in esame, ne fa una utile applicazione al caso sottoposto al suo giudizio. Infatti, fa derivare la decisione di assoggettare la merce di contrabbando ad imposizione, non da una valutazione aprioristica di liceità bensì dalla analisi degli effetti di una eventuale deroga impositiva sul funzionamento concorrenziale del mercato relativo a prodotti omogenei.

Ne consegue che, ogni qual volta vengono in rilievo sul mercato merci di provenienza illecita che, concorrendo con merci similari, possono arrecare danni al funzionamento della concorrenza, con molto pragmatismo, la Corte ritiene utile ed opportuno escludere che esse sfuggano all'imposizione onde evitare una disciplina discriminatoria favorevole proprio alle merci di provenienza illecita. Sicché il principio di concorrenza, prevalendo su ogni dubbio di ordine morale, ne rende corretta la tassazione (8).

La Corte, decidendo in questa direzione, dà conferma della rigorosa valenza in termini europei del "principio di concorrenza" cui nessun *vulnus* può essere apportato da disparità fiscali.

Daniela Conte

(7) Pace E., *Le distorsioni economiche di origine fiscale*, nota a commento del volume di M. Laurè, *Les distorsions économiques d'origine fiscale*, in "Boll. bibl. istit. giur.", Napoli, 1959, pp. 237 e ss..

In un maggiore approfondimento, la dottrina ha elaborato varie categorie di neutralità, distinguendo tra "neutralità domestica", "neutralità comunitaria", "neutralità internazionale", "neutralità mondiale". Su queste diverse accezioni v., in particolare, MARCHESE S., VISENTIN G., BALESTRA M., BARBARO M., BETTINI A., D'AMBROSIO B., FATTACCIO M., PICCOLOTTI B., *Integrazione economica e convergenza dei sistemi fiscali nei Paesi UE*, 30° Congresso Nazionale Ragionieri Commercialisti, Roma 9-11 marzo 2000, Giuffrè, Milano, 2000, pp. 43 e ss..

(8) A riguardo, MARINELLO A., *Principio di neutralità fiscale e tassazione dei proventi da attività illecita*, Dir. prat. trib., parte II, 1998, p. 640, sostiene che "*il richiamo al criterio della concorrenza economica tra un settore lecito ed uno illecito appare un preciso segnale nella direzione di una interpretazione meno scontata e più esaustiva del principio di neutralità fiscale. In particolare, l'Autore sostiene che "non può sfuggire a chi si sia interessato ad un certo tipo di prospettiva 'filosofica' nell'interpretazione della norma tributaria il richiamo al prevalente carattere 'economico' del principio di neutralità fiscale e le valutazioni scelte dalla Corte in ordine alle conseguenze pratiche e financo ipotetiche che un diverso regime impositivo avrebbe sul regime della concorrenza. Si tratta di parametri di valutazione tipici della giurisprudenza statunitense, che affondano le loro radici negli insegnamenti della 'economic analysis of law', e che piuttosto raramente sono utilizzati dai giudici del vecchio continente".*

2A) EC COURT OF JUSTICE, FIFTH CHAMBER, JUDGEMENT OF 14 SEPTEMBER 2000, CASE C- 384/98, CHAIRMAN AND RAPPORTEUR L. SEVÓN, GENERAL LAWYER A. SAGGIO (*Rosenmayr versus the Austria State*)

Value added tax – Sixth Council Directive – Medical examination – VAT exemption – Does not apply

Art.13 A, no. 1, let. c, of the Sixth Council Directive of 17 May 1977, 77/388/EEC in matter of exemption from tax on turnover, is to be interpreted as meaning that it does not apply to services consisting, not in providing care to persons by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests. The fact that the doctor acting as expert was instructed by a court is irrelevant in that regard. (*)

2B) CORTE DI GIUSTIZIA CE, SEZ. V, SENTENZA 14 SETTEMBRE 2000, C-384/98 PRESIDENTE E RELATORE L. SEVÓN; AVVOCATO GENERALE A. SAGGIO (*Rosenmayr contro Repubblica Austriaca*)

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Imposta sul valore aggiunto - Sesta direttiva CE - Esenzione delle prestazioni mediche effettuate nell'esercizio delle professioni mediche e paramediche - Presentazione da parte di un medico in qualità di perito giudiziario di un parere in materia di accertamento di paternità - Esenzione IVA - Non sussiste.

L'art. 13, parte A, n.1, lett. c), *della sesta direttiva del Consiglio, 17 maggio 1977, 77/388/CEE, in materia di esenzione dall'imposta sulla cifra di affari, deve essere interpretato nel senso che non rientrano nell'ambito di applicazione di tale disposizione le prestazioni mediche che consistono non già nel somministrare cure alle persone mediante diagnosi e trattamenti di una malattia o di qualsiasi altro problema di salute, bensì nello stabilire, con analisi biologiche, l'affinità genetica di individui. Il fatto che il medico che agisce in qualità di perito sia stato incaricato da un giudice è irrilevante al riguardo (**).*

Sentenza

1. Con ordinanza 2 settembre 1998, pervenuta in cancelleria il 26 ottobre seguente, il Landesgericht di St. Pölten ha sottoposto a questa Corte, ai sensi dell'art. 177 del Trattato CE (divenuto art. 234 CE), due questioni pregiudiziali sull'interpretazione dell'art. 13, parte A, n. 1, lett. *c),* della sesta direttiva del Consiglio 17 maggio 1977, 77/388/CEE, in materia di armonizza-

zione delle legislazioni degli Stati membri relative alle imposte sulla cifra di affari - Sistema comune di imposta sul valore aggiunto: base imponibile uniforme (GU L 145, pag. 1; in prosieguo: la "sesta direttiva").

2. Tali questioni sono state sollevate nell'ambito di una controversia relativa al trattamento da riservare, ai fini dell'imposta sul valore aggiunto (in prosieguo: l' "IVA"), agli onorari relativi ad un esame genetico effettuato da un perito medico incaricato dal giudice investito di un procedimento di accertamento di paternità che oppone D a W.

La normativa applicabile

3. L'art. 13, parte A, n. 1, lett. *c),* della sesta direttiva prevede:

"Fatte salve le altre disposizioni comunitarie, gli Stati membri esonerano, alle condizioni da essi stabilite per assicurare la corretta e semplice applicazione delle esenzioni previste in appresso e per prevenire ogni possibile frode, evasione ed abuso:

(...)

c) le prestazioni mediche effettuate nell'esercizio delle professioni mediche e paramediche quali sono definite dagli Stati membri interessati". 15

4. In Austria, l'art. 6, nn. 1, punti 19 e 27, e 3, dell'Umsatzsteuergesetz (legge relativa all'imposta sul fatturato) del 1994 dispone:

"1. Tra le operazioni che rientrano nell'art. 1, prima e seconda frase sono esenti

(...)

19) le operazioni relative all'attività di medico (...)

(...)

27) le operazioni svolte dalle piccole imprese, ossia quelle con domicilio o sede in Austria e le cui operazioni, in base dell'art. 1, n. 1, prima e seconda frase, non superano la cifra di 300.000 ATS durante il periodo d'imposizione...

(...)

3. L'imprenditore la cui cifra d'affari è esentata, in forza dell'art. 6, n. 1, punto 27, può rinunciare, fintantoché la decisione non sia definitiva, all'ap-

plicazione dell'art. 6, n. 1, punto 27, con una dichiarazione scritta indirizzata al fisco".

5. In Austria un perito, allorché è incaricato dal giudice investito della controversia di contribuire all'accertamento dei fatti, ha il diritto di ricevere onorari e, nella misura in cui le sue prestazioni sono soggette all'imposta sul fatturato, di chiedere il rimborso dell'imposta relativa ai suoi onorari.

6. Detto giudice fissa gli onorari del perito in un'ordinanza appellabile. Esso dispone, con la medesima ordinanza, il versamento di tali onorari, che sono prelevati da un fondo spese depositato consegnata da una delle parti e, nel caso questo sia insufficiente, da denaro pubblico, ossia da fondi provenienti dall'Österreichischer Bundesschatz (Tesoro federale austriaco).

I fatti della causa principale e le questioni pregiudiziali

7. Il Bezirksgericht di St. Pölten ha incaricato il dottor Rosenmayr di stabilire, in qualità di perito medico, sulla base di un esame genetico, se la ricorrente nella causa principale potesse essere figlia del convenuto.

8. Allo scopo di procedere alla detrazione dell'IVA che aveva pagato a monte per l'acquisto del materiale necessario alle sue analisi e per la retribuzione dei suoi collaboratori, la signora Rosenmayr ha optato per l'imposizione della sua attività ed ha chiesto allo Stato austriaco, oltre al pagamento degli onorari, una somma di 14 108,60 ATS come imposta sulla cifra d'affari.

9. Avendo il Bezirksgericht accolto integralmente tale domanda, il revisore del Bundesschatz ha presentato appello dinanzi al giudice del rinvio contro l'ordinanza di imposizione delle spese della perizia, così come autorizzato a fare allo scopo di preservare il denaro pubblico, sostenendo che l'esenzione dall'IVA istituita per le attività mediche non può essere considerata facoltativa.

10. Detto giudice ha ritenuto che un perito, nell'esercizio delle proprie attività professionali, debba essere considerato come un imprenditore ai sensi dell'art. 1, n. 1, punto 1, dell'Umsatzsteuergesetz del 1994, e che quindi i suoi onorari sono, in linea di principio, soggetti all'imposta sulla cifra d'affari. Tuttavia, dal momento che l'art. 6, n. 1, punto 19, del medesimo atto normativo prevede l'esenzione delle operazioni relative all'attività di medico, il giudice nazionale si domanda se tale esenzione comprenda anche le prestazioni mediche di un medico che agisce come perito e, più in particolare, gli esami genetici effettuati nell'ambito di un procedimento di accertamento di paternità.

11. In tali circostanze, il Landesgericht di St. Pölten ha sospeso il procedimento ed ha sottoposto alla Corte le seguenti questioni pregiudiziali:

"1) Se l'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva del Consiglio 17 maggio 1977, 77/388/CEE, in materia di armonizzazione delle legislazioni degli Stati membri relative alle imposte sulla cifra d'affari, debba essere interpretato nel senso che l'esenzione dall'imposta sulla cifra d'affari ivi sancita riguarda anche prestazioni mediche fornite da un medico nella sua qualità di perito giudiziario per incarico del Tribunale, in particolare mediante analisi antropologiche genetiche operate nell'ambito di un procedimento di accertamento di paternità.

2) Qualora la prima questione sia risolta affermativamente: se la precitata disposizione della direttiva osti all'applicazione di una norma nazionale la quale, al verificarsi di determinati presupposti, consente (anche) ai medici di rinunciare efficacemente alla menzionata esenzione".

Sulle questioni pregiudiziali

12. Con la prima questione il giudice di rinvio domanda in sostanza, da un lato, se l'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva debba essere interpretato nel senso che rientrano nell'ambito di applicazione di tale disposizione le prestazioni mediche non già consistenti nel somministrare cure alle persone, mediante diagnosi e trattamenti di una malattia o di qualsiasi altro problema di salute, ma nello stabilire, con analisi biologiche, l'affinità genetica di individui e, dall'altro, se il fatto che il medico che agisce in qualità di perito sia stato incaricato da un giudice sia rilevante in proposito.

13. I governi austriaco, olandese e del Regno Unito sostengono che l'esenzione dall'IVA prevista dall'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva si applica alle prestazioni mediche senza distinzione riguardo alla loro finalità, tanto che siano dirette a effettuare un atto tecnico, come esami di laboratorio, oppure a curare una malattia, quanto che esse siano effettuate su richiesta di un privato o su incarico di una autorità pubblica. Pertanto, un esame genetico, realizzato nell'ambito di un'azione di accertamento di paternità da parte di un medico incaricato da un giudice, dal momento che comporta l'esercizio di una attività medica o paramedica, sarebbe una prestazione medica esente dall'IVA.

14. La Commissione fa valere invece che, per poter usufruire dell'esenzione, la prestazione medica deve consistere appunto in cure prestate alla persona. Ora, l'obiettivo degli esami genetici ai fini della ricerca della paternità non sarebbe né quello di prevenire, né quello di diagnosticare o di curare una ma-

lattia. Non vi sarebbe pertanto alcuna ragione per accordare a tali attività, esercitate da un medico, un trattamento fiscale diverso da quello riservato alle attività di periti giudiziari in altri settori, quali i periti contabili, gli ingegneri o gli psicologi. Anche se l'attività di un esperto incaricato da un tribunale può essere considerata d'interesse generale, tale caratteristica non basterebbe, di per sé, a giustificare l'esenzione dall'IVA sulla base dell'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva, delle prestazioni svolte da tale perito.

15. Occorre ricordare, a titolo preliminare, che i termini con i quali sono state designate le esenzioni di cui all'art. 13 della sesta direttiva devono essere interpretati restrittivamente, dato che costituiscono deroghe al principio generale secondo cui l'imposta sulla cifra d'affari è riscossa per ogni prestazione di servizi effettuata a titolo oneroso da un soggetto passivo (v., in particolare, sentenze 15 giugno 1989, causa C-348/87, Stichting Uitvoering Financiële Acties, Racc. pag. 1737, punto 13, e 12 novembre 1998, causa C-149/97, Institute of the Motor Industry, Racc. pag. I-7053, punto 17).

16. Riguardo alla questione se l'esame genetico che un medico svolge ai fini della ricerca della paternità rientri nella nozione di "prestazioni mediche", ai sensi dell'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva, occorre comparare le differenti versioni linguistiche di tale disposizione, così come richiede il principio dell'interpretazione uniforme del diritto comunitario. Inoltre, in caso di disparità tra le diverse versioni linguistiche, la disposizione in questione deve essere intesa in funzione del sistema e della finalità della normativa di cui essa fa parte (v., in particolare, sentenze 27 marzo 1990, causa C-372/88, Cricket St. Thomas, Racc. pag. I-1345, punto 19, e 9 marzo 2000, causa C-437/97, EKW e Wein & Co., Racc. pag. I-0000, punto 42).

17. A tal proposito, come al paragrafo 16 delle sue conclusioni ha rilevato l'avvocato generale, eccetto la versione italiana, tutte le versioni dell'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva si riferiscono solo alle prestazioni mediche relative alla salute delle persone. Occorre rilevare in particolare che le versioni tedesca, francese, finlandese e svedese utilizzano la nozione di trattamenti terapeutici o di cure per la persona.

18. Si deve constatare quindi che tale nozione di "prestazioni mediche" non si presta ad una interpretazione che includa interventi medici diretti ad uno scopo diverso da quello della diagnosi, della cura e, nella misura del possibile, della guarigione di malattie o di problemi di salute.

19. Pertanto le prestazioni in esame non perseguendo siffatto scopo terapeutico, devono, tenuto conto del principio dell'interpretazione restrittiva di ogni disposizione diretta ad introdurre un'esenzione dall'imposta sulla cifra

d'affari, essere escluse dal campo di applicazione dell'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva e sono quindi soggette all'IVA.

20. Tale interpretazione non può essere inficiata dall'eventuale carattere di attività di interesse generale rivestita dalle attività peritali in questione. Infatti, l'art. 13, parte A, della sesta direttiva non esenta dall'IVA ogni attività di interesse generale, ma solo quelle enumerate e descritte in modo molto dettagliato (precitata sentenza Institute of the Motor Industry, punto 18).

21. Poiché dette operazioni peritali non possono essere esenti dall'IVA a causa della loro intrinseca natura, è irrilevante a questo proposito che esse siano state ordinate da un giudice.

22. Alla luce di quanto precede, occorre risolvere la prima questione affermando che l'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva deve essere interpretato nel senso che non rientrano nell'ambito di applicazione di tale disposizione le prestazioni mediche che consistono non già nel somministrare cure alle persone mediante diagnosi e trattamenti di una malattia o di qualsiasi altro problema di salute, bensì nello stabilire, con analisi biologiche, l'affinità genetica di individui. Il fatto che il medico che agisce in qualità di perito sia stato incaricato da un giudice è irrilevante al riguardo.

23. Tenuto conto della soluzione data alla prima questione, non si deve risolvere la seconda questione.

Sulle spese

24. Le spese sostenute dai governi austriaco, olandese e del Regno Unito, nonché dalla Commissione, che hanno presentato osservazioni alla Corte, non possono dar luogo a rifusione. Nei confronti delle parti nella causa principale il presente procedimento costituisce un incidente sollevato dinanzi al giudice nazionale, cui spetta quindi statuire sulle spese.

Per questi motivi,

LA CORTE (Quinta Sezione),

pronunciandosi sulle questioni sottopostele dal Landesgericht di St. Pölten con ordinanza 2 settembre 1998, dichiara:

L'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva del Consiglio 17 maggio 1977, 77/388/CEE, in materia di armonizzazione delle legislazioni degli Stati membri relative alle imposte sulla cifra di affari - Sistema co-

mune di imposta sul valore aggiunto: base imponibile uniforme, deve essere interpretato nel senso che non rientrano nell'ambito di applicazione di tale disposizione le prestazioni mediche che consistono non già nel somministrare cure alle persone mediante diagnosi e trattamenti di una malattia o di qualsiasi altro problema di salute, bensì nello stabilire, con analisi biologiche, l'affinità genetica di individui. Il fatto che il medico che agisce in qualità di perito sia stato incaricato da un giudice è irrilevante al riguardo.

(*) Exemption from VAT for medical activities is only for those activities consisting in providing care to persons by diagnosing and treating a disease or any other health disorder.

The question referred to the Community judges with the judgement in the epigraph, concerns the treatment, for the purposes of value added tax, of a fee for a genetic test carried out by a medical expert appointed by the court dealing with a paternity dispute. In other words, the Court of Justice was asked whether Article 13A(1)(c) of the Sixth Council Directive, 17 May 1977, 77/388/EEC, concerning medical activities was to be considered as including medical services not strictly to do with diagnosing, treating and curing diseases or health disorders.

As is well-known, the line (1) taken by the Court of Justice, to which the judgement in question has conformed, is one which interprets strictly the cases of exemptions as defined in the article 13 being examined, seen that

(1) See ECJ judgements, *Stichting Uitvoering Financiële Arties*, of 15 June 1989, case C-348/87, Racc. Page 1737, point 13, *Bulthuis-Griffioen,* of 11 August 1995, case C-453/93, Racc. Page 2341 and, *Institute of the Motor Industries,* of 12 November 1998, case C-149/97, Racc. Page I-7053, point 17 and lastly, *Gregg-Commissioners,* of 7 September 1999, case C-216/97, in *Riv. Dir.Trib.*, 1999, III, page 169.

In the legal literature, on the problem of the strict interpretation with reference to the cases of exemption as defined in article 13 of the Sixth Council Directive see: L.Bucci-P.Farano, *Rassegna di giurisprudenza della Corte di Giustizia CE in materia di Iva (1994-1998)*, in *Rass.Trib.*, 2000, page 673, M.Ravaglia, *Presupposto soggettivo delle operazioni esenti ed imposta sul valore aggiunto*, in *Riv.Dir.Trib.*, 1999, III, page 171, M.Giorgi, *Il revirement della Corte di Giustizia sulle condizioni soggettive per l'esenzione delle prestazioni di ricovero e cura*, in *Rass.Trib.*, 1999, page 1578, and, *sull'oggettività dell'esenzione da Iva delle operazioni di assicurazione e riassicurazione e sulla nozione di operazione accessoria*, in *Rass.Trib.*, 1999, page 648, C.Fusco, *Le esenzioni Iva e le operazioni finanziarie nell'Unione europea: spunti di riflessione*, in *Riv.Dir.Trib.*, 1998, III, page 44, S.Confalonieri, *Sulla interpretazione delle esenzioni Iva oggetto dell'art. 13 della sesta direttiva*, in *Riv.Dir.Trib.*, 1997, II, page 687, Lenz, *The jiurisprudence of the European Court of Justice in tax matters*, in *EC-Tax Review*, 1997, page 80.

these: *'constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person'.*

What needs to be considered is then the following: the various language versions of this provision should be compared and, should differences emerge between the various wordings, the provision in question must then be interpreted by reference to the purpose and general scheme of rules of which it forms part. (2) Indeed, the Court has pointed out that, save for the Italian version which constitutes the only exception, each and every version of the article in question refer only to medical care concerning the health of persons, therefore it would seem that one may reach the conclusion that the concept of medical care does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and curing diseases of health disorders.

The conclusion reached by the Court of Luxembourg therefore excludes from the VAT exemption regime medical and paramedical activities not having such a therapeutic aim furthermore, the fact that the expert medical examination was ordered by a court is irrelevant.

Unlike the version of the other Member States, the Italian wording of article 13 of the Directive cannot be said to clearly identify in the condition for being granted VAT exemption on medical activities, the purpose of treatment and diagnosis. In spite of this, Italian law assimilating the EEC Directive, (article 10, point 18, of D.P.R. October 26 1972, no. 633) seems to be in line with the Community's guidelines. (3) Indeed, by granting the value added tax exemption to only: *'medical care of diagnosis, treatment and rehabilitation provided to the person in the exercise of the professions subject to control...'* it is precisely requiring as condition for its application that the purpose be one of treatment of the person.

The ministerial line taken on the subject, however, as pointed out by a number of authors (4), is by no means univocal: whereas some ministerial

(2) See ECJ judgements, *Cricket St Thomas*, of 27 March 1990, C-372/88, Racc., page I-1345, point 19 and, *EKW e Wein & Co.*, of 9 March 2000, C-437/97, point 42.

(3) The Central Tax Commisssion, XVth Chamber, with the judgement of 4 November 1988, no. 7337, in *Boll.Trib.*, 1989, no. 13, page 1114, concerning a question similar to the one being commented in this piece, it was established that: *'to the rules above mentioned the extensive interpretation willed by the Office cannot be applied, seen also the fact that we are dealing with exemptions - and therefore with exceptions to the taxing rule – the interpretation of which should be strict and rigorous'.*

(4) Refer to A.Iorio, *Perizia medica imponibile IVA – Esenti solo le cure alla persona*, in *il sole 24/Ore*, September 19th, 2000. For a first comment to the judgement see also the following: C.Bannella, *Niente IVA sulle attività per la salute*, in *il sole 24/ore*, October 16th, 2000.

circulars (5) require that the purpose of services rendered by doctors be one of diagnosis and treatment of patients, others (6) do not seem to contemplate such a condition to be able to benefit from VAT exemption.

Article 6, paragraph 10 of Law 13 May 1999, no. 133 deserves a separate mention. According to this article: *'services rendered by the medical expert, under legislative decree September 19 1994, no. 626, should be seen as falling within the medical care category as defined in number 18 of article 10 D.P.R. October 26, 1972, no. 633.'* Indeed, the legislative decree above mentioned (7), in the list of the various activities and competencies of doctors dealing with health control at the workplace, it also includes functions and provisions not involving: *'medical care provisions to persons by diagnosis and treatment of a disease or of any other health disorder.'*

The activities of the medical expert, listed in detail in articles 16 and 17 of legislative decree September 19, 1994, no. 626, though directed at keeping the workplace safe and, therefore, indirectly aimed at the prevention of the so-called 'professional' diseases, include within their category a series of provisions, such as giving an opinion of fitness for a specific job, in others words, giving medical advice and opinions. And the nature and purpose of these services, rather than treating, guarantee safety at work and therefore constitute expert medical advice.

In the light of the above developed comments, it would not appear unfounded to have serious doubts about the potential contradiction inherent in Italian legislation and/or Italian praxis with reference to the judgement annotated herein.

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(5) See by way of example: Ministry of Finance Circular, October 16th, 1990, no.38/69949, in *Boll.Trib.*, 1990, no.22, pag.1640; Circular, March 6th, 1987, no.10/1114, in *Boll.Trib.*, 1987, no.8, page 669; Ministry of Finance Resolution, January 11th, 1982, no. 330884, in. *Boll.Trib.*, 1982, no.5, page 381; Circular, August 3rd, 1979, no. 25/364695, in *Boll.Trib.*, 1979, no.17, page 1321.

(6) See Resolution, July 20th, 1996, no. 149/E/III/7/911, in *Boll.Trib.*, 1996, no.15-16, page 1227, where it emerges that services of medical advice rendered by doctors employed by INPS, the Italian National Institute of Social Insurance, would seem to come under the VAT exemption regime regardless of whether the provision was for treatment purposes.

(7) Implementing Directives 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC and 90/679/EEC concerning the betterment of health and safety at the workplace.

(**) L'esenzione IVA per le attività svolte dai medici è limitata esclusivamente a quelle consistenti nel somministrare cure alle persone

La questione affrontata dai giudici comunitari con la pronuncia in epigrafe, concerne il trattamento da riservare, ai fini dell'imposta sul valore aggiunto, agli onorari percepiti, in relazione ad un esame genetico, da un perito medico incaricato dal giudice investito di un procedimento di accertamento di paternità. In altri termini, si chiedeva alla Corte di Giustizia se l'esenzione prevista dall'art. 13, parte A, n. 1, lett. *c)*, della sesta direttiva del Consiglio, 17 maggio 1977, 77/388/CEE, per le attività sanitarie dovesse ritenersi estesa anche alle prestazioni mediche non aventi carattere strettamente curative, ossia non finalizzate alla guarigione di malattie o di problemi di salute.

Come è noto, l'orientamento (1) della Corte di Giustizia, al quale si è peraltro uniformata la decisione in epigrafe, è nel senso di interpretare restrittivamente le ipotesi di esenzione di cui all'art. 13 in esame, dato che queste "costituiscono deroghe al principio generale secondo cui l'imposta sulla cifra d'affari è riscossa per ogni prestazione di servizi effettuata a titolo oneroso da un soggetto privato".

Si tratta, quindi, di porre a raffronto le diverse versioni linguistiche di tale disposizione e, nel caso di disparità, interpretarla in modo funzionale al sistema ed alle finalità dell'intera normativa di cui essa fa parte (2). Orbene,

(1) Si vedano sentenze della Corte di Giustizia CE, *Stichting Uitvoering Financiële Arties*, del 15 giugno 1989, causa C-348/87, Racc. pag. 1737, punto 13, *Bulthuis-Griffioen*, dell'11 agosto 1995, causa C-453/93, Racc. pag. 2341, e *Istitute of the Motor Industries*, del 12 novembre 1998, causa C-149/97, Racc. pag. I-7053, punto 17 e da ultimo *Gregg-Commissioners*, del 7 settembre 1999, causa C-216/97, in *Riv. Dir. Trib.*, 1999, III, pag. 169.

In dottrina sul problema dell'interpretazione restrittiva delle cause di esenzioni di cui all'articolo 13 della sesta direttiva si vedano: L. Bucci-P. Farano, *Rassegna di giurisprudenza della Corte di Giustizia CE in materia di Iva (1994-1998)*, in *Rass. Trib.*, 2000, pag. 673, M. Ravaglia, *Presupposto soggettivo delle operazioni esenti ed imposta sul valore aggiunto*, in *Riv. Dir. Trib.*, 1999, III, pag. 171, M. Giorgi, *Il revirement della Corte di Giustizia sulle condizioni soggettive per l'esenzione delle prestazioni di ricovero e cura*, in *Rass.Trib.*, 1999, pag. 1578, e *Sull'oggettività dell'esenzione da Iva delle operazioni di assicurazione e riassicurazione e sulla nozione di operazione accessoria*, in *Rass. Trib.*, 1999, pag. 648, C.Fusco, *Le esenzioni Iva e le operazioni finanziarie nell'Unione europea: spunti di riflessione*, in *Riv. Dir. Trib.*, 1998, III, pag. 44, S. Confalonieri, *Sulla interpretazione delle esenzioni Iva oggetto dell'art. 13 della sesta direttiva*, in *Riv. Dir. Trib.*, 1997, II, pag. 687, Lenz, *The jiurisprudence of the European Court of Justice in tax matters*, in *EC-Tax Review*, 1997, pag. 80.

(2) Cfr. sentenze Corte di Giustizia CE, *Cricket St. Thomas*, del 27 marzo 1990, C-372/88, Racc. pag. I-1345, punto 19, e *EKW e Wein & Co.*, del 9 marzo 2000, C-437/97, punto 42.

la Corte, ha rilevato che, con l'unica eccezione della versione italiana, tutte le versioni dell'articolo in questione si riferiscono solo alle prestazioni mediche relative alla salute delle persone, dovendosi quindi concludere che la nozione di prestazione medica contenuta nella direttiva non si presta ad una interpretazione estensiva che includa interventi medici diretti ad uno scopo diverso da quello della diagnosi e della cura di persone.

La conclusione cui è arrivata la Corte del Lussemburgo, pertanto, esclude dal regime di esenzione IVA tutte quelle attività mediche o paramediche che non risultino in qualche modo collegate alla cura ed alla guarigione, anche attraverso diagnosi ed analisi, di persone, a nulla rilevando peraltro che l'attività sia stata richiesta quale perizia da un giudice.

Diversamente da quella degli altri Stati aderenti la versione italiana dell'art. 13 della direttiva comunitaria non è così chiara nell'individuare, come presupposto per il regime di esenzione IVA dell'attività medica, una finalità curativa o diagnostica alla persona. Nonostante ciò, la normativa italiana che ha recepito la direttiva CE (articolo 10, punto 18, del D.P.R. 26 ottobre 1972, n. 633) sembra in linea con l'orientamento comunitario (3). Infatti, concedendo l'esenzione dall'imposta sul valore aggiunto alle sole "prestazioni sanitarie di diagnosi, cura e riabilitazione rese alla persona nell'esercizio delle professioni soggette a vigilanza...", essa non fa altro che richiedere una finalità curativa della persona come presupposto per la sua applicazione.

L'orientamento ministeriale sull'argomento, tuttavia, come rilevato da alcuni autori (4), non è certamente univoco: mentre alcune circolari (5) ministeriali richiedono che le prestazioni rese dai medici risultino finalizzate alla

(3) Con la sent. Comm. Trib. Centr., Sez. XV, del 4 novembre 1988, n. 7337, in *Boll. Trib.*, 1989, n. 13, pag. 1114, concernente una questione simile a quella oggetto di commento, si è stabilito che "*alle norme sopra richiamate non può darsi l'interpretazione estensiva voluta dall'Ufficio, anche in considerazione che si tratta di esenzioni e quindi di eccezioni alla norma impositiva, che vanno intese in senso ristretto e rigoroso*".

(4) Si veda A. Iorio, *Perizia medica imponibile IVA - Esenti solo le cure alla persona*, in *Il Sole 24/Ore*, 19 settembre 2000. Per un primo commento alla sentenza si veda anche C. Bannella, *Niente IVA sulle attività per la salute*, in *Il Sole 24/Ore*, 16 ottobre 2000.

(5) A titolo esemplificativo si vedano: Circ. Min. Fin., 16 ottobre 1990, n. 38/69949, in *Boll. Trib.*, 1990, n. 22, pag. 1640; Circ. 6 marzo 1987, n. 10/1114, in *Boll. Trib.*, 1987, n. 8, pag. 669; Ris. Min. Fin., 11 gennaio 1982, n. 330884, in. *Boll. Trib.*, 1982, n. 5, pag. 381; Circ. 3 agosto 1979, n. 25/364695, in *Boll. Trib.*, 1979, n. 17, pag. 1321.

diagnosi ed alla cura dei pazienti, altre (6) non sembrano richiedere tale presupposto per poter usufruire dell'esenzione IVA.

Discorso a parte merita poi l'art. 6, comma 10, della L. 13 maggio 1999, n. 133, il quale dispone che "le prestazioni rese dal medico competente, ai sensi del decreto legislativo 19 settembre 1994, n. 626, devono intendersi ricomprese tra quelle sanitarie di cui al numero 18) dell'articolo 10 del decreto del Presidente della Repubblica 26 ottobre 1972, n. 633". Invero, il decreto legislativo richiamato (7), nell'elencare le diverse attività e competenze dei medici in materia di sorveglianza sanitaria sui luoghi di lavoro, include anche funzioni e prestazioni che non implicano "la somministrazione di cure alle persone mediante diagnosi e trattamenti di una malattia o di qualsiasi altro problema di salute".

Le attività del medico competente, dettagliatamente elencate negli artt. 16 e 17 del D.Lgs. 19 settembre 1994, n. 626, pur essendo finalizzate al mantenimento della sicurezza sul posto di lavoro e quindi indirettamente alla prevenzione di una qualsiasi malattia cosiddetta "professionale", includono nel loro novero una serie di prestazioni, tra cui giudizi di idoneità alla mansione specifica al lavoro ovvero consulenze e pareri, la cui natura e finalità più che curative sono appunto di garanzia della sicurezza sul posto di lavoro ossia di carattere consulenziale.

Alla luce delle considerazioni svolte non appare pertanto improprio nutrire delle perplessità circa la potenziale contrarietà della normativa e/o della prassi italiana alla sentenza che si annota.

Francesco Amyas d'Aniello

(6) Si veda la Ris. 20 luglio 1996, n. 149/E/III/7/911, in *Boll. Trib.*, 1996, n. 15-16, pag. 1227, la quale sembra estendere il regime di esenzione IVA anche alle prestazioni rese in tema di consulenza sanitaria dai medici dipendenti dell'INPS senza porsi il problema della finalità curativa della prestazione stessa.

(7) Attuativo delle direttive 89/391/CEE, 89/654/CEE, 89/655/CEE, 89/656/CEE, 89/656/CEE, 90/269/CEE, 90/270/CEE, 90/394/CEE e 90/679/CEE riguardanti il miglioramento della sicurezza e della salute dei lavoratori sul luogo di lavoro.

II – B) Altre sentenze e decisioni
Other cases and judgements

1A) ITALY - SUPREME COURT OF CASSATION - TAX CHAMBER - JUDGEMENT NO. 3119 OF NOVEMBER 25, 1999 - MARCH 17, 2000.

Direct Taxes - Residents - Cross-border income - Article 36-*bis* D.P.R. n. 600/73 formal verification of tax returns - Application limits - Tax credit not recognised in respect of the dividends of american subsidiaries - Does not fall within it - Ordinary procedure of assessment - Is necessary.

Provisions as in Article 36, second paragraph of D.P.R. 600/73, introduced in order for the revenue authorities to quickly rectify oversights or mistakes in the calculation as they emerge from a formal tax return are to be intended as exceptional and preclude extensive application that refer to cases not expressly contemplated by the norm. It follows that the revenue authorities cannot use the said provisions in cases where it is necessary to proceed with the interpretations of general principles of law or of specific norms of internal laws, of international tax conventions and of Community law.

1B) ITALIA - SUPREMA CORTE DI CASSAZIONE - SEZIONE TRIBUTARIA - SENTENZA N. 3119 DEL 25 NOVEMBRE 1999 - 17 MARZO 2000.

Imposte dirette - Soggetti residenti - Redditi prodotti all'estero - Articolo 36-*bis* D.P.R. n. 600/73 controllo formale delle dichiarazioni - Limiti applicativi - Disconoscimento del credito d'imposta sui dividendi di società figlie residenti negli Usa - Non vi rientra - Ordinaria procedura di accertamento - È necessaria.

*Le disposizioni dell'articolo 36-*bis*, secondo comma, del D.P.R. n. 600/73, introdotte per rendere possibile la sollecita correzione, da parte dell'Ufficio, degli errori materiali o di calcolo rilevabili da un mero controllo formale della dichiarazione fiscale, hanno portata eccezionale ed escludono applicazioni estensive riferibili ad ipotesi diverse da quelle indicate tassativamente dalla norma. Ne discende che l'Amministrazione Finanziaria non può utilizzare tali disposizioni in fattispecie in cui si renda necessario procedere all'interpretazione di principi giuridici generali o di specifiche norme delle leggi interne, delle convenzioni internazionali in materia tributaria e del diritto comunitario.*

1. Svolgimento del processo

E.D., per sé e anche nell'interesse del coniuge dichiarante, E.M.T., impugnava con distinti ricorsi dinanzi alla Commissione tributaria di Perugia due cartelle di pagamento - rispettivamente per lire 1.160.326.000 e lire 879.730.000 - a seguito d'iscrizione nei ruoli formati dall'Ufficio imposte dirette di Gubbio sulla base di rettifiche effettuate, ai sensi dell'art. 36-*bis* del D.P.R. 29 settembre 1973, n. 600, alle dichiarazioni dei redditi per gli anni 1988 e 1989.

La Commissione, disposta la riunione dei ricorsi, li accoglieva.

La Commissione tributaria regionale dell'Umbria, con sentenza del 17 settembre 1997, accoglieva l'appello dell'ufficio, rilevando che il ricorso alla rettifica nelle forme previste dall'art. 36-*bis* del D.P.R. n. 600/1973 era legittimo, e che non era ammessa l'esposizione a credito d'imposta in relazione a dividendi di società estere, aventi sede negli U.S.A. che non abbiano assolto il debito IRPEG in Italia. Avverso tale sentenza E.D. e E.M.T. hanno proposto ricorso per cassazione, sulla base di un mezzo d'annullamento. Il Ministero delle finanze resiste con controricorso.

2. Il motivo del ricorso

Con un unico, articolato motivo privo di rubrica, denunciando violazione di norme di diritto, i ricorrenti deducono:

a) nessun avviso di accertamento in rettifica delle dichiarazioni era stato emesso dall'ufficio. L'esposizione di un credito d'imposta per i dividendi corrisposti da società aventi sede negli U.S.A., credito che l'ufficio considerava non ammesso, non può essere qualificato come un errore materiale di calcolo, come prescritto dall'art. 36-*bis* del D.P.R. n. 600/1973.

La costante giurisprudenza della Corte di cassazione esclude, infatti, la legittimità di correzioni automatiche quando la rettifica implichi la risoluzione di questioni giuridiche o esiga una motivazione. Le ipotesi previste dall'art. 36-*bis*, da considerarsi tassative, sono soltanto gli errori materiali o di calcolo, rilevabili *ictu oculi* dal controllo formale delle dichiarazioni.

Tale orientamento ha ricevuto una conferma nell'ordinanza della Corte costituzionale 7 marzo 1988, n. 430;

b) l'esposizione del credito d'imposta era stata fatta scientemente, sulla base della sentenza di primo grado che aveva accolto la tesi dei contribuenti.

Il potere di rettifica previsto dall'art. 43, D.P.R. n. 600/1973, al quale la sentenza impugnata si riferisce, non svolge alcun ruolo nel caso di specie, in quanto riguarda soltanto i nuovi elementi che possono essere presi in considerazione ai fini dell'accertamento;

c) la tesi che nega il diritto dei ricorrenti al credito d'imposta per dividendi di società estere, in quanto le stesse non hanno pagato al fisco italiano l'IRPEG, non considera che il rapporto in contestazione è regolato dalla Convenzione contro la doppia imposizione tra Italia e Stati Uniti d'America, firmata il 17 aprile 1984 e ratificata e resa esecutiva in Italia con legge 11 dicembre 1985, n. 763.

La Convenzione - che, come trattato internazionale, prevale sul diritto interno - stabilisce, all'art. 10, che le società aventi sedi in uno Stato siano ivi soggette all'imposizione diretta, per cui, se non venisse riconosciuto il credito d'imposta, il contribuente residente nell'altro Stato firmatario verrebbe ad essere tassato anche sulle imposte già pagate dalla società.

D'altra parte, l'art. 14 del D.P.R. n. 917/1986 stabilisce soltanto che «... al contribuente è attribuito un credito d'imposta pari a nove sedicesimi dell'ammontare degli utili stessi», e non condiziona in alcun modo tale credito al pagamento di qualsiasi imposta, né tanto meno fa riferimento all'IRPEG.

D'altra parte, non vi è dubbio che l'art. 1 della legge 26 dicembre 1977, n. 904, attribuisca il credito d'imposta non solo sui dividendi distribuiti su società aventi sede in Italia, ma anche su quelli distribuiti da società con sede negli U.S.A.

Il fatto che l'art. 10 della Convenzione preveda che le norme ivi contenute non riguardano gli utili delle società, coi quali vengono pagati i dividendi, e quindi non obblighi gli Stati firmatari a concedere il credito d'imposta sui dividendi provenienti da società avente sede nell'altro Stato non significa che la previsione di tale credito sia vietato alla legislazione interna dei due Stati.

L'art. 3, infatti, prevede espressamente che la Convenzione non limiti in alcun modo le esclusioni, esenzioni, deduzioni, crediti e altre facilitazioni, concessi dalla legislazione di ciascuno degli Stati contraenti o da specifici accordi fra gli stessi.

Infine, il principio di non discriminazione dettato dall'art. 24 della Convenzione prevede, non solo che i residenti di uno Stato contraente non possano essere assoggettati nell'altro Stato ad un'imposizione diversa o più onerosa di quella prevista per i residenti dell'altro Stato, ma anche che i residenti di uno Stato non possono essere assoggettati ad imposta su elementi di reddito derivanti dall'altro Stato in misura diversa o più onerosa rispetto a quella prevista per gli stessi elementi di fonte interna.

Per quanto si riferisce al credito d'imposta per imposte pagate all'estero (art. 16 del D.P.R. n. 917/1986) l'ufficio ha omesso di calcolare in detrazione il credito di cui all'art. 15 dello stesso D.P.R.

Pertanto i contribuenti, che hanno pagato negli U.S.A. l'imposta del 15% sui dividendi lordi percepiti, hanno conseguentemente diritto alla detrazione di questa imposta dall'IRPEF netta, avendo adempiuto a tutte le formalità prescritte per ottenere la detrazione.

3. Motivi della decisione

3.1. Il ricorso merita accoglimento, nei limiti che saranno di seguito precisati.

Secondo la costante giurisprudenza di questa Corte (1), la previsione dell'art. 36-*bis*, secondo comma, del D.P.R. n. 600/1973, introdotta dall'art. 2 del D.P.R. 24 dicembre 1976, n. 920, allo scopo di rendere possibile la più sollecita correzione da parte dell'ufficio degli errori individuabili nella dichiarazione sulla scorta di un mero controllo formale, ha carattere eccezionale, e non tollera applicazione estensiva a ipotesi diverse da quelle tassativamente indicate dalla legge. Pertanto, a tale strumento non può fare ricorso l'Amministrazione finanziaria ogniqualvolta sia necessario procedere, al di là del mero riscontro cartolare, ad attività di interpretazione ed applicazione di norme o principi giuridici, alla qualificazione di fatti o di rapporti, alla risoluzione di questioni di imponibilità o di deducibilità o relative all'applicabilità di norme di esenzione o di agevolazione.

Pertanto, per risolvere il problema sottoposto all'esame della Corte, è necessario verificare se le rettifiche apportate dall'ufficio alle dichiarazioni, a seguito del non riconoscimento di un credito d'imposta derivante dal pagamento di tributi su dividendi percepiti negli U.S.A. consistano o meno nell'applicazione di criteri automatici, ovvero presuppongano la risoluzione di questioni d'interpretazione e qualificazione giuridica.

Occorre, quindi, darsi carico della problematica introdotta dai ricorrenti al punto *c)* del motivo di ricorso.

3.2. La Corte ritiene che la tesi dell'Amministrazione finanziaria parta da una limitata visione dei problemi interpretativi suscitati dalla reciproca interferenza tra norme fiscali nazionali e norme di convenzioni bilaterali contro la doppia imposizione, visione che pretende di risolvere tali complesse questioni come se si trattasse di correggere errori di calcolo, rilevabili *ictu oculi*.

Occorre considerare che le convenzioni in materia di doppia imposizione, nella loro natura di norme di diritto internazionale di conflitto, hanno il fine di eliminare le sovrapposizioni dei sistemi fiscali nazionali, perché, in tal caso, le pretese fiscali degli Stati si sommerebbero, e i soggetti obbligati dovrebbero subire, per i loro redditi e patrimoni all'estero, un carico più gravoso, che finirebbe con l'ostacolare le attività internazionali economiche e d'investimento. Lo scopo di tali trattati è, pertanto, quello di stabilire che ad un potere impositivo su un determinato oggetto di uno Stato deve corrispondere una rinuncia all'esercizio del potere impositivo da parte dell'altro Stato.

(1) Si vedano, tra le ultime, le sentt. 11 settembre 1999, n. 9818; 11 settembre 1999, n. 9686 (in sintesi in *Corr. Trib.* n. 48/1999, pag. 3625 e in *Banca Dati* n. 2/2000, pag. 188); 23 novembre 1999, n. 12998.

Secondo la più autorevole dottrina giuridica dei Paesi in cui tali norme hanno grande rilievo nei rapporti economici internazionali (soprattutto gli U.S.A. e la Germania), la stessa funzione dei trattati sulla doppia imposizione comporta che nel sistema da essi introdotto costituisca principio regolatore fondamentale il divieto di discriminazione, anche nei trattati non conformi al modello OCSE, che non contengano (a differenza della Convenzione applicabile nella specie) una specifica clausola che recepisca tale principio.

Per quanto riguarda il caso in esame, è evidente che l'applicazione del regime fiscale nazionale ad un reddito proveniente da una società avente sede nell'altro Stato contraente, sul quale il percipiente ha assolto agli obblighi tributari in tale Stato, può portare, in pratica, ad una discriminazione nei confronti dei residenti che percepiscano lo stesso reddito da una società avente sede in Italia.

Oltre ai profili discriminatori evidenziati dai ricorrenti, occorre rilevare che la disparità di trattamento non riguarderebbe tanto i percipienti, ma piuttosto il complessivo regime fiscale societario, essendo evidente che un onere fiscale più sfavorevole sui dividendi pagati a soggetti che risiedono nell'altro Stato contraente svolge un effetto negativo, nel senso di distogliere gli investitori dal partecipare al capitale di società, i cui dividendi subiscano un carico fiscale più gravoso di quelli corrisposti da società nazionali.

In altre parole, verrebbe frustrato il già ricordato fine delle convenzioni contro la doppia imposizione.

Il problema dovrebbe essere risolto, quindi, mediante l'impiego dei criteri normativi previsti per dirimere i contrasti tra norme interne e norme o principi di fonti internazionali pattizie (come l'art. 128, del D.P.R. 22 dicembre 1986, n. 917).

3.3. In secondo luogo occorre considerare il ruolo del diritto comunitario, il quale entra in gioco come terza dimensione nella geometria dell'ordinamento giuridico e svolge la sua influenza, pur con differente intensità, anche nell'interpretazione ed applicazione di trattati internazionali conclusi da Paesi membri della Comunità Europea, tra loro e con Paesi terzi.

Riguardo a tale specie di trattati il regime comunitario è differente, a seconda che la disciplina convenzionale applicabile sia anteriore o posteriore all'entrata in vigore del Trattato di Roma (1° gennaio 1958).

L'art. 234 (307 nella versione consolidata a seguito del Trattato di Amsterdam), primo comma, del Trattato CE, fa salve le convenzioni internazionali concluse dagli Stati membri prima di tale data, per cui i diritti e gli obblighi sorti da tali convenzioni restano immodificabili e non subiscono l'influenza del diritto comunitario. Tale regola viene comunemente ricondotta al principio *pacta sunt servanda* ed è stata ribadita dalla Corte di Giustizia CE nelle sentenze 14 ottobre 1980, C-812/79, procedimento penale c. Juan C. Bur-

goa; 11 marzo 1986, C-121/85, Conegate Limited c. HM Customs & Excise.

Il secondo comma dell'art. 234 prevede che gli Stati membri devono assumere le necessarie misure per rimuovere le divergenze col diritto comunitario che possano derivare dall'applicazione di tali trattati.

Dalle predette disposizioni si ricava, *a contrario*, che i trattati internazionali conclusi dagli Stati membri con Paesi terzi successivamente all'entrata in vigore del Trattato di Roma (quale è la Convenzione applicabile nella specie) devono conformarsi al diritto comunitario, primario e secondario.

Prendendo in considerazione le convenzioni bilaterali contro la doppia imposizione, vi è da considerare, anzitutto, che la materia dell'imposizione diretta non rientra nelle competenze normative comunitarie. L'art. 220 (293 nella versione consolidata a seguito del Trattato di Amsterdam) prevede che gli Stati membri avviino tra loro, «per quanto occorra, negoziati intesi a garantire, a favore dei loro cittadini... l'eliminazione della doppia imposizione fiscale all'interno della Comunità».

Nella sentenza 14 febbraio 1995, C-279/93, Finanzamt K»ln-Altstadt c. Roland Schumacker, la Corte di Giustizia comunitaria ha enunciato i seguenti principi:

a) benché la materia delle imposte dirette non rientri, in quanto tale, nella competenza della Comunità, l'esercizio da parte degli Stati membri di questa competenza loro attribuita non può prescindere dal diritto comunitario;

b) il principio di non discriminazione previsto in generale dall'art. 6 (12 nella versione consolidata) del Trattato, e ribadito in altre norme, quale l'art. 48 nei confronti dei lavoratori dipendenti, osta a che la normativa di uno Stato membro in materia d'imposte dirette conceda ai residenti il beneficio di particolari procedure (nel caso di specie, il conguaglio annuale delle ritenute alla fonte a titolo d'imposta sulle retribuzioni), ma lo neghi a persone fisiche che percepiscano risorse di natura retributiva nel suo territorio, ma non abbiano ivi residenza.

L'applicabilità del principio di non discriminazione nel campo dell'imposizione fiscale diretta è stata ripetutamente affermata dalla Corte di Giustizia: si vedano soprattutto le sentenze 28 gennaio 1985, C-270/83, Commissione c. Francia; 13 luglio 1993, C-330/91, Commerzbank; 12 aprile 1994, C-1/93, Halliburton Services; 15 maggio 1997, C-250/95, Futura Participations.

In base a quanto già osservato, anche per i trattati coi Paesi terzi, pertanto, l'applicazione delle norme convenzionali nell'ambito intra-comunitario e dell'ordinamento dello Stato membro contraente incontra i limiti del principio di non discriminazione e del rispetto delle libertà fondamentali garantite dal Trattato.

La soggezione al diritto comunitario - nell'ambito della Comunità europea - del contenuto dei trattati coi Paesi terzi comporta, quindi, l'obbligo del giudice nazionale e della pubblica amministrazione di interpretare le disposizioni convenzionali in modo conforme al diritto comunitario e, nei casi in cui tale in-

terpretazione conforme non sia possibile, di trarre tutte le conseguenze che derivano dal contrasto tra le norme dei due ordini, prima fra tutte l'obbligo di disapplicare le norme (interne o di diritto internazionale pattizio) contrastanti con le disposizioni e principi di diritto comunitario, primario o secondario, che abbiano diretta applicabilità, quale è certamente l'art. 6 del Trattato CE.

3.4. La sintetica esposizione della complessa problematica in materia rende del tutto evidente come, alla stregua dei criteri tracciati dalla giurisprudenza di questa Corte, il sub-procedimento di riscossione (e in definitiva, di accertamento) di cui all'art. 36-*bis* non possa essere utilizzato per rettificare le dichiarazioni dei contribuenti nel senso preteso dall'Amministrazione finanziaria, e cioè per negare il diritto all'esposizione di un credito d'imposta derivante dal pagamento di tributi negli U.S.A. in relazione a dividendi corrisposti da società aventi sede in tale Stato, dovendo l'ufficio ricorrere all'ordinaria procedura di accertamento.

Ne deriva che gli atti impositivi e di riscossione adottati nell'ambito della procedura di cui all'art. 36-*bis* sono affetti da radicale nullità.

3.5. L'accoglimento delle censure sul punto comporta, quindi, l'accoglimento del motivo di ricorso, in relazione ai punti *a)* e *b)* ivi dedotti. Poiché ricorrono i presupposti per una decisione nel merito, ai sensi dell'art. 384, comma primo, cod. proc. civ., deve essere accolto il ricorso introduttivo dei contribuenti, ed annullati l'iscrizione a ruolo per la maggiore imposta dovuta a seguito della rettifica e le cartelle di pagamento.

L'invalidità degli atti di riscossione impedisce un esame della fondatezza della pretesa tributaria.

La Corte intende, in tal modo, aderire alla propria giurisprudenza (soprattutto ai principi affermati da Sez. Un.,13 luglio 1987, n. 6069, e 26 ottobre 1988, n. 5782) secondo cui è preclusa al giudice tributario - in caso di nullità radicale dell'atto impugnato - ogni possibilità di indagine sul merito del debito d'imposta, che implicherebbe una sua inammissibile sostituzione all'amministrazione nella ricerca della materia imponibile e dei presupposti del potere impositivo.

L'annullamento, pronunciato per violazione dell'art. 36-*bis* del D.P.R. n. 600/1973, non contiene, quindi, alcun accertamento sulla pretesa dei contribuenti a far valere un credito d'imposta, per le ragioni e nella misura da loro esposti in dichiarazione.

Ricorrono giusti motivi per compensare le spese dell'intero giudizio.

P.Q.M.

La Corte di Cassazione accoglie il ricorso per quanto di ragione; cassa la sentenza impugnata e, decidendo nel merito, accoglie il ricorso introduttivo; compensa le spese dell'intero giudizio.

2A) ITALY - SUPREME COURT OF CASSATION - TAX CHAMBER - JUDGEMENT NO. 10062 OF MAY 17 - AUGUST 1, 2000.

Direct Taxes - Business income - Multinational company groups - Requisite of inherence of costs and expenses - Correlation with only profits - To be excluded - Correlation with the activity - Applies.

Within a multinational company group the requisite of inherence of costs required by article 74, paragraph 3, D.P.R. 29 September 1973 (currently article 75, paragraph 5, D.P.R. 22 December 1986 no. 917) must refer to the business activity and not just to profits of the same. This principle renders legitimate attribution of part of the costs incurred by the foreign parent company to its permanent establishment in Italy, in relation to both general and operational expenses.

2B) ITALIA - SUPREMA CORTE DI CASSAZIONE - SEZIONE TRIBUTARIA - SENTENZA N. 10062 DEL 17 MAGGIO - 1 AGOSTO 2000.

Imposte dirette - Redditi d'impresa - Gruppi societari multinazionali - Requisito dell'inerenza dei costi ed oneri - Correlazione ai soli ricavi - Va esclusa - Correlazione all'attività - Sussiste.

Nell'ambito di un gruppo d'impresa a carattere multinazionale il requisito dell'inerenza dei costi richiesto dall'articolo 74, comma 3, del D.P.R. 29 settembre 1973, n. 597 (ora art. 75, comma 5, D.P.R. 22 dicembre 1986, n. 917), deve riferirsi all'attività dell'impresa e non soltanto ai ricavi della stessa. Tale principio legittima l'attribuzione di parte dei costi sostenuti dalla capogruppo estera alla sua stabile organizzazione in Italia, con riferimento sia alle spese generali che a quelle operative.

1. Svolgimento del processo

L'ufficio distrettuale delle imposte dirette di Roma emetteva, in data 3 settembre 1991, avviso di accertamento nei confronti della società di Hong Kong C. P. A., con il quale l'imponibile IRPEG - ILOR per il 1987 veniva determinato in lire 3.235.127.000, a fronte di una perdita dichiarata di lire 2.627.176.000. L'accertamento era basato su un processo verbale di constatazione del 1990 dell'ispettorato compartimentale delle imposte dirette, dal quale emergeva, fra l'altro, che alcuni costi di diretta imputazione ai voli erano stati direttamente rilevati in Italia ed erano rimasti a carico della filiale, mentre altri costi di diretta imputazione ai voli erano stati rilevati dalla casa madre ed erano stati attribuiti alla filiale italiana in base alla formula marittima o del volato; l'esigenza di rendere omogenei i costi specifici con i ricavi

della gestione Italia rendeva necessario che essi fossero interamente assunti dalla casa madre e poi girati a carico della filiale in funzione del volato.

Sempre sulla base delle risultanze del detto p.v. venivano ripresi a tassazione anche costi sopravvalutati per non corretta applicazione dei tassi di cambio applicabili, nonché spese non documentate, non di competenza o non inerenti.

La società impugnava l'accertamento dinanzi alla commissione tributaria provinciale di Roma, la quale accoglieva il ricorso limitatamente ai costi di diretta imputazione ai voli e alle spese non riconosciute.

Il ricorso dell'Ufficio alla commissione tributaria regionale del Lazio veniva rigettato con sentenza 16 gennaio-5 maggio 1997, così motivata per quanto interessa il presente giudizio di cassazione:

• la censura dell'ufficio riguardava il modo di computare i costi sostenuti da un'impresa che, organizzata in un gruppo di società, eserciti attività di trasporto aereo internazionale operando su scali situati nel territorio di Stati diversi. I costi sostenuti da un'impresa di tale specie sono ripartiti in costi specifici, sostenuti in ogni scalo e imputabili a ciascuna società nazionale del gruppo, e in costi operativi generali, denominati anche spese di regia. I primi non possono essere sostenuti che dalle società figlie: i secondi, sostenuti da società madre e da società figlie, sono interamente rilevabili solo dalla prima, che poi li deve equamente distribuire tra le società figlie;

• tenuto conto della duplice natura dei costi e della loro distribuzione tra le imprese del gruppo è corretto tenere separato il relativo computo e, al fine di realizzare una ripartizione il più possibile equa dei costi ai fini tributari, è corretto applicare alle sole spese di regia la formula del volato, mediante la quale viene imputata a ciascuna società figlia la quota dei costi generali secondo il rapporto tra le vendite accreditate da ciascuna di esse (produzione nazionale) e le vendite totali della società (produzione mondiale). Nella specie tale criterio risultava osservato. Avverso tale sentenza l'Amministrazione finanziaria ha proposto ricorso per cassazione, sulla base di un mezzo d'annullamento. La C. P. A. resiste con controricorso.

2. Il motivo di ricorso

2.1. Denunciando omessa o insufficiente motivazione su punto decisivo e violazione dell'art. 74 del D.P.R. 29 settembre 1973, n. 597, in relazione all'art. 360, n. 3 e n. 5, cod. proc. civ., l'Amministrazione ricorrente deduce:

• come non è contestato in causa, la C. effettuava voli di linea con partenza dall'Italia ed aveva ritenuto di poter imputare al bilancio della filiale italiana tutti i costi operativi sostenuti in Italia e parte di quelli sostenuti dalla casa madre a Hong Kong. Nell'accertamento dell'ufficio si considerava irra-

zionale e ingiustificata la ripartizione tra casa madre e filiale soltanto di una parte dei costi operativi;

• poiché il trasporto aereo, soprattutto su grandi distanze, prevede diversi scali, analizzando il processo produttivo, mentre è agevole stabilire il luogo dei ricavi, con riferimento alla vendita dei biglietti aerei, non è altrettanto facile localizzare i costi di produzione;

• l'ufficio ha applicato la cd. formula marittima anche ai costi operativi italiani, realizzando, così, l'applicazione di un medesimo criterio d'imputazione a tutti i costi;

• infatti, la ripartizione proporzionale dei costi operativi tra casa madre e singole filiali si giustifica con la considerazione che la filiale dello scalo di partenza non sostiene tutti i costi del volo, perché i passeggeri che hanno stipulato il contratto ricevono assistenza anche in altri scali di passaggio, e nella stessa situazione si trovano gli aeromobili ed il personale;

• se è razionale che alla filiale italiana facciano carico, in proporzione, anche i costi operativi sostenuti dalla casa madre e dalle altre filiali, altrettanta ripartizione deve avvenire per i costi operativi sostenuti dalla filiale italiana. Quest'ultima, infatti, non si trova sempre nella situazione di scalo di partenza, ma non manca di dare, con la propria organizzazione e con costi diretti, assistenza ai voli che fanno transito in Italia. Anch'essa, insomma, sostiene costi che afferiscono a ricavi di altri;

• su tale incongruità, dedotta fin dal primo grado di giudizio, la sentenza impugnata non ha fornito alcuna risposta, limitandosi ad osservare che i giudici di primo grado avevano correttamente applicato alle sole spese di regìa la formula del volato. Nella specie, infatti, non si tratta di spese di regìa;

• in conclusione, mentre il criterio di contabilizzazione seguito dalla filiale italiana della C. è corretto per le stabili organizzazioni il cui processo produttivo si svolge interamente in Italia, lo stesso non può avvenire per il trasporto aereo, il cui processo produttivo non si esaurisce nel territorio nazionale.

2.2. Nel controricorso si obietta quanto segue:

• nel ricorso l'Amministrazione si limita a dare una propria interpretazione di come si svolgerebbe l'attività di trasporto aereo internazionale, senza indicare in modo specifico le circostanze di fatto che avrebbero dovuto condurre ad una diversa decisione.

Rileva in proposito che già nel ricorso introduttivo era stato dedotto il difetto di motivazione dell'accertamento, dove si faceva riferimento a documenti non portati a conoscenza della società, diversi dal processo verbale di constatazione e che, in ogni caso, l'accertamento sulla connotazione dei costi sostenuti e accertati dalla casa madre non può essere effettuato in sede

di legittimità, non avendo l'Amministrazione dedotto alcunché sulla loro inerenza e misura;

• per quanto riguarda la dedotta violazione dell'art. 74 del D.P.R. n. 597/73, si deve premettere che le spese sostenute dalla casa madre, dalle quali trae vantaggio anche la stabile organizzazione in Italia, sono deducibili, essendo le stabili organizzazioni di soggetti non residenti assoggettate a tassazione in Italia ai sensi degli articoli 20 e 112 del D.P.R. n. 917/86, relativamente ai redditi prodotti nel territorio dello Stato;

• anche per la stabile organizzazione di un soggetto non residente deve essere individuata la ricchezza che promana dalla fonte produttiva al netto delle spese per la produzione del reddito (articoli da 52 a 68 del D.P.R. n. 917/86, secondo il combinato disposto degli articoli 113 e 95 dello stesso D.P.R.;

• il mancato o diverso riconoscimento della deducibilità delle spese da parte dello Stato dove è situata la stabile organizzazione e/o dello Stato di appartenenza dell'impresa può dar luogo a fenomeni di doppia imposizione. Il fenomeno è stato, pertanto, oggetto di disciplina in diverse convenzioni internazionali;

• in particolare, l'art. 7, terzo comma, dei modelli OCSE del 1963 e del 1977 prevede che nella determinazione degli utili di una stabile organizzazione sono ammesse in deduzione le spese sostenute per gli scopi perseguiti dalla stabile organizzazione, comprese le spese di direzione e le spese generali di amministrazione, sia nello Stato in cui è situata la stabile organizzazione, sia altrove.

Il commento al detto articolo stabilisce che per la determinazione delle spese generali sopportate dalla casa madre, attribuibili in concreto alla stabile organizzazione, può essere utilizzato un calcolo proporzionale tra il fatturato della medesima e quello dell'impresa nel suo complesso; inoltre che la deduzione accordabile alla stabile organizzazione per spese della casa madre ad essa attribuite non dipende dall'effettivo rimborso di queste ultime da parte della prima;

• l'ordinamento fiscale italiano non contiene alcuna disposizione in proposito.

Peraltro, nella risoluzione ministeriale 31 gennaio 1981, n. 9/2555, è stata ritenuta la correttezza del metodo indicato dal citato art. 7, terzo comma, dei modelli OCSE. Identica soluzione è stata adottata dalla nota 8 aprile 1980, n. 9/427, e nella circolare ministeriale 21 ottobre 1997, n. 271/E.

Pertanto, una volta che tale regola è stata ritenuta valida dalla stessa Amministrazione, in relazione alla stessa non possono introdursi le distinzioni che la stessa pretende nel caso di specie.

3. Motivi della decisione

Le censure dell'Amministrazione non meritano accoglimento.

Premesso che l'attribuzione di parte dei costi, sostenuti da un'impresa capo-gruppo avente sede all'estero, alle organizzazioni stabili costituite da detta impresa in Italia non formava, all'epoca della produzione del reddito in questione, specifico oggetto di regolamentazione normativa, nazionale o internazionale pattizia, deve osservarsi che neppure esigenze di carattere logico-sistematico impongono l'adozione del criterio indicato dall'Amministrazione finanziaria, anziché quello seguito dall'impresa.

Deve innanzitutto escludersi che - come sostenuto dalla controricorrente - il criterio seguito dall'Amministrazione finanziaria conduca di necessità ad una doppia imposizione. Infatti, se è vero che l'attribuzione ad una filiale estera di una parte dei costi e degli oneri subiti nel Paese in cui ha sede la società-madre comporta per la stessa un incremento di reddito, con conseguente incremento dell'imposizione fiscale nello stesso Paese, a tale inconveniente può essere dato rimedio con gli strumenti posti a disposizione dall'ordinamento fiscale nazionale. Per quanto riguarda le società aventi sede a Hong Kong, la Convenzione bilaterale col Regno Unito contro le doppie imposizioni 4 luglio 1960, così come modificata dal protocollo 4 novembre 1969, applicabile *ratione temporis* al caso di specie, non conteneva alcuna norma che si occupasse della ripartizione di utili e di costi tra società-madre e filiali, aventi rispettiva sede nei due Stati contraenti, a differenza dell'art. 7, n. 3, della Convenzione 21 ottobre 1988, uniformatasi al modello OCSE.

Quindi, l'inconveniente paventato dalla controricorrente è soltanto una eventuale e naturale conseguenza della mancanza di specifica regolamentazione pattizia e della non omogeneità degli ordinamenti fiscali dei due Paesi.

La correttezza del metodo seguito dalla C. P. A. si fonda, invece, su ragioni tratte dal sistema normativo nazionale.

La tesi dell'Amministrazione contrasta nettamente col sistema introdotto con la riforma tributaria del 1972. Come la stessa Amministrazione ha riconosciuto nelle proprie circolari, l'inerenza dei costi e degli oneri in materia di reddito d'impresa, richiesta dall'art. 74 del D.P.R. 29 settembre 1973, n. 597 (richiamato, ai fini della determinazione dell'imponibile IRPEG, dall'art. 21, comma secondo, del D.P.R. 29 settembre 1973, n. 598) deve essere riferita, non ai ricavi, ma all'oggetto dell'impresa.

Il Ministero delle Finanze, nella circolare 7 luglio 1983, n. 30/9/944 della Dir. Gen. imposte dirette, dopo aver premesso che «... tutti i costi e gli oneri sono deducibili se e in quanto provvisti dei requisiti della certezza, della competenza e dell'inerenza», precisava che dette componenti negative, a seguito delle modifiche introdotte al secondo comma del citato art. 74 con la

legge 4 novembre 1981, n. 626, erano deducibili se ed in quanto si riferissero ad attività da cui derivano ricavi e che, contrariamente al sistema preriforma, nel quale la spesa doveva presentarsi nella sua individualità non generica, secondo la nuova legislazione il concetto di inerenza «... non è più legato ai ricavi dell'impresa, ma all'attività della stessa». In tale prospettiva, nella stessa circolare viene ammessa la deducibilità delle spese sostenute per attività di certificazione, anche se volontaria, dei bilanci della società madre, nonostante sia palese che i detti costi non abbiano un diretto collegamento coi ricavi.

Tale orientamento è stato ribadito nella risoluzione n. 158/E del 28 ottobre 1998, nella quale si stabilisce che il concetto d'inerenza, accolto dalla riforma del 1972 e trasfuso nell'art. 75 del D.P.R. 22 dicembre 1986, n. 917, «... non è più legato ai ricavi dell'impresa, ma all'attività della stessa».

Si può aggiungere che l'abbandono del concetto di costo come entità collegata ai ricavi investe anche settori diversi dall'imposizione fiscale diretta: si consideri che, in materia di IVA, l'art. 19 del D.P.R. 26 ottobre 1972, n. 633, ammette che possa essere portata in detrazione l'imposta assolta, dovuta o addebitata a titolo di rivalsa «in relazione ai beni ed ai servizi importati o acquistati nell'esercizio dell'impresa».

Per quanto concerne l'attribuzione alla stabile organizzazione italiana di una quota delle spese sostenute dalla società madre di Hong Kong, la tesi dell'Amministrazione è, quindi, manifestamente in contrasto con le linee interpretative indicate dalla stessa Amministrazione in propri atti di portata generale, oltre che in quelli indicati dalla controricorrente, nei quali viene condiviso il metodo indicato nell'art. 7, n. 3, del modello di Convenzione OCSE 1977, secondo il quale *«Pour déterminer les bénéfices d'établissement stable, sont admises en déduction les dépenses exposées aux fins poursuivies par cet établissement stable, y compris les dépenses de direction et les frais généraux d'administration ainsi exposés, soit dans l'État où est situé cet établissement, soit ailleurs»*.

Tale indirizzo pare alla Corte pienamente condivisibile e, nella sua applicazione al caso concreto, assolutamente coerente con la logica della produzione del reddito d'impresa, a maggior ragione quando, come nella specie, la distribuzione dei costi avviene nell'ambito di un gruppo.

È evidente, infatti, che la strategia degli investimenti di un'impresa che si trova a capo di un gruppo non può essere confinata nei limiti di quella propria del cd. investitore singolo, per il quale il processo produttivo esige il conseguimento di una redditività in tempi brevi.

L'impresa capo-gruppo può, infatti, per le esigenze più svariate, che possono anche consistere nella tutela dell'immagine mondiale del gruppo o nell'intento di assicurarsi una maggiore presenza sul mercato, mantenere proprie strutture indipendenti, siano esse società partecipate, siano, come nel-

la specie, stabili organizzazioni senza personalità giuridica distinta, anche quando dalle stesse non conseguano ricavi in tempi brevi.

È del tutto congruente con tale prospettiva la ripartizione del peso finanziario, che l'impresa-madre sopporta, tra tutte le entità del gruppo.

In definitiva, la scelta - perfettamente legittima e coerente ad una corretta strategia aziendale di gruppo - della C. P. A. di attribuire alla propria organizzazione stabile in Italia una quota di costi (siano essi generali o operativi) da essa sopportati, non implica necessariamente che l'entità secondaria imputi alla società madre una quota dei costi da essa direttamente sostenuti, ma connessi con ricavi da essa non realizzati.

Il criterio che sta alla base dell'accertamento, infatti, non è soltanto arbitrario (in quanto impone all'impresa una scelta nell'ambito della strategia di gruppo, non sindacabile dall'Amministrazione finanziaria e dal giudice tributario), ma si risolve in una violazione del principio secondo cui il concetto di inerenza dei costi va riferito, non ai ricavi, ma all'oggetto dell'impresa.

È chiaro, del resto che - come la stessa Amministrazione finanziaria ha rilevato nella citata circolare 7 luglio 1983 - rientra nella competenza degli uffici accertare in concreto la sussistenza e la congruità dei costi dedotti, sulla base della documentazione fornita e di qualsiasi altro dato rilevante a tali fini.

Poiché nel caso di specie l'ufficio non aveva mosso rilievi sulla concreta effettività e congruità dei costi imputati dalla società madre, le considerazioni che precedono conducono al rigetto del ricorso dell'Amministrazione finanziaria, con la condanna della stessa alle spese, da liquidarsi in complessive lire 10.166.000 di cui lire dieci milioni per onorari.

P.Q.M.

La Corte di Cassazione

rigetta il ricorso e condanna l'Amministrazione ricorrente al pagamento delle spese liquidate in complessive lire 10.166.000 di cui lire dieci milioni per onorari.

3A) ITALY - PROVINCIAL TAX COMMISSION OF MILAN - XVIII CHAMBER - JUDGEMENT NO. 175/18, APRIL 4 - MAY 30, 2000.

Direct Taxes - Residents - Cross-border unearned income - Assessment - European Convention of judicial assistance - Penal rogatory - Information - Use - For fiscal purposes - Not permitted.

Proceedings following an international penal rogatory cannot be used for tax assessment. Probative material transmitted by a foreign State, in accordance with the penal assistance regime, cannot be used to institute legal proceedings of a tax nature for this would violate the European Convention of Judicial Assistance in penal matters signed in Strasbourg on April 20th 1959.

3B) ITALIA - COMMISSIONE TRIBUTARIA PROVINCIALE DI MILANO - SEZ. XVIII - SENTENZA N. 175/18 DEL 4 APRILE - 30 MAGGIO 2000.

Imposte dirette - Soggetti residenti - Redditi di capitale prodotti all'estero - Accertamento - Convenzione europea di assistenza giudiziaria - Rogatoria penale - Informazioni - Utilizzo - Ai fini fiscali - Non è consentito.

Gli atti conseguenti a rogatoria penale internazionale, non sono utilizzabili per l'accertamento fiscale. I mezzi di prova trasmessi da uno Stato straniero, in esecuzione del regime di assistenza penale, non possono essere utilizzati per il perseguimento di infrazioni di natura fiscale pena la violazione della Convenzione Europea di Assistenza Giudiziaria in materia penale firmata a Strasburgo il 20 aprile 1959.

Oggetto della domanda

Richiesta di annullamento degli avvisi di accertamento n. 4641047931, relativo ad IRPEF 1992, e n. 4641047932, relativo ad IRPEF 1993, emessi dal I Ufficio imposte dirette di Milano.

Svolgimento del processo

Nel presupposto che il ricorrente, sig. T. (...), abbia costituito la disponibilità della somma di L. 517.879.570 all'estero, e che questa disponibilità non sia stata dichiarata nel quadro W della Dichiarazione dei redditi per l'anno 1992, ai sensi dell'art. 6 della L. 227/90, nonché dell'art. 41 TUIR, l'Ufficio

II.DD. di Milano determina il reddito di capitale di L. 66.578.000, nonché un tasso di rendimento applicato per l'anno 1992 del 12,8558%. Il reddito è sottoposto a tassazione separata con aliquota del 30%: l'imposta corrispondente ammonta a L. 19.973.000. La relativa sanzione, irrogata ai sensi dell'art. 7 del D.Lgs. n. 472/97, è di L. 38.785.000 (pari al 150% dell'imposta accertata aumentata di un terzo).

Con ricorso tempestivamente inoltrato, i difensori di parte ricorrente, Avv.ti (...) F. e (...) G., eccepiscono la illegittimità dell'avviso di rettifica per manifesta illogicità dell'impianto motivazionale; contraddizione tra avviso di accertamento relativo all'anno 1992 e PVC sul tempo delle giacenze e mancanza di contraddittorio la irrituale acquisizione dei mezzi di prova e la non ammissibilità della prova orale (e, quindi, testimoniale); irrilevanza dei mezzi di prova (non è in alcun modo dimostrato che parte ricorrente era beneficiaria dei conti esteri); insussistenza dei presupposti per l'applicazione dei commi 1 e 2 dell'art. 4 L. n. 227/90.

Si lamenta, ancora, la sussistenza di *error in personam.* Si contesta, infine, la quantificazione del numero di giorni di presunta fluttuosità del capitale in parola, nonché la legittimità al ricorso all'art. 41-*bis*, del D.P.R. n. 600/73 e, specificatamente, del provvedimento sanzionatorio (ex artt. 7 e 17 del D.Lgs. 472/97).

Per l'anno 1993, invece, con l'avviso di accertamento n. 4641047932 di cui all'oggetto l'Ufficio ha accertato a carico del contribuente, agli effetti della tassazione separata, un imponibile di L. 24.896.000 al quale corrisponde un'imposta di L. 7.365.000. 18

I difensori tecnici concludono per l'annullamento di entrambi gli avvisi di accertamento.

Con separati atti depositati l'8/6/1999 si costituisce in giudizio l'Ufficio II.DD. di Milano per:

- contestare la mancanza di contraddizione e la illegittimità degli atti impugnati;
- confutare le argomentazioni contrarie sulla prova testimoniale, sulla ritualità di acquisizione degli atti, nonché sulla disponibilità-titolarità delle somme trasferite all'estero.

L'Ufficio accertatore conclude per il rigetto dei due ricorsi.

Con ulteriore memoria tempestivamente depositata, sia per l'anno 1992 che per il 1993, i difensori di parte ricorrente rilevano che il PVC allegato all'atto di costituzione in giudizio dell'Ufficio e relativo all'anno 1991 e che per gli altri atti allegati sono incomprensibili le ragioni della esibizione. Rilievi specifici vengono formulati con riferimento al contenuto dei PVC allegati dall'Ufficio II.DD. ed alla loro capacità probatoria in fatto. Sulla prova testimoniale, specificatamente, i difensori evidenziano come nel PVC relativo alle dichiarazioni di M. manchi un qualsiasi riferimento a T..

All'udienza di trattazione, tenutasi in forma pubblica su richiesta di parte ricorrente, i rappresentanti di quest'ultima ribadiscono ed illustrano quanto in atti.

Non è rappresentato l'Ufficio impositore.

Motivi della decisione

La Commissione, preliminarmente, procede alla riunificazione dei due procedimenti per evidente connessione oggettiva e soggettiva.

Nel merito, il Collegio evidenzia che gli atti utilizzati dall'Ufficio II.DD. per supportare il proprio accertamento sono conseguenti a rogatoria con la Svizzera, per cui appare fondata l'eccezione di inutilizzabilità nell'accertamento fiscale formulata da parte ricorrente in ossequio alla Convenzione Europea di Assistenza Giudiziaria in materia penale.

Infatti, l'art. 2, lett. *a)*, di tale Convenzione prevede la facoltà per lo Stato firmatario di rifiutare l'assistenza oggetto della rogatoria ove la stessa si riferisca ad infrazioni che lo Stato (destinatario della richiesta) considera come infrazioni politiche, oppure come infrazioni fiscali. Proprio con esplicito riferimento alla facoltà di cui all'art. 2, la Svizzera si è riservata espressamente il diritto di non accordare l'assistenza richiesta, se non alla condizione espressa che il risultato delle inchieste fatte in Svizzera e le informazioni contenute nei documenti trasmessi siano utilizzati esclusivamente per istruire e giudicare le infrazioni per le quali l'assistenza è fornita (cd. "principio di specialità"). Di conseguenza, poiché lo Stato elvetico rifiuta l'assistenza in materia fiscale o valutaria, i mezzi di prova trasmessi nel caso *de quo* all'Italia non possono essere utilizzati per il perseguimento di infrazioni di questa natura né, in ogni caso, per fini fiscali o comunque estranei al perseguimento di infrazioni penali di diritto comune, pena la violazione della Convenzione di cui la riserva è parte integrante.

Non rilevante è, invece, a giudizio di questa Commissione, l'eccezione in forza della quale gli atti impugnati sarebbero privi di efficacia per il semplice fatto che l'autorizzazione all'acquisizione da parte dell'Ufficio proviene dal PM titolare dell'indagine penale ed è emessa in un momento successivo al trasferimento degli atti stessi al GIP per l'emanazione dei provvedimenti di sua competenza. Si ritiene, infatti, che il PM resti il titolare dell'interesse alla tutela della riservatezza delle indagini e, pertanto, l'organo che può valutare l'opportunità o meno di rendere pubblici gli atti su cui ha svolto attività istruttoria.

A tal fine si ricorda che l'art. 329 cod. proc. pen. statuisce che «gli atti di indagine compiuti dal PM e dalla PG sono coperti dal segreto fino a quando l'imputato non ne possa avere conoscenza e, comunque, non oltre la chiu-

sura delle indagini preliminari». Alla luce di quanto sopra l'eccezione di parte ricorrente è priva di pregio per un duplice motivo: gli atti erano già conoscibili all'imputato e le indagini preliminari erano già chiuse all'atto dell'emissione del provvedimento da parte del PM.

La Commissione, inoltre, prende atto che la dichiarazione della Guardia di Finanza, secondo la quale non era stato possibile accertare il periodo di permanenza delle somme nella disponibilità del T., confligge, nell'assenza di ulteriori elementi probatori acquisiti per impulso dell'Ufficio II.DD., con l'utilizzo che quest'ultimo fa degli elementi acquisiti in rogatoria.

In buona sostanza, pur emergendo in modo inconfutabile che la movimentazione finanziaria che ha generato il presente contenzioso è stata unanimemente definita "operazione transitoria" e che la stessa Guardia di Finanza ha dichiarato *apertis verbis* che non è stata in grado di quantificare il tempo di permanenza di detta somma nel conto che si presume essere stato nella disponibilità del T., l'Ufficio accerta un reddito presunto nel presupposto che detta somma sia rimasta nella disponibilità del ricorrente per un intero anno solare. Detta conclusione, per quanto sopra esposto, non è condivisa da questa Commissione.

Gli elementi in atti fanno concludere, con plausibile certezza e prescindendo da altre considerazioni pur meritevoli di attenzione sviluppate dal ricorrente, per una sostanziale inattendibilità dell'accertamento induttivo opposto.

Ulteriore elemento critico meritevole di accoglimento è l'assenza nel fascicolo di causa del PVC relativo all'anno 1992. Sul punto si è potuto constatare dall'esame del fascicolo che è sostanzialmente corretta l'eccezione sollevata da parte ricorrente.

P.Q.M.

La Commissione accoglie i ricorsi riuniti. Spese compensate.

Sezione III - Documentazione

Section III - Laws, administrative practice and other official documentation

COMMMISSION OF THE EUROPEAN COMMUNITIES
COMUNICATION FROM THE COMMISSION
SUPPLEMENTARY CONTRIBUTION OF THE COMMISSION TO THE INTERGOVERNMENTAL CONFERENCE ON INSTITUTIONAL REFORMS
QUALIFIED MAJORITY VOTING FOR SINGLE MARKET ASPECTS IN THE TAXATION AND SOCIAL SECURITY FIELDS (*)

Brussels, 14-3-2000
COM (2000) 114 final

1. Introduction

The perspective of enlargement up to 28 Member States constitutes an important increase in terms of numbers and diversity of national economies and legal systems. The number of players in the Single Market whether national or private will almost double. In addition, the performance gap between Member States' economies will also enhance diversity in the Single Market. The fact that an important number of new Member States will be undergoing long term structural changes means that the Union will be faced with an evolving environment. The three effects combined will tend to bring out and accentuate the remaining imperfections of the Single Market, notably in the areas of social policy and taxation. Uneven levels of application of Community law, incompatible national rules and distortions of competition may affect the Single Market in a way that requires co-ordinated responses on behalf of the Community.

With the Economic and Monetary Union, the need for a greater co-ordination of fiscal and structural policies has increased. In addition, globalisation has reinforced the potential for spill over effects across Member States, which could distort the functioning of the Single Market. It should be recognised, however, that different levels and structures of taxation and of social protection could also reflect different levels of per capita income and productivity and do therefore not necessarily harm competition in the single market.

The Union can only cope with this challenge by enhancing the efficiency of its decision making process. Hence, the need for greater recourse to qualified majority voting, to the extent that it is necessary for the establish-

(*) See for of M. Benigna in Section IV of this number.

ment and functioning of the Single Market. The change in the decisional mode will leave unaffected the current distribution of competences as contained in the Treaty. The switchover from unanimity to qualified majority will merely enhance the decision-making capacity of the institutions.

In its Opinion of 26 January 2000 "Adapting the Institutions to make a success of enlargement" the Commission announced that it would provide a further contribution concerning the application of qualified majority voting in the social security and taxation fields. The approach proposed by the Commission implies a detailed examination of the relevant Articles of the Treaty in order to identify the decisions that should be taken by qualified majority versus those which should remain subject to unanimity.

2. The orientations for decision making in the area of taxation and social security

National provisions concerning taxation and social security reflect the fundamental preferences of national legislators in economic and social policies. The level of social protection and welfare benefits as well as the ways in which the revenue to finance such benefits is raised through taxation constitute the essence of sovereignty exercised by national parliaments. In general terms, these provisions express national choices concerning the degree of solidarity and support between public bodies and citizens. Such choices are usually "neutral" with regard to the European dimension.

However, there are few clearly defined types of national fiscal and social security provisions which cannot be considered "neutral" with regard to the functioning of the Single Market. These rules can affect the Single Market either due to their contents or to their nature. Their effects can broadly be classified into two categories: rules that are incompatible with Single Market objectives and rules that give rise to distorsions of competition in the Single Market.

a. Incompatibility of national rules with Single Market objectives

Traditionally, national rules on taxation and social security apply within a strictly national framework. By definition, they do not take account of cross-border considerations. Unless they do so, however, these national rules may impede the exercise of the four fundamental freedoms of the treaty (free movement of goods, persons, services and capital). Despite the completion of the Single Market and the advent of economic and monetary union, progress has generally been slow in removing cross-border obstacles. Many such obstacles remain. The resulting vacuum has increasingly

been filled by the European Court of Justice, which has, in numerous decisions, held aspects of national rules in both areas to be incompatible with the Treaty provisions on the four Single Market freedoms. In these cases Member States must amend their legislations in order to eliminate the possibility of discriminations on grounds of nationality contrary to the Treaty. However, such unilateral or bilateral modifications are not sufficient, and they often do not address situations where more than two countries are involved. It is unsatisfactory for the public to have to take legal action in order to obtain recognition of rights secured by the Treaties. At the same time, it is far from ideal for the Member States if Community law in this area is developped on an *ad hoc* basis by judgements of the Court of justice rather than via the political process. Moreover they give rise to uncertainty and may lead to an inconsistent application of Community rules across the board. As a result, administrative costs and legal insecurity mean that citizens and companies cannot make full use of their rights to move or invest in another Member State.

A Community solution would often mean that coherent application of Single Market law would not depend on the individual inititative of one economic operator who, possibly on the basis of a judgement from the European Court of Justice, would convince the authorities of one Member State to amend one specific aspect of the national legislation. Community solutions have the benefit of orderly policy making as opposed to a case by case approach.

b. Distortion of competition in the Single Market

Already in the Single Market of today national rules on taxation and social security tend to be influenced by policy choices in other Member States.

The fact is, that as the number of Member States increases so will the differences of development between Member States in the Union. Such divergences are lihely to broaden the gap between different national economies. Recent data (1) indicate that the average GNP per capita for the ten Central and Eastern European candidate countries, adjusted for purchasing power, is a third of the EU average; among the Central and Eastern European countries the lowest individual level is a third of that of the highest. As the state of development of national economies differ so will the policy considerations underlying national legislator's choices concerning the level of social protection and the corresponding level of revenue generation through fiscal policies. Policy choices against such different backgrounds may

(1) See Change and Choice in social protection. The experience of Central and Eastern Europe, Consensus 1999.

interfere with the overall objective of promoting a harmonious and balanced development of economic activities as well as sustainable growth and a high degree of convergence of economic performance (Article 2 EC). Thus, it will be important to ensure that co-ordinated responses at Community level remain possible, in order to address any distortions of competition in the Single Market.

c. Conclusion

In conclusion the Commission considers that almost doubling the number of Member States of the Union in the foreseeable future will tend to bring out and accentuate the remaining imperfections of the Single Market, notably in the areas of social policy and taxation. Uneven levels and distortions of competition require a Community response. If the Community does not avail of efficient instruments to address these issues at Community level, those negative side effects will hamper the harmonious development of the Union.

3. Available instrument

When defining such instruments the Commission proposes to draw on the experience of the integration achieved in the areas of social protection and taxation to the present day.

a. The type of intervention

Community intervention for the establishment of the Single Market can involve different degrees of regulatory intensity. The EC Treaty can broadly be said to distinguish between co-ordination of legislation, adoption of minimum rules and harmonisation of rules.

Co-ordination of national rules through Community legislation leaves national regimes as such untouched, but defines the interface between national regimes in relation to cross-border elements. Examples of such co-ordination are, in the social security field, regulation 1408/71 (2) and, in the direct tax field, the Council Parents/Subsidiaries and Mergers Directives (3).

(2) Regulation (EEC) n° 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community.

(3) OJ 1990, L 225/6 and OJ 1990, L 225/1.

The directives leave national rules on groups of companies and business reorganisations intact. They merely lay down rules limited to transactions involving companies from more than one Member State.

Another form of intervention is the adoption of minimum requirements. Such requirements are limited to the creation of a common minimum base of rules in the different national laws. In principle, minimum requirements, like coordination, solve the problem of interface between different national laws. An example of minimum requirements can be found in Directive 92/77 EEC (4) concerning tbe rates for value added tax. The Directive fixes the minimum rates but does not impose a specific rate. In the area of social security, Article 137 (3) EC provides for the adoption of minimum requirements. The first objective of such minimum standards is, of course, to secure an appropriate level of social protection but secondarily such rules also prevent distortions of competition.

Complete harmonisation, finally, may be necessary in cases where coordination of national provisions or minimum requirements do not permit the attainment of the objective of establishing the Single Market. The Sixth VAT Directive is an example of such harmonisation, despite the fact that the Directive also contains numerous derogations and exceptions.

b. Decision-making

Due to the unanimity requirement it has been difficult in recent years to make progress in a number of areas in which action is urgently required to ensure the proper functioning of the internal market and the unfettered exercise of the Treaty freedoms. Since the completion of the internal market and the advent of economic and monetary union no further steps to remove fiscal obstacles to cross-border activity have been possible. In the area of social security Member States have not yet agreed on any measure based on Article 137 (3) first indent, which provides for measures in the area of social security and social protection of workers.

The Commission considers that the scope for unanimity voting currently contained in the Treaty must now be narrowed for the sake of efficiency.

c. Conclusion

The Commission proposes to introduce qualified majority voting for in-

(4) Council Directive 92/77/EEC of 19 October 1992 supplementing the commons of value added tax and amending Directive 77/388/EEC (approximation of VAT), OJ L 316, 31.10.1992, p. 1-4.

struments allowing the co-ordination of national rules or the introduction of minimum requirements in the areas of taxation and social security set out in more detail below. As far as indirect taxation is concerned, where a significant degree of harmonisation has already been achieved, separate specific considerations apply.

4. Practical implications of this approach for taxation:

a. Co-ordination of national rules with a view to the removal of direct obstacles to the exercise of the four freedoms (ensuring compatibility of national rules with Single Market objectives)

The Commission considers that all Community measures necessary to remove a direct obstacle to the exercise of the four freedoms must in future be adopted by qualified majority. These measures will have as their objective to define the interface between national systems and thereby remove additional burdens to which the taxpayer is subject by reason of his cross-border situation, in particular discrimination and double taxation. Community legislation will therefore take the character of coordinating measures. These measures will not address obstacles that arise simply from the need to comply with more than one tax system or the lack of uniformity of tax systems. Unanimity would therefore, for example, continue to be required for the harmonisation of corporate taxation rates. Furthermore, the scope of measures adopted by qualified majority voting would be limited to situations involving more than one Member State. Community measures necessary for the functioning of the Single Market that also have an impact on purely internal situations would continue to require unanimity.

A measure providing for deductibility in the host country of pension contributions paid by migrant workers to a supplementary pension scheme in their home country would be one example of an issue that should be subject to qualified majority voting. Bilateral solutions may not address all aspects of the problems of individuals who work in more than two countries during their career. Another example would be the proposed Directive on a common system of taxation applicable to interest and royalty payments made between associated companies in different Member States. The proposal is designed to eliminate taxes levied at source on payments of interest and royalties between associated companies in different Member States with a view to avoiding double taxation. There, a Community solution would have the two advantages of eliminating those withholding taxes which are not currently eliminated under some bilateral tax treaties and of dealing with the incomplete double taxation relief in triangular situations which bilateral treaties cannot,

by their very nature, address. By contrast provisions harmonising taxation of interest and royalty payments would still require unanimity.

b. The specific situation of free movement of goods and services

Value Added Tax

The free movement of goods and services is a specific case because questions linked to the free movement of goods have been dealt with in a detailed manner by, in particular, the Sixth Directive on VAT (5) that created a common base for levying value added tax. However, ever since its adoption in 1977, except for the 1992 amendments to remove physical controls at the frontiers, the common VAT system has not known any significant evolution. The system was conceived in the early seventies prior to the advent of the Single Market and prior to the upsurge of the services industry. This system is hardly adapted to the economic situation of today. The establishment of the Single Market has entailed a large scale liberalisation of economic activities. For example, services in the public interest were either exempted from a VAT regime or excluded because of their being provided by public authorities. This situation now gives rise to distortions of competition in a liberalised environment (the transport of a letter by a private mail service is subject to VAT, whereas the "postage stamp" issued by a public authority which pays for a similar service, is not). In addition new forms of economic activity such as electronic commerce are difficult to address with the existing rules, which in turn gives rise to tax avoidance schemes which lead to erosion of the tax base. The Directive no longer responds to the needs of operators who need simple, modern and more uniform rules within the Single Market. Inadequate rules may affect the Single Market in the same way as a lack of rules altogether.

Given the existing considerable degree of harmonisation in the area of VAT, new instruments will have to provide for the adaptation of the existing rules in order to maintain that acquis.

The Commission proposes to specify in detail which aspects of the VAT rules should now be subject to qualified majority voting. Qualified majority voting should apply for decisions which

- modernise and simplify existing Community rules in order to eliminate distortions of competition
- ensure a uniform application of existing taxation rules and guarantee the simple and transparent application of such rules.

(5) Directive 77/388 of 17 May 1977, OJ No. L 145/1.

The changeover to a new common VAT system, implying fundamental changes concerning the localisation of operations and the reattribution of VAT income between Member States, would clearly have to be decided by unanimity. The same applies to rules concerning the determination of the rate (normal rate and reduced rate, non-obligatory character of reduced rate) or for rules which are different between Member States but which do not in themselves constitute an obstacle to the operation of the Single Market (for example, the exemption schemes for real estate operations or in the social and training sector).

Excise duties

The problems explained above concerning the VAT rules are mirrored in the Community excise duty rules. Because of the rapid evolution of products to which Community excise duties apply, such duties require constant adaptation, which the current unanimity requirement does not allow for. In fact, the products that are subject to excise duties were defined a decade ago and the definition does not correspond to the evolution of market requirements (taste, fashion). In the area of alcohol and alcoholic drinks a number of new products do not fall into the categories of products defined by the directive. The question of whether a new product falls into one or the other category is therefore important for the taxation issue. In the absence of clear rules, distortions of competition and possibly even fraud related issues will continue to arise. A similar situation can be observed as far as tobacco products and mineral oils are concerned.

The Commission proposes that qualified majority voting should apply for decisions which

- modernise and simplify existing Community rules in order to eliminate distortions of competition
- ensure a uniform application of existing taxation rules and guarantee the simple and transparent application of such rules.

Obviously, rules concerning the place of taxation or the fixing of rates for products subject to excise duties will remain subject to unanimity.

Tax measures of a primarily environmental nature

The protection of the environment is one of the Union's key priorities (Articles 2 and 6 of the Treaty). In the recent past, Member States have increasingly used taxation measures as means to address environmental preoccupations by seeking to modify the operators' behaviour in a way more favourable to environmental protection. While the implementation of such measures constitutes a means to address the overall objective of improvement environmental protection such legislation can have the secondary effect of creating obstacles to the functioning of the Single Market. Accession

of new Member States with economies undergoing important structural changes will require an increased recourse to efficient measures, including fiscal measures, to ensure the pursuit of the environmental objectives of the Treaty, which provide for the sustainable development (Article 6 EC) and the preservation and improvement of the quality of the environment (Article 174 EC). Therefore, the Commission considers that taxation measures that have as their principal objective the protection of the environment and have a direct and significant effect on the environment also requires qualified majority voting.

For example, a levy based on the sulphur contents of certain fossil products clearly has an environmental objective, as sulphur emissions are a principal cause of acidification. Taxation of products containing sulphur would discourage use and proliferation of such products. A differentiation in tax rates to take account of sulphur contents could, therefore, be adopted by qualified majority voting. On the other hand, a uniform increase of excise duties on mineral oils does not in itself pursue an environmental objective even if such measure could have a secondary impact on the environment. Such a decision would therefore continue to be taken by unanimity.

The Commission recalls that such change of the decisional mode does not affect the distribution of competencies currently contained in the Treaty. In particular, such modification could not be seen as permitting the introduction of Community fiscal measures for the benefit of the Community budget. Article 269 (2) EC clearly establishes that decisions on own resources are taken by unanimity.

c. Rules for combating fraud, fiscal evasion and avoidance

Provisions directly governing the levying of direct and indirect taxes and aimed at preventing fraud, evasion (6) or tax avoidance (7) are necessary to eliminate cases of double non-taxation in cross-border situations and to prevent circumvention of existing provisions, particularly in the VAT field. Such operations can have the effect of eroding taxation bases in the Member States concerned. Provision already exists for individual Member States to derogate from Community rules to combat evasion or avoidance and this has,

(6) Tax evasion is understood as an act of illegal withholding of taxes from the tax authorities. By definition tax evasion is illegal under the national law applicable to the tax operation in question.

(7) Tax avoidance is the setting up of an economic operation in a way to minimise the tax impact of such operation by exploiting existing loopholes in the applicable legislation. By definition tax avoidance is legal.

on occasion, been used as a mechanism for allowing several Member States to apply the same derogation. It would be preferable in such cases to amend the provisions of the Sixth Directive (8) itself by qualified majority.

In the area of direct taxation, the objective of a new Treaty provision would be to allow a more effective tackling of situations of double non-taxation, in particular by allowing adoption of coordinating Community measures by qualified majority voting. The Commission's savings taxation proposal addresses the issue of tax evasion in the direct tax field (9). Such measures are not aimed at limiting the freedom of companies and citizens to take advantage of the different national tax rates in order to reduce their tax burdens.

d. Mutual assistance and co-operation between tax authorities

Measures on mutual assistance and co-operation between tax authorities currently fall under the general legal basis of Article 95 EC and are therefore already subject to qualified majority voting. An example of such a measure would be the Fiscalis programme, which was adopted under Article 95 EC. Another would be the proposed Directive amending Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, tax and other measures, which has been proposed under Article 95. However, in an effort to improve legal certainty and understanding of the provisions in question the Commission prefers to bring such measures into a single chapter of the Treaty dealing with both tax measures and measures on assistance and co-operation between tax authorities.

5. Practical implications of the Commission approach for social security

a. The removal of direct obstacles to the Single Market (ensuring compatibility of national rules with Single Market objectives)

Article 42 EC, already in co-decision procedure provides for the adoption of measures necessary for establishing the free circulation of workers. The most important legal instrument adopted on this basis is Regulation 1408/71. This regulation provides in essence for the co-ordination of national social security provisions in order to take account of cross-border elements. As na-

(8) Directive 77/388 of 17 May 1977, OJ No. L 14S/1.

(9) COM (98) 295, OJ C 150, 28.5.1999, 184.

tional provisions evolve, the Community instrument should also evolve in order to maintain the beneficial effects for the free movement of workers. The numerous adaptations of regulation 1408/71 have not always achieved the desired objective because of the unanimity requirement in Article 42. Moreover this instrument needs to be simplified and modernised. The need for a general overhaul of the legislation was recognised as early as 1992 when the Edinburgh Council appealed for simplification of co-ordination rules. In its 1997 Communication: "An Action Plan for Free Movement of Workers" (10), the Commission also recognised that modernisation and simplification of the rules on the co-ordination of social security schemes were essential to make them "more efficient and user friendly". To this end the Commission adopted on 21 December 1998 a proposal for a new simplified co-ordination Regulation (11). The adoption by unanimity requirement in Article 42 makes negotiations on this proposal in the Council very difficult.

The Commission therefore proposes that Community co-ordination in order to facilitate the free movement of workers should in the future be adopted by qualified majority (12).

In addition, the Commission considers it necessary to widen the scope to beneficiaries over and above workers. The legal instruments adopted on the basis of Article 42 (Regulation 1408/71, Regulation 574/72 and Directive 98/49) have Article 308 as a second legal basis. This basis has been added in particular to allow the extension of Regulation 1408/71 to self-employed persons (by Regulation 1390/81). There is indeed no specific legal basis for the social security co-ordination for persons other than workers. Later Article 308 also allowed the extension to students (by Regulation 307/1999). In the absence of an extension of the personal scope of Article 42 application of qualified majority voting would remain theoretical. The adoption of social security provisions for persons other than workers in the single Community instrument would still require recourse to Article 308 and therefore unanimity.

Therefore this Article should be redrafted to cover not only migrant workers but all persons who exercise the Aght to move and reside freely within the union (13).

(10) COM (97) 586 final.

(11) COM (1998) 779 final.

(12) See also the explicit reference to Regulation 1408/71 in Communication of 26.1.2000 COM (2000) 34 under point 10. (iii).

(13) See footnote ** of Annex 2 of the Communication of 26.1.2000.

Finally the possibility should be given to the Council to extend wholly or partly the instruments adopted under the redrafted Article, to non-EC-nationals legally residing within the territory of a Member State. This is in line with the conclusions of the European Council of Tampere which called for the adoption of a general statute for third country nationals legally residing in the Member States. The Tampere Council also stressed that such rules should be aligned to the greatest possible extent to the rules applying to citizens of the Union.

The attainment of these objective is hampered by the absence of a clearly specified legal base. Article 63 EC cannot be applied in this context as the provision only concerns the admission and residence of third country nationals. The Commission considers therefore that the best way forward would be the extension of article 42 as the appropriate legal bases for adopting rules that mirror, to the extent necessary, the rules adopted for citizens of the Union (14).

b. Prevention of distortion of competition

Article 137 (3) first indent constitutes the legal basis for adopting measures in the area of social security. Measures based on Article 137 must be confined to minimum requirements for gradual implementation and can not permit fully-fledged harmonisation. The Commission considers it necessary that such minimum standards should be adopted by qualified majority voting to allow for the effective exercise of the right to free movement or to prevent distortions of competition.

Extending qualified majority voting to social security and the social protection of workers in this way is wholly in line with meeting the objectives set out in Article 136. The Commission recalls that in its Opinion of 26 January 2000, it proposed to apply qualified majority voting as a general rule for decision-making under the EC Treaty. As a consequence of that approach, decisions under Article 137 (3), 2nd to 5th indent, should be subject to qualified majority voting because such decisions do not comply with the criteria that according to the Commission in its opinion of 26 January 2000 would justify maintenance of unanimity. The remaining issue was Article 137, (3), 1st indent. Social security and social protection are intimately and inextrica-

(14) The current Treaty already provides for .such extension mechanism by qualified majority concerning service providers who are third country nationals and who are established in the Community. ("The Council may, acting by a qualified proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and are established within the Community").

bly linked to most of the objectives in the area of social policy (eg. improved living conditions, proper social protection, the development of human resources, and combating exclusion) and there is thus a strong case for extending to this field the decision making mechanism already used to guarantee improving standards in other fields with a bearing on competitiveness and the Single Market such as health and safety, working conditions, integration of persons excluded from the labour market, and aspects of equality between men and women. Community intervention in the field of social security and social protection would, of course, be limited by the imperatives to respect national practice and maintain competitiveness contained in Article 136, and the clear limits that Article 137 (2) places on the nature and effects of any measure to be adopted.

6. Conclusion

In conclusion, the Commission proposes to the Conference that qualified majority voting should be introduced for

- adoption of coordinating provisions intended to remove a direct obstacle to the exercise of the four freedoms, and in particular to prevent discrimination and double taxation
- measures which modernise and simplify existing Community rules in the indirect tax area in order to eliminate distortions of competition
- measures which ensure a uniform application of existing indirect taxation rules and guarantee the simple and transparent application of such rules
- taxation measures which have as their principal objective the protection of the environment and have a direct and significant effect on the environment
- adoption of provisions directly governing the levying of tax and aimed at preventing fraud, evasion or tax avoidance in order to eliminate cases of double non-taxation in cross-border situations and to prevent circumvention of existing provisions, particularly in the VAT field
- measures of co-ordination of social security schemes in order to facilitate the free movement of persons
- measures providing for minimum requirements which are necessary to allow for the effective exercise of the free movement of persons or to prevent distortions of competition through artificial lowering of social protections standards.

In addition the Commission proposes with a view to consolidating the Treaty and providing for more readily understandable provisions

- To widen the scope of beneficiaries of Article 42 EC over and above workers to include all persons exercising a right of free circulation and to al-

bly linked to most of the objectives in the area of social policy (eg. improved living conditions, proper social protection, the development of human resources, and combating exclusion) and there is thus a strong case for extending to this field the decision making mechanism already used to guarantee improving standards in other fields with a bearing on competitiveness and the Single Market such as health and safety, working conditions, integration of persons excluded from the labour market, and aspects of equality between men and women. Community intervention in the field of social security and social protection would, of course, be limited by the imperatives to respect national practice and maintain competitiveness contained in Article 136, and the clear limits that Article 137 (2) places on the nature and effects of any measure to be adopted.

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- measures providing for minimum requirements which are necessary to allow for the effective exercise of the free movement of persons or to prevent distortions of competition through artificial lowering of social protections standards.

In addition the Commission proposes with a view to consolidating the Treaty and providing for more readily understandable provisions

- To widen the scope of beneficiaries of Article 42 EC over and above workers to include all persons exercising a right of free circulation and to al-

low the Council to extend wholly or partly the existing instruments to non-EC-nationals.

• To include in the tax chapter measures on mutual assistance and co-operation between tax authorities which would currently be concluded on the basis of a provision in another chapter of the Treaty.

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Annex

Current text of EC Treaty

ARTICLE 93

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Artide 14.

ARTICLE 42

The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into accoount under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

The Council shall act unanimously throughout the procedure referred to in Anticle

ARTICLE 137

1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- the integration of persons excluded from the labour market, without prejudice to Article 150;
- equality between men and women with regard to labour rnarket opportunities and treatment at work.

2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation aod development of small and medium sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions.

The Council, acting in accordance with the same procedure, may adopt measures designed to enconrage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.

3. However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas:

- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;
- conditions of employment for third country nationals legally residing in Community territory;
- financial contributions for promotion of employment and job creation, without prejudice to the provisions relating to the Social Fund.

4. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3.

In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.

5. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

6. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts.

Draft amendment

ARTICLE 93

1. The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions **[...] concerning the laws and regulations of Member States on [...] direct and** [...] indirect taxation to the extent that such **provisions are** necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.

2. By way of derogation from Paragraph 1 the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt:

- measures for the coordination of provisions laid down by law, regulation or administrative action in Member States in order to remove direct obstades to the free movement of goods, persons, services or capital arising from tax provisions and in particular to prevent discrimination and double taxation;

- measures for the coordination of provisions laid down by law, regulation or administrative action in Member States concerning direct taxation in order to prevent fraud, evasion or tax avoidance;

- measures concerning value added tax, excise duties and capital duty which modernise or simplify existing Community rules or ensure a uniform application or ensure the simple and transparent application of such rules, other than those which fix the rates of tax or bring about a general change in the system of taxation;

- measures concerning indirect taxation in order to prevent fraud, evasion or tax avoidance and to prevent circumvention of existing provions

- taxation measures which have as their principal objective the pursuit of the environmental objectives of the Treaty such as laid down in particular in enviromnental objectives of the Treaty such as laid down in particular in Article 174, and have a direct and significsnt effect on the environment (15).

3. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt provisions necessary for mutual assistance, co-operation and exchange of information between tax authorities within the Community with a view in particular to combating fraud, evasion or avoidance.

ARTICLE 42

The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for **persons**; to this end it shall notably make arrangements to secure for migrant persons and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

[deletion]

The Council may, acting in accordance with the same procedure, extend wholly or partly the benefit of this system to nationals of a third country, who are lepally resident within the territory of a Member State.

ARTICLE 137 (16)

1. With a view to achieving the objectives of Article 136, the Community

(15) Article 175 (2) should be deleted, because the remaining issues would fall under the general rule of qualified majority as the commission explained in its Communication of 26 January 2000.

(16) The proposed draft also includes the elements contained in the Commission's opinion of 26 january 2000.

shall support and complement the activities of the Member States in the following fields:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- the integration of persons excluded from the labour market, without prejudice to Article 150;
- equality between men and women with regard to labour market opportunities and treatment at work.

- social security and social protection of workers;

- protection of workers where their employment contract is terminated;

- representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;

- conditions of employment for third country nationals legally residing in Community territory;

- financial contributions for promotion of employment and job creation, without prejudice to the provisions relating to the Social Fund.

2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions.

The Council, acting in accordance with the same procedure, may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.

[deletion]

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2.

In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and

labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.

4. The provisions adopted pursuant to this Article shall not prevent any Menlber State from maintaining or introducing more stringent protective measures compatible with this Treaty.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts.

1A) KINGDOM OF THE NETHERLANDS - MINISTRY OF FINANCE - NOTE NR. DB98/4355, FEBRUARY 18, 1999.

Tax Treatment of proceeds from Reverse Convertible Notes - Domestic Income Tax - Characterization as interest income.

Reverse Convertible Notes have to be regarded as interest-producing loans for domestic income tax purposes. All payments received by the holder at the various coupon dates during the outstanding period of the note are to be regarded as interest payments for Netherlands income tax purposes (*).

1B) NETHERLANDS MINISTRY OF FINANCE.

Fiscale behandeling van reverse convertible notes - Besluit (art. 7, 24, 25a en 27 Wet IB 1964; art. Wet Vpb. 1969)

De staatssecretaris heeft een besluit aangegeven wat de fiscale gevolgen van een nieuw financieel instrument, de reverse convertible note, zijn voor zowel de crediteur als de debiteur.

210 *Besluit staatssecretaris van Financiën 18 februari 1999, nr. DB98/4355*

1. Inleiding

Mij is de vraag voorgelegd wat de fiscaalrechtelijke behandeling is van de zogenoemde reverse convertible notes (hierna: RCN) zoals deze recent door een aantal banken zijn uitgegeven.

Onder een RCN wordt verstaan een lening waarvan de debiteur bij de (vervroegde) aflossing kan kiezen tussen een aantal mogelijkheden:

- betaling van de pariwaarde van de RCN;
- betaling van de tegenwaarde van een mandje van vermogenstitels (doorgaans (certificaten van) aandelen, vandaar dat hierna steeds van "aandelen" wordt gesproken);
- bijschrijving van de aandelen zelf op een effectenrekening van de crediteur (hierna: participant).

De aandelen zijn geen aandelen van de debiteur of een met de debiteur verbonden lichaam.

Op de RCN wordt rente vergoed. De rente is relatief hoog omdat daarin in economische zin mede een vergoeding voor een geschreven optie is be-

(*) See note of C. ROTONDARO, in Section IV of this number.

emissie dan wel de latere verwerving van de obligaties. Voorts kan een waardedaling voortvloeien uit een ontwikkeling van de rentestand. Waardedelingen van de RCN liggen in de vermogenssfeer en kunnen dus niet leiden tot een aftrekpost of een correctie op de te belasten rente.

c. Aflossing tegen een lagere dan de pariwaarde

In de mij bekende gevallen heeft de debiteur de keuze de aflossing te laten plaatsvinden tegen de parie?waarde van de RCN dan wel tegen de (lagere) waarde van het pakket aandelen dat in de emissieprospectus is vermeld. De (vervroegde) aflossing tegen de (lagere) waarde van het aandelenpakket leidt in het jaar van aflossing niet tot een post die het inkomen raakt van de belastingplichtige die de RCN tot zijn privé-vermogen moet rekenen. Het resultaat ligt immers in de vermogenssfeer.

Wellicht ten overvloede merk ik nog op dat in sommige gevallen de aflossing - indien gekozen wordt voor de aflossing anders dan tegen de pariwaarde van de lening - in aandelen en/of in contanten tot het bedrag van de tegenwaarde van de aandelen kan plaatsvinden. Naar mijn oordeel is de vormgeving van de aflossing - bijschrijving van de aandelen op een effectenrekening dan wel de uitbetaling van de tegenwaarde van de aandelen in contanten - voor de fiscaalrechtelijke beoordeling van de RCN niet relevant.

3. Belastingheffing bij de debiteur

Bij de debiteur kan het gehele bedrag dat als rente in fiscale zin bij de particuliere belegger in aanmerking moet worden genomen ten laste van de winst worden gebracht. Het verschil tussen de pariwaarde en de aflossing is uiteraard tot de winst te rekenen.

4. Renterenseignering

In het voorgaande ligt besloten dat het volledige bedrag van de vergoeding op de RCN, hoe ook genoemd, in de renterenseignering moet worden meegenomen.

5. Bijzondere gevallen

Gevallen waarin de RCN wordt uitgegeven door fondsen met een bijzonder karakter of waarin de toepassing van artikel 25a van de Wet IB 1964 wordt overwogen, moet worden voorgelegd aan de Kennisgroep Bancaire Producten, door tussenkomst van de Portefeuillehouder IB-niet winst van de Belastingdienst/Directie particulieren te Utrecht. Hetzelfde geldt voor gevallen waarin de toepassing van dit Besluit anderszins vragen oproept.

2A) GERMANY - MINISTRY OF FINANCE - NOTE BMF, SCHRB. V. 7.10.1999, IV C 1-S 2252 - 589/99

Tax Treatment of proceeds from Reverse Convertible Notes - Domestic Income Tax - Characterization as interest income.

Reverse Convertible Notes have to be regarded as interest-producing loans for domestic income tax purposes. All payments received by the holder at the various coupon dates during the outstanding period of the note are to be regarded as interest payments for German income tax purposes (*).

2B) BESTEUERUNG VON HOCHZINS-ANLEIHEN MIT RÜCKZAHLUNGSWAHLRECHT DES EMITTENTEN

BMF, Schrb. v. 7.10.1999, IV C 1-S 2252 - 589/99

Die obersten Finanzbehörden des Bundes und der Länder haben die steuerliche Behandlung festverzinslicher Anleihen erörtert, die mit seinem Zinskupon ausgestattet sind und bei denen der Emittent die Wahl hat, ob er sie zum Nennwert zurückzahlt oder ob er dem Inhaber der Anleihe statt dessen eine bei Ausgabe bereits festgelegte Anzahl bestimmter Aktien überträgt.

Nach dem Ergebnis der Erörterung sind die Zinsen aus dem Kupon in voller Höhe als Kapitalertrag nach § 20 Abs. 1 Nr. 7 EStG bzw. im Veräußerungsfall nach § 20 Abs. 2 Nr. 3 EStG ("Stückzinsen") steuerpflichtig. Nach § 43 Abs. 1 Nr 7 bzw. 8 EStG unterliegen sie dem Zinsabschlag.

Erfolgt die Rüchkzahlung der Anleihe in Form von Aktien, deren Wert unter dem Nennwert der Anleihe liegt, erleidet der Anleger - ohne Berücksichtigung des in aller Regel weit über dem Marktzins liegenden Zinskupons - einen wirtschaftlichen Verlust. Dieser Verlust ist der steuerlich unbeachtlichen Vermögens ebene zuzuordnen. § 20 Abs. 2 Nr. 4 Buchst. c EStG ("Schuldverschreibungen..., bei denen die Höhe der Erträge von einem ungewissen Ereignis abhängt") findet keine Anwendung, weil lediglich die Rendite ungewiß ist, nicht aber die Höhe der Erträge.

LATIN AMERICAN COUNTRIES ORGANIZATION (OEA) - FISCAL CODE MODEL FOR LATINAMERICAN COUNTRIES (MCTAL) (*)
ORGANIZACIÓN DE LOS ESTADOS AMERICANOS (OEA) - MODELO DE CODIGO TRIBUTARIO PARA AMERICA LATINA (MCTAL)

TÍTULO I
Disposiciones preliminares

CAPÍTULO I
Normas Tributarias

Art. 1. Aplicación. – Las disposiciones de este Código son aplicables a todos los tributos y a las relaciones jurídicas emergentes de ellos.

También son aplicables a las obligaciones establecidas a favor de personas de Derecho público no estatales, siempre que no existan disposiciones especiales.

Art. 2. Fuentes. – Constituyen fuentes del Derecho tributario:

1. Las disposiciones constitucionales.
2. Las convenciones internacionales.
3. Las leyes y los actos con fuerza de Ley.
4. Las reglamentaciones y demás disposiciones de carácter general establecidas pori los órganos administrativos facultados al efecto.

Art. 3. Resoluciones administrativas internas. – Las órdenes e instrucciones internas de carácter general impartidas poru los órganos administrativos o sus subordinados jerárquicos no son de observancia obligatoria para los contribuyentes y responsables.

Art. 4. Materia privativa de la Ley. – 1. Crear, modificar o suprimir tributos; definir el hecho generador de la relación tributaria, fijar la alícuota del tributo y la base de su cálculo e indicar el sujeto pasivo.

2. Otorgar excenciones, reducciones o beneficios.

3. Establecer los procedimientos jurisdiccionales y administrativos, en cuanto éstos signifiquen una limitación o reglamentación de los derechos o garantías individuales.

4. Tipificar las infracciones y establecer las respectivas sanciones.

5. Establecer privilegios, preferencias y garantías par los créditos tributarios.

6. Regular los modos de extinción de los créditos tributarios por medios distintos del pago.

Art. 5. Interpretación. – Las normas tributaria se interpretarán con arreglo a todos los métodos admitidos en Derecho, pudiéndose llegar a resultados restrictivos o extensivos de los términos contenido en aquéllas.

La disposición precedente es también aplicable a las exenciones.

Art. 6. Integración analógica. – La analogía es procedimiento admisible para colmar los vacíos legales, pero en virtud de ella no pueden crearse tributos ni exenciones.

Art. 7. Principios aplicables. – En las situaciones que no puedan resolverse por las disposiciones de este Código o de las leyes específicas sobre cada materia se aplicarán supletoriamente los principios generales de Derecho tributario, y en su defecto, los de otras ramas jurídicas que más se avengan a su naturaleza y fines.

Art. 8. Interpretación del hecho generador. – Cuando la norma relativa al hecho generadors se refiera a situaciones definidas por otras ramas jurídicas, sin remitirse ni apartarse expresamente de ellas, el intérprete puede asignarle el significado que más se adapte a la relidad considerada por la ley al crear el tributo.

Las formas jurídicas adoptadas por los contribuyentes no obligan al intérprete, quien podrá atribuir a las situaciones y actos ocurridos una significación acorde con los hechos, cuando de la Ley Tributaria surja que el hecho generador fue definido atendiendo a la realidad y no a la forma jurídica.

Cuando las formas jurídicas sean manifiestamente inapropiadas a la realidad de los hechos gravados y ello se traduzca en una disminución de la cuantía de las obligaciones, la Ley Tributaria se aplicará prescindiendo de tales formas.

Art. 9. Vigencia de la Ley Tributaria en el tiempo. – Las normas tributarias regirán desde la fecha en ellas establecida. Si no la establecieran, se aplicarán a los ... días de su publicación oficial, sin perjuicio de lo dispuesto en los apartados siguientes:

(Nota: La Comisión entiende que los plazos deben ser breves y uniformes para todo el territorio).

1. Las norms referentes a la existencia o cuantía de la obligación regirán desde el primer día del año calendario siguiente al de su promulgación cuando se trate de tributos que se determinen o liquiden por períodos anuales o

mayores, y desde el primer día del mes siguiente cuando se trate de período menores.

2. Las norms que gravan hechos instantáneos seguiráan el principio general, pero mediante resolución administrativa de carácter general podrán aplicarse a los hechos ocurridos desde la fecha de la promungación de aquéllas, siempre que dicha aplicación alcance a todos los contribuyentes afectados y en cuanto concierne a los hechos posteriores a la resolución administrativa.

3. Las reglamentaciones y demás disposiciones administrativas de carácter general se aplicarán desde la fecha de su publicación oficial. Cuando deban ser cumplidas exclusivamente por los funcionarios, se aplicarán desde la fecha de dicha publicación o de su notificación a éstos.

Art. 10. Plazos. – Los plazos legales y reglamentarios se contarán de la siguiente manera:

1. Los plazos por años o meses serán continuos y terminarán el día equivalente del año o mes respectivo.

2. Los plazos establecidos por días se entienden referidos a días hábiles en tanto no excedan de ... días; siendo más extensos se computarán por días corridos.

Art. 11. Vigencia de la Ley Tributaria en el espacio. – Las normas tributarias tienen vigencia en el ámbito espacial sometido a la potestad del órgano competente para crearlas.

Art. 12. Vigencia de las convenciones internacionales. – Las norma contenidas en las convecciones internacionales tienen vigencia en todo el territorio nacional aunque existan potestades tributarias locales.

CAPÍTULO II
Tributos

Art. 13. Concepto. – Tributos son las prestaciones en dinero que el Estado, en ejercicio de su poder de imperio, exige con el objeto de obtener recursos para el cumplimiento de sus fines.

Art. 14. Clases de tributos. – Los tributos son: impuestos, tasas y contribuciones ecspecíales.

Art. 15. Impuesto. – Impuesto es el tributo cuya obligación tiene come hecho generador una situación independiente de toda actividad estatal relativa al contribuyente.

Art. 16. Tasa. – Tasa es el tributo cuya obligación tiene come hecho generador la prestación efectiva o potencial de un servicio público individualizado en el contribuyente. Su producto no debe tener un destino ajeno al servicio que constituye el presupuesto de la oblicación.

No es tasa la contraprestación recibida del usuario en pago de servicios no inherente al Estado.

Art. 17. Contribución especial. – Contribución especial es el tributo cuya obligación tiene como hecho generador beneficios derivados de la realización de obras públicas o de actividades estatales y cuyo producto no debe tener un destino ajeno a la financiación de las obras o las actividades qe constituyen el presupuesto de la obligación.

La contribución de mejora es la instituida para costear la obra pública que produce una valorización immobiliaria y tiene como límite total el gasto realizado y como límite individual el incremento de valor del immueble beneficiado.

La contribución de seguridad social es la prestación a cargo de patronos y trabajadors integrantes de los grupos beneficiados, destinada a la financiación del servicio de previsión.

TÍTULO II
Obligación tributaria

CAPÍTULO I
Disposiciones generales

Art. 18. Concepto. – La obligawción tributaria surge entre el Estado u otros entes públicos y los sujetos pasivos en cuanto ocurre el presupuesto de hecho previsto en la Ley.

Constituye un vínculo de carácter personal aunque su cumplimiento se asegure mediante garantía real o con privilegios especiales.

Art. 19. Convenios entre particulares. – Los convenios referentes a la materia tributaria celebrados entre particulares no son oponibles al Fisco.

Art. 20. Juridicidad de los hechos gravados. – La obligación tributaria no será afectada por circunstancias relativas a la validez de los actos o a la naturaleza del objeto perseguido por las partes, ni por los efectos que los hechos o actos gravados tengan en otras ramas jurídicas.

CAPÍTULO II
Sujecto activo

Art. 21. Concepto. – Es sujeto activo de la relación jurídica el ente acreedor del tributo.

CAPÍTULO III
Sujecto pasivo

SECCIÓN PRIMERA
Disposiciones generales

Art. 22. Concepto. – Es sujeto pasivo la persona obligada al cumplimiento de las prestaciones tributarias, sea en calidad de contribuyente o de responsable.

Art. 23. Solidaridad. – Están solidariamente obligadas aquellas personas respecto de las cuales se verifique un mismo hecho generados.

En los demás casos la solidaridad debe ser establecida expresamente por la Ley.

Los efectos de la solidaridad son:

1. La obligación puede ser exigida total o parcialmente a cualquiera de los deudores a elección del sujeto activo.

2. El paga efectuado por uno de los deudores libera a los demás.

3. El cumplimiento de un deber formal por parte de uno de los obligados no libera a los demás cuando sea de utilidad para el sujeto activo que los otros obligados lo cumplan.

4. La exención o remisión de la obligación libera a todos los deudores, salvo que el beneficio haya sido concedido a determinada persona. En este caso el sujeto activo podrá exigir el cumplimiento a los demás, con deducción de la parte proporcional del beneficiado.

5. Cualquier interrupción de la prescripción o de la caducidad, en favor o en contra de uno de los deudores, favorece o perjudica a los demás.

6. En las relaciones privadas entre contribuyentes y responsables la obligación se divide entre ellos, y quien efectuó el pago puede reclamar de los demás el total o una parte proporcional según corresponda. Si alguno fuere insolvente su porción se distribuirá a prorrata entre los otros.

SECCIÓN SEGUNDA
Contribuyentes

Art. 24. Obligados por deuda propia (contribuyentes). – Son contribuyentes las personas respecto de las cuales se verifica el hecho generador de la obligación tributaria.

Dicha condición puede recaer:

1. En las personal físicas, prescindiendo de su capacidad según el Derecho privado.
2. En las personal jurídicas en los demás entes colectivos a los cuales otras ramas jurídicas atribuyan calidad de sujeto de Derecho.
3. En las entidades o colectividades que constituyan una unidad económica, dispongan de patrimonio y tengan autonomía funcional.

Art. 25. Obligaciones. – Los contribuyentes están obligados al pago de los tributos y al cumplimiento de los deberes formales impuestos por este Código o por normas especiales.

Art. 26. Transmisión por sucesión. – Los Derechos y obligaciones del contribuyente fallecido serán ejercitados o, en su caso, cumplidos por el sucesor a título universal, sin perjudicio del beneficio de inventario.

SECCIÓN TERCERA
Responsables

Art. 27. Obligados por deuda ajena (responsables). – Responsables son las personas que sin tener el carácter de contribuyentes deben, por disposición expresa de la ley, cumplir las obligaciones atribuidas a éstos.

Art. 28. Solidaridad por representación. – Son responsables olidarios en calidad de representantes:

1. Los padres, los tutores y los curadores de los incapaces.
2. Los directores, gerentes o representantes de las personas jurídicas y demás enes colectivos con personalidad reconocida.
3. Los que dirijan, administren o tengan la disponibilidad de los bienes de los entes colectivos que carecen de personalidad jurídica.
4. Los mandatarios, respecto de los bienes que administren y dispongan.
5. Los síndicos de quiebras o concursos, los liquidadores de las quiebras, los representantes de las sociedades en liquidación, los administradores judiciales o particulares de las sucesiones.

La responsabilidad establecida en este artículo se limita al valor de los bienes que se administren, a menos que los representantes hubieran actuado con dolo. Dicha responsabilidad no se hará efectiva si ellos hubieran procedido con la debida diligencia.

Art. 29. Solidaridad poru sucesión. – Son responsables solidarios en calidad de sucesores a título particular:

1. Los donatarios y los legatorios por el tributo correspondiente a la operación gravada.

2. Los adquirentes de fondos de comercio y demás sucesores en el activo y pasivo de empresas o entes colectivos con personalidad jurídica o sin ella. A estos efectos se consideran sucesores a los socios y accionistas de las sociedades liquidadas.

La responsabilidad precedente está limitada al valor de los bienes que se reciban, a menos que los sucesores hubieran actuadso con dolo o culpa. La prevista en el número 2. cesará a los ... meses de efectuada la transferencia, si ésta fue comunicada a la autoridad de aplicación con ... días de anticipación por lo menos y no se hará efectiva si el adquirente no pudo conocer oportunamente la obligación.

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Art. 30. Agentes de retención y percepción. – Son responsables directos en calidad de agentes de retención o de percepción las personas designadas por la Ley o por la Administración, previa autorización legal, que por sus functiones públicas o por razón de su atividad, oficio o profesión, intervengan en actos u operaciones en los cuales puedan efectuar la retención o percepción del tributo correspondiente.

Art. 31. Responsabilidad del agente. – Efectuada la retención o percepción, el agente es el único responsable ante el Fisco por el importe retenido o percibido. De no realizar la retención o percepción, responderá solidariamente.

El agente es responsable ante el contribuyente por las retenciones efectuadas sin normas legales o reglamentarias que las autoricen.

SECCIÓN CUARTA
Domicilio

Art. 32. Domicilio de las personas fisicas. – A todos los efectos tributarios se presume que el domicilio en el país de las personas fisicas es:

1. El lugar de su residencia habitual, la cual se presumirá cuando permanezca en ella más de...

2. El lugar donde desarrolle sus actividades civiles o comerciales, en caso de no conocerse la residencia o de existir dificultad para determinarla.

3. El que elija el sujeto activo, en caso de existir más de un domicilio en el sentido de este artículo.

4. El lugar donde ocurra el hecho generador, en caso de no existir domicilio.

Art. 33. Domicilio de las personas jurídicas. – A todos los efectos tributarios se presume que el domicilio en el país de las personal jurídicas es:

1. El lugar donde se encuentre su dirección on administración efectiva.

2. El lugar donde se halle el centro principal de su actividad, en caso de no conocerse dicha dirección o Administración.

3. El que elija el sujeto activo, en caso de existir más de un domicilio en el sentido de este artículo.

4. El lugar donde ocurra el hecho generador, en caso de no existir domicilio.

Art. 34. Personas domiciliadas en el extranjero. – En cuanto a las personas domiciliadas en el extranjero, regirán las siguientes normas:

1. Si tienen establecimiento permanente en el país se aplicarán a éste las disposiciones de los arts. 32 y 33.

2. En los demás casos tendrán el domicilio de su representante.

3. A falta de representante tendrán como domicilio el lugar donde ocurra el hecho generador del tributo.

Art. 35. Domicilio especial a los efectos tributarios. – Los contribuyentes y los responsables podrán fijar un domicilio especial a los efectos tributarios con la conformidad de la Administración Tributaria, la cual sólo podrá negar su aceptación si resultare perturbador para las tareas de determinación y recaudación.

Las aceptación de la Administración se presume si no manifiesta oposición dentro de los ... días.

El domicilio así constituido es el único válido a todos los efectos tributarios.

La Administración Tributaria podrá en cualquier momento requeris la constitución de nuevo domicilio especial cuando ocurra la circunstancia prevista en el párrafo primero.

Art. 36. Obligación de comunicación y cambio de domicilio. – Los contribuyentes y los responsables tienen la obligación de comunicar su domicilio fiscal y de consignarlo en todas sus actuaciones ante la Administración Tributaria.

Dicho domicilio se considerará subsistente en tanto no fuere cambiado de conformidad con los artículos precedentes.

CAPÍTULO IV
Hecho generador

Art. 37. Concepto. – El hecho generador es el presupiesto establecido por la Ley para tipificar el tributo y cuya realización origina el nacimiento de la obligación.

Art. 38. Ocurrencia. – Se considera ocurrido el hecho generador y existentes sus resultados:

1. En las situaciones de hecho, desde el momento en que se hayan realizado las circunstancias materiales necesarias para que produzca los efectos que normalmente le corresponden.
2. En las situaciones jurídicas, desde el momento en que estén definitamente constituidas de conformidad con el Derecho aplicable.

Art. 39. Actos jurídicos condicionados. – Si el hecho generador fuere un acto jurídicos condicionado se le considerará perfeccionado:

1. En el momento de su celebración, si la condición fuere resolutoria.
2. Al producirse la condición, si ésta fuere suspensiva.

En caso de duda se entenderá que la condición es resolutoria.

Art. 40. Echo generador condicionado. – Si el hecho generador estuviere condicionado por la Ley, se considerará perfeccionado en el momento de su acaecimiento y no en el del cumplimiento de la condición.

CAPÍTULO V
Extinción

Art. 41. Medios de extinción. – La obligación tributaria se extingue por los siguientes medios:

1. Pago.
2. Compensación.
3. Transacción.
4. Confusión.
5. Condonación o remisión.
6. Prescripción.

(Nota: La enumeración de los medios de extinción precedentes es a título ilustrativo, por entender la Comisión que deben relacionarse con la legislación de cada país).

SECCIÓN PRIMERA
Pago

Art. 42. Obligados al pago. – El pago de los tributos debe ser efectuado por los contribuyentes o por los responsables.

Art. 43. Pago por terceros. Subrogación. – Lo terceros extraños a la obligación tributaria también pueden realizar el pago, subrogándose sólo en cuanto al Derecho de crédito y a las garantías, preferencias y privilegios sustanciales.

Art. 44. Lugar, fecha y forma. – El paga debe efectuarse en el lugar, la facha y la forma que indique la Ley o, en su defecto, la reglamentación.

Art. 45. Anticipos. – Los pagos anticipados deben ser expresamente dispuestos o autorizados por la Ley.

En los impuestos que se determinan sobre la base de declaraciones juradas, la cuantía del anticipo se fijará teniendo en cuenta las estimaciones del contribuyente.

Art. 46. Prórrogas y facilidades de pago. – Las prórrogas y demás facilidades deben solicitarse antes del vencimiento del plazo para el paga y sólo podrán ser concedidas cuando a juicio de la Administración se justifiquen las causas que impiden el cumplimiento normal de la obligación. La decisión denegatoria no admitirá recurso alguno.

Las prórrogas y facilidades que se concedan devengarán los intereses del art. 61.

Art. 47. Retención o percepción por terceros. – Existe pago por parte del contribuyente en los casos de percepción o retención en la fuente previstos en el art. 30.

SECCIÓN SEGUNDA
Compensación

Art. 48. Casos de compensación. – Se compensarán de oficio o a petición de parte los créditos líquidos y exigibles del contribuyente por concepto de tributos y sus accesorios, con la deudas tributarias liquidadas por aquél y no observadas, o con las liquidadas de oficio, referentes a períodos no prescritos, comenzando por los más antiguos y aunque provengan de distintos tributos, siempre que sean administrados por el mismo órgano administrativo.

También son compensables los créditos por tributos con las multas firmes que no tengan afectación especial.

Art. 49. Compensación especial. – Cuando la Administración determine nuevas obligaciones, el contribuyente podrá compensarlas con créditos que tenga correspondientes a los mismos períodos fiscales, no invocados con anterioridad, aunque estuvieran prescritos.

Igual derecho tendrá la Administración en las situaciones análogas producidas a raíz de reclamaciones del contribuyente.

Art. 50. Compensación por terceros cesionarios. – Los créditos líquidos y exigibles del contribuyente por concepto de tributos podrán ser cedidos a otros contribuyentes y responsables al solo efecto de ser compensados con deudas tributarias que tuviese el cesionario en el mismo órgano administrativo.

SECCIÓN TERCERA
Transacción

Art. 51. Objeto. – La transacción es admisible en cuanto a la determinación de los hechos y no en cuanto al significado de la norma aplicable.

Art. 52. Facultades de la Administración. – El consentimiento de la Administración Tributaria debe contar con la aprobación escrita del funcionario de mayor jerarquía.

SECCIÓN CUARTA
Confusión

Art. 53. Confusión. – Habrá extinción por confusón cuando el sujeto activo de la obligación tributaria, como consecuencia de la transmisión de los bienes o derechos sujetos al tributo, quedare colocado en la situación del deudor.

SECCIÓN QUINTA
Condonación o remisión

Art. 54. Procedimiento. – La obligación de pago de los tributos sólo puede ser condonada o remitida por Ley dictada con alcance general. Las

demás obligaciones, así como los intereses y las multas, sólo pueden ser condonadas por resolución administrativa en la forma y condiciones que la Ley establezca.

SECCIÓN SEXTA
Prescripción

Art. 55. Términos de prescriptción. – El derecho de la Administración tributaria de determinar la obligación y exigir su pago con los intereses correspondientes prescribe a los ... años.

El término precedente se extenderá:

1. A ... años cuando el contribuyente o terceros no cumplan con la obligación de inscribirse en los registros pertinentes, de declarar el hecho generador, o de presentar las declaraciones tributarias y, en los casos de determinación de oficio, cuando la Administración no pudo conocer el hecho.

2. A ... años cuando el contribuyente o el responsable haya ocultado a la Administración el hecho generador o extraído del país los bienes afectados al pago del tributo.

A los efectos de la extensión de los términos se tendrá en cuenta si los actos del contribuyente son intencionales o culposos, conforme a lo dispuesto por los arts. 98, 100 y 113.

(Nota: A juicio de la Comisión los plazos deben ser breves. Para el común se sugieren cuatro años; para el del número 1., seis años, y para el del número 2., diez años).

Art. 56. Cómputo de los términos. – El término se contará desde el 1. de enero del año calendario siguiente a aquel en que se produjo el hecho generador.

Para los tributos cuya determinación o liquidación es periódica se entenderá que el hecho se produce al fginalizar el período respectivo.

Art. 57. Interrupción de la prescripción. – El curso de la prescripción se interrumpe:

1. Por la determinación del tributo, sea ésta efectuada por la Administración Tributaria o por el contribuyente, tomándose como fecha la de notificación o de presentación de la liquidación respectiva.
2. Por el reconocimiento expreso de la obligación por parte del deudor.
3. Por el petido de prórroga u otras facilidades de pago.

Interrumpida la prescripción comenzará a computarse nuevamente el término a partir del 1. de enero del año calendartio siguiente a aquel en que se produjo la interrupción.

Art. 58. Suspención de la prescriptción. – El curso de la prescripción se suspende por la interposición de peticviones o recursos administrativos hasta sesenta días después que la Administración Tributaria adopte resolución definitiva, tácita o expresa, sobre los mismos.

Art. 59. Prescripción de intereses. – La prescripción de la obligación tributaria extingue el derecho a los intereses.

Art. 60. Repetición de lo pagado. – Lo pagado para satisfacer una obligación prescrita no puede ser materia de repetición, aunque el pago se hubiera efectuado con conocimiento de la prescripción.

CAPÍTULO VI
Intereses

Art. 61. Intereses a cargo del contribuyente. – El pago efectuado fuera de término gace surgir, sin necesidad de actuación alguna de la Administración Tributaria, la obligación de pagar juntamente con ele tributo un interés equivalente al corriente en plaza para el descuento bancario de los documentos commerciales, el que se liquidará hasta la extinción de la obligación.

Anualmente el Poder Ejecutivo, previo asesoramiento de la banca oficial, fijará el tipo de interés que regirá en el año siguiente.

Art. 62. Intereses a cargo des Fisco. – El artículo anterior es también aplicable a las deudas del Fisco resultantes del cobro indebido de tributos.

En tal caso, los intereses se liquidarán a partir de los ... días de la reclamación del contribuyente o, en su caso, de la notificación de la demanda.

CAPÍTULO VII
Privilegios

Art. 63. Alance de los privilegios. – Los créditos por tributos gozan de privilegio general sobre todos los biennes del contribuyente o responsable y tendrán prelación sovre los demás créditos con excepción de:

1. Los garantizados cond erecho real, siempre que éste se haya constituido con enterioridad a la determinación del crédito fiscal.
2. Las pensiones alimenticias y los salarios, cualquiera que fuere su fecha.

El privilegio sólo alcanza a los tributos correspondientes al año en que se invoque y de los ... años anteriores y no es extensivo a los intereses ni a las sanciones de carácter punitivo.

(Nota: La Comisión sugiere que el plazo sea de don años).

Art. 64. Prelación en caso de concurso. – En caso de concurso, quiebra o liquidación, el orden de preferencia de los créditos tributarios se rige por las normas del Derecho privado.

CAPÍTULO VIII
Exenciones

Art. 65. Concepto. – Exención es la dispensa legal de la obligación tributaria.

Art. 66. Condiciones y requisitos exigidos. – La Ley que establezca exenciones especificará las condiciones y requisitos exigidos para su otorgamiento, los tributos que comprende, si es total o parcial y, en su caso, el plazo de su duración.

Art. 67. Límite de aplicación. – Salvo disposición en contrario de la Ley Tributaria, la exención no se extiende a los tributos instituidos posteriormente a su otorgamiento, siempre que difieran sustancialmente de los incluidos en la norma de exoneración.

Art. 68. Vigencia. – Salvo que tuviera plazo cierto de duración, la exención, aun cuando fuera concedida en función de determinadas condiciones de hecho, puede ser derogada o modificada por Ley posterior.

TÍTULO III
Infracciones y sanciones

CAPÍTULO I
Part general

SECCIÓN PRIMERA
Disposiciones generales

Art. 69. Excepciones a la irretroactividad. – Las normas tributarias punitivas sólo regirán par el futuro. No obstante, tendrán efecto retroactivo las

que supriman infracciones, establezcan sanciones más benignas o términos de prescripción más breves.

Art. 70. Principios y normas aplicables. – Las disposiciones de este Código se aplican a todas las infracciones tributarias, salvo disposición legal expresa en contrario.

A falta de normas tributarias expresas se aplicarán supletoriamente los principios generales des Derecho en materia punitiva.

Las infracciones previstas en el Capítulo II de este Título, salvo las establecidas en las Secciones primera y segunda, no se considerarán a los efectos de la determinación de la responsabilidad penal de Derecho común.

SECCIÓN SEGUNDA
Infracciones

Art. 71. Concepto. – Toda acción u omisión que importe violación de normas tributarias de indole sustancial o formal constituye infracción punible en la medida y con los alcances establecidos en este Código y en las leyes especiales.

Art. 72. Tipos de infracciones. – Son infracciones tributarias:

1. Defraudación.
2. Contrabando.
3. Instigación pública a no pagar los tributos.
4. Contravención.
5. Mora.
6. Incumplimiento de los deberes formales.
7. Incumplimiento de los deberes por los funcionarios de la Administración Tributaria.

Art. 73. Culpabilidad. – Las infracciones tributarias requieren la existencia de dolo o culpa.

Las presunciones establecidas al respecto en este Código o en Leyes especiales admiten prueba en contrario y presuponen el conocimiento por parte del imputado de los hechos que le sirven de base.

Art. 74. Concurrencia formal. – Cuando un hecho configure más de una infración se aplicará la sanción más grave.

Art. 75. Reincidencia y reiteración. – Habrá reincidencia siempre que el sancionado por sentencia o resolución firme cometiere una nueva in-

fracción del mismo tipo dentro del plazo de ... años, contados a partir de aquélla.

Habrá reiteración de infracciones cuando el imputado incurriere en nueva infracción del mismo tipo, sin que mediare condena por sentencia o resolución firme.

Art. 76. Extinción de acciones y de sanciones. – Las acciones y sanciones por infracciones tributarias se extinguen:

1. Por muerte del infractor, sin que esto importe la extinción de la acción y de la sanción contra los coautores, cómplices y encubridores. No obstante subsistirá la responsabilidad por las multas aplicadas cuyas decisiones hubieren quedado firmes o pasado en autoridad de cosa juzgada.
2. Por amnistia dispuesta por Ley.
3. Por precripción.

Art. 77. Prescriptción de las infracciones. – El derecho de aplicar sancionnes prescribe por el transcurso de los términos siguientes:

1. ... años, contados desde el 1. de enero del año calendario siguiente a aquel en que se cometión la infracción.
2. Cuandola Administración Tributaria hubiere tenido conocimiento de la infracción, el término será de ... años, contados desde el 1. de enero del año calendario siguiente aquel en que tuvo ese conocimiento, pero en ningán caso el término podrá exceder el fijado en el número anterior. El conocimiento de la infracción por parte de la Administración deberá ser probabo fehacientemente por el infractor.
3. En caso de mora, los plazos precedentes se reducirán a la mitad.

(Nota: Se aconseja para el número 1. plazo de cinco años y par el numero 2., dos años).

Art. 78. Interrupción y suspensión de la prescriptción. – La prescripción se interrumpe una sola vez por la comisión de nuevas infracciones del mismo tipo. El nuevo plazo se contará desde el 1. de enero del año calendario siguiente a aquel en que se reiteró la infracción.

Los términos se suspenden durante la instrucción del sumario administrativo por un plazo de ... meses desde la citación o emplazamiento del imputado.

(Nota: Se recomienda la fijación de un plazo breve que se determinará de acuerdo con las características administrativas de cada país. Se sugiere un plazo de seis meses.).

SECCIÓN TERCERA
Responsabilidad

Art. 79. Personalidad. – La responsabilidad por infracciones es personal, salvo las excepciones establecido en este Código.

Art. 80. Eximentes de responsabilidad. – Excluyen la responsabilidad:
1. La incapacidad absoluta.
2. La fuerza mayor y el estado de necesidad.
3. El error en cuanto al hecho que constituye la infracción.
4. El cumplimiento de la Ley y la obediencia debida.

Art. 81. Ignorancia o error. – Pueden ser eximidos de responsabilidad quienes, por ignorancia o error excusable de hecho o de derecho, hayan considerado lícita la acción o la omisión.

Es exclusable el error en que incurriera el infractor inducido por alguno de los profesionales a que se refiere el art. 83.

Art. 82. Concurso de infractores. – Se aplicará la misma sanción que al autor principal, sin perjuicio de la graduación de la pena que corresponda:

1. A los coautores, cómplices y encubridores, considerándose tales a los que financien, instiguen o ayuden de cualquier manera al autor según el caso.

2. Al que para su provecho, adquiera o tenga en su poder, oculte, venda o colabore en la venta o negociación de mercaderías, productos u objetos respecto de los cuales sepa o deba saber, conforme a las circunstancias, que se ha cometido una infracción.

3. A los terceros que, aun cuando no tuvieran deberes tributarios a su cargo, faciliten por su culpa o dolo una infracción.

Art. 83. Responsabilidad de profesionales. – A los profesionales que participen en infracciones dolosas en cualquiera de las formas previstas en el art. 82, además de las sanciones en él previstas, podrá aplicárseles la inhabilitación para el ejercicio de la profesión por el término de ...

Se considerarán profesionales a los efectos de este artículo a los abogados, contadores, escribanos, notarios, agentes de aduana y demás personas que por su título, oficio o actividad habitual sean especialmente verss en materia tributaria.

Art. 84. Responsabilidad de las colectividades. – Las entidades o colectividades, tengan o no personalidad jurídica, podrán ser sancionadas por

infracciones sin necesidad de establecer el dolo o cumpa de una persona física.

Sin perjuicio de la responsabilidad pecuniaria de la entidad, sus representantes, directores, gerentes, administradores o mandatarios podrán ser sancionados por su actuación personal en la infracción.

Art. 85. Responsabilidad por acto de los representantes. – Cuando un mandatario, representante, administrador o encardago incurriere en infracción, los representados seán responsables por las sanciones pecuniarias, sin perjuicio de su acción de reembolso contra aquéllos.

Art. 86. Responsabilidad por acto de los dependientes. – Las entidades o colectividades y los patronos en general son responsables por las sanciones pecuniarias aplicadas a sus dependientes por su actuación como tales.

Art. 87. Responsabilidad accesoria de los copartícipes. – Los autores, coatores, cómplices y encubridores responden solidariamente por las costas y demás gastos procesales. Esta responsabilidad es independiente del pago solidario de las obligaciones tributaria que no tuvieran carácter represivo.

SECCIÓN CUARTA

Sanciones

Art. 88. Aplicación. – Las penas deberán ser aplicadas, en definitiva, por los órganos jurisdiccionales con sujeción a lo dispuesto por los Títulos IV y V de este Código.

La pena de prisión sólo podrá ser aplicada por los órganos judiciales competentes.

Art. 89. Sanciones. – Las sanciones aplicables on:

1. Prisión.
2. Multa.
3. Comiso de los efectos materiales objeto de la infracción o utilizados para cometerla.
4. Clausura de establecimiento.
5. Suspensión y destitución de cargos públicos.
6. Inhabilitación para el ejercicio de oficios y profesiones.
7. Pérdida de concessiones, privilegios y prerrogativas.
8. Cancelación de inscripción en registros públicos.

Art. 90. Graduación. – Las sanciones se graduarán tomando en cuenta las siguientes circunstancias atenuantes y agravantes:

1. La reincidencia y la reitaración.
2. La condición de funcionario o empleado público que tenga el imputado.
3. El grado de cultura del infractor y el conocimiento que tuvo o debió tener de la norma legal infringida.
4. La importancia del perjuicio fiscal y las características de la infracción.
5. La conducta que el infractor asuma en el esclarecimiento de los hechos.
6. El grado de dolo o culpa.
7. La incapacidad relativa.
8. La presentación espontánea con regularización del crédito tributario. No se reputa espontánea la presentación motivada por una inspección efectuada u ordenada por la Administración/
9. Las demás circunstancias atenuantes que resulten de los procedimientos administrativos o jurisdiccionales, aunque no estén prevista expresamente por la Ley.

Art. 91. Suspensión condicional de la pena. – Los órganos jurisdiccionales podrán resolverse la suspensión condicional de la pena de prisión inferior a ... años cuando se trate de infractores primarios y atendiendo a las circunstancias del caso.

La suspensión de la pena quedará sin efecto en caso de reincidencia.

Art. 92. Inconversión de la pena. – Las sanciones pecuniarias no son convertibles en pena de prisión.

Art. 93. Sustitución del comiso. – Si no fuere posible el comiso por no poder aprhenderse las mercaderías u objetos, será reemplazado por multa igual al valor de éstos.

Cuando a juicio del órgano que aplica la sanción exista una diferencia apreciable de valor entre la mercadería en infracción y los efectos utilizados para cometerla se sustituirá el comiso de éstos por una multa adicional de dos a cinco veces el valor de la mercadería en infracción, siempre que los responsables no sean reincidentes en el mismo tipo de infracción.

Art. 94. Tentativa. – La tentativa será sancionada con penas que se graduarán de un tercio a la mitad de las correspondientes a la infracción consumada.

Art. 95. Fijación de valores. – Cuando las sanciones estén relacionadas con el valor de las mercaderías u objetos en infracción se tomará en cuenta el valor real del día en que se cometió la infracción.

Art. 96. Prescriptción de las sanciones en general. – Las sanciones aplicadas, salvo las de prisión, prescriben por el transcurso de ... años, contados desde el 1. de enero del año calendario siguiente a aquel en que quedó firme la resolución o la sentencia que las impuso.

Cuando la ejecución de la sanción requiera la intervención de órganos jurisdiccionales, la Administración Tributaria deberá iniciar los procedimientos respectivos dentro del mismo plazo.

(Nota: Se recomienda que el plazo sea de un año).

Art. 97. Prescriptción de las sanciones de prisión. – Las sanciones de presión prescriben por el transcurso de un tiempo igual al de la condena.

El término se cumputará desde el día siguiente al de la notificación de la sentencia al condenado.

CAPÍTULO II
Parte especial

SECCIÓN PRIMERA
Defraudación

Art. 98. Concepto. – Comete defraudación el que, mediante simulación, ocultación, maniobra o cuanquier otra forma de engaño, induce en error al Fisco del que resulte, para sí o un tercero, un enriquecimiento indebito a expensas del derecho de aquél a la percepción de los tributos.

Es agravante especial la circunstancia de que la defraudación se cometa con la participación del funcionario que, por rázon de su cargo, intervenga o deba intervenir en los hechos constitutivos de la infracción.

Art. 99. Enumeración. – Son casos de defraudación, de acuerdo con el artículo anterior, sin perjuicio de otras situaciones:

1. Declarar cifras o datos falsos u omitir deliberadamente circunstancias que influyan en la determinación de la obligación tributaria.

2. Emplear mercaderías o productos beneficiados por exenciones o franquicias en fines distintos de los que corresponde según la exención o franquicia.

3. Elaborar o comeciar clandestinamente con mercaderías gravadas, considerándose comprendidas en esta previsión la substracción a los controles fiscales; la utilización indebida de sellos, timbres, precintos y demás medios de control, o su destrucción o adulteración; la alteración de las características de la mercadería, su ocultación, cambio de destino o falsa indicación de procedencia.

4. Atestar los funcionarios o empleados públicos, o los depositarios de la fe pública, de haberse satisfecho un tributo sin que realmente hubiera ocurrido.

5. Ocultar mercaderías o efectos gravados siempre que el hecho no configure contrabando.

Art. 100. Presunciones de fraude. – Se presume la intención de defraudar cuando:

1. Se adopten formas o estructuras jurídicas manifiestamente inadecuadas para configurar la efectiva operación gravada y ello se traduzca en apreciable disminución del ingreso tributario.

2. No se ingresen en los plazos establecidos los importes retenidos por tributos.

3. Se lleven dos o más juegos de libros para una misma contabilidad, con distintos asientos.

4. Exita contradicción evidente entre las constancias de los libros o documentos y los datos consignados en las declaraciones tributarias.

5. No se lleven o exhiban libros, documentos o antecedentes contables cuando la naturaleza o el volumen de las actividades desarrolladas no justifique tales circunstancias.

6. Se produzcan informaciones inexactas sobre las actividades o negocios.

7. Se omita la denuncia de hechos previstos en la Ley como generadores de tributos o no se proporcione la documentación correspondiente.

Art. 101. Penas. – La defraudación fiscal será penada con las sanciones siguientes, que podrán aplicarse conjunta o separadamente:

1. Multa de dos a cinco veces el monto del tributo omitido o de $ ... a $ ... cuando no pudiere determinarse el monto de la defraudación.

2. Comiso de las mercaderías o productos, y de los vehículos, animales y demás elementos utilizados para la comisión de la infracción.

3. Clausura del local donde se hubiere cometido la infracción, por un máximo de ...

4. Cancelación de la inscripción en los registros públicos relacionados con la actividad desarrollada por el infractor, por un máximo de ...

SECCIÓN SEGUNDA
Contrabando

Art. 102. Concepto. – Constituye contrabando toda acción u omisión en la entrada o salida de mercaderías que eludiendo la intervención de los funcionarios aduaneros o induciéndolos a error viole las leyes establecidas por razones de orden público o perjudique la percepción de los tributos que deban recaudarse en ocasión de la operación.

La configuración del contrabando no exige necesariamente la concurrencia del perjuicio fiscal.

Art. 103. Culpabilidad. – En todos los casos de contrabando se presume el dolo, salvo prueba fehaciente en contrario.

Art. 104. Enumeración. – Son casos de contrabando, sin perjuicio de otras situaciones:

1. La entrada o salida de mercaderías, objetos o productos:
   a) Por vías o lugares no autorizados.
   b) En horas fuera de las señaladas o autorizadas.
   c) Cuya entrada o salida estuviera prohibida.
2. La acción u omisión tendente a hacer aparecer como nacionalizadas mercaderías introducidas temporalmente.
3. La existencia de mercaderías en el medio de transporte utilizado en la entrada o salida sin la documentación exigida por las disposiciones pertinentes.
4. La desviación o sustitución totalo parcial de bultos o su contenido en las operaciones de importación, exportación, tránsito, reembarco o transbordo.
5. La tenencia injustificada de mercaderías de importación dentro de la zona aduanera sin la documentación correspondiente.

Art. 105. Agravantes. – Existe contrabando calificado:

1. Cuando intervienen tres o más personas.
2. Cuando media intimidación, amenaza, exhibición de armas, violencia en las personas o fuerza fisica en las cosas.
3. Cuando media violación de sellos, documentos, precintos o candados fiscales.
4. Cuando se falsifican sellos, timbres, marcas o documentos públicos.
5. Cuando colabora en funcionario o empleado público que por razón de su cargo intervino o debió intervenir en la operación.
6. Cuando se trada de contrabando de armas, municiones, explosivos y afines, alcaloides, narcóticos o sustancias y elementos de cuanquier ín-

dole cuyo uso se hubiera declarado atentatorio contra la seguridad o la salud públicas.

Art. 106. Penas. – El contrabando será penado con las siguientes sanciones:

1. Prisión:

a) De un mes a cinco años, cuando no mediare calificación.

b) De un año a ocho años, en las situaciones previstas en los números 1. a 5. del art. 105.

c) De cinco a veinte años en la situación prevista en el número 6. del art. 105.

2. Además de la pena de prisión se aplicarán como sanciones accesorias:

a) Multa de dos a cinco veces el valor de las mercaderías.

b) Comiso de las mercaderías u de los vehículos, animales y demás elementos utilizados para la comisión de la infracción.

3. Atendiendo a la gravedad de la infracción podrán aplicarse, además, las sanciones siguientes:

a) Inhabilitación para ejercer actividades relacionadas con operaciones aduaneras y de comercio de importación y exportación de dos meses a diez años.

b) Inhabilitación especial para ejercer el comercio de uno a cinco años.

c) Pérdida de las concesiones, privilegios y prerrogativas de que gozaren las persona físicas o colectivas.

d) Cancelación de la inscripciónción en los Registros Públicos por un másimo de cinco años.

Art. 107. Penas en las infracciones leves. – No se aplicará pena de prisión, sin perjuicio de las sanciones del art. 106, números 2. y 3.:

a) Cuando el valor de las mercaderías objeto de contrabando no exceda de $ ...

b) Cuando a juicio del juez la conducta del agente no revele peligrosidad y éste sea primario.

Art. 108. Actos sucesivos. – Si para llevar a cabo la entrada o salida se recurre a diversos actos sucesivos que separadamente pudieran considerarse incluidos en el concepto genérico establecido en el art. 102, toda la serie de hechos se estimará como un solo contrabando, pero si en la comisión del delito concurre algún otro acto delictuoso distinto del contrabando, se seguirán las reglas del concurso de delitos.

Art. 109. Encubridores. – Serán considerados encubridores, además de los mencionados en el art. 82 de este Código:

1. Los que adquierant de personas que no tengan comercio establecido mercadería de procedencia extranjera para comerciar con ellas sin asegurarse previamente el cumplimiento de las obligaciones aduaneras, y resulte que tales mercaderías están en infracción.
2. Los que hagan la adquisición a que se refiere el número anterior a sabiendas de la ilegítima introducción.

SECCIÓN TERCERA
Istigación pública o no pagar tributos

Art. 110. Concepto. – El que instigare públicamente a rehusar o demorr el pago de los tributos al margen de los recursos regulados por este Código será penado con multa de $ ... a $ ...

Art. 111. Agravante. – Cuando la instigación vaya acompañada por vías de hecho, amenazas o maniobras concertadas, tendentes a organizar la negativa colectiva al cumplimiento de las obligaciones fiscales, podrá imponerse, además de la multa establecida en el artículo anterior, prisión hasta de un año.

Art. 112. Responsabilidad de los representantes. – Cuando se tratare de personas jurídicas la pena de prisión será soportada por los integrantes que hayan participado activamente en la infracción.

SECCIÓN CUARTA
Contravención

Art. 113. Concepto. – Incurre en contravención fiscal el que mediante acción u omisión que no constituya defraudación o contrabando deterine una disminución ilegítima de los ingresos tributarios o el otorgamiento indebido de exenciones u otras ventajas fiscales.

Art. 114. Enumeración. – Se considera configurada la infracción cuando se compruede que:
1. Los agentes de retención no han efectuado las retenciones a que están obligados o han omitido ingresar las cantidades retenidas.
2. Los contribuyentes han omitido el pago de los tributos.

Art. 115. Penas. – Las contravenciones dolosas serán penadas con una multa hasta de dos veces el importe del tributo omitido, y las culposas con

una multa hasta de una vez dicho importe. Cuando no pueda determinarse el importe la multa será de $ ... a $ ...

SECCIÓN QUINTA

Mora

Art. 116. Concepto. – Incurre en mora el que paga la deuda tributaria después de la fecha establecida al efecto sin haber obtenido antes de tal fecha la prórroga a que se refiere el art. 46

Art. 117. Pena. – La mora será penada con una multa equivalente al importe de los intereses previstos en el art. 61, independientemente del pago de éstos.

La multa podrá ser aplicada sin audiencia del deudor, sin perjuicio de los recursos pertinentes.

SECCIÓN SEXTA

Incumplimiento de los deberes formales

Art. 118. Concepto. – Constituye incumplimiento de los deberes formales toda acción u omisión de los contribuyentes, responsables o terceros que viole las disposiciones relativas a la determinación de la obligación tributaria u obstaculice la fiscalización por parte de la autoridad administrativa.

Art. 119. Enumeración. – Incurren en violación de deberes formales, sin perjuicio de otras situaciones:

1. Los que no cumplan las obligaciones establecidas en el art. 139 y demás disposiciones de este Código.

2. Los que no cumplan los deberes formales establecidos en las normas administrativas a que se refiere el art. 2, núm. 4, de este Código.

Art. 120. Pena. – El incumplimiento de los deberes formales será penado con multa de $ ... a $ ...

Art. 121. Accumulación. – Esta sanción independiente de las que correspondan por la comisión de otras infracciones, salvo que el incumplimiento de los deberes formales constituya un elemento integrante de aquéllas.

SECCIÓN SÉPTIMA
Incumplimiento de los debered por los funcionarios
de la Administración Tributaria

Art. 122. Daño. – El funcionario o empleado de la Administración Tributaria que violando dolodamente los deberes del cargo provoque un daño económico al Fisco o al contribuyente será sancionado con multa de $ ... a $ ... y suspensión de ... a ...

Art. 123. Revelación de hechos o documentos reservados. – El funcionario o empleado de la Administración Tributaria que divulgue dolosamente hechos o documentos que conozca en razón de su cargo y que por su naturaleza o por disposición de la ley sean reservados será sancionado con ...

Art. 124. Infracciones culposas. – Si las infracciones establecida en los artículos anteriores fueran culposas las sanciones serán reducidas a la mitad.

Art. 125. Inaplicabilidad. – Las sanciones previstas en esta sección no se aplicarán si los hechos constituyen un delito o una infracción más grave, previstos en este Código o en otras leyes.

TÍTULO IV
Procedimientos ante la Administración Tributaria

CAPÍTULO I
Facultades y deberes de la Administración

Art. 126. Facultades. – El órgano que tenga a su cargo la percepción y fiscalización de los tributos podrá dictar normas generales a los efectos de la aplicación de las leyes tributarias dentro de los límites que fijen las disposiciones pertinentes.

Art. 127. Revisión por el superior jerárquico. – Las normas a que se refiere el artículo precedente podrán ser modificadas o derogadas por el superior jerárquico.

Art. 128. Publicidad. – Sin perjuicio de la publicación de las normas incluidas en el art. 2, las disposiciones generales y las resoluciones particu-

lares que a juicio de la Administración ofrezcan interés general serán dadas a conocer de inmediato por intermedio de las publicaciones oficiales y demás medios adecuados a las circunstancias, omitiendo las referencias que puedan lesionar intereses particulares.

Art. 129. Resolución tácita. – La Administración está obligada a adoptar resolución en toda petición o recurso planteado por los interesados dentro de los siguiente plazos: en las peticiones, ... días, en los recursos de revocación, ... días, y en los recursos jerárquicos, ... días.

A los efectos de este artículo, por peticiones se entenderán las reclamaciones sobre casos reales fundadas en razones de legalidad.

Vencidos los plazos sin que se adopte resolución, se presume que hay resolución denegatoria, quedando los interesados facultados para interponer los recursos y acciones que correspondan.

Art. 130. Fiscalización. – La Administración dispondrá de amplias facultades de fiscalización e investigación;, y especialmente podrá:

1. Exigir a los contribuyentes y responsables la exhibición de sus libros, documentos y correspondencia comerciales y requerir su comparecencia ante la autoridad administrativa para proporcionar informaciones.

2. Intervenir los documentos inspeccionados y tomar medidas de seguridad para su conservación.

3. Incautarse de dichos libros y documentos cuando la gravedad del caso lo requiera.

Cuando se prive al contribuyente de la disponibilidad de sus documentos, la medida deberá ser debidamente documentada y estará limitada a ... días, prorrohables por los órganos jurisdiccionales competentes cuando fuere indispensable.

4. Requerir informaciones a terceros relacionadas con hechos que en el ejercicio de sus actividades hayan contribuido a realizar o hayan debido conocer, así como exhibir documentación relativa a tales situaciones y que se vincule con la tributación.

No podrá exigirse informes de:

a) Las personas que por disposición legal expresa puedan invocar el secreto profesional.

b) Los ministros del culto en cuanto a los asuntos relativos al ejercicio de su ministerio.

c) Aquellos cuya declaración importara violar el secretp de la correspondencia epistolar o de las comunicaciones en general.

d) Los parientes próximos en caso de que su declaración estuviera relacionada con hechos que pudieran motivar la aplicación de penas de prisión.

Se consideran parientes próximos al cónyuge, a los ascendientes y descendientes en línea directa y los hermanos.

5. Practicar inspecciones en locales ocupados a cualquier título por los contribuyentes y responsables. Para realizarla en los locales fuera de las horas hábiles y en los domicilios particulares será necesario orden de allanamiento de acuerdo con el Derecho común.

Art. 131. Reserva de las actuaciones. – Las informaciones que la Administración obtenga de los contribuyentes, responsables y terceros, por cualquier medio, tendrán carácter reservado. Sólo podrán ser comunicadas a la autoridad jurisdiccional cuando mediare orden de ésta.

CAPÍTULO II
Determinación

Art. 132. Deber de iniciativa. – Ocurridos los hechos previstos en la ley como generadores de una obligación tributaria, los contribuyentes y demás responsables deberán cumplir dicha obligación por sí cuando no proceda la intervención de la Administración. Si ésta correspondiere, deberán denunciar los hechos y proporcionar la información necesaria para la determinación del tributo.

Art. 133. Determinación por la Administración. – La determinación por la Administración es el acto que declara la existencia y cuantía de un crédito tributario o su inexistencia.

Art. 134. Declaración de los contribuyentes. – La determinación se efectuará de acuerdo con las declaraciones que presenten los contribuyentes y responsables en el tiempo y condiciones que establezca la autoridad administrativa, salvo cuando este Código o leyes particulares fijen otro procedimiento.

Art. 135. Determinación por incumplimiento. – La Administración podrá verificar la exactitud de las declaraciones.

Podrá asimismo proceder a la determinación de oficio, sobre base cierta o sobre base presunta, en cualquiera de las siguientes situaciones:

1. Cuando el contribuyente o responsable hubiera omitido presentar la declaración.

2. Cuando la declaración ofreciera dudas relativas a su sinceridad o exactitud.

3. Cuando no exhiba los libros y documentos pertinentes.

Art. 136. Formas de la determinación. – La determinación por la Administración se realizará aplicando los siguientes sistemas:

1. Sobre base cierta, tomando en cuenta los elementos que permitan conocer en forma directa los hechos generadores del tributo.

2. Sobre base presunta, en mérito a los hechos y circunstancias que, por su vinculación o conexión normal con el hecho generador de la obligación, permitan inducir la existencia y cuantía de la obligación.

Art. 137. Efectos. – La determinación sobre base presunta sólo procede si el contribuyente no proporciona los elementos de juicio necesarios para practicar la determinación sobre base cierta. En tal caso subsiste la responsabilidad por las diferencias en más que pudieran corresponder derivadas de una posterior determinación sobre base cierta practicada en tiempo oportuno.

La determinación a que se refiere este artículo no podrá ser impugnada fundándose en hechos que el contribuyente no hubiere puesto oportunamente en conocimiento de la Administración.

Art. 138. Determinación por mandato legal. – Cuando la ley encomienda la determinación a la Administración, prescindiendo total o parcialmente del contribuyente, aquélla deberá practicarse sobre base cierta.

Sólo podrán utilizarse indicios o presunciones en caso de imposibilidad de conocer los hechos.

El contribuyente podrá impugnar la determinación asi practicada invocando todos los fundamentos de hechos y de Derecho que considere pertinentes.

CAPÍTULO III

Deberes formales de os contribuyentes y responsables

Art. 139. Obligaciones de los particulares. – Los contribuyentes y responsables están obligados a facilitar las tareas de determinación, fiscalización e investigación que realice la Administración, y en especial deberán:

1. Cuando lo requieran las leyes y los reglamentos:

a) Llevar los libros y registros especiales, referentes a las actividades y operaciones que se vinculen con la tributación.

b) Inscribirse en los registros pertinentes, a los que aportarán los datos necesarios y comunicarán oportunamente sus modificaciones.

c) Solicitar a la autoridad que corresponda permisos previos o de habilitación de locales.

d) Presentar las declaraciones que correspondan.

2. Conservar en forma ordenada, mientras el tributo no esté prescrito, los libros de comercio, los libros y registros especiales, los documentos y antecedentes de las operaciones o situaciones que constituyan hechos gravados.

3. Facilitar a los funcionarios fiscales autorizados las inspecciones o verificaciones en cualquier lugar, estabiecimientos comerciales o industriales, oficinas, depósitos, buques, aeronaves y otros medios de transporte.

4. Presentar o exhibir en las oficinas fiscales o ante los funcionarios autorizados las declaraciones, informes, documentos, comprobantes de legítima procedencia de mercaderías, relacionados con hechos generadores de obligaciones tributarias, y formular las ampliaciones o aclaraciones que les fueren solicitadas.

5. Comunicar cualquier cambio en su situación que pueda dar lugar a la alteración de su responsabilidad tributaria.

6. Concurrir a las oficinas fiscales cuando su presencia sea requerida.

Art. 140. Entes colectivos. – Los deberes formales deben ser cumplidos:

1. En el caso de personas jurídicas, por sus representantes legales o convencionales.

2. En el caso de entidades previstas en el art. 24, núm. 3., por la persona que administre los bienes, y en su defecto por cualquiera de los integrantes de la entidad.

3. En el caso de sociedades conyugales, núcleos familiares, sucesiones y fideicomisos, por sus representantes, administradores, albaceas, fiduciarios o personas que designen los compentes del grupo, y en su defecto por cualquiera de los interesados.

Art. 141. Responsabilidad de los declarantes. – Las declaraciones o manifestaciones que se formulen se presumen fiel reflejo de la verdad y comprometen la responsabilidad de quienes las suscriban, sin perjuicio de lo dispuesto en el art. 85.

En principio se consideran definitivas, pero pueden ser modificadas en cualquier tiempo sin perjuicio de las facultades de verificación de la Administración y de la aplicación de las sanciones que corresponden si tal modificación ha sido hecha a raíz de denuncia, observación o inspección de la autoridad.

CAPÍTULO IV
Tramitación

SECCIÓN PRIMERA
Comparecencia

Art. 142. Personería. – En todas las actuaciones los interesados podrán actuar personalmente o por medio de sus representantes legales o voluntarios. Quien invoque una representación acreditará su personería en la primera presentación.

Art. 143. Constitución de domicilio. – Los interesados están obligados a constituir domicilio en el primer escrito o audiencia, siempre que no tengan domicilio fiscal registrado en la oficina correspondiente de la Administración Tributaria.

Art. 144. Fecha de presentación. – La fecha de presentación se anotará en el escrito y se otorgará en el acto constancia oficial al interesado si éste lo solicita.

SECCIÓN SEGUNDA
Notificaciones

Art. 145. Formas de notificación. – Las notificaciones se practicarán en cualquiera de esta formas:

1. Personalmente.
2. Por correspondencia postal o telegráfica.
3. Por constancia escrita entregada por empleados en el domicilio del interesado, la que será practicada con las formalidades establecidas en la legislación procesal común.
4. Por constancia administrativa dejada en el expediente una vez transcurridos los plazos fijados para la comparecencia de los interesados en las citaciones que se les formulen, las que podrán ser hechas por correspondencia.

Art. 146. Forma del documento. – En las notificaciones de resoluciones que liquiden tributos o apliquen sanciones se transcribirán íntegramente sus fundamentos.

Art. 147. Fecha de la notificación. – Las notificaciones se practicarán en día hábil.

Si los documentos fueran entregados en día inhábil, la notificación se entenderá realizada el primer día hábil siguiente.

Art. 148. Notiticación personal y a domicilio. – Las resoluciones que determinen tributos, impongan sanciones, decidan recursos, decreten apertura a prueba, y en general todas aquelias que causen gravamen irreparable, serán notificadas personalmente en las oficinas de la Administración Tributaria o en el domicilio del interesado, en la forma prescrita en los números 1. y 3. del art 145.

SECCIÓN TERCERA

Prueba

Art. 149. Medios de prueba. – Podrán invocarse todos los medios de prueba admitidos en Derecho, con excepción de la confesión de empleados públicos.

Art. 150. Vista de las actuaciones. – Los interesados o sus representantes y sus abogados tendráll acceso a las actuaciones, inclusive a los sumarios por infracciones, y podrán consultarlas sin más exigencia que la justihcación de su identidad.

Art. 151. Término de prueba. – El término de prueba será fijado de acuerdo con la importancia y complejidad de cada caso y no podrá ser inferior a ... días. El término de prueba no es perentorio.

En los asuntos de puro derecho se prescindirá de él, de oficio o a petición de parte.

Art. 152. Admisibilidad de la prueba. – No se admitirán las pruebas inconducentes, las que deberán rechazarse mediante resolución fundada. El afectado podrá dejar constancia de su disconformidad, la que será considerada al sustanciarse el recurso que corresponda.

Art. 153. Medidas para mejor proveer. – La autoridad administrativa impulsará de ohcio el procedimiento. En cualquier estado del trámite podrá disponer medidas para mejor proveer.

SECCIÓN CUARTA
Determinación por la Administración

Art. 154. Vista inicial. – La determinación a que se refiere el art. 135 se iniciará con el traslado al contribuyente de las observaciones o cargos que se le formulen. En este caso la autoridad administrativa podrá - si lo estima conveniente - requerir la presentación de nuevas declaraciones o la rectificación de las presentadas.

Art. 155. Trámite. – En el término no perentorio de ... días el contribuyente deberá formular su descargo y presentar u ofrecer prueba. Si se le formulan cargos deberá establrcerse en forma circunstanciada la infracción que se le imputa.

Vencidas los términos respectivos se dictará resolución en la que se determinará la obligación y se intimará el pago que corresponda.

Si del procedimiento resultara comprobada alguna infracción, la sanción deberá ser aplicada en la misma resolución que determina la obligación. De no hacerlo, se entenderá que no hay mérito para ello, con la consiguiente liberación de responsabilidad del contribuyente.

Art. 156. Requisitos de la resolución. – El acto de determinación debe contener las siguientes constancias:

1. Lugar y fecha.
2. Indicación del tributo y del periodo fiscal correspondiente.
3. Apreciación de las pruebas y de las defensas alegadas.
4. Fundamentos de la decisión.
5. Elementos inductivos aplicados, en caso de estimación sobre hase presunta.
6. Discriminación de los montos exigibles por tributos, intereses y sanciones según los casos.
7. Firma del funcionario autorizado.

La ausencia de cualquiera de estos requisitos vicia de nulidad el acto.

SECCIÓN QUINTA
Infracciones

Art. 157. Sumarios. – Las infracciones que se comprueben en ocasión de inspecciones o actos similàres deberán documentarse en actas, sobre la base de las cuales la autoridad respectiva ordenará la instrucción del sumario.

El sumario estará a cargo de los funcionarios competentes o de los designados especialmente al efecto.

En materia de prueba regirá lo dispuesto en la Sección Tercera de este capítulo.

Art. 158. Secreto de las actuaciones. – Al ordenarse el sumario podrá disponerse el secreto de las actuaciones durante un plazo que no podrá exceder de ...

Art. 159. Requisitos del acta. – El acta consignará en forma circunstancia da la infracción que se imputa y hará plena fe mientras no se pruebe su falsedad.

El interesado deberá firmar el acta, en la que podrá dejar las constancias que estime convenientes; si se negare a firmarla, así lo hará constar el funcionario actuante.

SECCIÓN SEXTA
Normas Supletorias

Art. 160. Normas supletorias. – En materia de procedimiento, a falta de norma expresa en este Código, se aplicarán las disposiciones generales de procedimiento administrativo y, en su defecto, las de los Códigos de Procedímiento Civil o Penal.

CAPÍTULO V
Certificaciones

Art. 161. Trámite. – Cuando los contribuyentes, responsables o terceros deban acreditar el cumplimiento de sus obligaciones tributarias solicitarán un certificado al órgano recaudador correspondiente, el que deberá expedirlo en un plazo no mayor de ... días.

Si no estuviere en condiciones de otorgarlo, dentro del mismo plazo deberá dejar constancia documentada, la que tendrá igual efecto que el certificado.

Art. 162. Presunción de no adeudo y fiscalización. – Se presume que los interesados han cumplido sus obligaciones tributarias cuando han observado sus deberes formales, sin perjuicio del derecho de la Administración a verificar la exacta aplicación de las normas dentro del término de prescripción.

En todos los casos la Administración podrá efectuar las fiscalizaciones pertinentes para comprovar la existencia de infracciones.

Art. 163. Efecto liberatorio. – Los certificados tendrán efecto liberatorio respecto de los contribuyentes y responsables cuando se emitan sobre la base de resoluciones firmes de la Administración o cuando así surja del propio documento, y frente a terceros en todos los casos.

Art. 164. Efectos del error. – El error o irregularidad en que pudiere incurrir la Administración no obstará al efecto liberatorio frente a terceros en tanto no se pruebe que éstos incurrieron en fraude.

Art. 165. Limitación de la certificación. – El requisito de la certificación no podrá afectar al libre ejercicio de los derechos individuales y políticos.

CAPÍTULO VI
Consultas

Art. 166. Trámite. – Quien tuviere un interés personal y directo podrá consultar a la autoridad administrativa correspondiente sobre la aplicación del derecho a una situación de hecho concreta y actual. A ese efecto, el consultante deberá exponer con claridad y precisión todos los elementos constitutivos de la situación que motiva la consulta, y podrá asimismo expresar su opinión fundada.

Art. 167. Efectos. – La consulta presentada dentro del término para el pago del tributo exime de sanciones al consultante por el excedente que resulte de la resolución administrativa, si fuera pagado en el término que ésta fijara.

Para evacuar la consulta la Administración dispondrá de los plazos que fijen las leyes especiales; en su defecto, el plazo será de ...

Art. 168. Plazo para resolver. – Si con posterioridad al vencimiento de los plazos previstos en el artículo anterior la consulta fuere reiterada y la Administración no dicta resolución dentro de los ... días de la reiteración, se entenderá aprobada la interpretación del consultante, si éste la hubiere expuesto.

Dicha aprobación se limitará al caso concreto consultado y no afectará a los hechos generadores que ocurran con posterioridad a la notificación de la resolución que en el futuro dicte la Administración.

La omisión de los funcionarios en evacuar las consultas dentro de los términos legales constituirá un caso de violación de los deberes del cargo, previsto en los arts. 122 y siguientes.

Art. 169. Recursos. – Si la autoridad administrativa no aceptara la interpretación del consultante, deberá liquidar la diferencia de tributo si la naturaleza de la situación consultada lo permitiera, a fin de que el interesado pueda recurrir de la misma.

Si la naturaleza de la consulta no permitiera liquidar de inmediato la diferencia, el plazo para interponer el recurso correrá a partir de la notificación de la liquidación.

Art. 170. Nulidad. – Será nula la consulta evacuada sobre la base de datos inexactos proporcionados por el consultante.

CAPÍTULO VII (texto 1.)
Acciones y recursos

Art. 171. Vía optativa. – Los actos de la Administración por los que se determinen tributos o se apliquen sanciones pueden impugnarse por quien tenga un interés legítimo, dentro del término perentorio de ... días, por una de las siguiente vías, a opción del interesado:

1. Recurso de revocacion ante la misma autoridad que dictó la resolución. Cuando la decisión haya sido adoptada por un órgano sometido a jerarquía, se entenderá interpuesto en forma subsidiaria el recurso jerárquico.

2. Acción ante la autoridad jurisdiccional, que se sustanciará en la forma establecida en el Título V de este Código.

La elección de una vía importa renuncia a la otra.

Art. 172. Efectos. – En cualquiera de los casos del artículo anterior, el recurso o la acción surten efecto suspensivo de la obligación y de la ejecución de la sanción, llevando implícito el recurso de nulidad.

El recurso o la acción deben interponerse por escrito ante la autoridad que deba conocer en el mismo y contendrá una exposición detallada de los ágravios que se invoquen contra la decisión.

Art. 173. Acción de repetición. – Si el recurrente optara por la vía autorizada en el número 1. del art. 171 siempre tendrá a su disposición, en caso de confirmatoria, la acción de repetición establecida en este Código.

Art. 174. Legitimación. – Los recursos mencionados en el art 171 podrán ser interpuestos por los contribuyentes o responsables afectados por resoluciones individuales.

Las disposiciones de carácter general que impliquen una interpretación de las normas tributarias podrán ser impugnadas por las asociaciones o en-

tidades que representen a los interesados afectados mediante el recurso del número 1. del art 171, o sin efecto suspensivo.

CAPÍTULO VII (texto 2.)
Recursos administrativos y jerárquicos

Art. 171. Forma. – Los actos de la Administración en materia tributaria contrarios a derecho pueden impugnarse por quien tenga un interés legítimo, mediante el recurso de revocación ante la misma autoridad que los dictó, dentro del término perentorio de ... días.

Cuando la resolución haya sido adoptada por un órgano sometido a jerarquía, se entenderá interpuesto en forma subsidiaria el recurso jerárquico.

Art. 172. Requisitos. – Los recursos deben interponerse por escrito, contendrán una exposición detallada de los agravios que se invoquen y tendrán efecto suspensivo.

Art. 173. Agotamiento de la vía administrativa. – La interposición y la decisión expresa o tácita de este recurso es requisito indispensable para la iniciación de las acciones previstas en el Título V.

Art. 174. Legitimación. – Los recursos podrán ser entablados por los contribuyentes o responsables afectados por disposiciones de carácter general o por resoluciones individuales.

Las disposiciones de carácter general y las resoluciones que impliquen una interpretación de las normas tributarias podrán ser impugnadas también por las asociaciones o entidades que representen los intereses afectados.

TÍTULO V
Contencioso tributario

CAPÍTULO I
Acción ordinaria

Art. 175. Tribunal. – (Texto 1.) (1). Las controversias tributarias serán decididas por un tribunal colegiado especializado, de plena jurisdicción, independiente de la Administración activa.

(1) Se presentan dos textos alternativos de los arts. 175, 176 y 177.

Sus sentencias serán siempre recurribles ante los Tribunales superiores, sin efecto suspensivo.

Art. 176. Parte actora. – (Texto 1.). La demanda podrá ser entablada por cualquiera de los contribuyentes o responsables será notificada a todos los que resulten obligados por la resolución impugnada, a efecto de que comparezcan como parte dentro del término de ... días.

Art. 177. Requisitos de la demanda. – (Texto 1.). La acción a que se refiere el art 175, párrafo primero, podrá interponerse y deberá fallarse sin que sea necesario el pago previo de los tributos o de las sanciones.

Art. 175. Tribunal de primera instancia. – (Texto 2.). Las controversias tributarias serán decididas en primera instancia por un tribunal colegiado, especializado, de plena jurisdicción, independiente de la Administración activa.

Sus sentencias serán siempre recurribles ante los tribunales superiores.

Art. 176. Parte actora. – (Texto 2.). La demanda podrá ser entablada por cualquiera de los contribuyentes o responsables será notificada a todos los que resulten obligados por la resolución impugnada, a efecto de que comparezcan como parte dentro del término de ... días.

Art. 177. Requisitos de la demanda. – (Texto 2.). Las demandas y recursos a que se refiere el art. 175 podrán interponerse y deberán fallarse sin que sea necesario el pago previo de los tributos o de las sanciones.

La demanda deberá presentarse dentro del término de ... de notificada la resolución administrativa impugnada.

(Nota: El plazo debe ser breve, por ejemplo sesenta o noventa días.)

Art. 178. Procedimiento en primera instancia. – El procedimento será el establecido en el Título IV de este Código, y en su defecto por el Derecho común para el juicio ordinario, con las siguientes excepciones en la primera instancia:

1. Los magistrados tendrán la facultad de impulsar de oficio el procedimienlo y podrán ordenar el diligenciamiento, de pruebas que estimen necesarias para el esclarecimiento de los hechos.

2. Los hechos que se deban probar serán determinados en una audiencia con intervención personal del magistrado, el que fijará la extensión del término según las circunstancias.

3. El Fisco estará obligado a remitir todos los antecedentes administrativos y los demás elementos de prueba que se hallen en su poder dentro de

los plazos que fije el magistrado, quien podrá dar por ciertas las afirmaciones de la contraparte. La omisión del Fisco no paralizará el procedimiento.

4. Diligenciada la prueba o vencido el término, el Tribunal fijará la fecha para la vista oral de la causa en audiencia pública.

Art. 179. Sentencia. – El Tribunal dispondrá del plazo de ... días para dictar sentencia.

Podrá exonerar total o parcialmente de las multas si estimare que el actor tenía fundadas razones para considerar improcedente el tributo.

Si juzgare que la acción es manifiestamente improcedente, podrá duplicar las referidas multas.

Art. 180. Procedimiento en segunda instancia. – La sentencia de primera instancia será apelable ante ... (2), dentro del plazo de ... días, cuyo pronunciamiento no admitirá ulterior recurso.

El procedimiento será el ordinario, salvo en lo que respecta a las facultades del Tribunal, el que en principio sólo se pronunciará sobre el derecho aplicable. No obstante, a pedido de parte o de oficio, podrá rever la prueba y eventualmente decretar diligencias para mejor proveer, cuando estimare que la sustanciación del proceso en primera instancia adolece de deficiencias.

CAPÍTULO II
Medidas cautelares

Art. 181. Procedencia. – El Fisco podrá solicitar de los órganos jurisdiccionales embargo preventivo, secuestro u otras medidas cautelares cuando exista riesgo para la percepción de los créditos fiscales por concepto de tributos e intereses, cuya existencia se compruebe por documentos emanados del contribuyente o por resolución de la autoridad administrativa competente.

Procederán también en caso de infracciones, cuando mediare resolución definitiva en los recursos administrativos o sentencia del Tribunal (3) confirmatoria de la resolución impugnada.

Art. 182. Requisitos. – El riesgo deberá ser fundamentado por el Fisco y justificado sumariamente ante la autoridad jurisdiccional.

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(2) Se determinará por la legislación local.

(3) Véase el art. 175.

Art. 183. Procedimiento. – El Juez decretará las medidas dentro del término de ... días sin conocimiento del deudor y bajo la responsabilidad del Fisco. En el mismo acto fijará el término durante el cual tendrá vigencia la medida cautelar.

Art. 184. Garantías. – Para decretar las medidas cautelares no se exigirá caución.

Las medidas decretadas podrán ser sustituidas por garantías suficientes a juicio del magistrado.

CAPÍTULO III
Juicio ejecutivo

Art. 185. Acción ejecutiva. – El Fisco tendrá acción ejecutiva para el cobro de los créditos por concepto de tributo e intereses que resulten en sus resoluciones firmes o de las sentencias dictadas en las acciones y recursos pertinentes. Para el cobro de las multas se requerirá sentencia ejecutoriada.

A tal efecto constituirán título ejecutivo los documentos administrativos presentados con los requisitos a que se refiere el artículo siguiente y el testimonio de las sentencias.

Art. 186. Título ejecutivo administrativo. – Para que el documento administrativo constituya título ejecutivo deberá reunir los siguientes requisitos:

1. Lugar y fecha de la emjsión.
2. Nombre del obligado.
3. Indicación precisa del concepto e importe del crédito, con especificación, en su caso, del tributo y ejercicio fiscal que corresponda, tasa y período del interés.
4. Individualización del expediente respectivo, así como constancia de si la deuda se funda en declaración del contribuyente o, en su caso, si se han cumplido los procedimientos legales pára la determinación de oficio o para la aplicación de sanciones.
5. Nombre y firma del funcionario que emitió el documento, con especificación de que ejerce las funciones debidamente autorizado al efecto.

Art. 187. Excepciones. – (Texto 1.) (4). Las únicas excepciones admisibles son:

(4) Se presentan dos textos alternativos del art. 187,

1. Inhabilidad del título por omisión de cualquiera de los requisitos previstos en el art. 186.
2. Pago.
3. Espera concedida con anterioridad al embargo.
4. Prescripción.
5. Inexistencia del crédito, declarada por resolución jurisdiccional ejecutoriada.

Art. 187. Excepciones. – (Texto 2.). Las únicas excepciones admisibles son:
1. Inhabilidad del título por omisión de cualquiera de los requisitos previstos en el art. 186.
2. Extinción de la obligación por cualquiera de los medios previstos en el art. 41 de este Código.
3. Espera concedida con anterioridad al embargo.
4. Inexistencia del crédito, declarada por resolución jurisdiccional ejecutoriada.

Art. 188. Suspensión del trámite. – El procedimiento se suspenderá a pedido de partes:

1. Cuando al ser citado de excepciones el ejecutado acredite que se encuentra en trámite la acción ordinaria contra la resolución que se pretende ejecutar. Ejecutoriada la sentencia pertinente, se citará nuevamente de excepciones a pedido de parte, y si aquélla hubiere sido favorable al ejecutado, todos los gastos judiciales u honorarios del juicio ejecutivo serán de cargo del Fisco.
2. Cuando se acredite que la Administración Tributaria ha concedido espera con posterioridad al embargo.

(Nota: El número 1. sólo es aplicable en caso de adoptarse el texto 2. de los arts. 171 a 174, pues de acuerdo con el texto 1., la acción tributaria tiene efecto suspensivo de la obligación fiscal, como consigna el art. 172, y, por tanto, no podria existir ejecución hasta terminar el juicio. La defensa fiscal estaría en las medidas cautelares.)

CAPÍTULO IV
Acción de repetición

Art. 189. Demanda. – Los contribuyentes o los responsables podrán reclamar la restitución de lo pagado indebidamente por tributos, intereses y sanciones mediante demanda de repetición. La demanda se notificará a todos los interesados a fin de que comparezcan a hacer uso de los derechos de que se crean asistidos.

Para la procedencia de la acción no es necesario el requisito del pago bajo protesta ni la presentación previa ante el Fisco, cualquiera que fuera el motivo de la misma.

Art. 190. Improcedencia. – No corresponde la acción de repetición:

1. Cuando la resolución que aplica sanciones por infracciones hubiera quedado firme por no haberse interpuesto los recursos o acciones pertinentes.
2. Cuando medie sentencia firme del órgano jurisdiccional.

Art. 191. Competencia y procedimiento. – La demanda de repetición deberá interponerse por escrito ante el Tribunal... (5).

El procedimiento se ajustará a lo establecido en el art. 178 de este Código.

Art. 192. Intereses. – Cuando se haga lugar a la demanda se reconocerán de oficio intereses a favor del actor en la forma prevista en el art. 62.

Art. 193. Caducidad. – La acción de repetición caduca a los ... años contados desde el 1 de enero siguiente al año en que se efectuó cada pago.

La acción podrá interponerse desde la fecha del pago aunque no hubiere comenzado a correr el término precedente.

CAPÍTULO V
Acción de amparo

Art. 194. Procedencia. – Procederá la acción de amparo cuando la Administración Tributaria incurra en demoras excesivas en resolver sovre peticiones de los interesados y ellas causen perjuicios no reparables por los medios procesales establecidos en este Código o en leyes especiales.

Art. 195. Legitimación y requisitos. – La acción podrá ser interpuesta por cualquier persona afectada mediante escrito presentado ante el Tribunal... (6).

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(5) Véase el art. 175.

(6) Véase el art. 175.

La demanda especificará las gestiones realizadas y el perjuicio que ocasiona la demora. Con ella se presentará copia de los escritos mediante los cuales se ha urgido el trámite.

Art. 196. Trámite. – Si *prima facie* la acción fuere procedente, el Tribunal requerirá informes sobre la causa de la demora y fijará un término breve perentorio para la respiesta. Vencido el plazo, el Tribunal dictará la resolución que corresponda en amparo del derecho lesionado, en la cual fijará un término a la Administración Tributaria para que realice el trámite o diligencia, o dispensará del mismo al peticionante previo afianzamiento del interés fiscal comprometido.

Sezione IV - Appunti e rassegne

Section IV - Notes and surveys

International fiscal transparency in the spanish legal system ("C.F.C. Rules")

Silvia Terrados

Through the approval by the Italian Parliament of the Bill in Parliament, relating to fiscal law, linked to the Budget for the year 2000 concerning CFC (Controlled foreign companies) and, to be more precise, the profits of controlled foreign companies, the first real attempt has been made to curb a problem, that of tax evasion unfortunately extremely widespread in Italy, due to the principle of world-wide taxation. According to this principle the income of legal persons resident will be subject to domestic taxation regardless of the country from which this income derived. Generally, these countries do not levy internal taxes also on the cross-border income of their residents, which is attributable to legal persons set up in another jurisdiction, because the latter have legal status and patrimonial autonomy that are different to those of their shareholders. In fact the problem of tax evasion in Italy consists in the opportunity held by subjects resident in Italy, to constitute or acquire stocks in foreign companies (domiciled in states with preferential tax treatment systems) by exploiting the different legal status relating to the said foreign companies in order to obtain a reduction in their tax base. This is because income received through these controlled foreign companies will be taxed according to considerably lower rates than those levied in Italy. The "C.F.C. rules" (1) are, therefore, a unilateral method employed by many industrialised countries, including the United States, France, Germany, England and Spain, which aims at preventing the beneficiaries of unearned income (i.e. revenue which is not derived from capital used for carrying on an economic activity) domiciled in any of these countries, from creating companies in territories which are qualified as 'tax havens' and from attributing to these companies revenue which should really be directly attributed to subjects domiciled within personal income tax (hereunder NPIT) or of the CT (corporate income tax, hereunder CT). In the case in question, the result of the application of the International Fiscal Transparency method (CFC rules) in the Spanish legal system is simply that of ignoring the shield that conceals the corporate status of the controlled foreign com-

(1) Controlled Foreign Companies

pany, and of attributing to the shareholders, who are resident within the Spanish territory, income gained by the said company. This will occur whenever certain conditions, established by law, are in place

The origin of the norms relating to International Fiscal Transparency (hereunder IFT), in the Spanish legal system, goes back to the issuing by the Ministry of Finance ("Ministerio de Economia y Hacienda") of the Royal-Decree of 5th July 1991, num.1080, which lists the countries or territories considered to be 'tax havens'. The list comprised a good 48 countries, including: The Republic of Andorra, Luxembourg, The Dutch Antilles, Cyprus, The Bahamas, The Cayman islands, The Mauritius islands, The Principality of Liechtenstein, the Republic of Malta The Republic of Panama, The Republic of San Marino, The Principality of Monaco etc. However, it was only with Law num. 42 of 30th December 1994 relating to 'Fiscal, Administrative and Social Measures' that for the first time a provision was introduced into the Spanish legal system concerning IFT to be enforced both as regards natural persons (art.2) and legal persons (art.10), domiciled in Spanish territory. The said law stipulates that its main objective is to prevent the deferment of the payment of Spanish taxes through the interposition of non-resident companies that are subject to a preferential fiscal system. Previous to Law 42/94, the said phenomenon occurred whenever the subjects domiciled in Spanish territory attributed to the tax bases of these instrumental companies, domiciled in "tax havens", the income which should instead fall within the field of application of Spanish income tax. The reason behind this attribution was simply to be able to tax the revenue in question according to considerably lower rates than those levied by the Spanish system.

Another aim of Law 42/1994 is to prevent the reduction of the tax base, subject to liability in Spain, which is implemented by invoicing of the costs deriving from controlled foreign companies subject to preferential fiscal systems. An example of the above is illustrated in the graph on page 7.

As mentioned before, I.F.T. is applied both to natural persons and to corporate persons. As regards natural persons the regime is set down in art. 75 of the Law relating to I.R.P.F. (personal income tax) (2) of 9th De-

(2) Ley 40/1998 December 9, *Impuesto sobre la renta de las personas fisicas*

cember1998, no. 40, whereas for corporate persons, the regulation is indicated in art. 121 of the Law relating to I.S (corporate income tax) (3) of 27th December 1995, no.43.

The Subjective Field of Application of I.F.T.

The following are subject to I.F.T. provisions:

1. Persons subject to N.P.I.T. (personal income tax)
2. Corporate bodies subject to C.T. (corporate income tax) because of their domicile (among others, corporate persons, investment funds, pension funds, ATI, etc.)

As a result of the application of the aforesaid IFT provisions, the persons liable are obliged to include in their tax base certain types of income received by non-resident instrumental companies.

The I.F.T. provisions are not applicable to non-resident, natural persons (with the exception of the stipulations of the second and third paragraph of art.9 of the Spanish law relating to N.P.I.T. (personal income tax) which refer to members of the diplomatic corps, to international organisations abroad and to those persons who are domiciled in tax havens. Nor are they applicable to non-resident companies (even when they have created a permanent establishment in Spain, by means of which they participate in instrumental foreign companies).

As regards the controlled foreign company participated by person domiciled in Spain whose revenue may be subject to inclusion in the tax base of the said persons, the former must necessarily be domiciled abroad.

A slight nuance to be carefully observed stems from the reading of art. 75 of the law relating to NPIT which states:

"The taxpayers will ***impute*** *income received from a company, non-resident in Spanish territory, whenever this revenue belongs to the categories listed in the second paragraph of this article and whenever any of the following circumstances occur, (...)*

With this end in mind, the said article uses the term 'to impute' instead

(3) Ley 43/1995 December 27, *Impuesto sobre Sociedades*

of 'include'. The most authoritative Spanish doctrine (4) considers that the first verb is used improperly, because the norms relating to International Fiscal Transparency cannot oblige a 'transparent' foreign company to **impute** to the tax base of its shareholders who are resident in another country, the income it has obtained. On the contrary, it will fall to the fiscal authorities of the shareholders' country of residence to oblige the shareholders to **include** in their tax base the said revenue. In this item we observe how art. 121 of the CT law, as against art. 75 of the NPIT law, uses this verb accurately.

Conditions for the application of I.F.T.

Both art.75 of the I.R.P.F. law and art.121 of the law on IS, stipulate that to be able to apply the IFT provisions the existence of certain conditions is essential.

Let us now analyse them.

1. Control of the foreign company

The natural or corporate person domiciled in Spain, must possess, by himself or together with other relatives (in the case of the natural person), or through 'captive' companies, a stock equal to or higher than 50% of the foreign company.

Should the subject in question be a natural person, the said percentage is permitted to be:

a) owned through the **direct shareholding** in the foreign company domiciled in a 'tax haven';
b) owned not directly, but through the shareholding in companies which are 'captive' to the foreign company;
c) owned jointly with the stocks that the members of a family group up to the second degree (including their spouses), resident in Spanish territory, possess in the foreign company which is domiciled in a 'tax haven'.

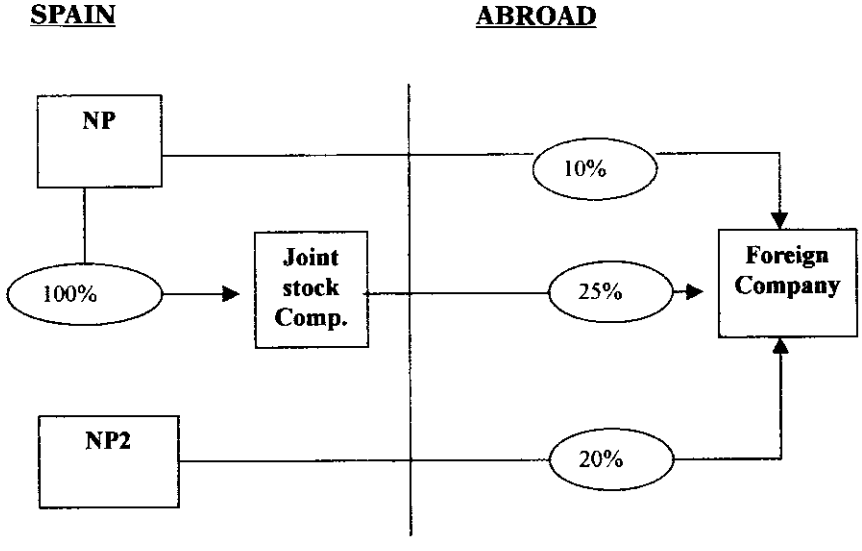
As regards a corporate person the 50% may be:

a) owned through the **direct stock** of the foreign company which is domiciled in a 'tax haven'.

(4) See SANFRUTOS GAMBIN, in *Cronaca Tributaria num. 88/1999*

b) owned not directly but through the stock in captive companies.
c) owned jointly with 'captive' persons through family relationships.
d) owned jointly with 'captive' persons and companies.
e) Consequently, the item in which natural persons are considered different from corporate persons is to be found in letter d), which refers to the so-called 'mixed conditions'. From a preliminary reading of articles 75 of the N.P.I.T. law and 121 of the C.T. law it is not clear whether, as regards the NPIT, the said 'mixed conditions' are possible. The latter refer to the possibility of combining the 'captive' groups with the family groups in order to achieve the aforesaid 50% quota, by means of adding the percentage owned by the members of the family group through their direct participation in foreign companies, to the percentage owned by the latter through the stock in companies domiciled in Spain but tied up, in their turn, with the foreign company.

Let us try to clarify the problem by means of a graph:



In our example the natural person (NP1) owns a direct stock of 10% of the foreign company domiciled in a country with preferential tax treatment. At the same time NP1 owns 100% of the share capital of the company domiciled in Spain, (Joint-stock Company.), which, in its turn, participates in the share capital of the foreign company with a 25% shareholding. NP1 has

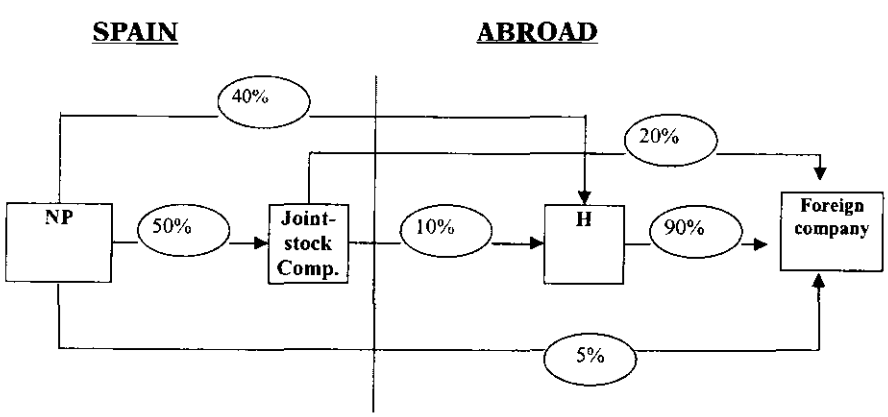
a brother (NP2) who holds a direct 20% stock in the foreign company.

Should it be possible to apply the 'mixed conditions', there would be control of the foreign company, because (NF1's 10% + the Joint-stock Company's 25% + NF2's 20% = 55%).

However, should it not be possible to apply the said condition this situation of control would not occur and consequently the TFL provisions would not be applicable because (NF1's 10% + NF2's 20% = 30%, or NF's 10% + the Joint-stock Company's 25% = 35%)

The prevailing trend in the *doctrine*, (Sanfrutos Gambin, Nuñez Pérez, Rubio Guerrero...) denies the possibility of applying the 'mixed conditions' in favour of natural persons but it does extend it to corporate persons. This statement is based mainly on the literal interpretation of the text of article 75 of the NPIT law and article 121 of the CT law. Article 75 of the N.P.I.T. law introduces in letter a), first paragraph, the following: '**alone or together with other captive companies, or together with other taxpayers linked by consanguinity**' which confirms without doubt the possibility of applying the aforesaid 'mixed conditions'. Moreover, letter a), first paragraph, article 121 of the I.S. law sets down: 'That **alone or together with captive persons or companies...**', which would seem to confirm the possibility of applying the mixed conditions regime to corporate persons.

Let us now examine another graph illustrating the method for calculating the percentage of control that we have been referring to:



In this case the calculation method for determining the percentage of control varies according to whether the natural person (NP) participates in the share capital of a resident company (Joint-stock Company) which, in its turn, participates in the share capital of the foreign company (both directly and indirectly), i.e. that the natural person participate in the share capital of a non-resident holding company (H) which, in its turn participates in the share capital of the foreign company domiciled in a country with a preferential tax treatment.

In the first case, NP's stock will be the same direct or indirect stock that the resident company owns in the foreign company, whereas in the second case, the participation of the holding in the foreign company is to be calculated on the basis of the stock which the natural person owns in the holding.

*In our example, NP's stock will be (5% direct stock + Joint stock Company's direct stock * 9% (10x90) indirect Joint-stock Company's stock + 36% (40x90) NP's indirect stock through the holding =70%. Consequently the IFT provisions will be applicable.*

In conclusion, the provisions mentioned above, after having established that the controlling groups can be set up only on the basis of consanguinity and of this 'captivity' between companies, have failed to include the possibility that the said groups might simply be made up of shareholders domiciled in Spanish territory (something which is instead provided for in other countries applying IFT provisions). As a result of this it will not be difficult to avoid the IFT provisions by means of agreements or pacts with other domiciled persons (with whom, obviously, there are no ties of consanguinity), for investing in foreign companies. In my opinion this is one of the more important gaps existing in the IFT provisions in force in Spain. 2

2. *Preferential tax treatment*

A country with a preferential tax treatment system is a country where the actual sum total of the taxes paid by the foreign company, (in respect of income falling within the category) is less than 75% of the sum total of the tax which is to be paid in Spain in respect of the said income. Consequently, the IFT provisions will be applied when the foreign company is domiciled in a territory qualified as a 'tax haven' in conformity with the Royal-Decree 1080/91, which we referred to in the above, or in a country which, though not qualifying as a 'tax haven', applies preferential tax treatment.

The domestic terms of comparison to be taken into account each and every time one is to assess whether a certain foreign country may or may not be considered as applying a preferential tax treatment, will be those relating to IRPEG (LIS), 35% of a general nature, 25% if we are dealing with a "non profit" Association, 20% if it is a Co-operative or 10% if it deals with a Foundation included among those provided for by the 30/94 law. Should the taxable person be a natural person, the rate to be applied will be the usual 35%.

Therefore, in order to establish whether the country in which a foreign company is domiciled can be considered to be a country with preferential tax treatment, it will be necessary to know the real sum total paid by the foreign company. In its turn, the comparison made between the Tax which is similar to the IS paid by the foreign company in its own country of domicile and the Spanish IS, will have to be carried out pro-quota in respect of the income subject to inclusion in the tax base of the company domiciled in Spain. This means that it will be necessary to calculate the value of the Tax effectively paid solely in relation to the income liable to inclusion in Spain. On this particular detail we make an in-depth study in paragraph number 3 dedicated to the *'Nature of income of the foreign company"*.

Be that as it may, art.75 of the law relating to NPIT does not specify the manner in which this comparison is to be carried out, therefore from a logical viewpoint, should the foreign company have benefited from tax breaks, it will be necessary to ascertain to what type of income this has been applied, and if this income is susceptible of inclusion in the tax base according to the provisions in force in Spain.

In conclusion, it will also be necessary to take into account the deductions and transfers which would have been applied in Spain if that income had been taxed in that country, though it will not be necessary to take into account those deductions which the non-resident company will have benefited from according to the provisions in force in its own country.

3. The nature of the income of the foreign company.

The second paragraph of article 75 of the Law relating to NPIT , and the second paragraph of art. 121 of the law relating to CT, refer to income liable to inclusion in the tax base of the person domiciled in Spain. This will be the unearned income, such as dividends, interest, fees deriving from the non-commercial transfer of real estate, etc. Notwithstanding this

fact, this income will not be subject to inclusion, whenever it has been obtained as an incidental result of a business activity. The reason behind this statement lies in the fact that, the IFT norms aim at taxing the unearned income of the persons domiciled in Spain, received through their holding of stock in companies domiciled in countries with preferential tax treatment. However, the regulations provide for, in some cases, the inclusion of certain income derived from commercial, credit, financial and insurance activities, besides that derived from the performance of services, when the said income has been obtained by the foreign company through the implementation of operations with captive persons domiciled in Spanish territory in respect of whom tax deductible expenses have been taken off the taxable basis.

On the basis of the above, in conformity with art. 75 of the law relating to NPIT, the following income is susceptible of inclusion:

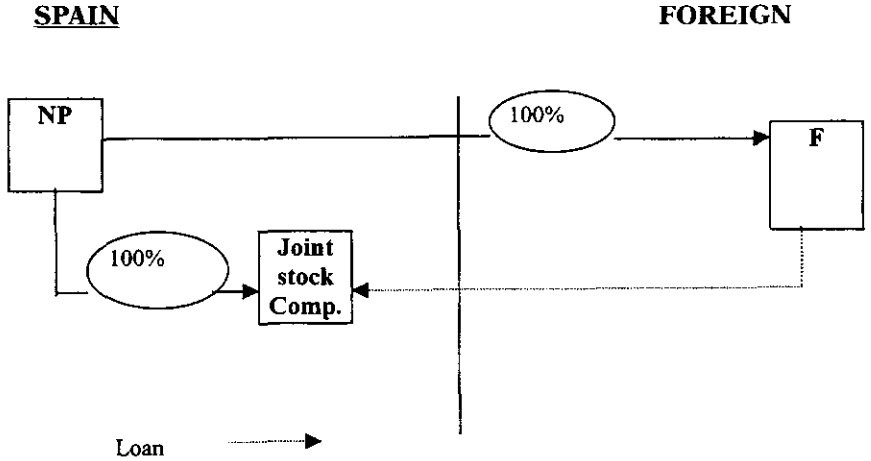
a) Income deriving from the ownership of real estate, both rural and urban, or of real rights to this real estate, with the exception of the case where the said income is generated from an entrepreneurial activity, or where its use has been transferred to companies which are non-resident but which belong to the same group, in conformity with art.42 of the Spanish Commerical Code. ' Codice di Commercio spagnolo').
b) Income deriving from the ownership of shares and bonds (with the exception of those listed in this article, as, for example those shares which incorporate credit rights stemming from contractual relations within business activities).
c) Income obtained by companies domiciled in countries with preferential tax treatment, deriving from credit, financial, insurance activities and from the performance of services (with the exception of those directly related to export transactions), carried out directly or indirectly with domiciled persons or companies, in respect of which fiscally deductible expenses in favour of the latter may be derived.

However, income obtained by the foreign company through the companies, of which 5% of the stock is directly or indirectly held by the foreign company, will be exempt, though only in the presence of the following two conditions:

1. That the foreign company control or manage the stocks through the organisation of human resources and material means;

2. That at least 85% of the proceeds of this company be derived from business activities.

The following is an example of what has been illustrated above:



The natural person (NP) sets up, in a country with preferential tax treatment, a financial company (F). The capital brought in to form this company is later used to finance, through a loan, the corporate activities of the Joint-stock company of which NP owns 100% of the share capital. In this way a reduction of the Spanish tax base is produced because the interest paid to the financial company (F), will involve costs that can be deducted from the tax base of the Joint-stock company. At the same time the interest paid to F will be subject to preferential tax treatment or even to no taxation whatsoever.

d) Income deriving from the transfer of goods and rights, as in letters a) and b) from which equity increments and decrements accrue, with the exception that the said real estate should be derived from an economic activity, or that their use be transferred to non-domiciled companies belonging to the same group.

In conclusion, articles 75 and 121, stipulate a whole series of criteria for determining the income that is to be included under the Spanish provisions relating to IFT.

Compulsory information

The subjects liable to the Spanish provisions relating to IFT, which are obliged to include in their tax base the income they have received from a company domiciled in a country with a preferential tax treatment system, must forward together with the NPIT or CT tax forms, all the details relating to the foreign company. These features are as follows:

1. Name or corporate name and corporate domicile of the company
2. List of directors
3. Financial statement and 'profit and loss' account
   Income to be included in the tax base
4. Justification of the taxes already paid for that part of income to be included in the tax base, in order to be able to deduct them.

Assessment of IFT. Exchange of information.

Due to the fact that the Spanish provisions relating to IFT determine the inclusion in the tax base of subjects domiciled in Spain of income they have received from foreign companies domiciled in countries with preferential tax treatment, it will be necessary to check the financial statement of the latter. However, what has just been stated becomes the real problem facing the IFT provisions, because the aforesaid revenue was obtained in a country that is not subject to Spanish rule. Therefore it will be necessary, in order to be able to implement the Spanish IFT provisions, to solicit the co-operation of the fiscal authorities of the source country. Furthermore it will be necessary to ascertain the percent of stockholding or control in the foreign companies, should this income not have been included voluntarily and fraudulently by the domiciled subjects. Consequently it is extremely difficult to gather all the necessary information, especially when the country where the foreign company is domiciled has not signed any Convention with Spain. Wherever a country with preferential tax treatment may have stipulated a Convention with Spain with a clause relating to the exchange of information, the Spanish authorities would rely on the latter in order to solicit all the details needed. However, in this case too, the foreign country might interpret that that type of income is not susceptible of inclusion and consequently could refuse to supply the documentation required. In conclusion, the foreign country is not obliged to adopt measures that are contrary to its own legislation and therefore the chance of obtaining information becomes day by day weaker and more abstract.

Within the E.U, the Co-operation between the various Financial Administrations has been the focal point of various Directives. This is the case in EEC Directive 77/799 relating to Direct taxes, assimilated in Spain by R-D 1326/87. The latter provides for the possibility - for the Spanish Ministry of Finance - to solicit from the authorities with jurisdiction of the member states the data, opinions or facts with fiscal relevance as regards NPIT or CT.

The territories qualified as tax havens

All the countries or territories included in the already mentioned list in R-D 1080/91, will be qualified as "tax havens". This qualification will lead to important juridical and fiscal consequences. The said territories, in conformity with D 1080/91 are the following:

The Principality of Andorra, The Dutch Antilles, Aruba, The Emirate of the State of Bahrein, The Sultanate of Brunei, The Republic of Cyprus, The United Arab Emirates, Gibraltar, Hong-Kong, Anguilla, Antica and Barbuta, The Bahamas, The Barbados, The Cayman islands, Cook island, The Dominican Republic , The island of Granada, The Fiji islands, The islands of Guernsey and Jersey, Jamaica, The Republic of Malta, The Malvinas islands, The isle of Man, The Mariannas, The Mauritius islands, The island of Monserrat, The Republic of Naurù, The Solomon islands, San Vincenzo and The Granadines, Santa Lucia, The Republic of Trinita and Tobago, The Turks and Caicos islands, The Republic of Vanuatu, The British Virgin islands, The Virgin islands of the United States of America, The Hashemite Kingdom of Jordan, The Lebanese Republic, The Republic of Liberia, The Principality of Liechtenstein, Luxembourg, Macao, The Sultanate of Oman, The Republic of Omàn, The Republic of Panama, The Republic of San Marino, The Republic of Seychelles, The Republic of Singapore.

From the inclusion of these territories in R-D 1080/91, stems the fact that the natural persons with Spanish nationality, who have established their fiscal domicile in one of these countries, shall not lose their status as Spanish taxpayers neither during the tax period in which their change of domicile took place nor during the four subsequent tax periods. This is provided for in the third paragraph of art. 9 of the law relating to NPIT. The latter provision attempts to dissuade the Spanish taxpayer from implementing this change of domicile for fraudulent motives, because the said change would only begin producing effects after five years.

The said paragraph stipulates that:

"In no instance whatever may the taxes paid in countries or territories regularly qualified as tax havens be deducted".

The Spanish system, in its turn, as regards the deduction of the expenses deriving from certain operations with companies domiciled in tax havens, forbids, by and large, this possibility. It specifies however that, notwithstanding this, these expenses are deductible if the person domiciled in Spain can prove that the operation which is the source of the said expenses has effectively been implemented. In this case, there is a an inversion of the burden of proof, and in virtue of this, the company domiciled in Spain which sustains the expenses will have to prove that the business operation from which these expenses have stemmed did in fact take place.

The OEIC (Open-end investment companies) in tax havens.

The subject matter concerning the OEIC (open-end investment companies = hereunder OEIC) is regulated by art.78 of the law relating to NPIT by art.74 of the law relating to CT. The contents of these articles stipulate that the taxpayers liable to NPIT, CT and IRNR (non resident income tax = hereunder NRIT) (5), who own stocks in OEICs, are obliged to integrate in their tax base the difference between the stock at closure date of the fiscal year, and the purchase value of this stock. If the result is negative, no type of deduction will be permissible.

The benefits deriving from the shareholding in the OEICs, will not be integrated in the tax base of the taxable person. Consequently, the sum total of the latter will reduce the purchase value of the stock thus increasing the difference between the two values of the stock that we referred to in the above. I.e. between its liquidation value and its purchase value. The aforesaid benefits, in their turn, will not be subject to deduction for double taxation.

Furthermore, it is presumed, excepting rebuttal evidence, that the difference between the different values of the stock, referred to in the preceding paragraph, will be 15% of the purchase value of the share or of the stock.

(5) Law 41/1998 of 9th December relating to non-residents income tax .

Companies domiciled in tax havens.

As already observed in the above, the norms relating to IFT are applicable not only when the controlled foreign company is domiciled in the territories qualified by R-D 1080/9 as being tax havens, but also when it is domiciled in a country which, without being qualified as such, has a preferential taxation system. This occurs when the Tax effectively paid in the said territory is at least 75% less than the Tax that is to be should be paid in Spain.

Having said that, let us now analyse whether there are differences between the so-called tax havens and the rest of the countries with preferential taxation systems. As regards this, we observe that the eleventh paragraph of art. 75 of the law relating to NPIT and the twelfth paragraph of art.121 of the law relating to CT, introduce a particular regulation concerning the companies domiciled in the tax havens, based on the existence, in favour of these companies, of 3 presumptions:

1. That the status of preferential taxation regime exist. Thus there is the presumption that the extent of taxation of the said territory is 75% lower than the Spanish "Impuesto de Sociedades" (IS) (corporate tax CT).
2. That there be income susceptible of inclusion. Thus there is the presumption that the income gained by the controlled foreign company is still among that which listed in the second paragraph of art..75 of the law relating to NPIT and art. 121 of the law relating to CT.
3. That the revenue gained by the company domiciled in the tax haven is equivalent to 15% of the purchase value of the stock owned in the said company by the domiciled persons.

As regards the control status of the foreign company, no type of presumption has been established, consequently the Fiscal Administration will have the responsibility of ascertaining the existence or non-existence of the said status.

These presumptions are the result of the lack of information exchange between Spain and the territories qualified as tax havens. This factor makes it extremely difficult for the Fiscal Administration to ascertain the income to be included in the tax base of the domiciled persons. However they are "iuris tantum" presumptions which allow rebuttal evidence.

In conclusion, as to whether the domiciled person is permitted or not permitted to deduct from his tax base the taxes paid in the tax haven, paragraph 8 of art.75 of the NPIT law absolutely forbids this possibility.

The said paragraph stipulates that:

"In no instance whatever may the taxes paid in countries or territories regularly qualified as tax havens be deducted".

The Spanish system, in its turn, as regards the deduction of the expenses deriving from certain operations with companies domiciled in tax havens, forbids, by and large, this possibility. It specifies however that, notwithstanding this, these expenses are deductible if the person domiciled in Spain can prove that the operation which is the source of the said expenses has effectively been implemented. In this case, there is a an inversion of the burden of proof, and in virtue of this, the company domiciled in Spain which sustains the expenses will have to prove that the business operation from which these expenses have stemmed did in fact take place.

The OEIC (Open-end investment companies) in tax havens.

The subject matter concerning the OEIC (open-end investment companies = hereunder OEIC) is regulated by art.78 of the law relating to NPIT by art.74 of the law relating to CT. The contents of these articles stipulate that the taxpayers liable to NPIT, CT and IRNR (non resident income tax = hereunder NRIT) (5), who own stocks in OEICs, are obliged to integrate in their tax base the difference between the stock at closure date of the fiscal year, and the purchase value of this stock. If the result is negative, no type of deduction will be permissible.

The benefits deriving from the shareholding in the OEICs, will not be integrated in the tax base of the taxable person. Consequently, the sum total of the latter will reduce the purchase value of the stock thus increasing the difference between the two values of the stock that we referred to in the above. I.e. between its liquidation value and its purchase value. The aforesaid benefits, in their turn, will not be subject to deduction for double taxation.

Furthermore, it is presumed, excepting rebuttal evidence, that the difference between the different values of the stock, referred to in the preceding paragraph, will be 15% of the purchase value of the share or of the stock.

(5) Law 41/1998 of 9th December relating to non-residents income tax .

Compatibility between the IFT provisions and the conventions against international double taxation. The OECD (Organisation for Economic Co-operation and Development) in particular.

First of all, it will be useful to recall that in the Spanish legal system, among the internal provisions relating to IFT and the bilateral Conventions against international double taxation, there is a relationship in which international law prevails over domestic law. However, the said relationship varies from country to country and, as a result of this, the problems deriving from it are very different.

To be more precise, in the United States (6), in Germany (7) and in the United Kingdom (8), the International Conventions are rendered equal to ordinary laws and, as a result of this, the principles of "lex posterior derogat priori", and "lex specialis derogat generali" prevail.

On the contrary, in France (9), in Spain and in Japan (10), the legal value of the Conventions is always higher than that of domestic laws.

Consequently, for the countries belonging to the first group, the possible conflict between the different systems might occur only after the entry into force of the IFT provisions; whereas for the countries belonging to the second group, the conflict might occur at any moment. This is the reason why the fiscal authorities have tried to render both systems compatible, adducing a series of motives that we will later be analysing.

Although it is certain that the OECD is favourable to the compatibility between the IFT norms and the Conventions against international double taxation, we must not forget that certain articles (such as nos. 5,

(6) Article VI of the Constitution of the United States, See, CASCAJO CASTRO.J.L. y GARCIA ALVARES. M., *Constituciones Extranjeras Contemporáneas,2° ed. Civitas, Madrid, 1991, p.74.*

(7) Article 59 of the German Constitution See, CASCAJO CASTRO.J.L. y GARCIA ALVARES. M., *Constituciones Extranjeras Contemporáneas, 2° ed. Civitas, Madrid, 1991, p.182.*

(8) See art.747 of the Taxes Act of 1988.

(9) See art.55 of the French Constitution of 1958

(10) Article 98.2 of the Japanese Constitution, See *http://www.ntt.jp/japan/constitution/english-Constitution.html* II CHAPTER-III.

7 and 10 of the 92 OECD model of Convention typology, may raise doubts as regards the said compatibility.

With regard to this, Comments nos. 23, 24, 25, 26, 37 and 38 in the OECD model Convention, have tried to justify the compatibility between both the systems, arguing that the IFT norms circumscribe taxable facts as regards domiciled subject, whereas international Conventions against double taxation concern non-resident subjects. Therefore the compatibility can be defended by adducing that it is a question of totally different subject matter. (This idea can be drawn from comment no.23).

In other comments it is stated that the IFT norms can never be incompatible with the Conventions because the former do no more than provide for the methods for avoiding international double taxation, in exactly the same way as the Conventions.

In conclusion, the IFT norms must respect certain rules in order to avoid entering into conflict with the international Conventions against double taxation. These rules can be summed up according to three fundamental points:

1) *First of all, they will have to avoid the creation of international double taxation situations.*

In this case, in my opinion, the Spanish system of provisions, stands apart from the OECD *doctrine* against double international taxation, because article 75 of the NPIT law allows the natural person domiciled in Spain to deduct only the taxes paid as a result of the distribution of dividends, but not to deduct the other taxes paid in the country of domicile of the foreign company.

However, as regards corporate persons, the ninth paragraph of art.121 of the CT law stipulates, in a totally contrary sense to what has been stated above, that it will be possible to deduct all the taxes that are identical or comparable to the CT paid by the foreign company. Consequently the Spanish system can be considered to be compatible with the OECD *doctrine* as regards corporate persons but not as regards natural persons.

2) *The norms relating to IFT will not have to be enforced with reference to those countries which have a taxation system similar to that of the country of domicile of the taxable persons.*

As regards Spain, the norms relating to IFT are enforced when the

tax paid abroad is 75% lower than the sum that should have been paid in Spain. This is so regardless of the general taxation system in force in the foreign country in question. Consequently, if the tax paid abroad is lower by this 75% the IFT norms will be enforced, regardless of the fact that both countries have, by and large, similar taxation systems.

The problem of incompatibility between the IFT norms and the OECD *doctrine* might arise should the foreign country recognise the possibility of compensating the losses deriving from previous fiscal years by means of a deadline for retroactivity which is higher than that provided for by the Spanish system, or should it provide for the existence of certain fiscal incentives etc. In these cases, even if there is no preferential fiscal regime (given that the latter must be the result of a global analysis of the general taxation system of the country in question), the IFT norms will be applicable because the result of these incentives or benefits leads to the concrete situation of taxation which is lower than 75% when compared to the Spanish tax, in favour of the foreign company.

3) *The norms relating to IFT are never to be applied to income deriving from business activities (such as the performance of services, productive activities and so on) effectively carried on by foreign companies.*

In this last case, the Spanish legal system appears compatible with the OECD doctrine, because it stipulates that the income susceptible of inclusion is to be unearned income, which is not derived from capital used for an actual business activity.

The European Union's enlargement and the mechanism of decision in fiscal matters

Marika Benigna (*)

1. In its Opinion of 26 January 2000 ("Adapting the Institutions to make a success of enlargement"), the Commission announced that it would provide a further contribution concerning the application of qualified majority voting in the taxation fields and social security. This proposal inevitably implies a detailed examination of the relevant Articles of the Treaty in order to identify the decisions that should be taken by qualified majority versus those which should remain subject to unanimity.

Reason of the Commission initiative is the perspective of enlargement up of the Economic and Monetary Union to 28 Member States, with the following problems caused by the important increase, in terms of numbers and diversity, of national economies and legal systems. Besides, the performance gap between Member States' economies and long term structural changes which many of these countries will have to suffer, they will also tend to enhance diversity and to accentuate the remaining imperfections of the Single Market, notably in the areas of taxation and social policy.

Therefore it is completely plain, according to the Commission, that the Union can only cope with this challenge by enhancing the efficiency of its decision making process through a greater resort to qualified majority voting, to the extent that it is necessary for the establishment and functioning of the Single Market.

2. National provisions concerning taxation and social security generally reflect the fundamental preferences of national legislators in economic and social policies. The level of social protection and welfare benefits as well as the way in which the revenue to finance such benefits is raised through taxation constitute the essence of sovereignty exercised by internal parliaments. In general terms, these provisions express national choices concerning the degree of solidarity and support between public bodies and citizens, choices that usually are "neutral" with regard to the European dimension.

However, there are rules which, either due to their contents or to their nature, cannot be considered "neutral", because they can affect the Sin-

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gle Market. These provisions can be classified into two categories: rules that are incompatible with Single Market objectives and rules that give rise to distortions of competition in the Single Market.

About the first point, though national rules on taxation and social security traditionally apply within a strictly national framework, these rules may impede the exercise of the four fundamental freedoms of the Treaty (free movement of goods, persons, services and capital in the Union). In this context it inserts the increasing presence of the European Court of Justice, which produces the effect to impose unilateral or bilateral modifications that can often be extended to situations where more than two countries are involved.

Anyhow, for the Member State it is far from ideal if Community law in these areas are developed on an *ad hoc* basis by judgements of the Court of Justice rather than via the political process.

About the second category that can affect the Single Market, the rules that give rise to distortions of competition in the Single Market, it's important to say that as the number of Member States increases it' s very probable that the differences of development between Member States in the Union increase, with the consequence that such divergences are to broaden the gap between different national economies.

In this situation there is the risk that policy choices against such different backgrounds may interfere with the overall objectives as well as sustainable growth and a high degree of convergence of economic performance.

In substance, according to the Commission, if the Community does not avail itself of efficient instruments to address these issues at Community level, those negative side effects will hamper the harmonious development of the Union.

3. For the establishment of the Single Market the Community intervention can involve different degrees of regulatory intensity, defined by the EC treaty as co-ordination of legislation, adoption of minimum rules and harmonisation of rules.

Co-ordination of national rules through Community legislation leaves national regimes as such untouched, but defines the interface between national regimes in relation to cross-border elements (examples in this case are regulation 1408/71 in the social security fields and the Council Parents/Subsidiaries and Mergers Directives in the direct tax field).

The adoption of minimum requirements, instead, is limited to the creation of a common minimum base of rules in the different national laws, solving, as in the case of co-ordination of national rules, the problem of interface between different national laws (for examples the Directive 92/77/CEE concerning the rates for value added tax or in the area of so-

cial security, Article137(3) EC).

Finally, for degree of regularity intensity and sharpness of intervention, there is the complete harmonisation, necessary when the previous ways do not allow the attainment of the objectives of establishing the Single Market (example in this case is the VAT Directive).

Nevertheless, the true obstacle for the actual and wide use of juridical instrument, it has been, in recent years, the unanimity requirement that has prevented the progress in a number of areas in which action is urgently required to ensure the proper functioning of the internal market and the unfettered exercise of the Treaty freedoms.

Therefore, the Commission considers that the scope for unanimity voting currently contained in the Treaty must be narrowed for the sake of efficiency and it proposes complementarily to introduce qualified majority voting for instruments allowing the co-ordination of national rules or the introduction of minimum requirements in the areas of taxation and social security.

4. Practical implications of the approach for taxation proposed by the Commission concern the exercise of the four freedoms, tax measures of primarily environmental nature, the rules for combating fraud, fiscal evasion and avoidance, and co-operation and mutual assistance between tax authorities.

About the first question, the Commission considers that all Community measures necessary to remove a direct obstacle to the exercise of the four freedoms must in future be adopted by qualified majority, so as to define the interface between national system and thereby to remove additional burdens to which the taxpayer is subject by reason of his cross-border situation, in particular discrimination and double taxation. These measures of co-ordination subjected to the qualified majority voting decisional process will have to be limited to situations involving more than one Member State, absolutely excluding the Community measures necessary for the functioning of the Single Market that also have an impact on purely internal situations.

The opportunity of qualified majority voting is plain, for example, in case of measures providing for deductibility in the host country of pension contributions paid by migrant workers to a supplementary pension scheme in their home country, as well as in case of a common system of taxation applicable to interest and royalty payments made between associated companies in different Member States, to eliminate taxes levied at source on payments of interest and royalties between associated companies in different Member States with a view to avoiding double taxation.

Always about the four freedoms, the free movement of goods and services is a specific situation because these questions have been dealt with in

a detailed manner by the Sixth Directive on VAT, that created a common base for levying value added tax. The system, created in 1977, is hardly suited to the current economic situation characterized by a large scale liberalisation of economic activities, a wide upsurge of services industry and the birth of new forms of economic activity, such as electronic commerce. It follows a normative picture that doesn't respond to the needs of operators who need simple, modern and more uniform rules within the Single Market, and potentially dangerous in terms of distortions of competition because inadequate rules may affect the market in the same way as a lack of rules altogether.

Therefore, the Commission proposes to apply qualified majority voting for decisions which "modernise and simplify existing Community rules in order to eliminate distortions of competition and ensure a uniform application of existing rules and guarantee the simple and transparent application of such rules".

The same considerations and conclusions can be reached with reference to excise duty rules, because products that are subject to this duty, defined ten years ago, don't exhaust the outline of the possible taxable instances in a background that tends to evolve fast.

About tax measures of primarily environmental nature, it's clear that the protection of the environment is one of the Union's key priorities (Article 2 and 6 of the Treaty). Consequentially to this priority, the Commission considers that taxation measures that have as their principal objective the defence, protection and improvement of the quality of the environment, and have a direct and significant effect on the environment, also require qualified majority voting.

The third taxation part more involved in the Commission reform proposal, is undoubtedly very complicated, delicate and difficult to manage in the taxation field. In fact, there are provisions directly governing the levying of direct and indirect taxes aiming at preventing fraud, evasion or tax avoidance, that is to say the situations that can have the effect of eroding taxation bases in the Member States concerned. These rules that often are created as derogation of Community provisions form a complicated derogatory system particular for every Member States. The Commission suggest to remedy this situation by amending the interested provisions by qualified majority.

The measures on mutual assistance and co-operation between tax authorities, currently falling under the general legal basis of Article 95 EC, are already subject to qualified majority voting. However, in an effort to improve legal certainty and understanding of the provisions in question the Commission prefers to bring such measures into a single chapter of the Treaty dealing with both tax measures and measures on assistance and co-operation between tax authorities.

The practical implications of the Commission's approach to social security are particularly evident with reference to the adoption of measures necessary for establishing the free circulation of workers and prevention of distortion of competition.

In conclusion, the Commission proposes to the Conference that qualified majority voting should be introduced for: "*a*-adoption of coordinating provisions intended to remove a direct obstacle to the exercise of the four freedoms, and in particular to prevent discrimination and double taxation; *b*- measures which modernise and simplify existing Community rules in the indirect tax area in order to eliminate distortions of competition; *c*- measures which ensure a uniform application of existing indirect taxation rules and guarantee the simple and transparent application of such rules; *d*- taxation measures which have as their principal objective the protection of the environment and have a direct and significant effect on the environment; *e*- adopting of provisions directly governing levying of tax and aimed at preventing fraud, evasion or tax avoidance in order to eliminate cases of double non-taxation in cross-border situations and to prevent circumvention of existing provisions, particularly in the VAT field; *f*- measures of co-ordination of social security schemes in order to facilitate the free movement of persons; *g*-measures providing for minimum requirements which are necessary to allow for the effective exercise of the free movement of persons or to prevent distortions of competition through artificial lowering of social protections standards".

In addition the Commission proposes with a view to consolidating the Treaty and providing for more readily understandable provisions: "*i*) to widen the scope of beneficiaries of Article 42 EC over and above workers to include all persons exercising a right of free circulation and allow the Council to extend wholly or partly the existing instruments to non-EC-nationals; *ii*) to include in the tax chapter measures on mutual assistance and co-operation between tax authorities which would currently be concluded on basis of a provision in another chapter of the Treaty".

L'allargamento dell'Unione Europea ed i meccanismi di decisione in materia fiscale

Marika Benigna

1. Nel suo parere del 26 gennaio 2000 ("La riforma istituzionale al servizio dell'allargamento"), la Commissione ha annunciato la propria intenzione di presentare un altro contributo riguardante l'applicazione del voto a maggioranza qualificata nei settori dell'imposizione fiscale e della sicurezza sociale. Tale proposta implica inevitabilmente un esame minuzioso dei pertinenti articoli del Trattato al fine di individuare quali decisioni vadano adottate a maggioranza qualificata e quali debbano restare soggette alla regola dell'unanimità.

Alla base dell'iniziativa della Commissione sta la prospettiva dell'ampliamento dell'Unione economica e monetaria sino a 28 Stati membri, con le conseguenti problematiche derivati dal considerevole aumento, in termini di numero e di diversità, dei sistemi economici e giuridici nazionali. Inoltre, il divario tra i risultati economici degli Stati membri e i mutamenti strutturali di lungo periodo che molti di questi ultimi dovranno imporsi, tenderanno ancora di più a mettere in luce le diversità e ad accentuare le persistenti imperfezioni all'interno del mercato unico, in particolare nei settori dell'imposizione fiscale e della sicurezza sociale.

È così del tutto evidente, a parere della Commissione, che l'Unione può affrontare questa sfida solamente potenziando l'efficienza del suo processo decisionale attraverso il più frequente ricorso al voto a maggioranza qualificata nella misura necessaria per l'attuazione ed il funzionamento del mercato unico.

2. Le disposizioni nazionali relative all'imposizione fiscale ed alla sicurezza sociale riflettono generalmente le preferenze fondamentali dei legislatori nazionali in materia di politica economica e sociale. L'entità della tutela delle prestazioni sociali e le modalità secondo cui si ottiene, tramite l'imposizione fiscale, il reddito necessario per finanziare tali prestazioni, costituiscono l'essenza della sovranità esercitata dai Parlamenti nazionali. In termini generali, le suddette disposizioni esprimono le scelte interne sul grado di solidarietà e di sostegno tra gli enti pubblici ed i cittadini, scelte che normalmente sono "neutrali" per quanto concerne la dimensione europea.

Tuttavia, esistono norme che, per il loro contenuto o la loro natura, non si possono considerare "neutrali", in quanto possono avere ripercus-

sioni sul mercato unico. Tali disposizioni possono essere classificate in due categorie: norme incompatibili con gli obiettivi del mercato unico e norme che causano distorsioni alla concorrenza nel mercato unico.

Per quanto concerne il primo aspetto, benché, tradizionalmente, le disposizioni interne in materia di imposizione fiscale e di sicurezza sociale si applichino in ambito strettamente nazionale, può accadere che tali norme possano ostacolare l'esercizio delle quattro libertà fondamentali (libera circolazione di beni, persone, servizi e capitali all'interno dell'Unione). In tale contesto si inserisce il sempre più significativo intervento della Corte di Giustizia il cui effetto di imporre modifiche unilaterali o bilaterali spesso non si estende a situazioni nelle quali sono coinvolti più di due Paesi.

Per gli Stati Membri è, però, tutt'altro che ideale che il diritto comunitario in questi settori si sviluppi su base *ad hoc*, con le sentenze della Corte di Giustizia piuttosto che attraverso il processo politico.

In relazione alla seconda categoria di disposizioni aventi ripercussioni sul mercato unico, ovvero le norme che causano distorsioni alla concorrenza, è necessario evidenziare il fatto che con l'aumentare degli Stati membri è più che probabile che si accentuino anche le differenze di sviluppo tra loro con la conseguenza di un più marcato divario tra le differenti economie nazionali.

In tale circostanza il pericolo maggiore è che in ragione di scenari tanto dissimili, le scelte politiche possano interferire con l'obiettivo generale di promuovere lo sviluppo armonioso ed equilibrato delle attività economiche, una crescita sostenibile ed un alto grado di convergenza dei risultati economici.

In sostanza, secondo la Commissione, se la Comunità non ricorrerà a strumenti efficaci per affrontare tali problemi a livello comunitario gli effetti negativi collaterali ostacoleranno lo sviluppo armonioso dell'Unione.

3. Al fine dell'instaurazione del mercato unico l'intervento normativo della Comunità può comportare diversi gradi d'intensità, definiti dal Trattato CE come coordinamento delle legislazioni, adozione di norme minime e armonizzazione delle disposizioni vigenti.

Il coordinamento delle legislazioni nazionali attraverso la normativa comunitaria non incide sui regimi interni, ma definisce l'interfaccia tra questi regimi per quanto riguarda gli elementi transfrontalieri (esempi in tal senso sono il regolamento n. 1408/71, nel settore della sicurezza sociale, e le direttive del Consiglio riguardanti le società madri, le filiali e le fusioni, nel settore dell'imposizione diretta).

L'adozione di norme minime è intesa unicamente a costituire una base normativa minima comune nelle diverse legislazioni nazionali, risolvendo così, come nel caso del coordinamento delle normative interne, il problema

dell'interfaccia tra i diversi diritti nazionali (vedasi ad esempio la direttiva 92/77/CEE riguardante le aliquote dell'imposta sul valore aggiunto o, nell'ambito della sicurezza sociale, l'art. 37, paragrafo 3, del Trattato CE).

Da ultimo, come grado di intensità e di incisività a livello d'intervento, si pone l'armonizzazione completa, necessaria allorquando le precedenti modalità non consentano di conseguire l'obiettivo dell'attuazione del mercato unico (esempio in tal senso è la Sesta direttiva IVA).

Vero ostacolo, tuttavia, all'effettiva operatività su larga scala degli strumenti giuridici d'intervento di cui la Comunità si è voluta dotare, si è dimostrata in questi ultimi anni, la regola dell'unanimità che ha reso difficile progredire in vari settori nei quali è urgente agire per assicurare l'adeguato funzionamento del mercato unico ed il pieno esercizio delle libertà garantite dal Trattato.

Pertanto, la Commissione ritiene che, ai fini di una maggiore efficienza, si debba ridurre il campo di applicazione del voto all'unanimità, così come è ora previsto dal Trattato, e propone complementarmente di introdurre il voto a maggioranza qualificata per gli strumenti che consentono il coordinamento delle norme nazionali o l'introduzione di disposizioni minime nei settori dell'imposizione fiscale e della sicurezza sociale.

4. Implicazioni pratiche dell'impostazione proposta dalla Commissione nel settore tributario riguarderebbero, in particolare, l'esercizio delle quattro libertà, le misure fiscali di carattere essenzialmente ecologico, le norme relative alla lotta contro la frode, l'evasione e l'elusione fiscali, e la cooperazione e assistenza reciproca tra autorità fiscali.

Per quanto concerne il primo aspetto, la Commissione reputa che in futuro tutte le misure comunitarie necessarie per eliminare gli ostacoli all'esercizio delle quattro libertà, si debbano adottare a maggioranza qualificata, così da definire l'interfaccia tra i sistemi nazionali e quindi eliminare i gravami supplementari ai quali si trova di fronte il contribuente a causa della situazione transfrontaliera, in particolar modo la discriminazione e la doppia imposizione. Tali misure di coordinamento sottoposte al processo decisionale a maggioranza qualificata dovranno in ogni caso essere limitate alle situazioni a cui sono interessati più Stati membri, con assoluta esclusione di quei provvedimenti comunitari necessari per il funzionamento del mercato unico che abbiano ripercussioni anche sulle situazioni puramente interne.

In questo senso, l'opportunità del voto a maggioranza qualificata la si rinviene, per esempio, in un provvedimento che preveda la possibilità di detrarre, nel Paese ospitante, i contributi previdenziali versati dai lavoratori migranti ad un fondo pensionistico complementare nel loro Paese d'origine, così come in un regime tributario comune da applicare ai pagamenti d'interessi e di royalties tra imprese associate di Stati membri

diversi, allo scopo di sopprimere la ritenuta alla fonte su simili pagamenti eliminando la doppia imposizione.

Sempre nell'ambito dell'esercizio delle quattro libertà, la libera circolazione delle merci e dei servizi costituisce un caso particolare, in quanto la questione è stata trattata minuziosamente nella Sesta direttiva IVA, che ha creato una base comune per la riscossione di tale imposta. Il sistema, elaborato nel 1977, si rivela ormai piuttosto inadeguato alla situazione economica odierna caratterizzata da un'ampia liberalizzazione delle attività economiche, da una forte espansione del settore dei servizi e dalla nascita di nuove forme di attività economica, quali il commercio elettronico. Ne deriva un quadro normativo non rispondente alle esigenze degli operatori che richiedono all'interno del mercato unico norme semplici, moderne ed uniformi, e potenzialmente pericoloso in termini di distorsioni alla concorrenza, poiché norme inadeguate possono nuocere al mercato allo stesso modo che se non vi fosse alcuna norma.

La Commissione propone perciò di applicare il voto a maggioranza qualificata alle decisioni intese ad "aggiornare e semplificare le norme comunitarie, così da eliminare le distorsioni di concorrenza ed assicurare l'applicazione uniforme, semplice e trasparente delle norme vigenti in materia fiscale".

Stesso discorso e medesime conclusioni si possono trarre in tema di accise, in quanto i prodotti soggetti a tale imposta, definiti dieci anni orsono, non esauriscono il panorama delle possibili fattispecie imponibili in un ambiente che tende ad evolversi molto velocemente.

In tema di misure fiscali di carattere essenzialmente ecologico è evidente come la salvaguardia dell'ambiente sia una delle priorità fondamentali dell'Unione (articoli 2 e 6 del Trattato). In ragione della suddetta priorità, la Commissione ritiene che si debba necessariamente ricorrere al voto a maggioranza qualificata per le misure fiscali il cui obiettivo principale è la tutela, la preservazione ed il miglioramento qualitativo dell'ambiente, ed aventi su quest'ultimo un effetto diretto e significativo.

Il terzo settore tributario maggiormente coinvolto dalla proposta di riforma della Commissione, tocca indubbiamente uno dei temi più complessi, delicati e di difficile gestione in materia di imposizione. Esistono, infatti, norme che disciplinano direttamente la percezione delle imposte dirette ed indirette intendendo prevenire la frode, l'evasione e l'elusione fiscale, ovvero le situazioni che possono tradursi in un'erosione della base imponibile degli Stati membri interessati. Tali disposizioni, che sovente nascono come deroga a norme comunitarie, creano un complesso sistema derogatorio specifico per ogni Stato membro. La Commissione suggerisce di porre rimedio a tale situazione modificando a maggioranza qualificata le disposizioni comunitarie interessate.

Infine, alle misure di assistenza reciproca e di cooperazione tra le autorità fiscali, aventi attualmente il loro fondamento giuridico nell'art. 95 del Trattato CE, si applica già il voto a maggioranza qualificata. Tuttavia, per migliorare la certezza giuridica e la comprensione delle disposizioni di questo tipo, la Commissione preferisce raggruppare tali misure in un unico capitolo del Trattato, riguardante al tempo stesso le misure fiscali e le misure di assistenza e di cooperazione tra le autorità fiscali.

Le implicazioni pratiche dell'impostazione della Commissione per la sicurezza sociale si manifestano in particolare nell'adozione di misure necessarie per consentire la libera circolazione dei lavoratori e nella prevenzione della distorsione alla concorrenza.

In conclusione, la Commissione propone alla Conferenza d'introdurre il voto a maggioranza qualificata per: "*a*- l'adozione di disposizioni di coordinamento intese a eliminare un ostacolo che si frapponga direttamente all'esercizio delle quattro libertà, e in particolare a prevenire la discriminazione e la doppia imposizione fiscale; *b*- le misure che aggiornano e semplificano le norme comunitarie vigenti nel settore fiscale, allo scopo di eliminare le distorsioni di concorrenza; *c*- le misure che assicurano l'applicazione uniforme, semplice e trasparente delle norme vigenti in materia di imposte indirette; *d*- le misure fiscali aventi come obiettivo principale la salvaguardia dell'ambiente e comportanti un effetto diretto e significativo sull'ambiente; *e*- l'adozione di disposizioni che disciplinino direttamente la riscossione fiscale e abbiano lo scopo di prevenire la frode, l'evasione e l'elusione fiscali, così da eliminare i casi di doppia assenza d'imposizione fiscale nelle situazioni transfrontaliere e di prevenire l'elusione delle disposizioni vigenti, in particolare nel settore dell'IVA; *f*- le misure di coordinamento dei regimi di sicurezza sociale allo scopo di facilitare la libera circolazione delle persone; *g*- le misure che prevedono le prescrizioni minime necessarie per consentire l'esercizio effettivo della libera circolazione delle persone o per prevenire distorsioni di concorrenza mediante l'abbassamento artificiale delle norme di tutela sociale".

Inoltre, per consolidare il Trattato e per facilitare la comprensione delle sue disposizioni, la Commissione propone di: "*i*) ampliare la sfera dei beneficiari dell'articolo 42 CE, che per il momento comprende soltanto i lavoratori, così da includervi tutte le persone che si avvalgano del diritto di libera circolazione, e consentire al Consiglio di estendere in misura integrale o parziale gli strumenti esistenti ai cittadini dei Paesi terzi; *ii*) includere nel capitolo sull'imposizione fiscale misure riguardanti l'assistenza reciproca e la cooperazione tra le autorità fiscali, che si adotteranno in base ad una disposizione di un altro capitolo del Trattato".

Marika Benigna

The income characterisation of proceeds from Reverse Convertibles for domestic and treaty purposes. The Right to Redemption as a Key Characterisation Factor in the OECD Model Convention Passive Income Taxation System

Carmine Rotondaro (*)

1. Introduction

International financial markets have recently developed and made available to private and corporate investors, several instruments providing the holder with (in addition to a fixed and predetermined coupon yield) an uncertain and conditional right to the redemption of the invested face value. These contracts raise various tax problems both in the domestic and in the tax treaty context, particularly as regards the characterisation, for tax purposes, of the proceeds received by the holder.

With reference to the most recent of those instruments (the reverse convertible bond/note) those problems have been lately addressed, in the domestic context, by two Official Notes of the Netherlands and German Ministry of Finance, stating the (largely consistent) positions of the corresponding tax administrations on the topic (1).

In this article, the two official documents will be commented and analysed. In addition, the role of the right to redemption as a key characterisation factor in the passive income taxation system of the OECD Model Convention will be examined.

2. Reverse Convertible (Exchangeable) Bonds

2.1. The structure of the product.

Reverse convertibles (also called, in the German tax literature (2), "cash-or-share bonds") are, substantially, normal stock exchange listed

(*) Edited by the author

(1) See both the notes in Section III of this number.

(2) Harenberg *"Besteurung von Hochzinsanleihen mit Tilgungwahlrecht (Cash-or-Share-Bonds)"*, in Neue Wirtschafts-Briefe (NWB) no. 5 of February the 2nd, 1999, at 367 et seq.

bonds (loans) with an outstanding period of generally two years: they are, therefore, securities embodying a (generally high) interest bearing debt obligation. Their distinctive feature is, however, that under the contract the issuer (3), at maturity, has the choice of either repaying, in cash, to the holder the face value of the bond or transferring to the latter a certain number of shares of a specified third party corporation. The concerned shares are normally listed on an Official Board of Exchange. The issuer's right of fulfilling its redemption obligation by transferring the shares (instead of paying the principal back) is, under the contract, made conditional upon the fact that the fixing price of the concerned shares lies, at maturity, below a predetermined price level benchmark. This price level benchmark is normally the unitary share price at which the value of the batch of shares transferred to the holder would equal the face value of the bond. Therefore, only when the fixing share price is, at maturity, below this price level benchmark, it is, for the issuer, financially more profitable to transfer the shares than to re-pay the face value of the bond.

When the above seen condition comes true and, at maturity, the issuer transfers the shares to the investor, the latter typically incurs a loss on redemption [given by the difference between the face value of the bond and the market value (price) of the shares received] because he does not get back shares whose total market price matches the invested principal but less than the latter. As a compensation for this risk, the bond carries a yield far above the current capital-market interest rate.

Economically, reverse convertibles surely qualify as hybrid financial instruments i.e. instrument with economic characteristics that are inconsistent, in whole or in part, with the classification implied by their legal form (4). Reverse convertibles indeed, though having the legal form of a bond, economically also entail the conditional grant of a put option by the holder to the issuer of the bond. The reverse convertible has for the issuer the same economic effect as if the holder had written a European put option on the concerned shares with the following strike price:

$$\frac{\textbf{\textit{subscription price of the bond}}\ (5)}{\textbf{\textit{number of shares to which each bond entitles.}}}$$

(3) Usually a banking institution.

(4) Duncan, *Tax Treatment of hybrid financial instruments in cross-border transactions*, General Report, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 22.

(5) I. e. the principal invested in each bond.

Part of the high interest income yielded by the instrument should, therefore, be regarded, under an economical point of view, as the option premium paid by the issuer of the bond (buyer of the option) to the holder of the bond (writer of the option).

The above highlights the basic difference between reverse convertible bonds on the one hand, and "traditional" convertible bonds, on the other hand. In the latter ones, indeed, the conversion right is normally in the hands of the holder (and not of the issuer) of the bond (6). While, therefore, under a traditional convertible bond, the holder is not contractually exposed to any redemption risk, this, as pointed out above, is not the case pursuant to a reverse convertible bond where, according to some scholars, "there is no real conversion of the bond into shares, but there is a risk of reduced redemption related to falling prices on a number of specified shares"(7). Another important difference between reverse convertible bonds, on the one hand, and "traditional" convertible bonds, on the other hand, lies in the fact that, in the latter ones, the shares, object of the holder's conversion right, are normally shares of the issuer's company, whereas, the shares, object of reverse convertible bonds, are normally shares of a third corporation. Both these differences and the underlying distinctive features of the reverse convertible pattern appear to the author to be crucial for the purposes of the tax treaty characterisation of the instrument.

(6) See "Taxation of New Financial Instruments", OECD, Paris, 1994 (hereinafter: the 1994 OECD Report), at 107: "Convertible: loan stock (eg. bonds or debentures) that can be converted (generally at the holder's option) into equity or further debt of the issuer, usually at an agreed price and within a specified time period". See also Duncan, *Tax Treatment of hybrid financial instruments in cross-border transactions*, General Report, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 24, under Para 3.1.1."Conversion right": "a debt obligation that is convertible at the holder's option into a predetermined number of shares of the issuer gives the holder the right to participate in the growth in value of the issuer's shares. Depending on factors including the term of the obligation and the volatility of the underlying shares, both the issuer and the holder of a convertible obligation may consider it highly likely that the holder will exercise its conversion privilege, and that the issuer will never be obligated to repay the principal amount of the obligations".

(7) Hultqvist, *Tax Treatment of hybrid financial instruments in cross-border transactions*, Sweden, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 604.

2.2. The domestic characterisation for income tax purposes.

2.2.1. The position of the Netherlands tax administration.

In February 1999 the Netherlands tax administration issued a position statement on the tax treatment of reverse convertible notes (8). These are described as a loan, where the debtor has the choice of redeeming the loan either by paying back the face value in cash, or by paying the value of a batch of specified securities (mainly shares issued by third, unrelated parties) at the date of redemption, or by handing over the securities themselves (9).

As regards the tax treatment of the bond holder, the Netherlands tax administration basically regards such an instrument as an interest producing loan (10). From this assumption follows that all payments received by the holder at the various coupon dates during the outstanding period of the note are to be regarded as interest payments for Netherlands income tax purposes (11). Having endorsed this inte-

(8) Published in Dutch language in *VakstudieNieuws* 1999/14.16. For a comment in English language, see Bierlaagh, Huub M.M., *Netherlands - Tax Authorities State Position on Tax Treatment of Reverse Convertible Notes*, in European Taxation, No. 8/1999 at 332 and 333.

(9) *"Onder een RCN wordt verstaan een lening waarvan de debiteur bij de (vervroegde) aflossing kan kiezen tussen een aantal mogelijkheden:*
- betaling van de pariwaarde van de RCN;
- betaling van de tegenwaarde van een mandje van vermogenstitels (doorgaans (certificaten van) aandelen, vandaar dat hierna steeds van "aandelen" wordt gesproken);
- bijschrijving van de aandelen zelf op een effectenrekening van de crediteur (hierna: participant).
De aandelen zijn geen aandelen van de debiteur of een met de debiteur verbonden lichaam".

(10) *"De betalingen die tijdens de looptijd van de lening op de rentecoupons worden voldaan dienen bij de particuliere belegger voor het volle bedrag als rente in de heffing van inkomstenbelasting te worden betrokken. Naar mijn oordeel vormt het volledige bedrag een vergoeding voor het ter beschikking stellen van de hoofdsom".*

(11) Although the position statement explicitly recognises that the high amount of the yield is economically due (*omdat*) to the circumstance that the holder of the instruments writes a (not separable from the loan, though) share put option: *"op de RCN wordt rente vergoed. De rente is relatief hoog omdat daarin in economische zin mede een vergoeding voor een geschreven optie is begrepen. Het komt voor - zo is gebleken uit een de Kennisgroep Bancaire producten van de Belastingdienst voorgelegd product - dat de vergoeding voor de geschreven optie afzonderlijk wordt vormgegeven; die (eenmalige) vergoeding is dan overigens wel onverbrekelijk met de lening verbonden".*

gration approach, the Netherlands tax administration explicitly rejects (12) the possibility of a bifurcation, in the tax classification of the proceeds, between a portion (remunerating the granting to the issuer of the right to use the invested principal) to be regarded as interest and a portion (remunerating the financial markets' risk undertaken by the investor) to be regarded as a premium for the put option ritten by the holder. The latter part of the bifurcated yield from the note would not be income, under Netherlands tax law, and thus would not be subject to taxation.

In order to support this solution as to the characterisation of the instrument, the Netherlands tax administration states that the income category "interest" is to be intended as encompassing not only, in strict sense, consideration for making a principal available (the time value of money), but also consideration for the general bad debt risk, the exchange rate risks, the costs of provisioning, profit mark-up, etc. The notion of interest income for Netherlands tax purposes is, therefore, not limited to the mere remuneration for the transfer to the debtor of the temporary availability of the principal, but includes also remuneration for other functions and risks somehow linked and accessory to the bare lending of the money. The concept of interest is, therefore, broad enough to encompass also remuneration for the put option risk undertaken by the reverse convertible note holder. This element is, in a reverse convertible note, strictly linked to the income yielded by the lending of the money and cannot be distinguished and isolated from the total interest amount. Such a distinction could be admitted only where the option and the compensation for it are embodied in separate negotiable instruments (13). Only then, the cash flows arising from the separate security could be regarded as having a capital nature and

(12) *"Een eventuele splitsing in een deel "rente" een deel niet als inkomsten uit vermogen te duiden "optiepremie" is niet aan de orde".*

(13) As it was admitted by the Netherlands tax administration, for the case of bonds cum warrants, in the Statement of Practice, 26 February 1986, BNB 1986/113. Accordingly, in the United States, the United Kingdom and Canada (even though, in Canada, no specific statutory provisions are to be found), warrants are generally treated as options for tax purposes, whether they are issued separately or attached to a share or security. Where warrants are attached to a share or security and a separate consideration for the issue of the warrant is not specified, it is necessary to allocate the total consideration between the two assets. This is normally done on a fair and reasonable basis.

would, therefore, under Netherlands tax law, not be taxable in the hands of an individual portfolio investor (14).

While dealing with the case, the reverse convertible note is sold by the holder before maturity, the position statement remarks the interest character, for income tax purposes, of part of the purchase price corresponding to the accrued interest not yet cashed by the seller. This interest component of the purchase price is, under Article 27 of the Netherlands Income Tax Act, subject to tax in the hands of the seller if that person is an individual portfolio investor (15). The position statement requires that such an interest component to be calculated strictly on the basis of the note's nominal interest rate, whereas devaluation of the note as a consequence of fluctuations in the value of the securities, or of interest rates, is of a capital nature and irrelevant for income tax purposes (16).

Likewise of a capital nature is the loss upon redemption suffered by the reverse convertible note holder when, at maturity, the instrument is redeemed by the issuer at less than the face value (either by paying the spot value of the batch of securities specified in the loan prospectus or by handing over the securities themselves). Consequence of the capital nature of this loss is that no relief for it can be claimed by note holders qualifying as individual portfolio investors: the loss is irrelevant for income tax purposes (17). As regards the tax regime of the reverse con-

(14) *"Het hiervoor vermelde inzake het rentebegrip lijdt slechts uitzondering indien sprake is van een afzonderlijke vergoeding voor de optie en dit vergoedingsrecht is belichaamd in een waardepapier dat - los van het waardepapier waarin het recht op aflossing van de hoofdsom is belichaam - kan worden vervreemd".*

(15) *"De lopende rente wordt op de voet van artikel 27, eerste lid, van de Wet op de inkomstenbelasting 1964 (hierna: Wet IB 1964) op reguliere wijze bij de verkopende belastingplichtige in de belastingheffing betrokken".*

(16) *"Ik wijs er nog op dat bij een tussentijdse verkoop een lagere opbrengst kan worden gerealiseerd ten gevolge van de waardedaling van het mandje aandelen ten opzichte ban de beurskoers van de aandelen ten tijde van de emissie dan wel de latere verwerving van de obligaties. Voorts kan een waardedaling voortvloeien uit een ontwikkeling van de rentestand. Waardedelingen van de RCN liggen in de vermogenssfeer en kunnen dus niet leiden tot een aftrekpost of een correctie op de te belasten rente".*

(17) *"De (vervroegde) aflossing tegen de (lagere) waarde van het aandelenpakket leidt in het jaar van aflossing niet tot een post die het inkomen raakt van de belastingplichtige die de RCN tot zijn privé-vermogen moet rekenen. Het resultaat ligt immers in de vermogenssfeer".*

vertible note issuers, the position statement specifies that the full amount of what is taxed as interest in the hands of the note-holder is deductible from the income tax liability of the issuer (18). The difference between the face value of the note (received by the issuer at the inception of the contract) and the amount actually paid on redemption is to be regarded as business profit (19).

2.2.2. The position of the German tax administration.

In a note (20) issued on October, the 7th, 1999 about the tax treatment of reverse convertible bonds, the German tax administration has taken a position similar to the one of the Netherlands tax authorities. Also for German tax purposes, reverse convertible bonds/notes have to be regarded as interest producing loans. Hence the payments received by the holder, at the various coupon dates during the outstanding period of the bond/note, are to be characterised as interest payments for German income tax purposes.

Hence, the payments received by the holder at the various coupon dates are taxable as interest income under Sec. 20 (1) No. 7 first sentence of the German Income Tax Act *(Einkommensteuergesetz)*. This provision subjects to taxation as income from capital investments:

"7. Proceeds from all other kinds of debt claims, if the repayment of the capital investment or a reimbursement for the provision of the capital in-

(18) *"Bij de debiteur kan het gehele bedrag dat als rente in fiscale zin bij de particuliere belegger in aanmerking moet worden genomen ten laste van de winst worden gebracht".*

(19) *"Het verschil tussen de pariwaarde en de aflossing is uiteraard tot de winst te rekenen".*

(20) BMF, Schrb. v. 7.10.1999, IV C 1-S 2252 - 589/99 *"Besteuerung von Hochzins-Anleihen mit Rückzahlungswahlrecht des Emittenten"*, published in DStR No. 49/99, at 2032. For a comment in German language on the note, see Harenberg *"Bundesfinanzministerium klärt Besteurung von Aktienanleihen"* in Neue Wirtschafts-Briefe (NWB), No. 47 of November the 22nd, 1999, at 4323 and 4324. The views and interpretations expressed in this note by the German Ministry of Finance had been smartly anticipated by Harenberg *"Besteurung von Hochzinsanleihen mit Tilgungwahlrecht (Cash-or-Share-Bonds)"*, in Neue Wirtschafts-Briefe (NWB) no. 5 of February the 2nd, 1999, at 367 et seq. A different approach, based on the bifurcation of the interest and option premium component of the reverse convertible coupon payments, had been proposed, in the German tax literature, by Fleischmann, Neue Wirtschafts-Briefe (NWB) Fach 3, S. 10659, Heft 50, 1999.

vestment is promised or was granted, even when the amount of the reimbursement depends on an uncertain event" (21).

In case of sale of the reverse convertible note/bond before maturity, the accrued interest included in the purchase price received by the seller is also taxable in the hands of the latter as income from capital investment under Sec. 20 (2) No. 3 of the Income Tax Act (22). Sec. 20 (2) No. 3 regards as income from capital investments:

3. Proceeds from the alienation of interest coupons and interest claims when the matching debt claims are sold at the same time and when the reimbursement for the interest of the current interest period attributable to the period up to the sale of the debt claim (accrued interest) is charged for separately (23)

The interest payments made at the various coupon dates and the accrued interest element included in the before maturity sale price of the bond/note are subject to 30% interest withholding tax (24) under Section 43(1) No. 7 and 8 of the Income Tax Act (25).

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(21) The German text of the provision reads as follows:
(1) Zu den Einkünften aus Kapitalvermögen gehören
(...)
7. Erträge aus sonstigen Kapitalforderungen jeder Art, wenn die Rückzahlung des Kapitalvermögens oder ein Entgelt für die Überlassung des Kapitalvermögens zur Nutzung zugesagt oder gewährt worden ist, auch wenn die Höhe des Entgelts von einem ungewissen Ereignis abhängt. Dies gilt unabhängig von der Bezeichnung und der zivilrechtlichen Ausgestaltung der Kapitalanlage.

(22) *"Nach dem Ergebnis der Erörterung sind die Zinsen aus dem Kupon in voller Höhe als Kapitalertrag nach § 20 Abs. 1 Nr. 7 EStG bzw. im Veräußerungsfall nach § 20 Abs. 2 Nr. 3 EStG ("Stückzinsen") steuerpflichtig".*

(23) *(2) Zu den Einkünften aus Kapitalvermögen gehören auch :*
(...)
3. Einnahmen aus der Veräußerung von Zinsscheinen und Zinsforderungen, wenn die dazugehörigen Schuldverschreibungen mitveräußert werden und das Entgelt für die auf den Zeitraum bis zur Veräußerung der Schuldverschreibung entfallenden Zinsen des laufenden Zinszahlungszeitraums (Stückzinsen) besonders in Rechnung gestellt ist.

(24) *"Nach § 43 Abs. 1 Nr 7 bzw. 8 EStG unterliegen sie dem Zinsabschlag".*

(25) Under German tax law, interest paid by banks and interest paid on certain bonds, including corporate and government bonds, to residents is subject to withholding tax (*Zinsabschlagsteuer*). The rate is 30%, increased to31.65% by the 5.5% solidarity surcharge. Anonymous over-the-counter transactions (*anonyme Tafelgeschäfte*), however, are subject to a 35% rate, increased to 36.93% by the solidarity surcharge. "Anonymous over-the-counter transactions" mean that interest is paid on coupons

The loss upon redemption suffered by the reverse convertible note holder when, at maturity, the instrument is redeemed by the issuer at less than the face value (either by paying the spot value of the batch of securities specified in the loan prospectus or by handing over the securities themselves) is not relevant for income tax purposes: as a consequence, no relief for the loss can be claimed by note holder (26). This follows from the fact that those losses belong to the capital sphere which falls outside the scope of income taxation.

Under Sec. 20 (2) first sentence No. 4 (c) of the Income Tax Act, income (and therefore also losses) from the alienation of bonds is attracted to the income tax sphere (and therefore subjected to taxation) if arising from transactions under which the amount of proceeds *(Ertrag)* is dependent on an uncertain event. From the assumption that reverse convertible bonds can be regarded, under Sec. 20 (2) first sentence No. 4 (c) of the Income Tax Act, as transactions under which the amount of proceeds is dependent on an uncertain event, it would have followed that the loss incurred by the holder upon redemption be of income nature and therefore deductible for income tax purpose. The rule reads as follows:

4. Income from the sale or transfer of

(...)

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c) bonds, Debt Register Claims and other debt claims with interest coupons or interest claims when accrued interest was not charged for separately or [interest claims] where the amount of the proceeds depends on an uncertain event, (...)

as far as they correspond to the issuing yield that can be mathematically attributed to the holding period. If the taxpayer does not prove the issuing yield, the difference between the purchase price and the proceeds for the sale, transfer or redemption of the securities and debt claims will be regarded as capital yield. The taxation of interest and accrued interest under Para 1 No. 7 and Sent. 1 No. 3 is not affected, the capital yields from the securities and debt claims which are subject to income tax under these provisions and have already been received by the taxpayer have to be deducted

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from bearer bonds (e.g. corporate and government bonds), the interest is not credited to an account of a foreign bank or another foreign financial institution and the custody of the bond is not retained by the debtor, the German bank or another German financial institution.

(26) *"Erfolgt die Rückzahlung der Anleihe in Form von Aktien, deren Wert unter dem Nennwert der Anleihe liegt, erleidet der Anleger - ohne Berücksichtigung des in aller Regel weit über dem Marktzins liegenden Zinskupons - einen wirtschaftlichen Verlust. Dieser Verlust ist der steuerlich unbeachtlichen Vermögensebene zuzuordnen".*

at the taxation of the issuing yield. Sentences 1 to 3 are likewise applicable to the redemption of the securities and debt claims at maturity by the second and any further purchaser. Sentences 1 to 4 are not applicable to interest from profit-sharing bonds (Gewinnobligationen) and jouissance rights (Genußrechte) within the meaning of Sec. 43 Para. 1 Sent. 1 No. 2 (27)

The above assumption is contradicted by the German tax administration's note, according to which Sec. 20 (2) first sentence No. 4 (c) of the Income Tax Act is not applicable to reverse convertible notes/bonds, where only the overall profitability of the instrument, and not the amount of the proceeds, is uncertain (28). In other words, the application of the relevant provision Sec. 20 (2) first sentence No. 4 (c) of the Income Tax Act is limited to transactions where the amount of the yield is, under the contract uncertain; but this requirement is not met by reverse convertible bonds/notes where the amount of the interest coupons is fixed and predetermined already at the inception of the contract. As a consequence Sec. 20 (2) first sentence No. 4 (c) of the Income Tax Act is not applicable to such bonds/notes.

2.3. Some remarks from a comparative and international tax law perspective.

Both the above analysed Ministerial documents propose a common tax characterisation and treatment pattern for proceeds and losses from

(27) In German language:

4. Einnahmen aus der Veräußerung oder Abtretung von

(...)

c) Schuldverschreibungen, Schuldbuchforderungen und sonstigen Kapitalforderungen mit Zinsscheinen oder Zinsforderungen, wenn Stückzinsen nicht besonders in Rechnung gestellt werden oder bei denen die Höhe der Erträge von einem ungewissen Ereignis abhängt, soweit sie der rechnerisch auf die Besitzzeit entfallenden Emissionsrendite entsprechen. Weist der Steuerpflichtige die Emissionsrendite nicht nach, gilt der Unterschied zwischen dem Entgelt für den Erwerb und den Einnahmen aus der Veräußerung, Abtretung oder Einlösung der Wertpapiere und Kapitalforderungen als Kapitalertrag. Die Besteuerung der Zinsen und Stückzinsen nach Absatz 1 Nr. 7 und Satz 1 Nr. 3 bleibt unberührt; die danach der Einkommensteuer unterliegenden, dem Veräußerer bereits zugeflossenen Kapitalerträge aus den Wertpapieren und Kapitalforderungen sind bei der Besteuerung nach der Emissionsrendite abzuziehen. Die Sätze 1 bis 3 gelten für die Einlösung der Wertpapiere und Kapitalforderungen bei deren Endfälligkeit durch den zweiten und jeden weiteren Erwerber entsprechend. 5 Die Sätze 1 bis 4 sind nicht auf Zinsen aus Gewinnobligationen und Genußrechten im Sinne des § 43 Abs. 1 Satz 1 Nr. 2 anzuwenden.

(28) *"§ 20 Abs. 2 Nr. 4 Buchst. c EStG ("Schuldverschreibungen..., bei denen die Höhe der Erträge von einem ungewissen Ereignis abhängt") findet keine Anwendung, weil lediglich die Rendite ungewiß ist, nicht aber die Höhe der Erträge".*

reverse convertibles. This pattern (29) is based on the following interpretative choices:

1) integration (no bifurcation) in the tax treatment of the yield;

2) characterisation as interest of the yield;

3) capital nature (undeductibility) of the loss on redemption, made in the framework and on the ground of each domestic tax and legal system.

The first choice, under 1) above (endorsement of the integration approach as opposite to the bifurcation one), is one of the two possible solutions to a basic problem in dealing with hybrid instruments. As already pointed out, hybrid instruments are contracts in which the features of debt, equity and/or DFI are to be found. Two alternative approaches are, in theory, available to tax systems in order to deal with the taxation of hybrids: bifurcation and integration.

Under the *bifurcation* approach, the hybrid is divided into two or more separate parts and assessed in accordance with the tax treatment of the single underlying instruments. The total tax is the sum of the different parts. Bifurcation can, for example, be applied to convertible debt instruments carrying the holder's right of conversion into the stock of the issuer or of another corporate entity related to the issuer. Under an economic point of view, such a contract can be regarded as consisting of:

1) a bond issued at a discount and carrying below market rate interest coupons;

2) an equity option. Under the bifurcation approach, the discounted bond and the option are taxed separately.

(29) Also shared by the tax literature of other countries. See, for example, Colmant & Jeanmart, *Tax Treatment of hybrid financial instruments in cross-border transactions*, Belgium, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 183, according to which *"les coupons payés durant la période intermédiaire se qualifient d'intérêts"*. With reference to the loss on redemption suffered by the holder, the opinion of the above authors reads as follows: *"lors de la conversion, l'investisseur subit une perte égale à la différence entre le coût d'acquisition fiscale des obligations souscrites et la valeur de marché des actions remises. Cette perte n'est déductible ni pour les particuliers investisseurs belges ni pour les entités juridiques assujetties à l'impôt des personnes morales. Pour les sociétés belges, une perte sur un titre de créance n'est déductible fiscalement que si elle est considérée comme définitive. Dans le cas d'espèce, bien que sur un plan économique, la perte encourue peut encore s'accroître ou se résorber en fonction de l'évolution du cours des actions remises lors de la conversion, elle doit, nous semble-t-il, être considérée sur le plan fiscal comme définitive dès lors que, par l'opération de conversion, le titre obligataire est sorti définitivement du patrimoine de l'investisseur et a été remplacé par un droit d'une autre nature, en l'occurrence un droit d'actionnaire"*.

According to *integration*, the tax legislation considers the two components as a single instrument, and applies the most suitable taxation solution . As regards the above presented example, the integration approach would require that the transaction is subjected to a single tax treatment, without distinguishing between its components. Of course, the endorsement of the integration system implies a choice to be made as to which of the components of the contract has to prevail for tax characterisation purposes. This requires the tax legislator/administration to lay down some guidance and criteria based on which such a choice is to be made (30).

Rationale of the bifurcation approach is to ensure a different tax treatment for the various components of the hybrid instrument which, where issued separately, would have been taxed differently. In other words, when the timing, character, or other tax attributes and conse-

(30) In the US, for example, IRC § 385 lists the following criteria to be taken into account in distinguishing debt and equity:

Whether the instrument contains a written unconditional promise to pay on demand or on a specified date a sum certain in money, in return for adequate consideration, and to pay a fixed rate of interest;

Whether the instrument is subordinate to or has a preference over indebtedness of the corporation;

The debt/equity ratio of the corporation;

Whether the instrument is convertible into stock of the corporation; and

The relationship between the holding of the instrument and the stock of the corporation, i.e., whether or not such holdings are proportional.

However, none of the above factors is normally conclusive. Further guidance as to the characterisation of hybrids is, in the US system, also provided by IRS Notice 94-47, 1994-1 C.B. 357, according to which:

"the characterisation of an instrument for federal income tax purposes depends on the terms of the instrument and all surrounding facts and circumstances. Among the factors that may be considered in making this determination are: (a) whether there is an unconditional promise on the part of the issuer to pay a sum certain on demand or at a fixed maturity date that is in the reasonably foreseeable future; (b) whether holders of the instruments possess the right to enforce the payment of principal and interest; (c) whether the rights of the holders of the instruments are subordinate to the rights of general creditors; (d) whether the instrument gives the holders the right to participate in the management of the issuer; (e) whether the issuer is thinly capitalised; (f) whether there is identity between the holders of the instruments and stockholders of the issuer; (g) the label placed upon the instruments by the parties; and (h) whether the instruments are intended to be treated as debt or equity for non-tax purposes. No particular factor is conclusive in making the determination of whether an instrument constitutes debt or equity. The weight given to any factor depends upon all the facts and circumstances and the overall effect of an instrument's debt and equity features must be taken into account".

quences would be different for each of the components of the hybrid instrument, it would arguably be appropriate to tax each of those components separately under the specific tax rules provided and applicable thereto. With reference to the above presented example of a convertible instrument, in a system that taxes interest from debt on an accrual basis and options and forwards on a cash basis, the endorsement of a bifurcation could in principle be argued as the best way to achieve consistency with the general tax principles governing debt as opposite to derivative financial instruments.

Notwithstanding the above, as also recognised by the OECD (31), the practical implementation of bifurcation can result to be so difficult and distortive that the outlined advantages are largely outweighed (32). With reference to the above example, bifurcating the convertible note and taxing the discount on an accrual basis as a normal interest would rely on the (not really likely) assumption that this part of the transaction has the features of a normal loan and could have been concluded on the market also without the conversion right attached thereto. The endorsement of an integration approach can, therefore, be regarded as justified especially in the Netherlands tax system where the Supreme

(31) *Innovative Financial Transactions: Tax Policy Implications*, a Report prepared for the Eighth Meeting of the Ad hoc Group of Experts on International Co-operation in Tax Matters, Geneva, 15-19 December 1997.

(32) It must be, however, pointed out that, notwithstanding the problems and distortions caused by bifurcation, this approach is, in some jurisdictions, admitted and applied by Courts. This is, for example, the case in the US where "one instrument need not even be characterised as either all debt or all equity for US tax purposes. Although US courts have been reluctant to bifurcate financial instruments, some courts have opted for this approach. In Farley Realty Corp. v. Commissioner, the most notable of the bifurcation cases, the court, faced with an instrument which provided the taxpayer with the right to receive the repayment of his investment, interest thereon, and the right to share in any appreciation in the value of the property to be purchased with the funds invested, concluded that the instrument was in part debt and in part equity. According to the court, the right to repayment of the investment and interest thereon (a creditor's interest), was separable from the right to share in the appreciation of the underlying property (an equity interest).

In 1989, Congress added parenthetical language to section 385(a), permitting the Treasury Department to issue regulations providing for the bifurcation of interests in a corporation into debt and equity components. Still, the Treasury Department has yet to exercise its authority under this provision..." (Berman & Strain in *Tax Treatment of hybrid financial instruments in cross-border transactions*, United States, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 675).

Court explicitly rejected the use of bifurcation for convertible debt tax characterisation purposes (33).

Once the integration approach has been endorsed, the more interesting problem arises as to which of the various "natures" enjoyed by the hybrid instruments should be regarded as prevailing, and should, therefore, act as the key factor driving the income tax characterisation of the instrument. Both the Dutch and the German tax administrations deemed the loan element to prevail on the option element of reverse convertibles. This conclusion can be more or less justified under the respective domestic commercial, civil and tax law systems (34) of the two jurisdictions.

The benchmark provided by these systems is not relevant in the treaty context, where, however, the question arises as to whether proceeds from an instrument not granting to the investor a certain and unconditional redemption right can be regarded as interest under Art. 11 of the OECD Model Convention.

Para. 21 of the OECD Model Commentary to Art. 11 states that the definition of Interest for treaty purposes contained in Art. 11, Para. 3 of the OECD Model Convention *"is, in principle, exhaustive. It has seemed preferable not to include a subsidiary reference to domestic laws in the text"*. The problem as to whether or not proceeds from reverse convertibles meet the requirements necessary in order to be regarded as interest for treaty purposes is therefore a question of treaty law to be answered regardless of the domestic law solutions. It should be pointed out that the

(33) See Warner in *Tax Treatment of hybrid financial instruments in cross-border transactions*, Netherlands, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 511and 512: "the Supreme Court ruled that convertible debt is to be treated as one instrument because on a conversion the obligation to pay into the shares is, as a general rule, offset with the obligation to repay principal on the bond. The result is that a convertible bond is treated as debt until conversion takes place. Issuers have argued that the right to convert is a separate instrument ("bifurcation"), to be treated as interest in kind. This position would allow the issuer to treat the value of the conversion right as interest. The result would essentially be that the issuer would be allowed deductions for a market rate of interest on the principal amount outstanding from time to time instead of deducting only the interest actually paid. The courts have rejected the argument for bifurcation; accordingly, only the interest actually paid is deductible (Supreme Court, 19 June 1996, BNB 1996/299 and 300)".

(34) For a comprehensive analysis of these issues, as regards the German tax system, see the already quoted Harenberg, *"Besteurung von Hochzinsanleihen mit Tilgungwahlrecht (Cash-or-Share-Bonds)"*, in Neue Wirtschafts-Briefe (NWB) no. 5 of February the 2nd, 1999, at 367 et seq.

scope and dimensions of this problem go beyond the case of the reverse convertible notes/bonds, since the absence of such a certain and unconditional entitlement to redemption also occurs in other widespread financial products, such as, among others, credit linked notes and bull & bear bonds.

The **credit linked note** is a contract under which the repayment of the principal and the payment of the coupons is made conditional to the fulfilment of the corresponding principal and interest obligations under a reference security issued by a third party, or, more generally, is affected by the occurrence of a credit event relating to this reference security. The standard structure of such a transaction provides, in fact, for the actual transfer of a principal from the purchaser to the issuer of the note. In the absence of a credit event,

1) the principal will be paid back by the issuer to the holder;

2) the holder will receive interest payments at the various coupon dates.

Under a credit linked note, therefore, the repayment of the principal and the payment of the coupons is made conditional to the fulfilment of the corresponding principal and interest obligations under a reference security issued by a third party (35). In the case of occurrence of a credit event, the principal of the note is repaid to the purchaser of the note, but not entirely: the repaid principal is diminished by the loss in value of the reference security/credit due to the occurred credit event. The similarity between the credit linked note structure and the reverse convertible one clearly regards the right of redemption: under both the instruments, the extent of the redemption payment depends on a future, uncertain event affecting a security issued by a third party.

The same conditional character of the holder's redemption right is to be found in the **bull & bear bonds**. These are debt obligations delivering to the holder a fixed and predetermined interest yield. As to the redemption right of the holder, a distinction is to be made between bull bonds, on the one hand, and bear bonds, on the other hand: such a right is, in both types of bond, linked to a financial index (stock exchange, commodities, currency exchange, etc.). However, under the bull bonds, the

(35) In general, the issuer of the note holds in its portfolio the reference security and aims at hedging against the credit risk therefrom. The holding of the security is, however, not material to the structure and rationale of the transaction. An hedging purpose can, indeed, be found also in the case the issuer of the note is, for example, exposed to the credit risk of the reference security as a guarantor of the obligations embodied in the security.

amount of the issuer's redemption obligation at maturity is directly proportional to the index, whereas, under the bear bonds, such an amount is inversely proportional to the index.

3. The redemption right as an essential element of the Art. 11 definition of Interest for treaty purposes.

As also resulting from the Ministerial notes and the prevailing scholars' opinions commented in the first part of the article, the reverse convertible bonds' yields are commonly classified as interest for domestic tax purposes. Aim of the present part of this article is to check whether the just mentioned income classification of the reverse convertible's proceeds can also be mantained in the treaty context. This entails an investigation as to whether the legal and economic features of the instrument match the requirements laid down by the definition of interest contained in Art. 11 of the OECD Model Convention.

The purpose of Article 11 is, indeed, defined in its Para. 3 which, since 1977 (36), reads as follows:

"the term 'interest' as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and, in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payments shall not be regarded as interest for the purposes of this Article".

According to the OECD Model Commentary to Art. 11 (37), the term "interest" in the OECD Model Treaty designates, in general, income from

(36) The 1963 Draft Convention contained a different version of paragraph 3 phrased as follows:

"3. The term 'interest' as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, an debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises".

Unlike the current text of paragraph 3, the 1963 version does not contain a completely self-supporting definition of interest. Only the first part of the definition is similar to the current one and self-supporting. Therefore, what we will be saying about the meaning of the current definition applies, as well, to the 1963 one. On the contrary, the last part of the 1963 definition contains a peculiar reference to domestic tax law of the State in which the income arises that has been repealed in 1977.

(37) Paragraph 18.

debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in profits. The mention, in the text of the Article, of "government securities, bonds or debentures" is, therefore, only meant to introduce a list of special cases (examples) encompassed, among others, by the general notion of "debt claims of every kind": *"the term 'debt-claims of every kind' obviously embraces cash deposits and security in the form of money, as well as government securities, and bonds and debentures, although the three latter are specially mentioned because of their importance and of certain peculiarities that they may present".*

Hence, for the purposes of our analysis, it must be checked whether the proceeds of reverse convertibles can be characterised as "income from debt-claims of every kind" under the treaty. The meaning of the last mentioned concept is explained both by the OECD Model Commentary on Article 11 and by the best international tax literature. According to Para. 1 of Commentary on Article 11, interest is generally taken to mean remuneration on money lent. The definition given by the doctrine is much clearer. Vogel describes interest referred to by Art. 11 as the "remuneration received for making capital available (i.e. making possible its use)" (38). In addition, it is stated that a payment can be regarded as an interest only when there is an underlying claim: "there is not interest in the absence of an underlying claim" (39). Finally, it is required that interest must be paid as interest and not, for example, as a price (40): "the requirement that interest must be paid as interest, while not being an integral part of the definition of interest is mentioned in Art. 11(1) (paid) as one of its prerequisites" (41).

(38) Vogel, *Klaus Vogel on Double Taxation Conventions*, Third Edition, Kluwer, Deventer, The Netherlands at 731.

(39) See Vogel, at 731.

(40) Vogel explicitly excludes that an interest paid as a price can be embraced by Art. 11: "interest and similar financing costs which are incurred by a supplier of goods and are passed on in the price charged for his goods and are borne by his customer when paying for the goods (interest included in calculation in respect of deferred payment after delivery of the goods sold, or in respect of financing the object of the sale when under production; similarly in respect of service or the like) might be considered interest as defined in Art. 11 (3), but they will not fall within Art. 11 because they are not paid as interest".

(41) See Vogel, at 731.

Also the famous Melford Decision (42) describes interest as the remuneration received by the lender in exchange for allowing the borrower to make use of the principal. In this case, the Supreme Court of Canada had to deal, among others, with the interpretation of the Interest clause contained in the Canada-Germany Income Tax Convention. Under this respect, the following is stated in the text of the decision:

"...As has already been noted, interest in the ordinary commercial usage of that term simply means the payment of rent by a borrower for the use of the principal of the lender to whom the rent is paid. It may be that the money flow will be different than this simple definition would indicate by reason of directions or special circumstances, but essentially the payment is made by the payer for the use of the payee's principal."

Consistent with the above statement is the remark, also to be found in the text of the decision, according to which:*"I do not believe (...) that interest relates to anything other than the payment for the use of the principal advanced to the payer by the payee"*. The issue as to the possibility of encompassing payments received by reverse convertible holders into the scope of "interest" for treaty purposes must, of course, be dealt with in the light of the above outlined, largely shared, interpretation of Art. 11 OECD Model Convention.

Reverse convertible bonds are investment instruments which, though providing the holder with a fixed yield at the various coupon dates, do not, however, grant him an unconditional and certain right to the redemption of the invested principal. The risk of a, theoretically total, loss on redemption is, therefore, connatural to this type of instrument. The payments received by the holder at the various coupon dates can, consequently, be characterised as interest under the treaty only to the extent the requirement of an absolute and unconditional right to redemption is not regarded to be an essential feature of the "debt claims of every kind" addressed by Art. 11 of the OECD Model Convention.

Such an assumption does not appear to the author to be correct. On the contrary, the author believes that the absolute and unconditional right to redemption is to be regarded as a basic feature of the "debt claims" giving rise to interest under Art. 11 of the OECD Model Convention. This opinion of the author is based on (the following) arguments deriving from the systematic analysis and interpretation of Art. 11 and of the Model Commentary thereto in the framework of the OECD Model Convention

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(42) Reference is made to the case *Her Majesty The Queen, Appellant, vs. Melford Developments Inc.* Respondent 1982 Carswell Nat 209, [1982] C.T.C. 330, [1982] 2 S.C.R. 504, 44 N.R. 62, 139 D.L.R. (3d) 577, 82 D.T.C. 6281.

and Commentary; furthermore it takes into account the positions previously expressed on the same topic by the best international tax literature.

It must, first of all, be pointed out that for a contract, in order to qualify as an interest producing debt claim under Art. 11 of the OECD Model Convention, a right to the payment of the interest or to the payment of a certain and predetermined amount of interest is not required. In other words, the scope of Art. 11 is not limited to receivables under which the unconditional right is granted to the investor to receive a certain yield at a predetermined amount. Conversely, the scope of Art. 11 also encompasses receivables generating uncertain interest income, i.e. debt claims under which the payment of the interest, on the one hand, and/or the amount of this payment, on the other hand, are not certain but subject to the hazard of a condition.

The above conclusion follows from the analysis of the wording of Art. 11 and of the OECD Model Commentary to it and is shared by the best tax literature. As already mentioned, according to Art. 11, Para. 3 of the OECD Model Convention, *"the term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and* ***whether or not carrying a right to participate in the debtor's profits****..."* (bold added). This statement has been interpreted both by the OECD Model Commentary on Art. 11 (43) and by the scholars (44) as entailing the treaty characterisation as interest of income from profit participating bonds and profit-sharing loans (45). Profit sharing loans are re-

(43) See Para. 19: "interest on participating bonds should not normally be considered as a dividend and neither should interest on convertible bonds until such time as the bonds are actually converted into shares...".

(44) See Vogel, *Klaus Vogel on Double Taxation Conventions*, Third Edition, Kluwer, Deventer, The Netherlands at 734: "... this is all the more true where income from profit-sharing loans and similar participations in profits are concerned. Such income is, as a rule, considered to be interest ...".

(45) The recent tax literature contains many references about these hybrid forms of investment. See, among others, H. de Feydeau, "Equity Flavoured Debt Instruments: Tax Considerations of Characterisation, Conversion and Modification", Tax Management International Forum, Vol. 17, June 1996 at 16-23; David, Cyrille & Michielse, Geerten (eds.) & Theisen, Manuel & Wenz, Martin & Tiley, John. *Tax Treatment of Financial Instruments*, Kluwer, The Hague 1996; *International Tax Glossary* 3rd edition. IBFD, Amsterdam 1996; *Hybrid Financing* Bureau Francis Lefebvre, Loyens & Volkmaars, Oppenhoff & Rädler. IBFD, Amsterdam 1996; *The Use of Hybrid Financial Instruments in Cross-Border Transactions*. KPMG, Amsterdam 1990; OECD 1994, *Taxation of New Financial Instruments*, Paris; Strnad, Jeff, "Taxing New Financial Products: A Conceptual Framework" Stanford Law Review 1994, Vol. 46 at 569-605; Warren, Alvin J. "Financial Contract Innovation and Income Tax Policy" Harvard Law Review 1993, Vol. 107 at 460-492.

ceivables under which the remuneration of the investor, totally or partially, depends on the profitability of the issuing company, so that the income of the investor may be uncertain both as regards its actual payment and as regards its amount (46). Notwithstanding this uncertain character, the proceeds from these contracts are interest under the treaty. Hence, the uncertainty as to the yield is not inconsistent with the characterisation of the underlying legal relationship as an interest producing "debt claim" under Art. 11 of the OECD Model Convention.

The opposite conclusion is to be drawn in cases of uncertainty as to the redemption of the principal. According to the author, there can be interest under Art. 11 of the OECD Model Convention only when the lender has got a certain and unconditional right to the repayment of the face value of the credit.

It seems, indeed, that an essential hallmark of interest under Art. 11 is the fact of being remuneration for a ***temporary*** transfer of the principal, i.e. for making available a principal whose repayment is certain and sure under the contract. On the contrary, remuneration for supply of funds do not qualify as interests under the treaty, if their repayment to the provider is subject, under the contract, to a certain degree of risk (47).

This seems to be the position of the OECD Model Commentary (48) which states that, although interest on participating bonds should not normally be considered as a dividend and neither should interest on convertible bonds until such time as the bonds are actually converted into shares, *"however, the interest on such bonds should be considered as a dividend if the loan effectively shares the risk run by the debtor company"*. The

(46) See Hey, Friedrich E. F., *Hybrid Financing*, IBFD, Amsterdam 1996, at 105: "a participating loan is a just like any other loan. Its distinctive feature is that the remuneration depends, in whole or in part, on the profits of the enterprise, which may be a corporation, partnership or sole proprietorship. A participating loan may or may not be secured. In the event of bankruptcy, the lender may exercise his rights as a creditor".

(47) The risk referred to in the text is, of course, not the so-called "creditor's general hazard (Vogel, *Klaus Vogel on Double Taxation Conventions*, at 733), i.e., the risk of not being able to enforce his debt claim on account of the borrower's insolvency or of the debt being irrecoverable". This kind of hazard is, in fact, common to every obligation and credit and does not prevent, at all, the characterisation of the income as interest. Reference is made, instead, to the risk of non-occurrence of a future and uncertain event upon the happening of which the contract makes dependant the existence of an obligation (in this case, the obligation of paying back the principal).

(48) Paragraph 19 of the OECD Model Commentary on Art. 11.

OECD Model Commentary (49) further specifies that *"interest on loans insofar as the lender effectively shares the risk run by the company, i.e. when* ***repayment*** *depends largely on the success or otherwise of the enterprise's business"* (bold added) is not to be deemed as falling into the scope of application of Art. 11.

These statements need, however, to be looked at and analysed within the larger framework of the OECD Model Convention's system of passive income characterisation and allocation of the Contracting States' taxing rights. As the author will try to demonstrate in the following lines, particularly this system calls for a limitation of the Interest Article's scope only to income arising from contracts attributing to the investor an unconditional and certain right to redemption of the face value.

Given the current set up of the international tax regime for cross-border interest and dividend payments under the OECD Model Convention and Commentary, the existence/non existence of an unconditional and certain right to redemption is the only effective and correct criterion available in order to distinguish between interest and dividend under the treaty. Pursuant to the definition contained in Art. 10, Para. 3 of the OECD Model Commentary:

"the term 'dividends' as used in this Article means income from shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident".

As explicitly stated by the OECD Model Commentary (50), the above definition consists of a series of examples (shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares) and of a general formula. The shares, i.e. formal, legal holdings in a joint stock company are only one of the examples mentioned in the definition of Para. 3 (51),

(49) Reference is made to Para. 25 of the OECD Model Commentary on Art. 10.

(50) See para 23 of the OECD Model Commentary to Art. 11: *"in view of the great differences between the laws of OECD Member countries, it is impossible to define "dividends" fully and exhaustively. Consequently, the definition merely mentions examples which are to be found the treaty in the majority of the Member countries' laws and which, in any case, are not treated differently in them. The enumeration is followed up by a general formula..."*.

(51) *"...The definition relates, in the first instance, to distributions of profits the title to which is constituted by shares, that is holdings in a company limited by shares (joint stock company)"* Para. 24 of the OECD Model Commentary to Art. 10.

which also covers all other securities issued by companies provided that:

1) they carry a right to participate in the companies' profits;

2) they are not debt claims (52).

In addition, according to the general formula laid down in the last part of Art. 10 Para. 3 definition, not even the issue of a security (what shares normally are) is required under Art. 10, Para. 3. Such a general formula, indeed, by referring to *"the other rights, not being debt-claims, participating in profits"* does not, indeed, seem to require such rights to be embodied in a security. The concept of dividend, as defined in the OECD Model Convention and further clarified by the OECD Model Commentary (53), is particularly broad and encompasses income arising from any profit participating right, which is not a debt claim.

In order to qualify as dividends for treaty purposes, cross border passive income items are, therefore, not required to arise from underlying instruments which entitle their holder to the typical rights and powers of the shareholder, such as:

i) a right to a share of the corporate business assets and reserves upon liquidation of the company;

ii) membership of the shareholders' meetings;

iii) voting rights etc.

Also counterparts of the company which are not entitled to such rights and powers can, nevertheless, be regarded as receiving dividend payments for treaty purposes, to the extent that the contract/s (pursuant to which these payments are made by the company):

1) carry a right to participate in the company's profits, and

2) are not debt claims.

As a consequence, the entitlement/ non-entitlement to the above rights and powers cannot be used as criteria in order to distinguish between interest-yielding instruments, on the one hand, and dividend-yielding instruments, on the other hand. Neither can the profit participating character of the investment (under 1. above) play the role of distinctive feature of the dividend yielding instruments as opposite to the interest

(52) *"The definition assimilates to shares all securities issued by companies which carry a right to participate in the companies' profits without being debt-claims; such are, for example, "jouissance" shares or "jouissance" rights, founders' shares or other rights participating in profits"* Para. 24 of the OECD Model Commentary to Art. 10.

(53) Beside, of course, by various OECD Reports such as the "Taxation of New Financial Instruments" and the "Thin Capitalisation" ones.

yielding ones. As already pointed out above, indeed, pursuant to Art. 11(3) (54), interest on participating bonds (or other profit participating debt claims) is capable of falling within the scope of Art. 11.

However, a distinctive criterion between the two classes of income is necessary and required by the system of the OECD Model Convention, since, as explicitly stated by Para. 19 of the OECD Model Commentary to Art.11 (55) and as remarked by the best international tax literature (56), Interest and Dividends are, under the treaty, two mutually exclusive income categories.

In addition, the structure of the definitions contained in Art. 10(3) and in Art. 11(3) of the OECD Model Convention calls for a "contractual" distinctive criterion between the two income categories, i.e. a distinctive criterion based on the set up of the parties' rights and obligations as governed by the contract which is source of the income to be characterised under the treaty. Art. 10(3) and Art. 11(3), indeed, define dividends and interest for treaty purposes by way of reference to the source of the income, i.e. to the contract from which the obligation to pay the income arises. Pursuant to the structure of these two provisions, the characterisation of the income as interest or dividend depends on the scope and type of the underlying contract, i.e. on the features and content of

(54) In the part mentioning " ... *debt claims of every kind* (...) *whether or not carrying a right to participate in the debtor's profits.* But see also the already quoted Para. 19 of the OECD Model Commentary to Art. 11 and Para. 24 of the OECD Model Commentary to Art. 10: "...*on the other hand, debt claims participating in profits do not come into this category*".

(55) Para. 19 of the OECD Model Commentary to Art. 11 reads as follows: "*it should be noted that the term 'interest' as used in Art. 11 does not include items of income which are dealt with under Article 10*". This statement of the OECD Model Commentary is, in itself, unilaterally exclusive: it only says that the scope of Art. 11 does not include items of income which are dealt with by Article 10, but it does not exclude that the scope of Art. 10 to encompass items of income falling under Art. 11. The mutually exclusive character of the relationship between the scope of Art.10 and the scope of Art. 11 can, however, be easily appreciated, by reading the above statement of the OECD Model Commentary in combination with Art. 10(3) and Art. 11(3). On the one hand, indeed, only debt claims are subject to Art. 11, whereas, on the other hand, debt claims are explicitly and absolutely excluded from the scope of application of Art. 10 ("*the other rights, not being debt-claims, participating in profits*").

(56) Piltz, D. J., *International Aspects of Thin Capitalization*, Cahiers de droit fiscal international, vol. LXXXIb, Kluwer Law International 1996, General Report, at 130: "*art. 10, para. 3 and article 11, para. 3 OECD model treaty define dividends and interest in such a way that there can be no overlapping*".

the parties' rights and obligations laid down thereby. Hence, also the distinction between the income categories must rely on such a rights and obligations set up, and, therefore, on the contract (57).

Pursuant to both the definition in Art. 10(3) and the definition in Art. 11(3), the only workable distinctive criterion left between the scope of Art. 10 and the scope of Art. 11 lies in the debt claim character (under 2. above) of the underlying receivable. Within the structure of the OECD Model Commentary to Art. 10, an explanation of the meaning of the clause "debt claim" seems to be provided by the first part of Para. 25 that, as already pointed out, subjects to Art. 10 (and, therefore, excludes from the scope of application of Art. 11) the investment contracts under which *"**the repayment** depends largely on the success or otherwise of the enterprise's business"* (bold added). The unconditional entitlement (under the contract) of the investor to the redemption of the face value of the investment is, therefore, the contractual distinctive feature of the interest income category as opposite to the dividend one.

Consistent with this position is the view of Vogel (58), according to which, *"interest is no more than the remuneration received for making capital available **subject to repayment**, and does not include profits from providing funds in cases where the provider accepts the hazards of the borrower's business"* (bold added).

Also Lang (59) deems the right to the redemption of the principal to be an essential feature of the treaty notion of interest. Particularly in-

(57) See, in this sense, with reference to the treaty classification of the convertible bonds, Michael Lang, *Hybride Finanzierungen im Internationalen Steuerrecht*, Vienna, 1991, at 145 - 146: *"es kommt aber nicht darauf an, ob die Einkünfte vor bzw nach der Ausübung der Option* zufliessen, *sondern es kommt darauf an, ob die Schuldverschreibung oder die Aktie für die Einkünfte* kausal *waren. Die Relevanz der Kausalität ergibt sich insbesondere aus dem Abkommenstext, wonach Art 10 Abs 3 OECD-MA "Einkünfte* aus *Gesellschaftsanteilen" und Art 11 Abs 3 OECD-MA "Einkünfte* aus *Forderungen" erfasst"*.

(58) *Klaus Vogel on Double Taxation Conventions*, at 733.

(59) Michael Lang, *Hybride Finanzierungen im Internationalen Steuerrecht*, Vienna, 1991. See, in general, about the meaning of "debt claims" in Art. 11, Para. 3, page 92: *"... aus dieser gemeinsamen Betrachtung der im OECD-MA vorgefundenen Anhaltspunkte kann angesichts der Tatsache, daß dieses Ergebnis im Kommentar des OECD-Steuerausschusses ausdrücklich bestätigt wird, davon ausgegangen werden, daß **'Forderungen' den Anspruch auf Rückzahlung des überlassenen Kapitals darstellen"*** (bold added). With reference to the treaty classification and treatment of the *jouissance* rights (*Genussrechte*) see page 142:*"... von entscheidener Bedeutung für die - als Alternative in Betracht zu ziehende - Subsumtion unter Art 11 OECD-MA ist nämlich die **erfolgsun-***

teresting and comprehensive is the analysis carried out by the same author about the consequences of the above assumption in the juridical systematic framework of the tax treaty regime of cross border interest and dividend payments.

Especially relevant, in this respect, is the statement of Para. 19 of the OECD Model Commentary to Art. 11, according to which interest on convertible bonds falls within the scope of Art. 11 until such time as the bonds are actually converted into shares (60). This distinction (drawn by the OECD Model Commentary) between the situation before and the situation after the exercise of the conversion right is explained by Lang (61) based on the certainty/uncertainty of the investor's entitlement to redemption. Before the exercise of the conversion right, the holder of the convertible bond is fully and unconditionally entitled to the redemption of the face value thereof, regardless of the profitability of the issuing enterprise. After the conversion, the holder looses the mentioned unconditional redemption right which was previously granted to him pursuant to the regime of the convertible instrument. It is exactly the loss of this unconditional (and independent of the profitability of the issuing company) entitlement to redemption which, after the conversion, prevents the application of Art. 11 to the proceeds received by the holder of the security.

Moreover, the conditional/unconditional character (*Erfolgsabhängigkeit / Erfolgsunabhängigkeit*) of the holder's redemption right is presented by Lang as a key factor also as regards the treaty characterisation

abhängigkeit des Rückzahlungsanspruchs des zugrundeliegenden Forderung. *Sofern die Rückzahlung zum Nennwert oder zum Ausgabekurs vorgesehen ist, kann von einer Erfolgsabhängigkeit nicht gesprochen werden. Eine Subsumtion der Einkünfte des Genussberechtigen unter Art 11 OECD-MA ist daher in diesen Fällen grundsätzlich möglich und von der Ausstattung der laufenden Gewinnbeteiligung abhängig"* (bold added).

(60) Para. 19 of the OECD Model Commentary to Art. 11 reads as follows: *"interest on participating bonds should not normally be considered as a dividend, and neither should interest on convertible bonds until such time as the bonds are actually converted into shares ...".*

(61) *Hybride Finanzierungen im Internationalen Steuerrecht*, Vienna, 1991, at 145: *"... in abkommensrechtlicher Hinsicht ist die Frage entscheidend, ob der Anspruch des Inhabers einer Wandelschuldverschreibung auf Rückzahlung des Darlehens erfolgsabhängig ist, was vor Ausübung des Rechts auf Umtausch zu verneinen ist. Der Inhaber des Wandelschuldverschreibung hat jedenfals bis zum Fälligkeitszeitpunkt bzw bis zum Zeitpunkt der Ausübung des Rechts auf Umtausch den Anspruch, einen feststehenden Betrag zu erhalten. Erst mit dem Zeitpunkt der Ausübung des Umtauschrechts trägt er das unternehmerische Risiko".*

of bonds with attached share warrants (*Optionsanleihen* as opposite to regular convertible receivables: *Wandelschuldverschreibungen*). These are bonds issued together with a separate paper - the warrant - which gives the holder the right to subscribe to shares for a fixed amount of cash. In a bond cum warrant, therefore, unlike in a normal convertible bond (where the bond itself is exchanged for the share), the holder may exercise the warrant conversion right, while retaining the bond. In addition, warrants, unlike the conversion rights embodied in regular convertible bonds, may be traded separately from the bond. Similarly as with convertible bonds, the holder's right to acquire shares at a fixed price (although the future market price may be higher) normally reduces the interest rate of the bond (62). According to Lang, the holder's entitlement to redemption of the face value (not affected by the attachment of the warrant's conversion right) is decisive for the treaty characterisation as interest of the income yielded by a bond cum warrant (63).

It must be pointed out that, according to my opinion, the OECD Model Convention's definition of interest requires the investor's full and unconditional entitlement to redemption of the *face value of the credit*, but not necessarily of the invested principal. The face value of the credit and the invested principal could, indeed, not coincide in the case of a bond or debenture issued at a premium. Pursuant to the OECD Model Convention and Commentary, income yielded by such a security is, however, to be characterised as interest under the treaty (64). The explicit interest

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(62) For an example of a warrant structure see the above quoted Sanders, T., in *Hybrid Financing*, The Netherlands, 1996, at 129: "a 10-year warrant bond is issued with a nominal value of 1,000 and a 6% coupon. The market interest rate at the time of issue is 10%. It follows then that the value of the warrant is 246, that is, the netpresent value of the 40 difference between coupon and market interest over 10 years. The issuer is now allowed to value its payable at 754 and treat the rest of the proceeds of the issue as an informal capital contribution which is not subject to corporate income tax. Over the period until maturity, the 754 debt accrues to 1,000 and the accrual is deductible. The result is an annual deduction consisting of 60 actual interest and an increasing amount of accruing 'discount'".

(63) *Hybride Finanzierungen im Internationalen Steuerrecht*, Vienna, 1991, at 147: *"die Einräumung eines Bezugsrechts ändert aber nichts daran, daß die Anleihe auch einen Rückzahlungsanspruch hinsichtlich des gesamten oder wesentlicher Teile des hingegebenen Kapitals verkörpert. Es liegt somit eine "Forderung" im abkommensrechtlichen Sinn vor. Sowohl die Gewährung von Zinsen als auch die Gewährung eines Bezugrechts auf Aktien stellen daher Einkünfte aus Forderungen dar".*

(64) See Para. 20 of the OECD Model Commentary to Art. 11: "As regards, more particularly, government securities, and bonds and debentures, the text specifies that pre-

characterisation of yields from bonds issued at a premium does not contradict the above proposed interpretation of Art. 11(3) as limited to contracts entailing the investor's certain and unconditional right to redemption of the face value.

Also in a bond issued at a premium, indeed, (unlike in a reverse convertible bond, in a bull & bear bond or in a credit linked note), the redemption right is not uncertain or subject to a condition or to another kind of hazard but it is sure and certain under the contract. The basic requirement for the characterisation as interest (i.e. ***an unconditional and certain redemption right under the contract***) is, therefore, in the case of issue at a premium, perfectly met. The underlying contract, i.e. the bond, entitles the holder to the unconditional and certain redemption of the face value and this is enough to consider the above requirement as met. The circumstance that the holder is entitled to the repayment of less than the invested principal, as also recognised by the OECD Model Commentary (65), affects not the redemption right under the loan (i.e. the bond, whose full face value is to be redeemed at maturity), but the interest remuneration thereof. Such a remuneration will therefore be less than the one resulting by applying the bond nominal interest rate to the invested principal.

In conclusion, as a consequence of the above analysis, proceeds from instruments and contracts under which (as under reverse convertible bonds, bull & bear bonds or credit linked notes) the holder is not granted an unconditional and certain redemption right of the face value, cannot be regarded as interest for the purposes of the 1977 OECD Model Convention and of the treaties concluded in accordance thereto.

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miums or prizes attaching thereto constitute interest. Generally speaking, what constitutes interest yielded by a loan security, and may properly be taxed as such in the State of source, is all that the institution issuing the loan pays over and above the amount paid by the subscriber, that is to say, the interest accruing plus any premium paid at redemption or at issue. It follows that when a bond or debenture has been issued at a premium, the excess of the amount paid by the subscriber over that repaid to him may constitute negative interest which should be deducted from the interest that is taxable".

(65) Para. 20 of the OECD Model Commentary to Art. 11, indeed, regards the premium paid by the subscriber as a negative interest and not as a capital loss upon redemption.

4. The consequences under treaty law. Applicability of the Capital Gain Article.

Under the 1977 OECD Model Convention, proceeds received by holders of reverse convertibles (but the same holds true for credit linked notes and bull & bear bonds) cannot either be regarded as dividends. As already pointed out above, for the classification of an instrument under Art. 10(3) of the OECD Model Convention, beside the non debt claim character of the investment, the grant to the investor of a right to participate in the company's profits is required (66). Since such a profit participation right is not granted to the holder of a reverse convertible (as it is not granted to the holder of a credit linked note or of a bull & bear bond/note), no dividend characterisation of the proceeds therefrom seems to be allowed under the OECD Model Convention (67).

In other words, in a reverse convertible (as in a a credit linked note or in a bull & bear bond/note) the circumstance that the holder is not granted an unconditional and certain redemption right of the face value excludes that reverse convertibles (credit linked notes, bull & bear bonds/notes) qualify as "debt claims" (and, therefore, give rise to interest payments under the treaty), but does not lead to the treaty characterisation as dividends of the yields therefrom. For this, an additional requirement (the profit participating character of the instrument) needs to be the fulfilled, that reverse convertibles (credit linked notes, bull & bear bonds/notes) do not meet.

Since neither the Interest article nor the Dividend article of the OECD Model Convention are applicable to the yields paid to the holders of re-

(66) See Para. 24 of the OECD Model Commentary to Art. 10: *"the definition assimilates to shares all securities issued by companies* ***which carry a right to participate in the companies' profits*** *without being debt-claims; such are, for example, 'jouissance' shares or 'jouissance' rights, founders' shares or other rights participating in profits"* (bold added).

(67) Unless, of course, proceeds from reverse convertibles (credit linked notes, bull & bear bonds/notes) can be regarded under Art. 10(3) of the OECD Model Convention *"as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident"*. This does not, however, seem to be the case, based on two main reasons:

1) reverse convertibles (credit linked notes, bull & bear bonds/notes) cannot be regarded as *"corporate rights"*;

2) the approach of the domestic jurisdictions seems to point to the tax treatment of reverse convertibles (credit linked notes, bull & bear bonds/notes) proceeds as interest, rather than as *"income from shares"*.

verse convertibles (credit linked notes, bull & bear bonds/notes), a first important consequence can be drawn under treaty law: these payments, at least according to the general pattern provided by the OECD Model Convention cannot be subject to tax in the source State, when not paid to a permanent establishment of fixed base therein. Both items of income dealt with under Art. 21 (or 7, for the case the receiver of the coupon payments is an entrepreneur), on the one hand, and items of income dealt with under Art. 13 (to the extent these coupon payments can be regarded as "gains from the alienation of any property"), on the other hand, are, indeed, not taxable in the source state, if not received by a permanent establishment therein. A different conclusion can be reached with reference to those treaty rules which, under specific circumstances, allow not only the State of residence of the alienator, but also the other Contracting State to tax certain financial capital gains, mainly arising from alienations of stock, participations or other rights in corporations.

This is, for example, the case of Paras. 2 and 4 of Art. 13 of the Income Tax Treaty between Spain and United States of 22 February 1990 which read as follows (68):

*"... 2. Gains from the **alienation** of stock, participations, or other rights in a company or other legal person the property of which consists, directly or indirectly, mainly of real property situated in Spain, may be taxed in Spain.*

*4. In addition to gains taxable under the foregoing paragraphs of this Article, gains derived by a resident of a Contracting State from the **alienation** of stock, participations, or other rights in the capital of a company or other legal person that is a resident of the other Contracting State may be taxed in that other Contracting State if the recipient of the gain, during the 12-month period preceding such alienation, had a participation, directly or indirectly, of at least 25% in the capital of that company or other legal person. Such gains shall be deemed to arise in that other State to the extent necessary to avoid double taxation."*

(68) Another example, less suitable to apply to reverse convertibles is to be found in the clause, commonly included in the Netherlands tax treaties, whose pattern occurs, among others, in Art. 14, Para. 5 of the 1970 Austria-Netherlands Income Tax Convention:

The provisions of paragraph 4 shall not affect the right of each of the States to levy according to its own law a tax on gains from the alienation of shares or "jouissance" rights in a company the capital of which is wholly or partly divided into shares and which is a resident of that State, derived by an individual who is a resident of the other State and has been a resident of the first-mentioned State in the course of the last five years preceding the alienation of the shares or "jouissance" rights.

Accordingly, the claim for the right to tax (regardless of the alienator's residence) financial capital gains (otherwise subject to the exclusive allocation rule contained in Art. 13 para. 4 of the OECD Model Convention) underlies also many of the reservations (69) to Art. 13, Para. 4. The common reference to the notion of "gains from the alienation (...) of other rights" also in the provisions/reservations (which, derogating from the rule of Art. 13 Para. 4 of the OECD Model Convention, allow not only the State of residence of the alienator, but also the other Contracting State to tax certain financial capital gains) makes applicable also to the above provisions/reservations the following investigation as to whether reverse convertibles are capable of giving rise, for the holder, to "gains from the alienation of a right" in the sense of the OECD Model Commentary.

It is, therefore, worth investigating whether or not the proceeds received by a reverse convertible holder can be, totally or partially, charac-

(69) In particular, and among others, **Canada** reserved *"its position on paragraph 4 in order to keep the right to tax **gains from the alienation** of shares of a company, or of interests in a partnership or trust, the value of which is derived principally from immovable property situated in Canada and in order to keep the right to tax gains of an individual who was a resident of Canada at any time during the 6 years preceding the alienation of a particular property"*.

Finland reserved *"the right to tax **gains from the alienation** of shares or other corporate rights in Finnish companies, where the ownership of such shares or other corporate rights entitles to the enjoyment of immovable property situated in Finland and held by the company"*. **France** accepted the provisions of paragraph 4, but retained *"the possibility of applying the provisions in its laws relative to the taxation of **gains from the alienation** of shares or rights which are part of a substantial participation in a company which is a resident of France, or of shares or rights of companies the assets of which consist mainly of immovable property situated in France"*.

Sweden reserved *"the right to tax **gains from the alienation** of shares or other corporate rights in Swedish companies"*. **Japan** retained *"the right to tax **gains from the alienation** of shares or other corporate rights which are part of a substantial participation in a Japanese company"*.

Korea and Spain reserved *"the right to tax **gains from the alienation** of shares or other rights in a company whose assets consist mainly of immovable property situated on their territory"*. They also reserved *"the right to tax **gains from the alienation** of shares or other rights forming part of a substantial participation in a company which is a resident"*.

Ireland reserved *"the right to subject to tax **gains from the alienation** of shares, rights, or an interest in a company the assets of which consist primarily of immovable property"*. **Mexico**, finally, reserved *"its position to retain the possibility of applying the provisions in its laws relative to the taxation of **gains from the alienation** of shares or rights that are part of a substantial participation in a company that is a resident of Mexico, or of shares or rights of companies the assets of which consist mainly of immovable property situated in Mexico"*.

terised as capital gains under Art. 13 of the OECD Model Convention (70). In particular, Art. 13(4) states that:

" gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident".

Under a reverse convertible bond/note, two elements of the transaction are theoretically capable of being regarded as entailing the alienation of property :

1) the transfer of the shares from the issuer to the holder on redemption;

2) the grant of the put option right by the holder to the issuer.

The first element, under 1 above, is, indeed, the alienation of a property under Art. 13 but it is incapable of producing a capital gain for the holder. From the transfer of the shares at maturity, the reverse convertible holder can only incur a loss, since, under the contract, the predetermined batch of shares will be handed over to the holder only when their overall market value is less than face value of the bond. Also in such a case it is still possible that the reverse convertible proves, however, to be profitable to the holder since, notwithstanding that:

value of the shares < invested principal

however:

value of the shares + coupon payments > invested principal (71)

The income gained by the reverse convertible holder would, however, not derive from the transfer of the shares and would, therefore, not be a gain from the alienation of that property under Art. 13(4) of the OECD Model Convention.

(70) Such a characterisation option does not seem at all applicable to coupon payments from credit linked notes and bull & bear bonds/notes, under which neither shares are alienated nor option rights granted.

(71) Economically, the holder actually receives a gain from the transaction only when the following condition occurs:

value of the shares + coupon payments > invested principal (+ invested principal x current market interest rate x outstanding period)

Requiring such a condition in order to recognise a taxable gain in the hands of the holder would, however, entail the bifurcation, for treaty characterisation purposes, of the reverse convertible's yield, since it would exclude from the gain a part of the yield corresponding to the market interest rate.

We are therefore only left with the question as to whether the grant of the put option right by the holder to the issuer can be regarded as the *"alienation of a property"* under Art. 13(4) of the OECD Model Convention. An argument supporting a positive answer could be found in Para. 5 of the OECD Model Commentary on Art. 13, which while listing some of the situations embraced by the formula "alienation of property" mentions, among others, "the sale of a right". The put option granted to the reverse convertible issuer is, for sure, a right: the residual problem is the one as to whether the grant thereof can be regarded as an *"alienation"*, under Art. 13(4).

As stated by the OECD Model Commentary on Art. 13, *"the Article does not give a detailed definition of capital gains"* (72). As a consequence, reference to the domestic law of the Contracting States could seem to be needed under the interpretation rule laid down in Art. 3(2) of the OECD Model Convention (73). Some Dutch caselaw (74), however, applied the Capital Gain Article of a Tax Treaty as a "self standing rule" with its own meaning, absolutely independent from the notion of "capital gain" endorsed by the domestic legislations of the Contracting States. In this case, the Supreme Court of the Netherlands ruled that the meaning of "capital gains" in the Belgium-Netherlands tax treaty based on the 1963 OECD Draft Convention was, alone, sufficiently clear to cover the transaction under consideration, regardless of the tax characterisation of the transaction under Dutch domestic law. The latter was deemed, in the decision, absolutely irrelevant for the purposes of the interpretation of the treaty. Likewise, also in the decision of the Canadian Federal Court of Appeal (81 DTC 5140) of 3 June 1981 *Her Majesty the Queen vs B.Vincent N. Hurd*, the interpretation of the notion of "capital gain" contained in the Canada-US tax treaty was based only on the treaty provision, without any reference to the domestic laws of the Contracting States.

(72) OECD Model Commentary on Art. 13, Para. 5.

(73) According to this rule: *"as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State"*.

(74) Reference is made to the decision of the Supreme Court of the Netherlands, No. 25 308 of 3 July 1991, published in BNB, 1991/248. On this decision, see P.M. Smit, Classification of Income Under a Tax Treaty - *Application of the Vienna Convention on Treaty Law?*, in European Taxation, vol. 32, 1992, at 57 et seq.

It is, therefore, correct and necessary to analyse the meaning of the concept of "gain from alienation" based on the wording of the treaty and of the Commentary. As already pointed out above, no specific definition of capital gain is contained in Art. 13. It is, however, specified by the Commentary that *"the words 'alienation of property' are used to cover in particular capital gains resulting from the sale or exchange of property and also from a partial alienation, the expropriation, the transfer to a company in exchange for stock, the sale of a right, the gift and even the passing of property on death"* (75). It seems, from the above list, that the notion of alienation is broad enough to encompass every kind of property's passing. It is further stated that the application of the treaty provisions about capital gains does not even require the actual transfer of an item of property. The mere taxable capital appreciation and book revaluation of not alienated business assets is, in fact, deemed to be equivalent to the actual alienation in triggering the application of the treaty rules about capital gains (76).

It follows from the above that the concept of *"alienation"* in Art. 13 of the OECD Model Convention is not really designed as a requirement for the application of this provision or as a limitation of the scope thereof. This also follows from the explicit statements of the OECD Model Commentary, according to which the concept of "gain" under the treaty cannot be defined by way of reference to the origin of the gain: *"the Article does not distinguish as to the origin of the capital gain"*. Also the further sentences of the Commentary contribute to feature a very broad notion of "alienation" under the treaty: *"therefore all capital gains, those accruing over a long term, parallel to a steady improvement in economic conditions, as well as those accruing in a very short period (speculative gains) are covered. Also capital gains which are due to depreciation of the national currency are covered. It is, of course, left to each State to decide whether or not such gains should be taxed* (77).

(75) OECD Model Commentary on Art. 13, Para. 5.

(76) In this sense, see OECD Model Commentary on Art. 13, OECD Paris, 1997, Para. 9: *"where capital appreciation and revaluation of business assets are taxed, the same principle should, as a rule, apply as in the case of the alienation of such assets. It has not been found necessary to mention such cases expressly in the Article or to lay down special rules"*.

(77) OECD Model Commentary on Art. 13, Para. 11.

It can, therefore, be maintained that the overall profit result (78) gained by the reverse convertible holder (as gain from the grant of a put option) to be regarded as "gain from alienation of a property" (in this case a right) subject to the allocation rules laid down in Art. 13 of the OECD Model Convention. The practical tax consequences of such a treaty classification solution (79) would, in general, not differ (80) from the ones following from the characterisation of the reverse convertible yields in the hands of the holder as "Other Income" under Art. 21 (or as "Business Profits" under Art. 7) of the OECD Model Convention. As already pointed out above, for the proceeds from credit linked notes and from bull & bear bond, the only acceptable outcome is the characterisation as, depending on the circumstances, "Other Income" or "Business Profits".

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(78) This overall profit result is to be calculated as follows, for tax purposes.

value of the shares + coupon payments - invested principal

Actually, the correct overall result gained by the holder from the transaction should be calculated as follows:

value of the shares + coupon payments - [invested principal + (invested principal x current market interest rate x outstanding period)]

As already pointed out above, however, the endorsement of such a result for tax purposes would entail the bifurcation, for treaty characterisation purposes, of the reverse convertible's yield, since it would exclude from the gain a part of the yield corresponding to the market interest rate.

(79) Considered by some scholars as an option also for domestic tax treatment. See Hultqvist, *Tax Treatment of hybrid financial instruments in cross-border transactions*, Sweden, Cahiers de droit fiscal international, vol. LXXXVa, 2000, Kluwer Law International, at 604: "a relatively new product, not yet dealt with by the courts, is a bond, called a reverse convertible bond. There is no real conversion of the bond into shares, but there is a risk of reduced redemption related to falling prices on a number of specified shares. A one-year loan has a high fixed rate of interest (i.e. 21 per cent), payable on maturity, but the redemption price may be reduced if the prices of the specified shares fall during the term of maturity. One option is to treat the fixed interest as interest and a reduction of the redemption price as a capital loss, since it is unpredictable. Possibly only a reasonable market interest rate should be characterised as interest, as the interest rate seems to be about seven times higher than the normal interest rate. **There are also arguments supporting the conclusion that all profits or losses would be characterised as capital gain or loss**, as in the stock index bond case above. At present there is not sufficient case law to draw any definite conclusions" (bold added).

(80) Since the allocation rule contained in its Art. 13, Para. 4 of the OECD Model Convention (exclusive taxation by the State in which the alienator is resident) leads to the same result (no withholding at source) as the application of Art. 7 about Business Profits, or of Art. 21 about Other Income.

5. Conclusion.

In two very recent notes, the Netherlands and the German Ministry of Finance consistently took the position of deeming proceeds from reverse convertible notes as interest for domestic income tax purposes. An interesting problem for non resident taxpayers and scholars is the extent to which such a characterisation is capable of affecting the tax treatment of these proceeds for international tax treaty purposes.

The notion of "debt claim" contained in both Art. 10 and Art. 11 of the 1977 OECD Model Convention entails an, under the contract, certain and unconditional right of the holder to the redemption of the face value. Only if intended in this way, such a notion can effectively perform, in the system of the OECD Model Convention, its own institutional and required function of distinction criterion between the scope of application of the Dividend article and the scope of application of the Interest article.

From this conclusion, it follows that income yielded by instruments which do not provide the holder with such a certain and unconditional right can never be regarded as interest for treaty purposes. The remaining options are, therefore, [beside, of course, the residual income categories of "Business Profits" and of "Other Income" (81)] the characterisation as dividends under Art. 10 and the characterisation as capital gains under Art. 13. The first characterisation option requires the underlying contract to carry a right for the holder to participate in the company's profits: this is clearly not the case in a reverse convertible bond/note. The requirements for the classification as capital gain under Art. 13 appear to be looser and less demanding and therefore suitable to allow reverse convertible yields to fall within the scope of application of such a provision (Art. 13 of the OECD Model Convention).

The above conclusions are based on the own and original scientific views of the author (82) as to the general system of passive income taxation endorsed by the OECD Model Convention. Comments, remarks and objections from the readers about the author's scientific reconstruction of this system would be most welcome (83).

(81) In which proceeds from credit linked notes and bull & bear bonds fall.

(82) As expressed and justified in the above paragraphs of this article.

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