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INTERNATIONAL TAX LAW REVIEW

THE MUTUAL ASSISTANCE IN TAX MATTERS
SITUATION AND PERSPECTIVES IN THE EU MEMBER STATES

Sapienza Università di Roma – Centro Congressi – Via Salaria, 113
26 January 2009

REPORTS OF THE MEETING

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The documents published in this booklet are based on the transcription of the reports presented during the Convention

THE MUTUAL ASSISTANCE IN TAX MATTERS SITUATION AND PERSPECTIVES IN THE EU MEMBER STATES

Sapienza Università di Roma, 26 January 2009

Full and definitive texts will be edited by this Review afterwards.

The collection and reviewing of the material here published has been provided by Prof. Pietro Selicato and Dott. Massimo Dafano.

Introductory Statement*

Prof. Giovanni Puoti**

The subject of today's meeting is "*The mutual assistance in tax matters. Situation and perspectives in the EU Member States*".

It's about an important theme for all of us: for the speakers intervened in the meeting and for all the present guests. That's because international co-operation in the fiscal area, maybe, actually represents the history itself of the International Tax Law, an history which interlaces itself since the end of the XIXth century, since the moment in which, within an internationalization if the relationships between the States (especially in economical fields), the problem of a possible conflict among the State regulations with reference to the right to tax rose up immediately.

Due to the above, since the last century the jurisprudence, the doctrine and the praxis have been oriented to the elaboration of an international co-operation theory and the principles of tax co-operation, leading – little-by-little - to what we can define as a "living right" (which is just the International Tax Law).

Obviously, this path found a set of problems, of internal character as well.

For example, the topic of co-operation provided elements to get to a unitary notion of International Tax Law. As you know, it does exist a bipartition between International Tax Law and International law on tax matters, which expresses, with reference to source and contents, a depth diversification of the rules included in both groups. Anyway, I've to say that today it has been arrived, at least, to a unitary definition of international tax law in order to individuate both the sectors and, therefore, for individuating both the position of the Member States within the international relationships (and then of the relevant and consequent right to tax) and of the taxpayers with reference to the protection of their positions.

Therefore, today's theme is particularly interesting and current, not just on a practical side but also on a theoretical side and represents the common point of reference for several initiatives that will involve (for different aspects) almost all the people that will intervene during this meeting.

The first – and I would say the most important in this moment – is that relevant to the next meeting organised by the *EATLP - European Association of Tax Law Professors*, which will take place in Santiago de Compostela on the first days of June 2009.

So, the meeting of Rome is exactly intended to allow the Italian members of the Association to present the early results of their research and to let them have the possibility to compare with Italian and foreign colleagues, with the representatives of the financial institutions and all the people involved in this issue, in view of the final presentation of Santiago.

This is the reason why *Prof. Roman Seer* from Bochum University (who I thank for accepting our invitation) has been proposed for the role of work co-ordinator and discussant. Indeed, professor Seer is the co-ordinator of the working-group that has been preparing the convention of Santiago since 2007, as well as the general relation.

Moreover, this initiative involves *Prof. Fabrizio Amatucci*, member of the Academic Committee of the Association, and, obviously, *Prof. Claudio Sacchetto*, who – if I'm not mistaken – is a founder member of the Association (which nowadays is active from ten years).

With reference to this link, the speakers of today's meeting are (most of them) Italian professors who will take part to the Santiago's meeting presenting the same themes, and the program follows the same scheme adopted within the Association for the preparation of the research.

I also show our gratitude for being here to *Prof. Pedro Manuel Herrera Molina* from the Complutense University of Madrid. He is a member of the EATLP working-group too that will enrich the results of

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* Translation by Chiara Albano

** Sapienza Università di Roma

our meeting with an important contribution about the guidelines of the European Court of Justice in the field of co-operation.

Moreover, I would particularly thank the civil and military functionaries of the Italian Tax Administration (of which we have some representatives among the speakers) who collaborated with the Italian research group for the acquisition and valuation of the data.

I think that, today, the theme of international co-operation will be treated under all the main points of view, so, I'd say under a theoretical point of view, under an historical point of view, under a point of view of the research of the principles and – as we'll see in the second part of this meeting – under an operational and applicatory point of view as well.

I would mention another subject which is strictly linked to this meeting: our *International Tax Law Review*. All the people here, or most of them, are linked to this Review both with reference to the Scientific Committee and the Direction and the Organizing Committee. Then we have here our prestigious editor the "*Istituto Poligrafico dello Stato*" represented here by *Dott. Antonio Licordari* who represents the managing director of the Institute as well, *Dott. Lamberto Gabrielli*.

I've to remind you that our review - and I think professor Sacchetto (who actively collaborates with other international tax law reviews) will agree with me – has been the first specialized Review in the field of International Tax Law. It was founded exactly ten years ago - in January 1999 – so we could celebrate its first ten years. It's a review that, among great difficulties both under an organizational and financial profile, is trying to promote the study in depth of international tax law themes involving both Italian and foreign experts. Moreover, I think this has been one of the first (maybe the first) Tax Law Reviews to edit the articles of the correspondents of different Countries in the original languages and, most important, to utilize the system of the translation in English of the articles of the Italian experts in order to consent the maximum level of development against the foreign Countries. By doing so, we tried to represent a sort of "meeting point" between Italian and foreign authors; and, well, "meeting point" means sometimes a comparison or confrontation point for the ideas about different tax systems, common problems and differences that obviously exist between the systems.

Besides the Review we have a *Master Course in International Tax Planning*, which is also linked with this meeting. Established at Sapienza University since 1989, it allows students to approach the subject of International Tax Law involving a lot of Italian and foreign researchers. Since the first years of this course, we have organised a lot of conferences about foreign tax systems with the participation of Professors from several States in order to have a discussion about the domestic Tax Law under a comparative point of view. The Master course still goes on and this meeting represents the beginning of the lessons for the current academic year.

I hope that today's discussion about the several subjects involved in this meeting could be useful to develop further synergies. Indeed, it exists a convergence through a common aim, which is the study in depth of International Tax Law. This convergence is possible through different ways: the Association (*EATLP*) of which a lot of European Professors of Tax Law are members, the Review which collects not only the acts of this meeting but also the contribution that our Italian and foreign colleagues will give us about the aspects of international co-operation and the Master course that studies in depth this matter too.

The Master course develops not only the subject of International Tax Law. Indeed, *Prof. Pietro Selicato* (who is the Master and the Review coordinator) and me have always believed that in order to enhance the knowledge of International Tax Law it is also necessary to study other subjects involved in the international operations. They are International Trade Law, Public and Private International Law, International Finance and the principles of International Accounting. The International Tax Law has towards these subjects the same role of the National Tax Law, as this one can be seen as a "second level" law. This is because the national tax rule becomes part of a structured economic and juridical system which already exists. The International Tax Law as well has the same structure. It refers indeed to a plurality of subjects between Law and Economics in a global perspective of the international tax phenomenon.

Introductory Statement*

Dott. Antonio Licordari**

I must thank *Prof. Puoti* for this invitation and I am pleased to bring to all of the people here the salutation of the *Istituto Poligrafico dello Stato* and of his managing director *doct. Lamberto Gabrielli.*

The Institute is present at this meeting because it is the publisher of the *International Tax Law Review*. Actually, it is rather a particular one because it is indeed the Public Administration's preferential partner regarding specific equipment essential for the daily routine of the Administration's Offices, s.a. documents, forms and State Bonds, which are not supplied any more because of the new technologies.

The Institute was founded in 1928 and now is facing a long period of transformations. To start with, a juridical one from Public Economic body to a joint stock Company even if the capital assets are public and then a technological one.

Indeed, for ages we have represented the kingdom of the printed paper but currently it is being replaced by telematic procedures in the Public Administration too, especially after the so called "cutting paper" decree.

Just because of this I would especially talk about our most important publication the "Gazzetta Ufficiale", which is not only an instrument of the Public Administration but something that affects all citizens directly because through it they learn about all Public Instruments.

The Institute has deeply innovated it in the access so that now it is not only a paper Review but also an on-line one. The next step, which reflects exactly the direction stated by the paper elimination decree, will be to offer the Gazzetta's text in a certified version, a PDF version, which will represent through the telematic way a perfect copy of the paper version. So the Institute is progressively adapting itself to the changing of the times and to the changing of technologies.

The Gazzetta Ufficiale has also an advertisement collection of competition announcements, notices concerning meetings, balance sheets of companies, which are all published in a specific section and are available on-line too. This involves a reduction of the working times, less costs for the advertisers and for us and more effectiveness of the instrument.

I would now speak about the *International Tax Law Review*.

This Review is directed to a qualified but limited public and this involves countless efforts both in the organization and collection of his contents and in the production and distribution to the subscribers.

Its main feature is the strong international inclination. It is multilingual, indeed it publishes all articles of foreign writers in their original language in order to keep their thought unchanged because this is the most effective instrument to achieve the circulation of ideas. This is possible because the Review is based on a network of scientific correspondents in many foreign States, who give their important contribution of ideas.

This means there is always an update and a better knowledge of foreign rules and at the same time the possibility of spreading the Review in all these places.

We would be happy offer you the last published booklet of the year 2007 and include in the brochure the overview of the first booklet of the 2008. It may seem that we are a year late but for scientific reviews one of the hardest things is to maintain a periodic publication. I hope the Review could be in favour with you and could be supported by your subscriptions.

Thank you for your attention.

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* Translation by Chiara Albano

* * Istituto Poligrafico e Zecca dello Stato

Introduction and general remarks*

Prof. Roman Seer **

I would like to thank *Prof. Selicato* very much for the invitation to this meeting and the possibility to act as a chairman here today. This meeting is organised in order to present the results of what the Italian working group has prepared for this year's EATLP congress in Santiago de Compostela. I am the general reporter of this EATLP project. Within this project I hope to receive national reports from ten different European countries I can work with in my general report. The national reports focus on five different topics: The questions of implementation, questions of use, questions of efficiency, questions of burden of proof and questions of legal protection. All of these aspects will also be topics of the lectures today. At the end of the project I hope to have concrete results and to be able to express preconditions, a minimum standard and a list of touchstones of what an effective mutual assistance has to look like and how far the development is in this issue. The national reports and the general report will be published in a book shortly after the conference in Santiago. It is our aim that this publication will also be helpful for the tax authorities and governments for improving the future tax law. I'm impressed by the Italian colleagues' work and by this helpful conference. Thank you very much.

We are facing a globalised business world that amongst others leads to an intensification of exports. But the *principle of formal territoriality* bans a state from carrying out field audits and other investigations on the one hand and there is no *principle of material territoriality* that would forbid connecting legal consequences of the national law with foreign facts and circumstances on the other hand. Most industrial countries follow a taxation of world wide income in there tax system[1]. These aspects lead to a missmatching with the principle of formal territoriality where the national instruments and means are limited by the boarders. The executability of the national law's order to tax the worldwide income shows a deficit here. Therefore there is a need to broaden the former pure national instruments into an international contest by the mutual assistance in tax matters.

When it comes to the concrete design of the tax law distinctions have to be made. Concerning VAT the development is further caused by an afar harmonised tax base whereas there is a material non harmonised direct taxation especially with the income taxation. These differences can also be seen from the European Community Law's legal sources for these kinds of taxes. The direct taxation is regulated by a directive, which only gives a minimum standard how to transform EU law into national law. VAT is regulated by a regulation that binds the Member States directly without discretion.

Even if countries installed the principle of territoriality and thus limited the national right to tax there would still be some problems. To avoid a double taxation all of the countries had to install this principle which is from a current perspective not likely. Nowadays most states have the principle to tax the world wide income also for fiscal reasons especially when they are export-oriented. So the majority of the states will not do this. Furthermore the unitary connections and definitions can differ between the states e. g. the definition of a permanent establishment. By using the principle of territoriality the problems could only be reduced and not solved totally. This also shows that there is a need for an information exchange on the field of direct taxation.

Speaking about the European information exchange we have to distinguish between two instruments. On the one hand there is the national instrument. Using national instruments first to clarify the tax claim arises from the principle of subsidiary. Directives and double tax treaties are in the relationship of subsidiary here. Through the burden of proof states can obligate the taxable persons to comply in a

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* Edited in English by the Author.

** Bochum Universitaat

[1] An exception in Europe is for example France that follows a worldwide taxation only in the field of income taxes but has the principle of territoriality concerning corporation tax.

more intense way in cross-border matters than in pure national matters. The idea is that the taxable person is closer to the evidences than the tax authority. So the taxable person has to clarify the facts he/she realised in a foreign country – and are therefore in his/her sphere – and to provide the evidences the tax authorities would otherwise never be able to get. In Germany there is e. g. sec. 90 (2) German General Fiscal Code that states enlarged duties to cooperate for the taxpayer when cross-boarder facts are concerned. On the other hand there is the mutual assistance. We will hear various lectures about the general principles and legislative framework on the community law level. *Prof. Claudio Sacchetto* will start with the *"Constitutional and EU principles"*, followed by *Prof. Marco Barassi* who is going to focus on *"The legislative framework"* and *Prof. Lorenzo Del Federico* whose topic is *"The legal protection of taxpayers in the mutual assistance procedures"*. On the bilateral level the information exchange follows article 26 OECD model tax treaty.

Talking about this above mentioned national burden of proof that is enlarged in cross boarder situations an interesting question comes up. Does this match with Community Law? For example does the burden of proof disadvantage tax payers in cross-boarder situations compared to pure domestic cases? *"The burden of proof in the exchange of information"* will be the topic of *Prof. Fabrizio Amatucci's* lecture.

In the recent year's the means of the mutual assistance have been enlarged and different fields of taxation are regulated. There is e. g. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, Council Regulation No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax, Council Directive 2008/55/EC of May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures but also the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters signed in Strasbourg on 25th January 1988 and the European Convention on Mutual Assistance in Criminal Matters. The "Ravon Case"[2] showed that also the European Convention on Human Rights can be relevant for the activities of tax authorities. We will hear about this in *Prof. Del Federico's* lecture. These few examples show that the legal framework of the mutual assistance is quite complex which makes it not easy for the user of the law. In the consequence we have to wait and balance out between the need of the tax authorities to enforce the efficiency and the taxpayer's legal protection. On the one hand the tax authorities need the information exchange as a mean to realise the material correct taxation of every taxpayer. Coping with a huge amount of taxpayers forces them to use their capacity as efficiently as possible by at the same time staying as close to the law as possible. In the afternoon *Prof. Pietro Selicato* is going to focus on *"The efficiency of the mutual assistance"*. On the other hand delivering information from one state to another can be a danger for the individual's fundamental freedoms rights especially when industrial secrets or intellectual property is affected.

[2] Ravon and others – France (no 18497/03), judgement by the European Court of Human Rights 21.2.2008.

Exchange of Tax Information. Connections with Criminal Proceedings. The Italian approach*

Prof. Claudio Sacchetto**

Summary: 1. Introduction; 2. A brief historical overview of the international co-operation in tax matters; 3. International sources of the judicial co-operation in criminal law; 4. Main principles; 5. Judicial deeds and exchange of information procedures in criminal tax law: the "rogatory letter"; 6. Limits to the judicial tax assistance; 7. The use of bank or financial information; 8. The Italian, European and international approaches to the exchange of information on administrative and criminal matters. The relationship between the pre-trial phase and the judicial one: a synthesis; 9.Exchange of tax information and double taxation conventions; 10. Conclusion.

1. Introduction

The exchange of tax information has many facets to it; however, the main form is that one used in criminal tax proceedings.

From a systematic point of view, we can state that tax criminal rules are acknowledged to be an integral part of criminal law and not of tax law. Their domestic relevance is based on their effectiveness: the tax criminal enforcement is assumed and probated with reference to the code of criminal procedure that doesn't accept arguing from analogy.

Furthermore, in the area of criminal tax law, as well as in all the other areas of international law studies, globalization and the liberalization of economic activity have accelerated the process of globalization of tax rules. It often happens that infringements of tax rules - incorrect attitudes that may result in pecuniary administrative sanctions - are penalties too. As a result, the first step of this survey is to analyze the relationships between the two systems (criminal procedure and tax law) in order to point out, if necessary, the main mutual exchanges of concepts.

Not only, have these relationships major consequences in theory, but also in practice, especially in procedural flaws of acts. With regard to this, we should also consider that, criminal proceedings, as well as the administrative ones, watch over different interests and therefore, infringements of these two systems of rules do have different effects.

Moreover, if information is obtained during one of these two proceedings, then, it may be transferred into the other - under particular circumstances - depending on whether it deals with crimes such as money-laundering, organized crime, drug traffic, currency regulations violations. In actual fact, such information can be employed for tax assessing as well as for criminal liability. For instance, a transaction or a delivery may become the object of a tax penalty and at the same time of a laundering crime, and so be considered as a legal offence.

Finally, the exchange of tax information has recently become decisive in the prevention and in the fight against international economic organized crime. As a result, the relation between such provisions of law and international rules within constitutional law is considered by scholars a relevant matter of study.

2. A brief historical overview of the international co-operation in tax matters

According to scholars and to jurisprudence too, there are neither main principles nor general mandatory provisions in criminal law as those of international law (principles and customary principles); at most, there are treaties of mutual assistance in enquiry and mutual recognition of enforcement of judgements.

Taxation is strictly limited to the borders of the national territory in token of the sovereignty of the State. Similarly, it occurs with the power to apply sanctions, since each State has only the inland monop-

* Edited in english by the Author

** University of Turin

oly to enforce the law and to punish by the criminal, administrative or tax law that comes under its jurisdiction[3]. When the tax offender is in an area under the jurisdiction of another country - not inland the territory of the State - tax penalties, as well as sanctions, can be applied only owing to the co-operation among States and indeed, such a collaboration is possible thanks to the adjustment of domestic law to the international treaties.[4] There are a number of forms of international co-operation based on those treaties; however, one of the most relevant is the exchange of information between the competent authorities of States involved.[5]

Then, in order to be legitimate, each exchange of information and each form of co-operation among States, on an administrative as well as on a judicial scale, must be founded on a bilateral or multilateral agreement.

3. International sources of the judicial co-operation in criminal law

At present, besides the bilateral conventions, the main international conventions on judicial assistance in tax matters are those listed hereinafter:

a) The European convention on international judicial assistance, April 20, 1959;
b) The European convention of extradition, December 13, 1957;
c) The Second additional protocol to the European convention of judicial assistance, in Strasburg, March 17, 1978;
d) The convention about money laundering crimes, in Strasburg, November 11, 1990 (art.1, paragraph 1);
e) The convention on extradition among the European Union's States members;
f) The Convention of Aja, 1970;
g) The agreement of co-operation against Community fraud and other similar violations that may affect Community interests.
h) The GAFI registration for money laundering crimes.
i) Rules of Code of criminal procedure related to relationships among international jurisdictional authorities.
j) The administrative agreements for simultaneous audits[6]
k) The European convention of Human Rights (ECHR) for legal protection in the field of taxation.

4. Main principles

This branch of law is regulated by the principles unlighted hereinafter:

4.1. *The principle of speciality*

According to this principle, the "Requested State", in other words the State that must provide judicial assistance, may admit it only under the express circumstance that, the enquiry results and information exchanged are solely employed by the "Requesting State" as documentation of pre-trial

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[3] See the Italian criminal code, art.6: "*Reati commessi nel territorio dello Stato. Chiunque commette un reato nel territorio dello Stato è punito secondo la legge italiana. Il reato si considera commesso nel territorio dello Stato, quando l'azione o l'omissione, che lo costituisce, è ivi avvenuta in tutto o in parte, ovvero si è ivi verificato l'evento che è la conseguenza dell'azione od omissione*". (Crimes committed in the territory of the State. Whoever commits a crime in the territory of the State is punished by the Italian law. The crime is intended committed in the territory of the State when the act or the omission has therein completely or partially occurred, or rather the event, which is the effect of the act or of the omission, has therein occurred.)

[4] See the Italian code of criminal procedure, art. 696 and fol. and its links with the European Convention on Legal Assistance.

[5] Under the definition of judicial assistance, we may include the activities listed hereinafter:
The acquisition of evidence that the fact amount to a crime.
The notification and summoning of trial proceedings.
The cross-examination and the collation abroad.
The accomplishment abroad of personal or house searches, of inspection of places, of experts' reports and technical examinations, of superintendence's observations.
The non-resident request to come before the court to bear witness. (artt.10, 12 CEAG)
The enforcement of last judgements abroad.
The public prosecution undertaking. (art. 21 CEAG)

[6] Italy signed administrative agreements for simultaneous audits with France (1st July 1985), Austria (1st January 1988), U.S.A. (1st January 1985), Denmark (1st January 1997), Belgium, Slovenia, Sweden and Hungary (all in force since 1st January 1998), Finland (1st March 1998), Norway (1st July 1998), Poland (1st January 2001), Australia (6th June 2002). The current agreement between Italy and U.S.A. has been recently amended by an appendix that admits also to assess fiscal infringements related to crimes.

investigation in the proceeding for which such assistance is provided.[7] However, many States admit that information may be employed without restrictions. This procedure is normally effective only if the Requesting State presents a sufficiently detailed request and the Requested State can obtain the relevant information. If the Requesting State does not present a sufficiently detailed request, and if the Requested State does not have sufficient information, exchange of information upon request will not be productive.

Generally, before applying for rogatory, States ask for a special statement in line with the principle of speciality. Furthermore, we can argue that, the Requesting State is not actually entitled to obtain an engagement from the Requested State, except for the observance of *bona fide* principle among States. For instance, Switzerland doesn't admit other States to use tax information acquired on the ground of judicial tax agreement, in pursuance of the saving clause of speciality.[8]

4.2 *The principle of double criminality*

The application of coercive measures, such as searches, sequestrations, injunctions to display papers, summoning a witness and the acquisition of summary information are allowed only if the infringement is a crime punishable by the law in the Requested State as well as in the Requesting one.

However, the enforcement of this principle, based on a substantive reciprocity, is in itself a hard limit to the exchange of tax information and to the co-operation among States. As a matter of fact, each State assumes a different notion of tax crime with a different extension and consequently, a different liability to punishment. For instance, the equivalent Italian terms for the expressions "tax fraud" and "tax evasion" are not considered as exactly alike by Swiss and Liechtenstein laws. Actually, these two States grant judicial assistance only when the tax fraud occurs, but they do not recognize the concept of "*frode fiscale*", as it is intended by the Italian tax law.

In actual fact, owing to this considerable discrepancy, the international co-operation in tax matter among Italy, Switzerland and Lichtenstein has always been problematic, above all about information concerning bank secrecy.

4.3 *The irrelevance of the Requesting State's rules of procedure as regards the Requested State's obligation to co-operate*

The prescription of rights is probably the explanatory example of this kind problem. Furthermore, the European convention of judicial assistance doesn't expressly deal with this argument, nevertheless, tax scholars argue that the judicial assistance may be denied to the Requesting State if the Requested one holds that the crime is statute barred.

4.4 *Principle of the "ne bis in idem"*

Generally, the judicial assistance is not granted when the related proceeding is either a pending criminal procedure against the same offender in the Requested State or the Requested State has already delivered the last judgement on the same fact.

4.5 *Principle of proportionality*

According to this principle, the authority having jurisdiction may reject co-operation if the fact occurred doesn't deserve the requested measures. In actual fact, it must verify if the proportionality, between this application and the seriousness of facts, exists. For instance, one may consider a bank account with a little amount of money whose attachment is demanded.

4.6 *Principle of the locus regit actum*

With regard to this aspect, the competent authority of the Requested State, applying for a rogatory letter, must provide tax information according to its own domestic procedure law.

4.7 *Principle of connection*

This principle establishes the necessity of a direct or indirect relationship between the evidence and the person under investigation.

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[7] See art.2 CEAG, 1959.

[8] See Comm. Trib. Prov. Milano, decision n. 175/18, May 30, 2000.

4.7.1 *Principle of reciprocity*

As for this principle, tax information is given only when the Requesting State and the Requested one agree to exchange analogous information on a mutual basis. As far as the Italian system is concerned, we can state that the new code of criminal procedure doesn't provide any special provision with regard to tax offences. Furthermore, unlike other countries, the tax crime law (D.Lgs 74/2000) doesn't provide any *ad hoc* regulation for tax offences. As a result, they are submitted to general regulations.

5. Judicial deeds and exchange of information procedures in criminal tax law: the "rogatory letter".

The mutual judicial assistance grounds on the International conventions and as for Italy, it is based on tax provisions included in the Italian Code of criminal procedure.[9]

In the international framework, the so-called "rogatory letter"[10] is universally considered the most convenient instrument for co-operation among States on criminal matters. The "rogatory letter" consists in a magistracy special request addressed by a State to its foreign homologue in order to acquire, through a pre-trial investigation, evidence inland the territory of that State[11]. This instrument within the extradition is probably the most ancient, as well as the most relevant, deed used by States.

Furthermore, we can state that whereas extradition is rarely used when tax offences occur, rogatory letters are regularly employed. Generally, passive and active requests are evaluated either by the Ministry of Justice or by the public authority. The active request is referred to the foreign competent authority through the diplomatic corps.

Moreover, the active and passive rogatory letters, as well as the exchange of information on tax offences, require a specific jurisdictional control and consequently a special qualified Court. As for Italy, such control is exercised by the Court of Appeal which may provide assessments on taxpayers carried out by the competent revenue police (*Guardia di Finanza*). All these results are finally deferred to the former Court, the Court of Appeal. In its turn, this Court finally sends them to the foreign judicial authority that formulated originally the request. This procedure, seen as a whole, is very strict and formal, and then its violation may give rise to the inadmissibility defect.

6. Limits to the judicial tax assistance

Considering the premises above, we can enlighten that, according to the European convention of judicial assistance signed in Strasburg on April 20, 1959, art. 2, letter b: "Assistance may be refused : a) if the request concerns an offence which the Requested Party considers as a political offence, an offence connected with a political or a fiscal offence; b) if the Requested Party considers that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of its country."

With regard to this, Switzerland neither signed nor ratified the 1978 protocol which establishes (Article 1) the Requested State impossibility to reject judicial assistance when the request concerns behaviour that it does not qualify a tax crime.

As the evaluation of the fiscal character of the violation is ascribed to the requested State, differences among tax regulations produce some zones of not correspondence among individual State disciplines. The judicial application for further survey of the Requested State is the only limit to its absolute discretionary evaluation.

7. The use of bank or financial information

According to main principles accepted by most of the countries, not only may tax authorities use tax information got through assessments, but also employ all information they got previously.[12] After discussing at length, if the extra fiscal information is legitimate or not, the Italian Constitutional Court reached an agreement and established that whatever the nature of information acquired is, it can be used also for tax purpose.

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[9] See art. 696 and fol. CPP

[10] In the UK language also called active and passive "letter of request".

[11] The Italian discipline is regulated by art. 723 and fol. CPP; however, in pursuance of the principle of Subsidiarity, it is enforced for those aspects that the international agreement doesn't provide for.

[12] See art. 37 Italian Dpr 600/73.

As a result, we can report that, extra fiscal information is largely used to carry out bank inspections; whereas once only 1 % of bank information were used to this end, at present, the percentage has increased to 10 %, even though, the regulation is still the same.

Unlike other States, Switzerland and Liechtenstein have specific rules on bank secrecy and other confidentiality laws[13]. In particular, bank secrecy violation is punished like the client attorney privilege violation.

As far as Italy is concerned, we can state that in the tax field there isn't a specific rule that imposes the banking secrecy. Consequently, tax authorities have no restrictions to get information by banks, so they use it for tax audit purposes. However, they may acquire directly by banks the information they need only if the bank doesn't cooperate with revenue police entrusted; for instance, if the bank provides incomplete or rather incorrect information.

Generally, the regular access to bank information must be previously permitted by the local tax authority (*Direzione Regionale delle Entrate*) and in order to safeguard privacy, assessments must take place in the presence of the bank manager. Moreover, the bank is supposed to inform its client about the procedure carried out. Finally, because of the law silence over the matter, the client can't assist actively to the procedure.

8. The Italian, European and international approaches to the exchange of information on administrative and criminal matters. The relationship between the pre-trial phase and the judicial one: a synthesis.

As far as the relationship between criminal and tax proceedings is concerned, art. 20 D.Lgs n.74/2000 establishes that the court may not stay a tax proceeding if a criminal action on the same fact is pending; this is defined "double track approach". In other words, the final judgement, the *res judicata* of a tax administrative judgement, doesn't have any mandatory effectiveness for the criminal judge, who, however, may take it into account as a clue.

With reference to how criminal final judgement may affect a tax trial, it's important to point out the Italian art. 654 CPP, which establishes the limits of effects in the civil and administrative judgement of a criminal decision. This judgement has a mandatory effectiveness in a tax judgement only if tax authority has sued for damages in a criminal proceeding.

8.1 *The relationship between the criminal and the tax investigation: the Italian view.*

First of all, when the same fact has a double relevance, that is to say both criminal and administrative relevance, Italian system allows both procedures. Then, the fact is judged in the tax as well as in the criminal proceeding.

It is extremely relevant to consider the tax pre-trial outcomes; as a matter of fact, it may occur that evidence got during the pre-trial phase may enter into the criminal judgement. In actual fact, this may not allow as the defendant's guarantees in the criminal proceeding are much higher. The Italian legislator doesn't provide a general solution to this problem, then, a case by case evaluation must be done.

Furthermore, it's likely that evidence of a criminal proceeding is used in a tax proceeding, but not vice versa. This is because guarantees provided in the criminal proceeding are higher than in the tax one.[14]

8.2 *The Council Directive 77/799 EEC[15]: the exchange of information and its use in criminal proceedings*

As a general principle, if the taxpayer behaviour amounts to a crime and the tax information is relevant for criminal purposes, the Council Directive establishes that such information may be used in the criminal proceeding if the State, which provides it, doesn't raise any objection.

In actual fact, the Mutual Assistance Convention allows a party that receives information from another party to forward such information to a third signatory country, provided that the party that first

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[13] See Article 14 Swiss and Liechtenstein banking law.

[14] With regard to this overview, see the decisions of the Italian Supreme Court as well as the Constitutional Court: Cass. Pen. n.45477; Cass Pen. n.2601 : "*In order to determine a turning of a mere administrative control activity into a criminal one, or vice versa, a simple clue of crime is not sufficient, whereas it is essential to identify the real indictee.*"

[15] Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation amended by the Council Directive 2003/93/EC of 7 October 2003.

provided such information agrees. However, EC Directive 77/799 supersedes the Mutual Assistance Convention in income tax matters between EC Member States, which are expected only to apply the Mutual Assistance Convention's rules to matters not covered by EC Directive 77/799.

In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital, and any information relating to the establishment of taxes. In particular, Article 7 (1) [16]states that such information: "All information made known to a Member State under this Directive shall be kept secret in that State in the same manner as information received under its national legislation. In any case, such information:

– may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment,

– may be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection,

– shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing of the tax assessment."

We can argue that it is an application of the principle of speciality and similarly it occurs with Article 41 of Council Regulation (CE) n.1798/03 and Article 9 of Council Regulation (CE) n. 218/92: "the information may be disclosed in administrative and judicial proceedings concerning tax law violations". This criterion is accordingly interpreted by scholars in these terms: the competent authority may expressly deny the use of tax information before its sending and any special request of authorization to use such information for criminal purposes is demanded.

Scholars, basically side with two theories. Accordingly with the first one, the information exchanged under the Council Directive 77/799/ECC and further amendment, may also be used, without reservation, in the field of criminal law. On the other side, the second theory distinguishes between those cases in which the criminal proceeding isn't pending yet and those ones in which it is actually outstanding. In this case, scholars argue that the "international letter rogatory" ought to be started up. So, tax information exchanged thanks to the mutual assistance between tax authorities may be used in a criminal proceeding only if it has been got before the opening of the pre-trial phase, otherwise its use may be declared as inadmissible evidence.

Accordingly, the Italian code of criminal procedure grants major guarantees to the person being prosecuted or under prosecution; for instance, declarations made by a taxpayer to foreign tax authorities may not be used if the defending counsel doesn't attend the audit.

By way of example, we can point out the recent affair occurred in Liechtenstein, a well-known tax haven. In this State and from a certain point of view in Switzerland too, there is strict bank secrecy. In particular, Liechtenstein doesn't cooperate in any way with other European States as it doesn't allow any form of exchange of information and any judicial assistance, above all in administrative as well as criminal tax matters.

In 2008, the German Secret Service bought from an unfaithful Liechtenstein bank employee some information. Afterwards, it exchanged it with other Member States according to the Council Directive 77/799/EEC (and further amendment). On the grounds of the information collected, a number of Italian taxpayers were inquired for tax offences. However, as Liechtenstein doesn't grant any judicial assistance in tax matter, even in criminal cases as well as in money laundering ones, such information couldn't ever been used through official ways. Tax courts argue that information obtained by an infringement (that is to say not through rogatory letters) may not be used during the tax proceeding[17].

In order to fight tax havens privileges, European and US tax authorities are trying to overcome such refusal to cooperate in criminal tax matters.

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[16] See article 7 (1) replaced by Council Directive 2003/93/EC of 7 October 2003.

[17] With regard to this, see Comm. Trib. Prov. Milano, sez. XVIII, April 4, 2000 n.178 and Trib. Bolzano June 15, 2006, n. 31. This cases are still in progress and they may become cases-law too.

9. Exchange of tax information and double taxation conventions

Many treaties against double taxation signed by Italy (for instance the tax treaty signed with France and Germany) establish the possibility to use information exchanged in tax proceedings. However, as for the principle of speciality pointed out above, this event may occur only if the Requested State allows information, by restricting its use. Similarly, the France - Italy and German - Italy Conventions are in compliance with the Council Directive 77/799.

In the Italian system, there is an open and controversial question: it often occurs that a criminal proceeding begins during a tax audit. In that case, art. 200 CPP provides that if tax inspectors find out facts that can amount to a crime, they may keep evidence and any other useful elements of crime.

This provision represents the frontier between the enforcement of tax law and the criminal one in judicial assistance matter. So, the legislator, in these cases grant to the person under prosecution all legal guarantees and defences provided by the code of criminal procedure. The question arises when the fact amount to a crime in violation of tax and criminal law. The rogatory letter could be granted to sanction the criminal infringement, but not the tax one. Accordingly, information got outside the rogatory letter way are unusable. In this matter, cases laws are very rare: we can point out the Court of Bari decision n. 1261, March 9, 1999, which states that any element of crime acquired abroad without using the rogatory procedure can't be used.

10. Conclusion

To conclude, we can state that, the international framework still grounds on the observance of sovereignty of States and on the principle of national exclusive jurisdiction. Each State preserves rigorously its own system of criminal rules. Therefore, in the way Member States cooperate in judicial assistance matter, something is changing.

In actual fact, not only does globalization concern the organized crime and tax evasion and tax fraud, but also the mutual assistance among Member States, and consequently among tax authorities. As States can't contrast effectively this phenomenon, in order to preserve their economic systems, they are forced to cooperate. States have realized that fighting tax criminality cooperating with Member States means a greater margin of success.

Recently, Member States has signed multilateral agreements in tax matter and in judicial assistance. New political measures and a better coordination among States on tax matter could grant an effective contrast to the use of tax heaven for tax fraud and tax evasion.

Finally, to realize a European common market, it is absolutely essential to safeguard the fundamental human rights and to tackle criminal behaviours as well as tax crimes. From this point of view, the harmonization process ought to be effective in order to improve European co-operation. The creation of an international committee could be the answer and the way to get through this challenge.

The legislative framework*

Prof. Marco Barassi**

Summary: 1. Introduction; 2. Sources of mutual assistance; 3. Exchange of information; 3.a) Aim and object; 3.b) Persons; 3.c) Types of exchange of information; 3.d) Relationships between different instruments; 4. Assistance for recovery; 5. Conclusions.

1. Introduction

My report deals with a general overview of the instruments that, under Italian tax law, allow tax co-operation.

International tax co-operation has been defined as the activity developed by States to allow the pursuit of the aims proper to taxation on the part of another State, and it is accomplished by instruments of administrative or judicial nature[18].

The object of administrative co-operation in tax matters has been identified as tax assessment and tax collection[19].

The assessment phase comprises the acquisition of information, notes, data and evidence useful to the administration for determining the existence and amount of taxation.

The collection phase consists in the execution, even compulsory (enforcement), of the tax liability.

Hereinafter the assessment and the collection phase will be dealt with.

According to the generally accepted observation of the distinction between internal and international law, the characteristics of originality and sovereignty of each State imply that no State could enforce its jurisdiction to tax in the territory of another State: in particular, carry out assessment or recovery activities in tax matters.

Given the existence of this limit, it is understandable how the need for States to extend assessment and recovery activities outside their own territory (a need which derives from the internationalisation of income-producing activities) inevitably requires the assistance of the State in which such activities are intended to be carried out, so that it is this latter State which effects these activities.

Since according to most scholars there is not a principle of international law which obliges States to provide mutual assistance in tax matters[20], administrative co-operation developed through international treaties which, historically, had co-operation, even prior to double taxation, as their object. In fact, the first examples of international treaties in tax matters are a group of three conventions between Belgium and France in 1843, between Belgium and Holland in 1845 and between Belgium and Luxembourg in 1845.

The Community perspective is quite different.

In fact, the Community framework seems to be the most suitable for identifying the existence of a common interest for the exchange of information aimed at the correct application of the taxes of single State. Mutual assistance is essential to create an integrated space where the realisation of fundamental freedoms is guaranteed[21].

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[18] The definition is from C. Sacchetto, *Tutela all'estero dei crediti tributari dello Stato*, Cedam, Padova, 1978, p. 209.

[19] M. Udina, *Il diritto internazionale tributario*, Cedam, Padova, 1949, p. 430.

[20] M. Udina, *Il diritto internazionale tributario*, p. 431; G. Croxatto, *La imposizione delle imprese con attività internazionale*, Cedam, Padova, 1965, p. 90, states that it is without doubt that an international obligation of co-operation between States in the assessment and collection of taxes does not exist. However on this issue see the wide analysis of G. Fransoni, *La territorialità nel diritto tributario*, Giuffrè, Milano, 2004, p. 98 et seq.

[21] F. Saponaro, *Lo scambio di informazioni tra Amministrazioni finanziarie e l'armonizzazione fiscale*, in Rass. trib., 2005, p. 453 ss.; F. Persano, *La cooperazione internazionale nello scambio di informazioni*, Giappichelli, Torino, 2006, p. 123. On the issue see also A. Fedele, *Lo scambio di informazioni*, in Rass. trib., 1999, p. 54 seq.

In effect this statement can find positive comparisons in the field of value-added taxes, where the correct application of these common taxes and the harmonisation of them with the aim of the creation of the internal market is a function of the exchange of information. Nevertheless, also in the field of income taxation, the necessity for the exchange of information is completely testified to by the Directive 77/799/Cee: "*practices of tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of conditions of competition; whereas they therefore affect the operation of the common market*".

Similar remarks may be extended to assistance in collection.

2. Sources of mutual assistance

As regards Italian tax legal order, the sources of mutual assistance are: tax treaties (sources of international law), community directives and regulations, domestic tax law and administrative agreement between tax authorities.

Domestic tax law affecting mutual assistance includes rules concerning the power of assessment (inquiring activity) that is to say rules applicable in order to provide information required by another State. Moreover there are also domestic tax rules affecting international elements that are applicable only if exchange of information is possible (for example art. 168 of Corporation income tax law).

Agreements between tax authorities have administrative nature and are not subject to ratification; they contain detailed rules concerning exchange of information.

3. Exchange of information

The legal instruments through which exchange of information is performed are: Directive 77/799/Cee, Regulation 1798/2003, convention between OECD and Council of Europe signed in Strasburg the 25th of January 1988 and ratified by Italy with law 19/2005 (*Convention on Mutual Administrative Assistance in tax Matters* MAAT). Italy has not concluded treaties based on the OECD Model of April 2002 on exchange of information.

The development of all these instruments has been very intensive. Under this point of view I would like to briefly deal with the most important elements of the instruments of exchange of information.

3.a) *Aim and object*

The aim of the directive is to exchange any information that may enable them to effect a correct assessment of taxes on income and on capital, and any information relating to the establishment of taxes on insurance premiums. So the directive concerns only assessment of taxes and does not deal with collection of taxes or with criminal penalties. Recently, Directive 2003/93 included also notification in the field of application of Directive 77/799.

As regards Italian taxes covered by the Directive 77/799 they are income taxes (Individual income tax and Corporation income tax). The previous Corporation income tax (Irpeg) was replaced by the new Corporation income tax (Ires) at the end of 2003. The new Corporation income tax is covered by the directive because according to article 1, the directive also applies "*to any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3*".

The applicability of the directive to Irap (Regional tax on productive activities) is more questionable. Irap is hardly definable as a tax on income or on capital as the hit ability to pay is neither income nor capital: so I think that Irap is not covered by the directive.

Taxes covered by the directive have not always been taxes on income and capital. In 1977 the objects of the directive were taxes on income and capital but later it was extended to Vat and to excise and insurance premiums. In 2003 the objective scope of the instruments was clearly divided: taxes on income and capital were covered by the directive while VAT was covered by Regulation 2003/1798.

Directive 77/799 was implemented by Italy firstly with Legislative decree 506/1982 and, as regards more recent provisions, with legislative decree 215/2002.

The development of article 26 of OECD Model was also very intensive. The wording of the different versions of the article 26 improved the rule in the light of a more effective exchange of information. The so called *minor clause* was substituted by the *major clause* and persons whose information may be exchanged are not more only residents of one or both the contracting States as article 1 of the OECD Model provides. Taxes affected by exchange of information are taxes of every kind and name, imposed by a con-

tracting State or by its political subdivisions. As it has been noted, article 26 becomes autonomous from the objective and subjective scope of application of the Convention.

As regards Italian tax treaties most of them follow the 1977 OECD Model. Few treaties are consistent with the 1963 version of the OECD Model (for example treaties with Ireland and Portugal). Notably the treaty concluded with Switzerland, although non member State, only allows exchange of information necessary for the regular application of the convention.

In Italian tax treaties exchange of information only concerns taxes covered by the treaty although in few recent treaties, as the one concluded with Iceland, exchange of information affects taxes of every kind.

The aim of the exchange of information ruled by the MAAT is the assessment and collection of taxes, the recovery and enforcement of tax claim and the prosecution before an administrative authority. The list of taxes covered by the MAAT is very long and includes income tax, capital tax, inheritance and gift tax and compulsory social security contributions.

3.b) *Persons*

The Directive 77/799/EEC and the MAAT do not limit persons whose information are exchanged to those that are resident or national of one of the contracting State.

Treaties concluded by Italy usually follow the 1977 OECD Model and so the exchange of information only affects persons covered by the treaty. However in some treaties the exchange of information is not limited by art. 1 (for example treaties with Spain, the Netherlands, Luxemburg).

3.c) *Types of exchange of information*

There are three main types of exchange of information: on request, automatic and spontaneous.

I would only underline a couple of points.

The first one concerns the spontaneous type of exchange. Under the Directive 77/799/EEC the spontaneous exchange is in some cases (listed in the Directive) compulsory; the same happens in the MAAT. Instead, the spontaneous exchange of information, according to art. 26 OECD Model, which only in the Commentary refers to the types of exchange, is not compulsory.

The second point concerns simultaneous tax examinations. They are mentioned in the Commentary of article 26 OECD Model, in article 8-ter of the Directive and in article 8 of the MAAT.

Italy signed twelve administrative agreements between tax authorities, concerning simultaneous tax examinations that are usually based on the existing tax treaty.

Article 8-ter of the directive, was implemented by Italy in a detailed way and the provision is now included in art. 31-bis of Presidential Decree 600/1973 (law on income tax assessment). As a consequence, simultaneous audits by member States do not seem to need any more administrative agreements between tax authorities.

3.d) *Relationships among different instruments*

The plurality of instruments of exchange on information gives rise to some issues. There may be cases in which more than an instrument is applicable: the ambit may overlap because among member States community law applies (the directive), member State signed tax treaties and some member States ratified the MAAT (for example, Italy and France).

Which instrument takes priority? Among member States community law should prevail but, according to article 11 of the directive, the provisions of the directive itself "*shall not impede the fulfilment of any wider obligations to exchange information which may flow from other legal acts*". A similar provision is included in Regulation 1798/2003 (art. 46).

Moreover, according to art. 27 of the MAAT, "*The possibilities of assistance provided by this Convention do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between the Parties concerned or other instruments which relate to cooperation in tax matters.*

Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community".

So the most wide obligation to provide assistance should prevail[22].

[22] On this issue see P. ADONNINO, *Lo scambio di informazioni fra amministrazioni finanziarie*, in *Diritto tributario internazionale*, Cedam, Padova, 2005, p. 1133. On the issue see also A. GRAU, *Convention on mutual administrative assistance in tax matters and Community rules: how to improve their interaction?*, *EC Tax Review*, 2006/4, p. 200.

4. Assistance for recovery

Just few remarks concerning assistance for recovery.

Assistance for collection of taxes developed sharply in recent years as to fill the gap with the various instruments for assistance in assessment. Art. 27 was introduced in OECD Model in 2003 that is to say 40 years after the 1963 version of the Model, which already contained art. 26 on exchange of information, even though the first tax treaties had assistance for recovery as their object[23].

As regards only the main instruments for assistance in collection, they are:

Directives 76/308/Cee and 2001/44/Ce[24], latest implemented by Italy with Legislative Decree 69/2003;

tax treaties that include a provision similar to art. 27 of the OECD Model;

the MAAT.

As regards recent Italian treaties, the one concluded with Congo (ratified with law n. 288/2005) includes a provision similar to art. 27. Moreover treaties with Belgium (ratified with law n. 148/1989) and with France (ratified with law n. 20/1992) include provisions concerning assistance for collection and the one included in the treaty with France is the same already included in the previous treaty between Italy and France of 1958.

Italy and France concluded also a treaty concerning gift and inheritance tax that includes a provision on assistance for collection (art. 15 law 708/1994).

Italy concluded also two old treaties that include assistance for collection: one with Germany (Royal law decree n. 1676/1938) and the other one with the Republic of San Marino (ratified with law 320/1939).

The development of the different instruments of assistance is proved by the increased number of taxes covered.

As regards the directive, it firstly covered agricultural subsidies and levies and custom duties, then was extended to VAT and excise and then further to taxes on income and on capital and taxes on insurance premiums.

The assistance also covers interests, administrative penalties and cost of recovery.

In treaties concluded by Italy with France, Belgium and Congo the assistance concerns only taxes covered by the treaty while art. 27 of the OECD Model is not limited by art. 2 (taxes covered) of the Model convention.

The objective scope of application of the MAAT is the wider as it includes taxes of every type and also social contributions.

The most wide kind of assistance includes exchange of information for the recovery of the claim, assistance for recovery and conservatory measures and notification of acts.

The assistance for recovery is provided by the requested State that proceeds as it was recovering its own credit and so it applies its own legislation.

The assistance is particularly intense in the directive where "*The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated*" (art. 8, par. 1).

Although the directive allows the requested State to accept, recognise, supplement with or replace the instrument permitting enforcement of the claim (art. 8, par. 2), the direct recognition and automatic treatment of the instrument (art. 8, par. 1), demonstrates a high level of integration and common interest of member States in recovery of tax claim that cannot be found in other instruments of assistance.

The MAAT is less intensive on this issue: the foreign instrument permitting recovery, where appropriate, shall be accepted, recognised, supplemented or replaced by an instrument permitting recovery in the requested State.

This element demonstrates that assistance for recovery is more difficult than the one for assessment. In the first kind of assistance the direct recognition and automatic treatment of the instrument, involves the acceptance in one legal order of a foreign instrument that is to say an instrument created under a different legal order and so requires a minimum level of uniformity of the legal features of the instrument under which the direct recognition is not possible.

[23] Treaties quoted in the Introduction of this paper.

[24] See also Directive 2008/55/Ce.

5. Conclusions

The international dimension of economic activities compared with the national ambit in which States taxing power may be actually applied is one of the condition for international tax evasion. This one causes great losses to public finance and, under a wider perspective, may cause an higher fiscal pressure on less movable elements as labour compared with capital.

The instrument against international tax evasion is tax co-operation that was improved developing the instrument through which it is carried out.

It has been moved from few and limited instruments to a set of instruments whit similarities and differences among them whose scope of application may sometimes overlap.

Then there are almost two questions to be examined (and I think it will be done by the following reports):

are the instruments for mutual assistance efficient and do they allow to reach the settled aims?

is there a sufficient protection of the taxpayer against an uncorrected use of mutual assistance instruments?

The burden of proof and limitations on the exchange of information in tax matters*

Prof. Fabrizio Amatucci**

Summary: 1. Effects of the limitations on the exchange of information and of "enlarged cooperation": tax restrictions within the EU; 2. Limitations on the exchange of information in the field of VAT; 3. The elimination of limits to the exchange of information in Directive No. 2003/48 on taxation of savings income; 4. Limitations contained in Articles 7 and 8 of Directive No. 77/799; their implementation into the Italian legal system; 5. Enlarged cooperation and reversal of the burden of proof; 6. The adequate exchange of information and the burden of proof on the taxpayer in the Italian legal system; 7. Conclusions.

1. Effects of the limitations on the exchange of information and of "enlarged cooperation": tax restrictions within the EU.

The exchange of information between tax administrations and the mutual assistance between States within the EU and OECD have become **essential** in recent years to monitoring taxpayers' behaviour and thus to the fight of international tax evasion and avoidance [25]. In 1997 the EU adopted the Code of Conduct – which is linked to the OECD Harmful Tax Competition Report in a wider context – in order to prevent Member States from engaging in harmful competition through the introduction of low or zero effective tax rates. For this purpose, the Code of Conduct provides for the exchange of information between Member States and foresees a central role for the European Commission. Likewise, the European Court of Justice refers to Community law on the exchange of information more and more frequently when applying fundamental freedoms in tax matters.

However, notwithstanding the importance of mutual assistance in tax matters, requesting tax authorities and assessing bodies must still face some legal limitations based on reciprocity, such as those laid down in Article 26 of the **OECD** Model Tax Convention, in Article 21(2)(d) of the European Strasbourg Convention and in Article 8 of Directive No. 77/799/EEC.

These limitations, which concern also the probative value of evidence, are major hindrances to the cooperation and exchange of information between tax administrations in tax matters at international and Community levels. Their effect is that Member States have enlarged the obligation of taxpayers in relation to cooperation and have imposed a higher number of requirements on taxpayers operating abroad. Taxpayers' "*enlarged cooperation*" significantly implies that information obligations shift from tax administrations to taxpayers and accordingly the burden of proof is reversed, putting the onus on taxpayers.

The European Court of Justice considered the application of this new form of cooperation in relation to natural persons (Judgement of 3 October 2002 case C-136/00 *Dieter Danner*, paragraph 50; judgement of 26 June 2002, case C-422/01 *Skandia Ramstedt*). The Court recalled that Directive No. 77/799 may be relied upon to ascertain the actual payment of contributions and held that there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider nec-

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[25] Originally, cooperation and assistance between tax administrations aimed at eliminating *international double taxation*. In this context, the mutual transmission of information enabled single Contracting States to realize their interests. Later on, as scholars pointed out, (FEDELE, *Prospettive e sviluppi della disciplina dello scambio di informazioni tra Amministrazioni finanziarie*, in *Rass. Trib*., 1999 p. 49) States realized that **cooperation** between tax administrations could be exploited to various purposes and correctly applied by tax systems, or at least by **surpanatational** systems like the European Union. SAPONARO (*Lo scambio di informazioni, le amministrazioni finanziarie e l'armonizzazione fiscale*, in *Rass. trib*., 2005, 458) deems that mutual assistance in the field of information exchange between Member States within the EU derived from the need to combat tax evasion and fraud practised through new schemes over the years.

essary in order to determine whether the conditions are met to grant the tax advantage[26]. This view does not take into account the limitations as provided for by Directive No. 77/99, under which Member States may easily not **give** the necessary **information** to determine whether the conditions are met to grant the tax advantage or whether the tax was paid.

It is necessary to point out that the application **of prohibition** of restrictions on the fundamental freedoms of the Community in tax matters requires the exchange of information between tax administrations, so that States cannot justify the different treatment on the basis they were not informed of some income situations. However, on the other hand, domestic legal provisions governing requests for information on intra-Community trade may reverse the burden of proof and make it particularly problematic, thus implying tax restrictions of procedural kind for fundamental freedoms by national tax systems.

2. Limitations on the exchange of information in the field of VAT

Regulation No. 1798/2003 of 7 October 2003, as amended by Regulation No. 143/2008 of 12 February 2008, was issued for the purpose of strengthening administrative cooperation in the field of VAT. It provides simpler and more effective legal rules to combat frauds and to adapt administrative cooperation to the challenges of single market. Before establishing the limitations on the exchange of information, Article 40(1) of Regulation No. 1798/2003[27] provides for the conditions under which the exchange of information may be used and the requested State is allowed not to comply with the request where:

A) the administrative burden on that requested authority is disproportionate;

B) the requesting authority has exhausted the usual sources of information (subsidiarity)[28].

Article 42 of Regulation No. 1798/2003 contains some useful indications in relation to evidence, where it provides that "reports, statements and any other documents, or certified true copies or extracts thereof, obtained by the staff of the requested authority and communicated to the requesting authority under the assistance provided for by this Regulation may be invoked as evidence by the competent bodies of the Member State of the requesting authority on the same basis as similar documents provided by another authority of that country"[29].

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[26] See also ECJ case C-55/98, where the Court held that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) can be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer himself to produce the proof that they consider necessary to assess whether or not the deduction requested should be allowed.

[27] Article 40 of Regulation No. 1798/2003 establishes some limitations on the exchange of information similar to those contained in Directive 77/799/EEC. It provides that this Regulation shall impose no obligation to have enquiries carried out or to provide information if the laws or administrative practices of the Member State which would have to supply the information do not authorize the Member State to carry out those enquiries or collect or use that information for that Member State's own purposes.

It also provides that:

the competent authority of a Member State may refuse to provide information where the Member State concerned is unable, for legal reasons, to provide similar information. The Commission shall be informed of the grounds of the refusal by the requested Member State;

the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

[28] The same rule is provided also in relation to direct taxation in Article 2(1) of Directive No. 77/799.

[29] **See art 16 directive proposal of new Council Directive on administrative cooperation in the field of taxation (COM 2009)** The Italian legal system generally recognizes the use of data obtained by other authorities, like criminal authorities, for tax purposes. Under Article 33(3) of Presidential Decree No. 600/73, tax authorities can use data and information obtained by police forces exercising judicial police functions, if previously authorized by the court. Moreover, under Article 36(6) of Legislative Decree No. 231/2007, data and information recorded in the Single Electronic Archive may be used also for tax purposes.

There are still some doubts on the probative value of such data. In this regard, it is to point out that tax courts can however base their decisions also on the evidence collected during criminal proceedings, even where relevant decisions cannot be relied upon in courts other than criminal ones. The only condition is that tax courts should *arrive at a free evaluation* of the evidence obtained in criminal proceedings according to the rules about the burden of proof in tax proceedings. That evidence can be used as a legal presumption (Italian Supreme Court, Tax Chambers, judgements No. 10945 of 24 May 2005 and No. 14593/2006). On the limited use of data derived from other authorities, see judgement of Regional Tax Court in Rome No. 108 of 16.5.2006.

It would be appropriate to determine whether this clarification on the probative value[30] of documentation collected by the requested State may concern also direct taxation.

3. The elimination of limits to the exchange of information in Directive No. 2003/48 on taxation of savings income

In relation to the circulation of capital, the EU considered necessary to issue Directive No. 2003/48 of 23 June 2003 on taxation of savings income in the form of interest payments (transposed into the Italian legislation by Legislative Decree No. 84/2005), which is actually based on the exchange of information involving paying agents. Article 9 provides that competent authorities are obliged to exchange information automatically (reciprocity is not a requirement, as instead is provided for in Article 8 of Directive 77/799/EEC[31]), so to protect internal procedures. The obligation concerns information provided by the paying agent on investments and interest payments, and on the identity of the beneficial owner[32]. Under this obligation the tax authority and the paying agent participate jointly in intra-Community assessments. However, it is to point out that information (personal documents) provided by the paying agent is not sufficient to identify the residence of the beneficial owner and thus to determine the taxing country.

Other cases where limitations on the exchange of information are eliminated can be found in Article 26 of the OECD Model Tax Convention: new paragraph 5 provides that Contracting States are not allowed to decline to supply information that are held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity, provided that the procedure is not long and burdensome.

4. Limitations contained in Articles 7 and 8 of Directive No. 77/799; their implementation into the Italian legal system

Directive No. 77/799/EEC contains some limitations on cooperation which are based on the principles of subsidiarity, equivalent access and reciprocity. Article 7 provides that where information may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment, it must be kept secret in the same manner as information received under its domestic legislation. This limitation guarantees that information is made available only to qualified persons and that is not used for purposes other than those of the Directive. This provision is to be connected to Article 8(2), under which the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy. Directive No. 77/799/EEC sets two types of limitations: limitations on the procedure (Articles 2 and 8(1)) connected to the requested State's investigation powers and limitations on the probative value of evidence (Article 8(3)) connected to the requesting State's legislation.

These limitations were transposed into the Italian legal system by Article 31*bis* of Presidential Decree (DPR) No. 6007/3 and Article 3 of Legislative Decree No. 69/2003, which do not impose an enlarged obligation of cooperation between tax administrations. In any case, Ministerial Circular Letter No. 201/E of 1996 regards the exchange of information as a valid tool against tax evasion and avoidance. The limitations set in paragraphs 3 and 4 of Article 31*bis* are substantially the same as those contained in Community law in relation to confidentiality, secrecy and public policy (Article 7 **of Directive 77/999**), as well as to the limitations contained in Article 8 of Directive No. 77/799.

Subject to some exceptions, Italian courts are in favour of providing information requested[33] as far as possible, although it is particularly burdensome for the tax administration, while disregarding formal obstacles[34] .

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[30] Courts, like tax administrations, should therefore make a free assessment of the evidence obtained by other authorities, as happens in relation to data collected during criminal proceedings, and regard them as legal presumptions or circumstantial evidence according to the cases.

[31] With reference to these limitations, see **par. 4**.

[32] See Article 9 of Directive No. 2003/48. It provides that article 8 of Directive No. 77/799 is not to apply.

[33] Judgement of Regional Tax Court Emilia Romagna No. 152/25/99 affirmed that information cannot be used as evidence when it is collected in an irregular way.

[34] See judgement of the Supreme Court No. 2390/2000 on the probative value of an unsigned declaration submitted by a competent foreign authority.

With regard to the first type of limitations, Article 8(1) of Directive No. 77/799 provides that "*This Directive* ***does not impose any obligation*** *upon a Member State from which information is requested* ***to carry out inquiries or to communicate information, if it would be contrary to its legislation or administrative practices for the competent authority*** *of that State* ***to conduct such inquiries or to collect the information sought***" (as amended by Article 1(4)(c) of Directive No. 2004/56/EC of 21 April 2004).

Procedural limitations, as laid down in Articles 8 and 7 of the Directive, guarantee the observance of the requested State's rules and should prevent national authorities from circumventing domestic limitations in order to obtain information through another State[35].

Limitations concerning other then procedural , the value of evidence [36], as laid down in Article 8(2) of Directive No. 77/799, according to which "*The competent authority of a Member State may decline transmission of information when the Member State requesting it* ***is unable****, for reasons of fact or law,* ***to provide the same type of information***". This limitation (which is contained also in the 2002 OECD Agreement on international cooperation) is based on the principle of equivalence and makes the exchange of information conditional upon the requested State's legislation. It extends and enhances the scope of limitation on information beyond investigating and assessment powers, in that it requires **reciprocity** of legislations in the States concerned and thus of relevant evidence regimes, which are often not compatible with each other.

Article **8(3**) of Directive 77/799 implicitly establishes that a State may refuse to provide information or documents where that information or is **not admissible or is not available** in the requesting State for evidence reasons (reasons of fact or law).

Let us think of some evidence, such as testimonies and oaths, made during criminal proceedings or oral procedures (declarations by parties or thirds), which are not allowed in the Italian legal system or whose probative value is controversial; and, on the other hand, of presumptions (of fact or of law), which are widely used during domestic assessments but not allowed or provided for by other legal systems of requesting countries.

We should wonder whether the fact that data or information may be regarded as evidence or merely as circumstantial evidence in two different legal systems (of the requesting State and the requested State) may be a limitation and justify the refusal of a State as the requirement of equivalent access is not met. The excessive discretion of the tax administration does not permit to answer this question in a precise way.

The limitation on the exchange of information cannot be justified by the principle of equivalent access and equal treatment of assessed taxpayers, as resident taxpayers generating income only within one State cannot always be compared to taxpayers generating income in States with preferential tax regimes. Moreover, it is not clear why the requested State cannot use the control procedures and evidence tools as provided for by its own legal system when the requesting State does not provide them. Actually, the fact that the overall income situation is not fully known to the requesting State should legitimate more or different investigation powers and evidence tools that are even not available to it but to the requested State. With regard to **reciprocity** underlying Article 8(3), it is also manifest that this principle does not conform to Community law: as pointed out before, the non-compliance by a Member State may be a hindrance to fundamental freedoms and the elimination of tax restrictions based on the fact that the overall income situation is not known. The European Court of Justice (cases *Halliburton* and *Futura*) considered Directive No. 77/799 a proper instrument to get information on the structures of foreign companies and often held (see case 196/04 *Caldbury Schweppes* of 12 September 2006 and case C-418/07 *Societé Papillon* of 27 November 2008[37]) that **the exchange of information** therein provided is the tool to verify whether the establishment or the activity of a company in another country is genuine in

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[35]In this sense, see FABBROCINI, *Cooperazione amministrativa finanziaria in tema di scambi di informazioni* in *Rivista della scuola superiore di economia e finanza*, 2006.

[36] SACCHETTO in *La cooperazione fiscale internazionale*, in his presentation to the Academy of *Guardia di Finanza* of 2 February 2008, 42, examines the issue of the probative value of evidence within domestic tax systems and deems that the meaning of Community and treaty law is to be identified in the probative value of information collected for assessment purposes. Further, he deems that information cannot be used as evidence when it is collected in an irregular way.

[37] In Judgement *Caldbury Schweppes* the Court held that the competent national authorities **have the opportunity, for the purposes of obtaining the necessary information** on the SEC's real situation (UK CFC rules), of resorting to the procedures for collaboration and exchange of information between national tax administrations introduced by legal instruments,

order not to apply anti-avoidance rules, or whether there is no risk of a double tax advantage. In above case *Societé Papillon* the ECJ held that difficulties, which Member States may face, cannot of themselves justify tax restrictions and recognized that tax information concerning companies is all the more appropriate since Community harmonization measures apply in the field of company accounts (reliable and verifiable data). For evidence purposes, it is very important that data can be verified, so that assessment systems can be compatible in different Member States for effective tax cooperation.

6. Enlarged cooperation and reversal of the burden of proof

Limitations on evidence and assessment powers, as laid down particularly in Article 8 of Directive No. 77/799, result in the **reversal of the burden of proof** on to the taxpayer operating abroad, which is not comparable to the burden on the taxpayer operating only in the State of residence. If the mutual assistance or the exchange of information between two States is missing or is **inadequate**, the burden of proof is inevitably put on the taxpayer, who has the duty to cooperate with the tax administration (enlarged cooperation)[38]. In some legal systems, such as the Italian one, this new form of cooperation is connected to a range of tax benefits and advantages. The burden of proof, which is often necessary not to apply anti-avoidance rules, is put on the taxpayer operating abroad in a pre-assessment phase as it affects the granting of tax advantages allowing a fair tax treatment. In these cases the duty to cooperate is more burdensome than that usually requested during the assessment.

If it is true that, as held by the European Court of Justice (Judgment of 8 July 1999, case C-254/97 *Baxter*, paragraphs 19 and 20), national legislation which absolutely prevents the taxpayer from submitting evidence that, for example, expenditure relating to a certain activity carried out in other Member States has actually been incurred and meets the requirements cannot be justified in the name of effectiveness of fiscal supervision, and that the taxpayer should not be excluded *a priori* from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain this expenditure, it is also true that enlarged cooperation cannot **offset the** inefficiencies or limitations concerning the exchange of information between tax administrations.

In this connection, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations provide that taxpayers may not have any legal obligation to prove the correctness of their transfer price and that it is necessary to have special care **in application of rule concerning** the burden of proof, which should not be misused by tax administrations as a justification for making groundless or unverifiable assertions. However, national authorities must prove that the transfer pricing is correct, even if the burden of proof is on the taxpayer.

namely Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15). These mechanisms are made necessary by the difficulty that the tax authorities have in ascertaining whether a risk exists that losses may be used twice where a non-resident subsidiary is interposed between the parent company and its sub-subsidiaries. The amount of a provision does not generally correspond to the loss of the subsidiary and it is not always possible to identify the exact origin of a provision. In Judgment of 27 November 2008, case C 418/07 *Societé Papillon*, paragraph. 54 and foll., it is pointed out that in order to acknowledge the tax integration regime to non resident companies practical difficulties cannot of themselves justify the infringement of a freedom guaranteed by the Treaty (Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 29; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 48; and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 70). Community legislation, namely Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), allows the Member States to request from the competent authorities of the other Member States all information which may be relevant in assessing, inter alia, the corporation tax payable.

In relations between Member States, information requested or provided by the tax authorities concerned is all the more likely to allow it to be ascertained whether the conditions laid down under national legislation are satisfied since Community harmonization measures apply in the field of company accounts, with the result that it is possible to produce reliable and verifiable evidence relating to a company established in another Member State (see, to that effect, Case C-101/05 *A* [2007] ECR I-11531, paragraph 62). Thus, where parent companies which are resident in a Member State wish to benefit from the tax integration regime together with sub-subsidiaries held through subsidiaries resident in another Member State, as in the main proceedings, the tax authorities of the first State may request those subsidiaries to provide the evidence the authorities consider necessary in order for the transparency of the provisions made by the subsidiaries to be fully guaranteed.

[38] In Germany, Article 90 AO establishes a larger obligation to cooperate in case of international tax operations than in case of domestic tax operations.

7. The adequate exchange of information and the burden of proof on the taxpayer in the Italian legal system

Recent Italian tax rules against international tax evasion and avoidance mainly refer to countries and territories other than those **allowing an adequate exchange of information** (Article 168 of the Italian Consolidated Text on Income Taxes – TUIR). Such adequateness is one of the main requirements to identify preferential tax regimes and significant low taxation systems. In order not to apply these rules, the burden of proof is reversed and the onus is put on taxpayers carrying out their activities mainly or genuinely in the other State. Referring to Article 168*bis* enables a range of anti-avoidance rules to comply with the subsidiarity principle, as only if there is not an adequate exchange of information, it is necessary to collect information directly from the taxpayer.

Among anti-avoidance rules based on enlarged cooperation, it is worthwhile mentioning Article 167 TUIR concerning controlled foreign companies (CFC) and Article 110 TUIR concerning deduction of expenses and losses derived from businesses located in countries other than those contained in the "white list" under Article 168*bis*(10)(11) TUIR[39]

Article 168*bis* is also referred to in order to exclude the 95% exemption on income derived from shareholdings in companies under Article 89 TUIR.

Moreover, Articles 26 and 27 of Presidential Decree (DPR) No. 600/73 provide that companies belong to White List Countries for withholding tax applied on interest and dividends at a rate of 12.5% and 1.375%. Enlarged cooperation implies some difficulties when companies must furnish the proof that their activity is genuinely carried out in the other State and the use of advance ruling is not always possible.

All these rules lead the taxpayer's cooperation being affected by the inadequacies in the exchange of information. Thus, the burden of proof can be burdensome for the taxpayer, particularly where it is difficult to provide information that is regarded as evidence by the tax administration (for example, carrying out an activity genuinely or mainly in a country).

Conversely, of a special type is the reversal of the burden of proof as laid down in Article **7(5***bis***)** TUIR. In order to combat **offshoring**, companies are regarded as resident in Italy where they control resident companies, or are controlled or managed by Italian residents, unless it is proved otherwise. Regardless of the adequate exchange of information and the provisions of Article 168*bis*, Article 73(5*bis*) reverses the burden of proof, putting the onus on companies.

Ministerial Resolution No 312/E of 2007 further clarifies that standard ruling procedure under Article 11 of Law No. 212 /2000 is not allowed for the purpose of identifying residence under Article 73(5*bis*) T.U.I.R.

Where tax investigations are not effective and accurate and no satisfactory evidence is obtained showing the existence of appropriate structures for the carrying out of a business activity, the claim of insufficient evidence can be raised before administration and courts, and evidence should be supplemented.

In any case, unlike other provisions, Article 73(5*bis*) does not refer to Article 168*bis* and applies depending on the composition of the board of directors of the holding's controlling companies, namely a holding that can be controlled in its turn. Well, then, although ministerial interpretations[40] seem to lead to considering that the connection of a foreign company with the Italian territory must be based on **sub-**

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[39] Article 110 TUIR concerns deductions of expenses and losses derived from transactions between resident enterprises and enterprises whose tax residence is in non-EU countries or territories with a preferential tax regime. According to this provision, controlled companies must furnish the proof that their main commercial activity is carried out in that specific country. Article 167 provides that anti-avoidance rules are not applied where controlling companies furnish the proof that their controlled companies carry on a genuine industrial or commercial activity mainly in the territory in which they have their actual head offices, and do not localize their income in territories other than those mentioned in the *white list* (as laid down in Article 168*bis*). For this purpose, a request for advance ruling must be submitted.

[40] See Ministerial Circular No. 28/E of 2006. Article 73(5*bis*) provides the reversal of the burden of proof on to the taxpayer; thus, it endows the legal system with a tool that relieves the tax administration of the obligation to furnish the proof in relation to the actual head office of companies connected to the territory of the State. In this context, the provision aims to enhance the fight against abusive practices, thus facilitating assessment of facts in order to determine the actual residence of companies. In particular, it aims at curbing "offshoring", namely the location of companies abroad for the main purpose of escaping domestic tax obligations; accordingly, the provision gives prominence to the **actual and substantial** aspects in place of the formal ones, in compliance with the international substance-over-form principle.

stantially effective evidence, this provision is in conflict with Community principles of proportionality and subsidiarity, while clearly applying a different treatment depending on the fact whether holding companies control or are controlled by Italian companies or by foreign companies. One of the main reasons of this conflict lies with the fact that Article 73(5*bis)* does not take into account whether the exchange of information is adequate, and immediately reverses the burden of proof, putting the onus on the taxpayer[41].

In compliance with the enlarged duty to cooperate, taxpayers carrying out cross-border activities must bear the burden of proof, in order to benefit from tax advantages or to avoid the application of anti-avoidance rules; they are to provide information (for example, an effective economic interest) or to make a request for a ruling to the tax administration of the State of residence.

8. Conclusions

In order to use enlarged cooperation with taxpayers, it would be necessary that Community and national laws provide **clarifications on when the exchange of information is adequate,** taking into account the limitations as laid down in Community and treaty laws, such as Directive No. 77/799 and Article 26 of the OECD Model Tax Convention.

Undoubtedly, the fact that a State does not own an adequate system for the information exchange automatically results in compulsory cooperation and more duties to cooperate for taxpayers or withholding agents operating with that country. This involves more restrictions on fundamental freedoms in that making investment is more difficult because of more limitations on evidence.

Moreover, with particular reference to Italy, it is not understandable why some provisions expressly provide "unless it is proved otherwise", or the reversal of the burden of proof, or the request for a ruling, or a deadline for proving the contrary. It would be appropriate to coordinate the anti-avoidance rules that reverse the burden of proof, where information is not adequate.

However, the shifting of the burden of proof from the tax administration to taxpayers who aim at benefiting from tax advantages for the purposes of enlarged cooperation should not lead national lawmakers to circumventing limitations on the exchange of information with some States.

To sum up, therefore, evidence regimes must comply with subsidiarity and proportionality principles where they reverse the burden of proof on to taxpayers and cannot relieve domestic authorities of assessing actual and substantial aspects in taxable facts.

[41] BAGAROTTO, *La residenza delle società alla luce delle presunzioni di esterovestizioni* in *Riv. Dir. trib.*, 2008, 1167) considers that the rationale of the presumption contained in this provision does not dictate that genuine structures cannot be located abroad; actually, the fact that there is no reference to Article 168*bis* conflicts with the principle of proportionality.

The issue of taxpayer's legal protection*

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with the collaboration of
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1. Introduction; 2. Taxpayer's legal protection against incoming requests of information exchange; 3. Suspensive effect of the objection and the right to appeal in case of outgoing requests; 4. Taxpayer's legal protection against a request made by the Italian Tax Authority; 5. Taxpayer's right to bar the Italian Tax Authority and the temporary legal protection; 6. Proofs illegally collected abroad and tax assessment: 7. Taxpayer's legal protection according to the Human Rights Treaty; 8. Conclusions: the Ravon case.

1. Introduction

By analyzing the mutual assistance procedure, rises the lack of taxpayer's legal protection.

However new perspectives come out the case law of the European Convention of Human Rights (ECHR).

At the Community level as well at national level the main issue is the taxpayer's right to be informed and this right to bar the tax examination in a preliminary phase.

2. Taxpayer's legal protection against incoming requests of information exchange

In the Italian legislation, the Tax Authority doesn't have the obligation to inform the taxpayer about a request of information exchange made by another member State.

Because of the lack of this obligation, the taxpayer doesn't known either that another State has made a request of information or which kind of information has been requested.

Despite this fact the Taxpayer Statute (or Taxpayer Bill of Rights- Law n. 212/2002) provides that the taxpayer has the right to know the reasons for which he has been assessed.

This means, for example that if, in order to answer to a request of information, it's necessary to collect documents in the taxpayer's head office, the taxpayer has the right to be informed by the Tax Authority and the Financial Police about the request of information exchange and about the legal instrument of cooperation on which it is based.

Moreover art. 31 bis, D.P.R. 29 September 1973 n. 600 of the Italian legislation deals with the information exchange requests between fiscal Authorities of different Member States. This rule doesn't provide anything about the taxpayer's legal protection in case of information requested from another Member State. It is only provided that the collection and the notification of information have to be done according to the procedure provided for the tax assessment.

It means that if the Tax Authority already owns any information concerning the taxpayer (e.g. because it concerns information given by the taxpayer through the tax return), it has the power to transfer the information to the Tax Authority of the other State without notifying it to the taxpayer and without asking his consent.

If the Tax Authority needs to do a fiscal assessment to look for the information requested, so, for example a questionnaire is notified to the taxpayer in order to obtain information, the taxpayer doesn't have the right to know that this activities are made on a request of information base.

In other words, the right for the taxpayer to be heard before the information is transferred to another member State doesn't exist.

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* § 1, 2, 7 and 8 are written by Lorenzo del Federico; § 3, 4, 5 and 6 are written by Riccarda Castiglione. Edited in English by the Authors.

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In this phase of the tax assessment procedure, the taxpayer doesn't have the right to contest the request before a Tax Court, because acts derived by this phase of the tax assessment procedure are not contestable before such Court (the breach of the preliminary phase of the tax assessment procedure can invalidate the notice of assessment that, as final act, can be contestable before a Tax Court).

The consequence of the fact that the taxpayer hasn't the right to be informed about the existence of the request, is that he doesn't have the right to bar the Tax Authority from giving the information.

The Italian legislation (Art. 31 bis, DPR 600/73) provides that the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or it concerns information whose disclosure would be contrary to public policy. In these cases, if the taxpayer gets to know about the request concerning him, he has the right to object the information exchange before the Civil Court (no Tax Court) and, in case, he can ask damages[42]. There are no juridical cases at the moment.

Anyway there are no specific rules that provide the taxpayer's right to bar the fiscal information exchange with another Member State. Consequently the only limits that Tax Authority must respect are given by the Taxpayer's Charter and by national and European rules concerning the mutual assistance in the field of taxation.

3. Suspensive effect of the objection and the right to appeal in case of outgoing requests

In the Italian legal system, there are no rules providing the taxpayer's right to bar the information exchange. Facts concerning the legality of the information exchange request cannot be object of appeal before a Tax Court because it doesn't have competence on it.

The taxpayer has only the right to bring the case before the civil Court for an interim measure or to ask for an award if the release of fiscal information has caused damages to him. There are no juridical cases concerning this matter and the possibility of legal protection is relevant only in theory.

The situation is different if information are utilised in a notice of assessment in Italy. In this case, the taxpayer has the right to appeal the notice of assessment (but not the preliminary acts) before the Tax Court according to the ordinary rules provided by the Italian legislation.

4. Taxpayer's legal protection against a request made by the Italian Tax Authority

There are no rules concerning legal protection for a resident taxpayer when the Italian Tax Authority intends to request to another Member State about his fiscal situation in that Member State.

In fact, there are no rules providing the obligation to inform the taxpayer about this intention and there are no rules providing the obligation to get his consent. The domestic Tax Authority operates in the same way of an internal assessment with no international outline. In fact, in both cases we are in front of internal public administration acts.

The Tax Authority operates in the same way of an internal assessment. This means that the legal protection is that given by the Taxpayer's Statute, and it is the same provided for the taxpayers who are not involved in a request of information exchange.

For what concerns the right of the taxpayer to bar the Italian Tax Authority to request fiscal information to another Member State, the taxpayer doesn't have the right to be informed and doesn't have any provisional/temporary legal protection. Moreover, this preliminary phase of the tax assessment procedure is kept completely secret.

The only limits that the Tax Authority must respect are given by the Taxpayer's Bill of Rights and by national and European rules concerning the mutual assistance in the field of taxation.

Besides, there are no specific rules concerning the matter regarding the right to appeal. On the base of rules that cover the public administration behaviour, it is possible to say that the taxpayer has the right to appeal before a civil court (but not before a Tax Court) to obtain an interim measure if he/she gets to know about the request of information exchange which can cause him or her damages. No cases concerning this matter exist.

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[42] See CASTIGLIONE, *La cooperazione fra autorità fiscali, lo scambio di informazioni nell'accertamento tributario e garanzie del contribuente*, Gius. Trib. on line, 2009, www.giustiziatributaria.it.

5. Taxpayer's right to bar the Italian Tax Authority and the temporary legal protection

Before the implementation of the Council Directive 77/799/EEC there was no legal protection for the taxpayer involved by an information exchange request.

However, with the implementation of the Council Directive 77/799/EEC the legal protection has not been developed too much.[43] In fact it has been implemented a rule, modified in 2005, that has provided the mutual assistance in the field of Taxation between member States, but it doesn't provide immediate and direct legal protection for the taxpayer.

The law, instead, provides limits to the obligation of information exchange that have the purpose to protect opposed interests of different member States rather than those of the taxpayer.

For example, the Council Directive 77/799/CE provides that "The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy", but, this valuation is done only by Tax Authority considering that the taxpayer is not informed about the procedure concerning him or her.

So, for example, if the information exchange has a damage as consequence for the taxpayer, in spite of his interest to the legal protection of a business secret, the taxpayer is not able to make objections.

In this preliminary phase of the tax assessment procedure, the illegal behaviour of the Tax Authority doesn't have importance for what concerns the legal protection of the taxpayer before the Tax Court.

As regards the information obtained from third persons, the Italian legislation (art. 31 bis, DPR 600/73) provides that for the collection of information that has to be notified to the other Member State, the Tax Authority has to follow internal rules concerning tax assessments. These rules provide that fiscal offices can request information to third persons too. In this case, the third person cannot refuse to give the requested information and if he/she doesn't answer, penalties are applicable.

6. Proofs illegally collected abroad and tax assessment

The Italian legislation (Art. 31 bis, DPR 600/73) provides that the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or if it concerns information whose disclosure would be contrary to public policy[44].

However, this valuation is done only by the Tax Authority because the taxpayer is not informed about the procedure concerning him or her. In fact the requested State can notify (but it is not obliged) the information to the other Member State which can always use it.

In case the exchange of information may cause damages to the taxpayer who is interested in the legal protection of a business secret, he/she cannot make any objections to the notification of the information and there is no illegal behaviour of the Tax Authority.

The Italian legal system doesn't provide either rules concerning the principle for which proofs illegally collected cannot be used, or rules providing the consequences of infringements done during a tax examination.

Because of the lack of court cases, it is possible to find the following solutions:

1) Proofs illegally collected cannot be used and if they are used for a tax assessment by State B (requesting State), the tax assessment has to be considered invalid. Consequently the taxpayer may contest the invalid assessment before the Court. This is the solution given by Italian Courts for what concern residents[45];

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[43] It should be noted that since the first version of the Council Directive concerning the exchange of information, the issue of the taxpayer's legal protection has been of much less importance than that of the relation between fiscal Authorities for the protection of their interests. For a scholarly exchange on the subject, see: SACCHETTO *L'evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche "incrociate"internazionali*, Boll. Trib. 7/1990; ID *L'evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche "incrociate" internazio*nali, Boll. Trib. 8/1990; BARASSI, *Lo scambio di informazioni tra amministrazioni finanziarie*, in *Materiali di diritto tributario internazionale* coordinated by C. SACCHETTO and L. ALEMANNO, Milano 2002, at 361.

[44] See for discussion on these issues FEDELE, Prospettive e sviluppi della disciplina dello scambio di informazioni fra amministrazioni finanziarie, Rass. Trib. *1999, at 49; ADONNINO, Lo scambio di informazioni fra amministrazioni finanziarie, in Corso di diritto tributario internazionale, coordinated by V. UCKMAR, at 1157,* Padova 2005.

[45] For a critical scholarly exchange on the development of the subject, but only on the problems raised in the national law, see MANZONI, *Potere di accertamento e tutela del contribuente*, Milano, 1993, at 213; SCHIAVOLIN, *Poteri istruttori dell'amministrazione finanziaria*, Riv. Dir. Trib., 1/1994, at 937; ID., *Le prove*, in *Il processo tributario*, coordinated by F. Tesauro, Torino, 1998, at 479; PORCARO, *Profili ricostruttivi del fenomeno della (in)utilizzabilità degli elementi probatori illegittimamente raccolti. La rilevanza anche tributaria delle (sole) prove "incostituzionali*", Dir. Prat. Trib., 1/2005, at 15.

2) It has to be taken into account that not all the infringements cause the invalidity of the tax assessment, but only the violation of those rules which provide legal protection of fundamental interests of the taxpayer[46];

3) Because of the lack of specific rules providing the impossibility to get it, such illegal proofs can be used for the tax assessment by State B taking into account, also, that we are in front of different legal systems[47].

7. Taxpayer's protection according to the Human Rights Treaty

The taxpayer is also protected by the following rules provided by the European Convention of Human Rights (ECHR): "Right to a fair trial" (art. 6), "No punishment without law" (Art. 7), "Right to respect for private and family life" (Art. 8), "Right to an effective remedy" (Art. 13), "Prohibition of discrimination" (Art. 14), "Protection of private ownership" (art. 1, prot. ECHR).

Nevertheless, fiscal matter has a marginal relevance because ECHR considers two different areas of human rights legal protection: "civil law" from one side and "criminal law" from the other side. Instead, the ECHR decisions states that "civil law" legal protection can be applicable partially also to cases derived from public authorities behaviour; the ECHR legal protection in the field of taxation is traditionally recognized only to cases correlated to the field of fiscal/administrative violations and penalties, placed by the ECHR in the field of "criminal law" [48].

Italian courts are reluctant to apply principles provided by the ECHR to the fiscal matter, but through the reception of them by the ECJ, those principles come inside the Community law and from it, in some way, they come inside national legal systems and are beginning to be applied in all fields of law (tax law too) and also in the field of administrative action, as well as in the field of taxation action (but with many difficulties as always)"[49].

As it has been said, the Italian Finance Courts and often those of the other European States are reluctant to apply the principles expressed by the ECHR also in the field of taxation. Besides, the European Court has traditionally been very cautious in extending to the field of taxation the guarantees offered by the European Convention.

However, in its decisions, the European Court, in the course of time, has arrived to recognize the application of the ECHR to the following fiscal matters:

1) fiscal administrative penalties (established and settled case-law);

2) tax allowances (ECHR 26.3.1992, Editions Pèriscope v. France);

3) tax refunds (ECHR 3.10.2003, Buffalo v. Italy; ECHR 22.10.2003, Cabinet Diot v. France; ECHR 22.10.2003, Gras Sayoye v. France) ;

4) pre-emptive right of the Fiscal Authority (ECHR 22.9.1994, Hentrich v. France)[50].

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[46] For a discussion with reference only to the national law and domestic Courts, see, LUPI, *Inutilizzabilità di elementi probatori irritualmente acquisiti*, *Dial. Dir. Trib*. 2/2005, at 160; Cass., 10 giugno 2004, n. 19689, Corr. Trib., 2005, at 53, with the note of CORSO, *Inutilizzabili i risultati di una verifica fiscale illegittima* and Riv. giur. Trib., 4/2005, at 371 with the note of COMELLI, *Autorizzazione agli accessi domiciliari, inviolabilità del domicilio e vizi degli atti istruttori*; Cass. 19 ottobre 2005, n. 20253, Corr. Trib. 2006, at 47, with the note of CORSO, *Non sono utilizzabili ai fini dell'accertamento le prove illegittimamente acquisite*; Cass., 16 maggio 2005 n. 10269, Fisco 2005, at 4758.

[47] It is possible to propose this solution on the base of what some scholars have suggested for what concerns the national law. See, e.g. LA ROSA, *Sui riflessi procedimentali e processuali delle indagini tributarie irregolari*, Riv. Dir. Trib., 4/2002, at 292.

[48] ECHR. 8.6.1976, Engel v. Holland; ECHR. 21.2.1984, Ozturk v. Germany, *Riv. it. dir. proc. pen*., 1985, at 894; ECHR. 28.6.1984, Campbell and Fell v. Great Britain; ECHR. 25.8.1987, Lutz v. Germany; ECHR. 24.2.1994, Bendemoun v. France; ECHR 27.2.2001, X v. Italy, *Fisco*, 2001, at 4683; ECHR 23.7.2002, Janovic v. Sweden; ECHR. 23.7.2002, Vastberg Taxi Aktiebolag v. Sweden; ECHR. 23.11.2006, Jussila v. Finland, Riv. dir. trib. 2007, at 34, with the note of LA SCALA, *I principi del "giusto processo" tra diritto interno, comunitario e convenzionale*; DELMAS MARTY, *I problemi giuridici e pratici della distinzione tra diritto penale e diritto amministrativo penale*, *Riv. it. dir. proc. pen*., 1987, at 744; DEL FEDERICO, *Le sanzioni amministrative nel diritto tributario*, Milano 1993, at 54.

[49] See in particular DEL FEDERICO, *Tutela del contribuente ed integrazione giuridica europea*, Pescara 2003, at 39.

[50] ECHR 26.3.1992, Editions Pèriscope v. France; ECHR 3.10.2003, Buffalo v. Italy; ECHR 22.10.2003, Cabinet Diot v. France; ECHR 22.10.2003, Gras Sayoye v. France; ECHR 22.9.1994, Hentrich v. France; DEL FEDERICO *Tutela del contribuente,* already mentioned.

8. Conclusions: the Ravon case

In the recent decision Ravon v. France[51], the European Court has surprisingly extended the legal protection provided by the ECHR to the tax examination field .

In this case the European Court considered the France tax Law in contrast with the art.6, par.1 of the ECHR, even though, according to the France law, the taxpayer has the right to appeal to the Supreme Court as well as to ask damages.

The Ravon case is very important because the Court has established the taxpayer's right to be informed and his right to bar the tax examination in a preliminary phase.

Even though this decision is referred to illegalities occurred during fiscal domiciliary visits, as far as I'm concerned, the principles expressed by the Court in the Ravon case can be applied also to the exchange of information procedures ruled by the Community law. This is because the mutual assistance field is ruled by the Community Law and the principles of the ECHR are part of the Community Law according to the art. 6 of the Treaty on European Union.

[51] ECHR 21.2.2008, Ravon v. France, *Riv. dir. trib., 2008*, at 181, with the note of MULEO, *L'applicazione dell'art. 6 CEDU anche all'istruttoria a seguito della sentenza del 21 febbraio 2008 della Corte Europea dei diritti dell'uomo nel caso Ravon e altri c. Francia e le ricadute sullo schema processuale vigente*.

Debate

Prof. Giovanni Puoti*

I would like to speak about the question raised by *Prof. Del Federico* about the protection of the taxpayer with reference to the acquisition of tax information from a foreign State by the national Tax Authority.

I think we should divide two spheres: the first one concerns the relationship among States with reference to the exchange of tax information, the request and the compliance by the requested State. The other one, completely different, concerns the protection of the taxpayer (who is protected by the national rules in connection with the fiscal authority that is acting).

Although the request of information by the national Tax Authority constitutes a kind of increase of the Authority's powers, the acquired information is a part of those powers and it is used for the development of the tax assessment.

Because of this, when the Italian Tax Authority requests the French one to provide information about the incomes earned in France by a person who has the residence in Italy, it wouldn't be legitimate if the Italian taxpayer could stop the request of information or intervene in an inquiry activity. This is true owing to the principle of the *Administration's Presumption of Legitimacy* that exists in Italy and in the European Countries which are different from the Anglo-Saxon model. Another principle which is directly involved in this situation is the one of the *efficiency of the procedure*, so that the taxpayer cannot proceed against the Inquiry Act but only against the Final Act of the procedure when it violates his rights. It could even happen that the requesting State doesn't use the information asked, so it would be absurd to be opposed this request giving the taxpayer the possibility to ask to a judge for stopping the inquiry activity. This is true even in the opposite situation when a foreign State requests Italy about some information regarding Italian incomes earned by a non-resident that could be taxed in the requesting State. This taxpayer has for sure domestic rules that ensure the control on the tax assessment activity ran by the Revenue Service of his Country.

Finally, I think that it is correct that the Law doesn't provide any rule on these issues, because, otherwise, the national mechanisms of each State would be twisted by an excess of favour for the taxpayer. A solution would be to reach the harmonisation of the rules concerning the tax assessment of incomes in every State. Indeed, this point has not been achieved yet.

Anyway, the taxpayer is protected by the national rules and it has all the legal remedies provided by its national system. So, I'd disagree with *Prof. Del Federico*'s opinion, and I think it shouldn't be possible to appeal to the judge against the request of information (in theory it could even exist a damage but the problem is to assess which can be actually the damage resulting from a simple request of information). For this reason, I believe that whether one would appeal to the European Convention of Human Rights admitting the taxpayer to an immediate action, a consent to the acquisition of information, that would trigger, at least for Italy, an unequal treatment between the position of the taxpayer for which this information are available. I think everything should be related to the position of the national taxpayer.

* Translation by Chiara Albano

Prof. Roman Seer[*]

It has to be pointed out that a distinction must be made between tax matters and criminal matters. There are different sources of law. The Council Directive 77/799/EEC does not provide means for criminal matters. It is the same with Art. 26 of the OECD model tax treaty. So if there is a request for information exchange that stipulates a request in criminal matters the requested state has to deny providing information. The same can be said for the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters that does not apply for crime matters.

In criminal cases we have completely different sources of law like the European Convention on Mutual Assistance in Criminal Matters of 20th April 1959 or the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29th May 2000.

Coming to the burden of proof: The idea of subsidiary gives the Member States the possibility to emend their national tax law by some fundamental law principles of the burden of proof. E. g. sec. 90 (2) German General Fiscal Code provides the tax authority the advantage of a shifted burden of proof in cross-border tax matters so that the burden of proof lies on the side of the taxpayer. As a result the taxpayer has the obligation to give complete information of his/her economic facts and circumstances that affect the foreign country and that are outside the territory of Germany and therefore out of the sphere of the German tax authorities. The fundamental idea behind this is that every party – the tax authority as well as the taxpayer – is responsible for the information that is available and kept in its sphere. Due to the limitation by the principle of formal territoriality the taxpayer has to bear an increased responsibility for the facts that are outside of his/her country of residence.

In a criminal procedure the role of the taxpayer is completely different. There we have the *presumption of innocence*[52]. This presumption gives the taxpayer the right to behave in a completely silent and passive way during the criminal procedure. This is basically and essentially different from the procedure in tax matters and shows why we have to distinguish strictly between tax matters and criminal matters. In tax matters the taxpayer is forced by national law to comply with the tax procedure measures and he/she has to provide the tax authority with all information and data that are relevant for his/her tax case. But in my opinion this obligation cannot and should not go beyond the sphere he/she can influence and where he/she is able to get the information needed. Sec. 90 (3) German General Fiscal Code also obliges the taxpayer to secure the evidence that is abroad and concerns the relationship to foreign contract partners that are his affiliates and/or subsidiaries.

[*] Edited in English by the Author

[52] This presumption of innocence is codified in Article 6 (1) of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. It can also be found in the national constitutions, in the German Constitution e. g. it is deduced from the personal rights of Articles 1 (1) and 2 (1).

The Instrument of international Cooperation*

Dott.ssa Serena Crisafulli**

Summary: 1. The Principle of Co-operation and the Exchange of Information at International Level; 2. The Exchange of Information in International Treaties; 3. The Exchange of Information in the European Union and the Management of Administrative Co-operation; 4. The National Context: Critical Issues and Strengthening Measures; 5. Outlook for the Italian Tax Administration.

1. The Principle of Co-operation and the Exchange of Information at International Level -

The processes of liberalization of economic activities and globalization of markets have resulted in an exponential increase of financial transactions and cross-border trade: in this context, marked by objective difficulties in assessing and collecting taxes related to the above types of transactions, Tax Administrations have become increasingly aware of the importance of mutual co-operation.

The use of co-operation, in fact, proves essential whenever a specific fiscal case involves interests attributable to different legal systems, which the individual Member States would not be able to protect themselves or would protect with actions that are potentially unfair to taxpayers, as in the case of international double taxation.

Summing up an effective passage of the speech given by OECD Secretary General Angel Gurrìa in September 2008, at the Conference on the 50th Anniversary of the OECD Model Tax Convention, it may be said that *the challenge that the governments of many Countries are facing is to reconcile the different features of national tax systems with the emergence of a growing number of "global" taxpayers. The only acceptable answer to this challenge, also reflecting the fact that few Countries are prepared to significantly limit their fiscal sovereignty, is better international co-operation in tax matters*.

It is worrisome to see some countries that still try to attract potential tax evaders worldwide through secrecy and lack of transparency; likewise, it is a source of concern that some financial intermediaries are prepared to take advantage of similar situations and to promote the use of tax havens.

International co-operation in tax matters is therefore the most appropriate tool to combat such practices since, thanks to it, it is possible to ensure that taxes do not become the last and most burdensome barrier to expanding cross-border trade and investment, and at the same time ensure that taxpayers pay at the right time, in the right Country, the right amount of tax.

2.The Exchange of Information in International Treaties

2.1 *International Multilateral and Bilateral Conventions*

Administrative co-operation can be achieved through international bilateral or multilateral agreements.

The Convention between the Council of Europe and the OECD on mutual assistance in tax matters, opened for signature as of 25 January 1988 and entered into force on 1 April 1995, belongs to the latter category.

This is an extremely useful tool in terms of "effectiveness" considering the broad range of types of taxes that it covers: direct, indirect and local taxes, excise taxes and social contributions.

However, since only a few Countries[53] have acceded to the Convention so far and in view of its short period of application (Italy actually ratified it in 2005 with the Law No 19 of 10 February 2005), there have been no significant cases of application by Italy.

As regards bilateral treaties, some international fora - such as the OECD and United Nations just to name the most important ones – have long ago developed some Model Conventions aimed at coun-

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[53] Besides Italy, the following Countries have so far ratified the Convention: Azerbaijan, Denmark, Finland, France, Iceland, The Netherlands, Norway, Poland, Switzerland, the United States and the United Kingdom.

tering the intensification of international tax evasion and tax avoidance, and reducing positive conflicts of taxation (Double Taxation Conventions).

In both the above-mentioned Model Conventions, Article 26 regulates the use of exchange of information: it constitutes, therefore, a privileged instrument to implement forms of international co-operation in tax matters. In Model Clauses of Conventions, indeed, the exchange of information between the Tax Administrations of contracting Countries becomes the means through which to acquire the data needed for a correct reconstruction of international taxable events and related tax bases, and to ensure proper application of those treaty rules.

It should be stressed in this connection that the clause in Article 26 of the OECD Model has undergone changes over the years, intended to make information exchange more extensive and incisive.

Thus, the objective scope, which had originally been restricted to residents (1963 OECD Model Tax Convention), was later extended to all potential taxpayers (1977 Model Convention).

Likewise, the objective scope originally limited to taxes covered by the Convention only (income taxes), further to a change in the 2000 OECD Model, was then extended to the other taxes. "The exchange of information is not restricted by Articles 1 and 2 ", says paragraph 1.

An important amendment to Article 26 of the OECD Model was then adopted in 2005.

The new version expressly provides that the competent national Authorities may not decline to supply information to foreign counterparts on the ground that it is covered by domestic banking secrecy.

This constitutes a major, high-impact change since access to bank information proves crucial for combating tax evasion and fraud, at both national and international level.

In this connection, it should be pointed out that Italy regards the inclusion of the amended clause as essential in new negotiations.

2.2 *Administrative arrangements for the exchange of information and simultaneous tax examinations*

It is precisely to ensure a more effective exchange of information that the States which signed Double Taxation Conventions have displayed a tendency to conclude bilateral administrative agreements of an operational nature. In fact, these are agreements for application of the said conventions, which seek to regulate the operational modes through which the national competent Authorities shall actually exchange information, depending on the type of exchange (on request, automatic or spontaneous). So far, Italy has concluded 17 agreements.

Another instrument of co-operation is the simultaneous tax examination, which constitutes a tax audit conducted in parallel by two Administrations, in their respective territories, on taxable persons of common interest.

The modes of implementation are governed by special agreements between Tax Administrations. The experience acquired at international level in this field led the OECD to draw up a draft Agreement on simultaneous tax examinations in 2002.

Italy has signed Agreements to carry out simultaneous tax examinations with 12 countries: Australia, Austria, Belgium, Denmark, Finland, France, Norway, Poland, Slovakia, the United States, Sweden and Hungary.

2.3 *The Model Agreement on Exchange of Information in Tax Matters developed by the OECD in 2002*

Another major step forward for improving co-operation was the adoption by the OECD of the Model *Agreement on exchange of information on tax matter* in 2002.

This is a model agreement specifically devised for the exchange of information with the so-called co-operative jurisdictions.

The Agreement has stemmed from the work undertaken by the OECD to address harmful tax practices. The 1998 OECD Report "Harmful Tax Competition: an emerging global issue" (*"Concorrenza fiscale dannosa: un problema mondiale emergente")* in fact identified the lack of effective exchange of information as one of the key criteria in determining harmful tax practices.

The Model Tax Convention is composed of 16 articles and an extensive commentary.

One of the most important features of the Model logically concerns the information expected from a tax haven, namely information relating to the banking sector and to financial companies.

The Agreement is presented as a Model in both a multilateral and bilateral version; however, the jurisdictions have expressed a decided preference for the bilateral option.

On the basis of this Model, a number of Countries have already started negotiations with jurisdictions and some agreements have already been concluded. Italy has not yet concluded any such Agreement.

2.4. *The Italian legislation relating to territories with a privileged low tax regime and the most recent guidelines for negotiating policy*

The legislative developments of recent years and the guidelines drawn up at international level recognizing that an effective exchange of information is the essential instrument to combat tax evasion and avoidance, have prompted the Italian law-maker to revise the system for the identification of Countries with a privileged low tax regime.

The 2008 Finance Act (Article 1, paragraphs 83 to 90) has in fact marked the transition from a "black list" system to a "white list" system.

The most significant element emerging from the new legislation is the exchange of information.

The 2008 Finance Act has introduced Article 168 *bis* of TUIR (Italian Tax Code) entitled "Countries and territories which allow an adequate exchange of information" which provides for the enactment of a decree ("white list") of the Minister of Economy and Finance identifying the States and territories which allow an adequate exchange of information, in order to apply certain national provisions of law (*e.g.* application of tax withholdings on outgoing income; deductibility of costs arising from transactions with companies domiciled in foreign Countries and territories).

The same decree will identify the States and territories with which the conditions are fulfilled for both an appropriate exchange of information and a level of taxation which is not significantly lower than that applied in Italy, since this is relevant for the application of further national provisions of law (*e.g.* CFC legislation – rules on C*ontrolled Foreign Corporations;* exemption on dividends from residents in foreign Countries and territories; exemption on capital gains).

With this intervention, the Italian law-maker has complied with the latest international guidelines, according to which the exchange of information is regarded as the preferred instrument to counter tax evasion and avoidance, and has conformed, in particular, to the position become evident within the OECD with respect to *Harmful Tax Competition*, as from the 2001 Progress Report.

To answer the question frequently raised regarding what is meant by "adequate exchange of information", we should point out that initially (see Revenue Agency's Circular No. 306 of 1996) the Italian Tax Administration had deemed it necessary to require the existence of a Convention for the avoidance of double taxation containing a clause *"including the rule that the information can be exchanged as widely as possible, so as to ensure the correct application of not only the conventional provisions, but also of the domestic laws of Contracting States."*

Subsequently, with Circular No. 23 of 2002, the Revenue Agency has clarified that *"the new wording of the rule envisages the possibility of extending the scope of application also to Countries other than those connected with Italy by a Convention. In fact, the exemption regime may also apply to residents of Countries that, in the absence of a convention, ensure in any event a system of information exchange, also through the conclusion of agreements in the field of administrative co-operation between Tax Authorities, in order to respond adequately to the needs arising from the implementation of the provisions concerned".*

The adequacy of the exchange of information should in any case be interpreted in accordance with the most recent guidelines adopted at international level, according to which the clauses concerning information exchange will have to conform to OECD standards.

In light of the above, the route that the Italian Tax Administration is going to follow in the years to come will place crucial importance to the signing of new Conventions on tax matters, as well as to the updating of the existing ones, but above all to the conclusion of specific agreements on exchange of information, for the application of existing tax treaties or independent of them, as in the case of TIEAs.

3. The Exchange of Information in the European Union and the Management of Administrative Co-operation

3.1 *The evolution of Community legislation*

Even within the European Community, there has been a general recognition that the functioning of the single market, shaped to ensure the fundamental freedoms of movement (movement of goods, persons, services and capital), in the absence of an effective coordination between national tax Authorities, could have created the conditions for engaging in illegal practices.

The Council Resolution of 10 February 1975 on the Community measures to counter international tax fraud and evasion, showed more than thirty years ago, that such practices –besides involving financial losses - undermine the principle of fair taxation and may lead to distortions of capital movements and competition conditions. The above-mentioned document recognized the inadequacy of the national measures to combat these practices and identified the mutual exchange of information as the main tool for establishing effective co-operation between Member States.

The evolution of EU legislation in this area was intense and went in the direction of a gradual extension of the scope of application of the measures relating to administrative co-operation and exchange of information.

Initially, it governed mutual assistance between Tax Administrations in the field of direct taxation (Council Directive 77/799/EEC and subsequent amendments), thus giving birth to a permanent form of assistance between the competent authorities of the Member States in collecting and exchanging useful data and information to determine the taxable base of single taxes. Subsequently, the administrative co-operation in the field of indirect taxation was regulated (Regulation 218/92/EEC, then repealed by Regulation 1798/2003/CE): the objective of Regulation No 218 was to ensure compliance with VAT legislation, through the establishment of an electronic system of administrative co-operation, *i.e.* VIES (VAT Information Exchange System), and the identification, in each Member State, of a central body - the CLO (Central Liaison Office) – to be responsible for the exchange with other Member States and contacts with the European Commission. In 2004, Regulation No 2073 made exhaustive provision also for administrative co-operation in the field of excise duties.

To complete the picture, it is necessary to point out three new proposals for directives recently submitted by the Commission in the field of administrative co-operation.

The "Proposal for a directive on administrative co-operation in the field of taxation" – whose text shall replace Directive 77/799/EEC as of 1st January 2010 - aims to further strengthen administrative co-operation and extend its scope to the indirect taxes not yet covered by a Community law instrument, *i.e.* indirect taxes other than VAT and excise duties[54].

The second proposal, which concerns "the mutual assistance in the recovery of claims relating to duties, taxes and other measures", was intended to replace Directive 2008/55/CE as of 1 January 2010, and aims to improve assistance in the recovery in the internal market so as to ensure the speed, efficiency and uniformity of procedures in Member States[55].

Lastly, there is the proposed amendment to Directive 2006/112/EC which aims to simplify, modernize and harmonize the invoicing rules concerning VAT[56].

3.2 *The organization of administrative co-operation in Italy*

With regard to administrative co-operation in the field of VAT in Italy, the entry into force of Council Regulation (EC) No 1798/2003 established – besides the Central Liaison Office (CLO) - three Liaison Services, one for each structure of the Tax Administration with direct responsibility in the field of VAT (Revenue Agency, Customs Agency and Guardia di Finanza): Member States are free to contact one of the three Services and directly transmit the requests for information exchange to it.

The CLO maintains contact with the other Member States and the Commission, and conducts the coordination and monitoring of exchanges made. This monitoring is carried out essentially by electronic means (*e.g.* a specific database solely dedicated to that function).

4. The National Context: Critical Issues and Strengthening Measures

The picture that has been briefly outlined and that should clearly illustrate the importance of exchange of information as an instrument to combat international tax evasion and avoidance, gives us the opportunity to make some reflections on the Italian situation.

Our Country, also due to the features of its domestic tax system, is a tenacious advocate of the principle of transparency, and has consistently promoted and supported international and Community initiatives aimed at combating forms of harmful tax competition, by establishing mecha-

[54] COM(2009)29 of 2.2.2009
[55] COM(2009)28 of 2.2.2009
[56] COM(2009)21

nisms for international co-operation in the tax field and implementing information exchange systems.

Though fully aware of technical difficulties and problems relating to the coordination with the national system in force, it is necessary to work effectively so that the exchange of information remains the preferred means of implementing international tax co-operation.

In fact, it is evident that, if not implemented in a timely and qualitatively significant way, the exchange of information - though potentially very helpful in terms of revenue recovery and induced effect of deterrence - becomes a mere procedural mechanism, no longer functional to the achievement of the objectives inherent to it.

This instrument should instead be the starting point for effective action aimed at successfully countering tax evasion and avoidance, also in view of the extent of human, instrumental and financial resources that its implementation requires.

In 2005, the system of administrative co-operation in the field of VAT created in the EU was the subject of a consultation by the European Court of Auditors: this initiative, whose findings were fed into the Court's Special Report No 8/2007, aimed to assess the level of timeliness and efficiency of information exchange and adequacy of the administrative structures and procedures implemented in support of co-operation.

The above-mentioned EU Institution highlighted weaknesses in the system used to ensure the monitoring and timeliness of responses to requests received and has also identified the excessive complexity of national organizational structures as a possible source of delay in processing and monitoring exchange requests.

On this point, it should be noted that other Administrations (*e.g.* Germany) did not consider it legitimate for the European Court of Auditors to make similar visits, disputing the very legal basis for the assumption that the management of those activities are the sole internal responsibility of the Tax Administrations concerned. Moreover, since the new information exchange system used at the entry into force of Regulation 1798/2003/CE and subject to verification started only in late 2004, the statistics of that time cannot be considered fully significant because they were the result of an evaluation concerning a period of observation that was too brief and therefore, inevitably, partial.

Moreover, the Italian Tax Administration which has always attached priority to the adoption of an operating line designed to speed up and improve the quality of administrative co-operation in the field of VAT has long been committed (this approach initiated before the visit by the European Court of Auditors) in the study and implementation of IT tools increasingly refined and effective (databases and messaging systems) to enable accurate monitoring of information flows by the Department and to avoid the duplication of activities, as well as, of course, instruments to achieve a closer coordination of facilities by the Department.

As to the criticism expressed by the European Audit Institution of the management of administrative co-operation, there is ground to believe that in the Italian administrative framework the coexistence of three structures has given rise to a race for best practices, *i.e.* an "active" tax competition that is a source of increased outgoing requests as a result of a more thorough investigation activity on the territory

5. Outlook for the Italian Tax Administration

During the latest G8 Summit held in Hokkaido, Japan, the Heads of State and Government launched, among other things, an invitation to fully implement the OECD standards on transparency and to put in place an effective system of tax-related information exchange. Administrative cooperation in tax matters implemented through the exchange of information will also be discussed during the upcoming G8 Summit, which will be hosted by Italy, on the island of La Maddalena. This is therefore an important issue, for which it is desirable that the Italian Tax Administration shows to be sensitive, proactive and prepared.

A clear sign in this direction, as mentioned above, is the growing momentum that is being given to the negotiation of bilateral administrative agreements on information exchange. Indeed, Italy has recently concluded this kind of agreements implementing Article 26 of the Double Taxation Agreement currently in force with Cyprus and Malta. Italy is also intensifying its activities in order to carry out negotiations with other major partners in the coming months.

Furthermore, there is the need for the Administration itself to foster and stimulate the use of information exchange, so that it is used consciously and increasingly oriented to achieving concrete results.

This effort is necessary and urgent also because Italy needs to continue to credibly and unassailably defend the position, held so far, in favour of fiscal transparency and enhanced use of information exchange as a tool to fight tax evasion, avoidance and fraud.

At European level, too, Italy will contribute in the near future to the efforts to strengthen the principle of transparency.

Indeed, on 15 September last year the European Commission submitted the first report on the functioning of the Savings Directive to the Council. This was a preliminary step to the presentation by the Commission of a proposal to introduce legislation aimed at broadening and correcting the scope of this Directive.

The review of the Savings Directive, which began with the recent proposal by the Commission last November 13, reopened the debate on fiscal transparency within the European Union, on the importance of the exchange of information and the need to further extend the geographical scope of the rules on savings taxation to third countries through the conclusion of agreements providing for the implementation of identical or equivalent measures to those set forth in the Directive. On this occasion, Italy will be called again to give its support to initiatives aimed at bridging the gaps of the Directive, as well as at improving its operation and combating attempts to circumvent its application.

The Mutual Assistance in Tax Investigation*

Col.t.ST Rosario Massino**

Summary: 1. Introduction; 2. The *Guardia di Finanza*: strategic function of economic and financial police; 3. The *Guardia di Finanza*: its role in the international tax cooperation; 4. The *Guardia di Finanza*: its role in the framework of the mutual administrative assistance in tax matters; 5. Other tools for combating fiscal evasion; 6. Operational aspects; 7. Weakness in the exchange of information; 8. Data on cooperation carried out by the *Guardia di Finanza*

1. Introduction

The globalization of financial and economic markets, the integration of European countries through the removal of customs barriers within the European Union and E-commerce strongly impact on the development of economy, which has long since undertaken an unstoppable process of "strategic" internationalization; nevertheless, they pave an easy way to tax avoidance and evasion.

Actually, the fact that commercial relationships may be maintained with businesses located in other States and manufacturing processes may be carried out through structures that are able to optimize the legal advantages granted in those foreign countries where the tax system is more convenient than in others is a first necessary step to tax avoidance and evasion, which tax administrations can tackle only through an effective administrative cooperation.

This is why governments are becoming more and more aware that mutual administrative assistance in tax matters is crucial in finding and collecting data, information and news, so that tax authorities can monitor taxpayers' compliance.

An evidence of this is that States have lately registered a huge increase in the exchange of information in tax matters.

2. The *Guardia di Finanza*: strategic function of economic and financial police

Legislative Decree No. 68 of 19 March 2001, under which the Ministry of Treasury was merged with the Ministry of Finance and tax agencies were created, re-organized the institutional role of *Guardia di Finanza*. It provides that:

- it is a police force with a military status and has general responsibilities in economic and financial matters;
- it is directly subordinate to the Minister of Economy and Finance to all intents and purposes.

In this way, the major institutional mission of the *Guardia di Finanza* is defined substantially and systematically, so that the prerogatives and responsibilities of the Corps are identified more clearly:

- as **financial police**, in order to protect public finance against illegalities that adversely affect public revenue and expenditure;
- as **economic police**, in order to prevent and suppress infiltrations or contaminations by economic and financial criminal organizations, which are harmful to the economic structure and the regular functioning of the market in Italy.

The application of Legislative Decree No. 68 of 19 March 2001 resulted in revising the organization and management of the Corps. It consists of:

- the **General Headquarters** performing high direction and control functions;

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* Edited in English by the Author

** Col.t.ST Guardia di Finanza

• **Special Units** performing operational analysis and planning functions, as well as execution functions in relation to tasks requiring a high level of expertise;

• **Territorial Units** performing execution functions in relation to institutional tasks.

3) The *Guardia di Finanza*: its role in the international tax cooperation

Current legislation defines also the role played by the *Guardia di Finanza* within the international tax cooperation.

Having regard to Article 1 of Presidential Decree No. 18 of 5 January 1967 and following amendments, as well as Law No. 121 of 1 April 1981 concerning the coordination of police forces in public policy and public security matters, the Corps must foster and implement international operational cooperation along with their counterparts in other countries, in order to protect the State's and EU's budget against economic and financial crimes.

While the Governmental body, through **Competent Authorities**, is responsible for defining the Agreements, the implementation of conventions and treaties is delegated to a particular department of the tax administration.

The General Headquarters of *Guardia di Finanza* are the central body in charge of information exchange on income taxes and VAT, smuggling of sensitive goods and cigarettes, money laundering and financial crimes, drug trafficking and EU budget frauds.

In this context, the Head of the **II Department** of General Headquarters is the only competent authority for exchanging information with their counterparts in other countries.

In particular, the **II Department** is a legitimate player on the national and international stage. Its role is to ensure that information flows intensively with its counterparts in other countries and to liaison with other headquarters with a view to applying international law (bilateral conventions for the avoidance of double taxation and the prevention of fiscal evasion) and Community law (directives and regulations) concerning income taxes and VAT.

Thus, the General Headquarters of *Guardia di Finanza* are the liaison between foreign counterparts and the Local Headquarters of the Corps, in that they assist units in their investigations and coordinate operational activities also by liaising with foreign authorities.

The reorganization of the II Department in 2007 resulted in the constitution of the *Ufficio Cooperazione Internazionale Finanza Pubblica* (Office of International Cooperation in Public Finance)

The Office deals with international cooperation measures available to the *Guardia di Finanza* in the operational sectors of public finance (revenue and expenditure in the budgets of the State, local governments and EU). According to its specific tasks and work processes, it operates in tandem with the Office for the Protection of Public Finance in the III Department (*Ufficio Tutela Finanza Pubblica*), the Headquarter for the Protection of Public Finance (*Comando Tutela Finanza Pubblica*) and its internal services – which were reorganized just before the II Department –, Tax Police Units in charge of protecting revenue and expenditure (*Gruppi Tutela Entrate* and *Gruppi Tutela Spesa Pubblica* of "large" Units; *Sezione Tutela Entrate* and *Sezione Tutela Spesa Pubblica* of "medium" Units; *Sezione Tutela Finanza Pubblica* of "small" Units).

The reorganization of the Office has been the last step in the reform process launched in 2004 with the "Project to verify consistency and efficiency in the organizationa nd management of the Corps", whose first development led to revise the Special Units.

The Office is directed by a Colonel and is divided in 4 sections, directed by a Major/Lieutenant Colonel. Two sections are divided in two squads, one directed by the Section Chief and one directed by a Captain. The effective force consists of 7 Officials, 27 Inspectors, 1 Superintendent, 15 Corporals and Officers. Not all the posts are filled.

The Italian tax administration can exchange information on income taxes and VAT with its counterparts in other countries on the basis of:

a) international law, namely bilateral conventions in accordance with the **OECD Convention Model on Income and on Capital** for the avoidance of double taxation and for the prevention of fiscal evasion;

b) **Community law (directives and regulations)**, containing detailed rules on the information exchange in tax matters (between Member States, of course), which apply along with conventions sub a).

Cooperation in the field of direct taxation is carried out:

• on the basis of Community Directives 77/799/EEC and 79/1070/EEC;

• on the basis of conventions for the avoidance of double taxation on income and for the prevention of tax fraud, which are based on the OECD Model;

• on the basis of above conventions with EU and non-EU countries, which are concluded and ratified in accordance with national procedures.

In relation to VAT, the *Guardia di Finanza* is part of the communication network based on Regulation No. 1798/2003.

4. The *Guardia di Finanza*: its role in the framework of the mutual administrative assistance in tax matters

As far as Italy is concerned, the Minister of Finance, or rather the Head of the Department for Fiscal Policies is in charge of applying instruments for administrative cooperation in the field of income taxation.

However, the General Headquarters of *Guardia di Finanza* are in charge, alongside the *Agenzia delle Entrate* (Revenue Agency), of the exchange of information upon request under Article 2 of Directive 77/799/EEC and current conventions for the avoidance of double taxation and for the prevention of fiscal evasion.

In particular, such treaties enable residents in a Contracting State to avoid double taxation on income derived in the other Contracting State or to avoid a higher taxation than they would pay if that income were generated in the State of residence. Moreover, these treaties aim to prevent and/or to suppress fiscal evasion.

As far as possible, where there is no legal instrument, intelligence cooperation is practised, taking into consideration the limited probative value of the evidence concerned: this is the case of Republic of San Marino.

In relation to direct taxation, the Office issued Circular letter No. 7/INCC of 4 February 2008, "Administrative Cooperation in the field of Direct Taxes and VAT – Legal instruments and operational procedures", which updates, harmonizes and simplifies the access of the Corps' operational units to this instrument of assistance carried out by the Office.

In relation to intra-Community exchanges which are liable to VAT, the Section for C.L.O. is part of the cooperation network created by Council Regulation No. 1798/2003. It provides that each Member State designates a single central liaison office to which principal responsibility is delegated for contacts with the other 26 Member States in the field of administrative cooperation. Each national C.L.O. may designate one or more "liaison departments", which are responsible for implementing cooperation, also in direct contact with central liaison offices and liaison departments in other Member States. In this context, the *Guardia di Finanza* is a liaison department alongside the Customs Agency (*Agenzia delle Dogane*) and Revenue Agency (*Agenzia delle Entrate)* under the aegis of the Italian C.L.O., which is based at the Department for Finance (*Dipartimento delle Finanze*) of the Ministry for Economy and Finance. The *Guardia di Finanza* can exchange information upon request (Article 5) or spontaneously (Article 19).

Regulation No. 1798/2003 deals with a particular kind of cooperation. In fact, communication between Member States can occur only:

– by electronic means, through the channel "CCN-MAIL" developed by the European Commission;

– in a vehicular language of the Community (English, French, German).

Requests for information must be replied within three months.

Implementing cooperation made it necessary to develop a specific work process with a view to reconciling different needs concerning deadlines, IT, language and national paper documentation. Also this matter has been regulated by above Circular Letter No. 7/INCC of 4 February 2008.

5. Other tools for combating fiscal evasion

The General Headquarters of *Guardia di Finanza* use also other tools in the fight against fiscal evasion.

First, the General Headquarters practise all types of international cooperation in the framework of current legislation:

– they promote operational meetings in Rome and abroad;

– they participate in multilateral controls;

– they coordinate the activities of staff working abroad at diplomatic representations and consular offices, as well as of liaison officers;

– they develop official contacts with tax attaches from foreign embassies located in Rome.

It is worthwhile giving some more information about how the *Guardia di Finanza* manages its tasks abroad.

In order to practise operational cooperation with its foreign counterparts in the area of competence, the *Guardia di Finanza* may send its own personnel to work at diplomatic representations and consular offices as "experts"; currently, 10 Officials are seconded to Italian diplomatic seats and this number will increase to 12 in a short time.

For the same purposes, the Corps may send its own personnel to work also at the institutional seats of international and national bodies in charge of combating economic and financial crimes to protect the State and EU budget (currently, there are liaison offices at the United Nations, in Germany and in Spain, at the Europol in the Netherlands and in Romania - in the latter case the liaison offices are located at the SECI Centre in Bucharest and accredited to the Romanian National Authorities).

Finally, at internal level, the General Headquarters carry on research and analysis, so to deliver periodically:

– information reports on detected fraud schemes;

– studies on illegal schemes in progress;

– analyses aimed at coordinating information and investigations in more complex operations.

6. Operational aspects

a. Requests cannot be adjusted

The following remarks result from on-the-field experiences.

Let us consider the case where the *Guardia di Finanza*, as economic and financial police and integral part of the Italian tax administration, receives a request for administrative assistance and relevant information is not available.

Academics wonder whether or not authorities concerned are entitled to amend or adjust automatically the request received, in order to obtain better replies before forwarding the request itself to the taxpayer or a third party.

Operationally, the *Guardia di Finanza* replies to all requests received from foreign authorities in each part, insofar they conform to double taxation conventions and are compatible with national law.

Replies are not provided where requests do not comply with those conformity and compatibility requirements, or are provided only partially in relation to the part complying with them.

Where conformity and compatibility requirements are not met, the *Guardia di Finanza* informs the requesting authority.

Requests received are not adjusted automatically.

Where the requesting authority adjusts the request in accordance with conformity and compatibility requirements, the *Guardia di Finanza* deals with it according to the standard procedure. In fact, the exchange of information is based on three fundamentals: reciprocity, equivalence, subsidiarity.

b. Relationships with uncooperative taxpayers

First, it is to point out that the *Guardia di Finanza* gathers information directly from taxpayers according to national legislation and international treaties (in observance of Law No 212/2000, the so-called Taxpayer's Bill of Rights, under which taxpayers are entitled, for example, to know the reasons why investigations have been started or why entries and searches have been carried out at their premises to gather documentation, etc.).

National legislation regulates the activity carried out by the *Guardia di Finanza*, including entry and search to the taxpayers' premises.

Where taxpayers fail to comply with the requests made by the investigating authority, or do not submit useful documentation during controls, they may be liable to national administrative or criminal penalties, where the relevant conditions are met (for example, Legislative Decree No. 471/97 and/or Legislative Decree No. 74/2000).

7. Weaknesses in the exchange of information

The exchange of information with Member States involves some weaknesses in its implementation.

In particular:

• **the language rules are problematic**, considering that only English, French and German can be used in the VAT proceedings (SCAC2004 and SCAC383 forms).

These "vehicular languages" are a clear advantage for those countries that can exchange information in their official language. In fact,

– they do not have to translate requests for mutual administrative assistance and relevant replies;

– they can reduce the average time for replies.

Oppositely, language rules imply operational and financial burdens, as well as shorter time frames for those countries whose languages are not considered "working" languages.

The use of only three working languages at Community level (English, French and German) is a huge weakness for Italy, which results in frequent difficulties in complying with the specific deadlines of each kind of information exchange.

Regulation No. 1798/93 provides that replies to requests for information must be sent within three months (SCAC2004 form).

This term is 1 month where information is already available to the requested authority and where the request concerns potential missing traders (SCAC383 form).

In addition to this, SCAC383 form is used in an anomalous way: it is not rare that it channels requests to be dealt with SCAC2004 form.

Furthermore, there is no feedback to the exchanges of information under Directive No. 77/799/EEC, in order to verify the effectiveness of cooperation given or requested, and spontaneous exchange is very limited in the field of direct taxation.

Accordingly, the Working Group on Administrative Cooperation in Direct Taxation (WG ACDT) has set up a subgroup with a view to preparing common forms to be used in the exchange of information upon request and spontaneous exchange and following replies. The *Guardia di Finanza* participates in the subgroup.

From 1 December 2008, the pilot project involving 10 Member States of the subgroup has been extended to all MS.

In relation to administrative cooperation in the field of VAT, in order to expedite contacts between the three national competent authorities (*Guardia di Finanza*, *Agenzia delle Entrate* and *Agenzia delle Dogane*) and Member States, electronic formats must always be used and transmitted between Member States through the EU communication network (CCN-MAIL) developed by the European Commission.

8. Data on cooperation carried out by the *Guardia di Finanza*

AREA: Direct Taxation	Information Requests received	Information Requests sent
2007	213	444
2008	147	130

AREA: VAT.	Information Requests received	Information Requests sent
2007	1171	2372
2008	1326	1484

Problems about operative aspects of information exchange: the protection of privacy and service abroad*

Dott. Carlo Soncini**

The report which I have been assigned is entitled "synthesis and conclusions" and refers to the subgroup presenting operative experience concerning the exchange of information. ([57]) I must point out that rather than a partial conclusion, I will provide a synthesis even if only it refers to some of the problematic areas. As we have just seen, there are a number of subjects involved in the exchange of information in Italy. We could even go as far as saying a plurality of subjects. Here today, not only are representatives from the Ministry of Finance and the Agenzia delle Entrate (Inland Revenue Agency) present but also those from the Guardia di Finanza. In this area, we must also mention the Agenzia delle Dogane (Customs Agency). But alongside these authoritative institutions there are also others: these firstly include the company Equitalia S.p.A., the Anagrafe Tributaria (Tax Registry) and then the Councils and I.n.p.s. (the National Social Security Institute).

This goes to underline how a plurality of subjects does not always ensure fast and efficacious exchange of information and aside from anything else how the problems discussed in this report also arise: service abroad and the protection of privacy (so called "Lichtenstein case"), the subject of a lively debate with the media in particular. ([58]) But before looking at these issues, it is worth analysing in greater depth how we have reached the current situation.

The current organisational structure is the result of a (relatively) recent governmental reform (D. Lgs 300/1999). Essentially, two changes were brought about by this reform: in the first, a hierarchical organisational model was exchanged in preference for a functional one; the second concerns the distinction between the "higher administration" and "lower administration" tasks. These are carried out by the Ministries and the Agencies respectively. As a result, the powers, functions and duties concerning the exchange of information have been divided between the Ministry of Finance on the one hand and Tax Agencies and other subjects on the other.

When introducing this reform, it should be noted that the legislator took tax specificity into account and defined tax Agencies as public legal persons in direct relation to their particular duties, in accordance with art. 61 of the first comma of D. Lgs. 300/99. ([59])

Furthermore, it is important to point out that the relationship linking the Ministry with the Agencies is one of a conventional nature. ([60]) From this point of view, apart from a few defects the juridical structure is thus also adequate for the activities that these subjects must carry out in the field of information exchange, which was perhaps not one of the foremost concerns of the legislator of this reform.

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([57]) There are certainly a number of references dealing with operative aspects concerning the exchange of information but not all of them are sufficiently precise or detailed. We need therefore to return to: SACCHETTO C., *L'evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche «incrociate» internazionali*, Boll. Trib., 1990, pg. 487 (part 1), pg. 563 (part 2); BARASSI M., *Lo scambio di informazioni tra le Amministrazioni Finanziarie*, in Materiali di Diritto Tributario Internazionale, by SACCHETTO C., ALEMANNO L., Milano, 2002, from pg. 361 on. ADONNINO P., *Lo scambio di informazioni fra amministrazioni finanziarie,* in Corso di diritto tributario internazione, by UCKMAR V., Padua, 2002, 1157.

([58]) CHINE' G., *Redditi on line: la soluzione legislative*, Corr. Giur., 2008, from pg. 1189 on.

([59]) GALGANO F., *Delle Persone Giuridiche*, in GALGANO F., *Commentario del codice civile* Scialoja-Branca, Bologna-Roma, 2006, pg. 121. On the concept of the public legal person see also SANDULLI A.M., *Manuale di diritto amministrativo*, Napoli, 1989, pg. 187. In particular, see note 1a) for its numerous references.

([60]) There are currently no analyses on this fundamental aspect of the relationship between the Ministry of Finance and the Agencies. A monograph on the subject is: SANVITI G., *Convenzioni ed intese nel diritto pubblico: struttura e tipi*, Milano, 1978. Naturally, this work does not address tax issues.

The fact that the company Equitalia S.p.A. is also characterised by a public nature function within the new structure, unlike in the past further underlines this. ([61])

From both a theoretical and practical point of view, this should provide us with a structure that facilitates the "exchange of information" in our country as well.

It must be underlined that in any case the Ministry institutionally guarantees a coordination role as expressly provided for in art. 56 lett. d) and e) of the D. L. 300/99. In addition, this regulation provides that in the sphere of such coordination activities, the agencies can "autonomously define forms of direct collaboration".

In any case, the principles of "efficiency, economy and efficacy" introduced by art. 61, III co., D. Lgs. 300/99 must be respected.

There are without doubt a number of operative areas worth looking at in depth. Many of them have been examined extremely authoritatively in the reports made before mine. I will focus on two areas in particular; the first relates to service abroad, and the second concerns privacy.

1) SERVICE ABROAD

Service abroad requires a more detailed analysis than can be provided in this report where, taking court rulings as our starting point, we will highlight the most important points from a perspective that also prioritises harmonisation and homologation of constitutional principles with those of the European Community in this area.

For this reason, therefore, and in light of this perspective, reference must be made to two rulings that have opened up a debate on this issue; the first ruling was made by the Constitutional Court, 7th November 2007, no. 366 as will be remembered, and was closely followed by the second made by the Supreme Court of Appeal, tax section, 31st March 2008, no. 8210. ([62]) A recent ruling by the Supreme Court of Appeal at "united sections" (no. 29290 dated 15th December 2008) was also made just a few days ago on the subject of service in the event of a plurality of sources. ([63]) This latter ruling does not therefore apply exactly to the issue that we are examining, yet as we will see it confirms some of the principles that have already been affirmed by previous rulings interpreting them in accordance with community principles. Several affirmations *in nuce* contained within previous rulings are thus rendered even more explicit. The ruling of the Constitutional Court, 7th November 2007, no. 366, whilst recognising that the issue of constitutional legitimacy is well-founded, states that "this Court has affirmed that «a binding limit beyond which the legislator has no discretion within the field of service is represented by the need to guarantee the addressee effective and prompt receipt of the documentation served so that he can therefore exercise his right to a defence» (ruling no. 360 dated 2003; see also ruling no. 346 dated 1998)". It continues by stating that "the abolished provisions were in breach of the said limit, because by considering the situation of the taxpayer resident abroad and registered with the AIRE equal to that of the taxpayer without a home, office or company in the council area of the tax residence, they require that service addressed to him is to be carried out only by means of filing the document at the town hall and recording notification of its filing in the same council office register" and, thus, "do not guarantee the addressee who is no longer resident in Italy effective receipt of the documents addressed to him".([64])

The ruling made by the Supreme Court of Appeal, no. 8210 dated 31st March 2008 reaffirms, on the basis of the Judge's ruling and the laws requiring that service upon non-residents must take place at their actual foreign domicile after sixty days have passed following the date of notification of a change of residency when this notification has not been made at the time the income tax return was presented.

([61]) See BASILAVECCHIA M., *La riscossione dei tributi*, Rass. Trib., 2008, from pg. 22 on. PARLATO A., *Gestione pubblica e privata dei tributi a mezzo ruolo,* Rass. Trib. 2007, 1355; PARLATO M.C., *Brevi note sulla Riscossione S.p.A.*, Rass. Trib., 2006, from pg. 1174 on.

([62]) Const. Court, 7th November 2007, no. 366, Pres. Bile – Red. Gallo, Corr. Trib., 2008, pg. 121; Cass., sez. Trib., 31st March 2008, n. 8210, Pres Altieri – Rel. Capobianca, in Bancadati *Fiscoonline*.

([63]) Supreme Court of Appeal, SS.UU. Civ., 15th December 2008, no. 29290, Pres. Carbone - Rel. Cicala, in Bancadati *Fisconline*.

([64]) Const. Court, Ruling 7th November 2007 (24th October 2007), no. 366 – Pres. Bile – Rel. Gallo, Corr. Trib., 2008, pg 121. See comment by GLENDI C., from pg. 473 on.

In particular, in the reasons stated in the Supreme Court ruling it is specified that "notification of tax return verification established in court, on the basis of the provision in D.P.R. 600 dated 1973, art. 58, comma 5 (not modified by the Const. Court 360/03, which applies exclusively to the term referred to in art. 60, comma 3, mentioned above, concerning the different situation of the mere change of address without changing the tax residence of the taxpayer) was to be carried out by the tax authority, until 26.1.1998 at the taxpayer's tax residence prior to that in Monaco, and, only after this date, at the foreign domicile in accordance with art. 142 c.p.c. (Civil Procedural Code) as prescribed in Constitutional Court ruling 366/07". ([65])

As we can see, the "connection" between the two rulings is evident. Of particular note, an excessively formalistic interpretation of the provision is not considered appropriate since the need for the document to be effectively received by the addressee becomes increasingly important. It is precisely on this point that the united sections of the Supreme Court are called upon to decide on a dispute between "*res judicata*" in the event of a single service of a document addressed to a plurality of parties. ([66]) In this particular case, the single service is carried out upon the authorised recipient legally representing the parties to whom the document is addressed. In light of this, it is specified in the motivations that: "it only concerns one means of execution of that particular form of service which is the "service upon the appointed procurator", undoubtedly a simplification of the system which in terms of the procedure means that there has never been any doubt as to the validity of the service of a single copy upon one subject representing a plurality of parties (v. Cass. Un. 20140 dated 2005; 11352 dated 2003; 4529 dated 2001)". Moreover, according to the United Sections, the first and second comma of art. 170 of c.p.c. must be read "as if they were (and as they actually seem to be) expressed as a single provision" and goes on to affirm that "not even the literal wording of art. 330 c.p.c., is incompatible with a similar conclusion". In light of this it is thus reaffirmed that "for the purposes of the validity of the service upon the authorised procurator representing a plurality of parties it is sufficient that this person receives delivery of a number of copies corresponding to the number of the parties represented (quantitative criterion) without requiring each specific party to be identified on the documents served". The Supreme Court Judges reached these conclusions on the basis of the assumption that "legal order would generally appear to favour the idea that the citizen's right to defence may be better protected if the procedural documents are first received by someone who has the technical expertise to be able to suggest how to proceed". This interpretation is consistent with the principle in art. 111 Cost. on fair trial and must also be applied to the tax trial, since "the principle based on the reasonable length of the trial, intended to speed up proceedings, must be deemed to apply not only to the judge as a subject concerned in the trial but also and more importantly to the legislator and to the judge as interpreter of trial regulations (in as far as a "constitutionally oriented" interpretation of the regulations that govern the trial cannot disregard the principle in question, which embodies hermeneutic canon that is valid in all procedural disciplines) and – in any case – apply to all parties concerned in the trial (therein included the parties, who must collaborate responsibly for the purpose of reasonable length particularly in trials characterised by a technical defence)". Not only this, but the United Sections affirm that this interpretation of art. 111 of the Constitution must be made in consideration of the European Court of Justice rulings. As argued in this ruling, the direction taken by previous rulings is deemed overruled "in light of the principle (acknowledged by the Constitution) of reasonable length of a trial which calls for a reduce to a minimum due to "legal technicality" as well as proper collaboration between the judge and appointed procurator in order to resolve the dispute promptly. This is further confirmed by the fact that the European Court of Human Rights has acknowledged the national judge's duty and power to extend the rights sanctioned by art. 111 of the Constitution in all proceedings coming under the authority of the tax judge, according to a guideline criterion which requires the highest standard of rights protection always to be applied to citizens (Grand Chamber, 23 November 2006, Jussila vs Finland).

Lastly, as we come to a conclusion, we cannot disregard a project for an EU directive - COM (2009) 28 – which expressly governs service abroad dedicating to this subject chapter III entitled "*Assistance for the notification of documents*" for the directive project COM (2009) 28 "*concerning mutual assistance for*

([65]) Const. Court, Ruling 19th December 2003 (10th December 2003), no. 360 – Pres. Zagrebelesky _ Rel. Marini, Corr. Trib., 2004, pg. 471. See GLENDI C., from pg. 473 on.

([66]) Cass. SS.UU. 29290, 15th December 2008, in Bancadati *Fisconline*.

the recovery of claims relating to taxes, duties and other measures". Above all, art. 7 ("*requests for notifications of certain documents relating to claims*") expressly provides for an obligation on the part of the country which has been requested to serve documents of claims to provide for the notification. Art. 8, first comma, lett. A) of the aforementioned project, provides that the means of service has to be "effected in accordance with the National law, regulations and administrative practices in force of the requested Member State".

It would once again appear evident that, whilst ensuring greater community harmonisation, at the current time it is considered appropriate to defer the matter to national law on the subject of service abroad. As can be noted, this deferment seems particularly broad, and encompasses not only *the National law but also "regulations" and "administrative practices", naturally "in force of the requested Member State".*

2) PRIVACY

A highly delicate aspect relating to the exchange of information concerns the protection of privacy.

This topic has hit the headlines as a result of events that are shocking to say the least. In this area we will of course examine the legal aspects focussing in particular on the comparative issues. Let us begin with the publication of data relating to income tax returns. ([67])

Until recently, there were no regulations in existence in Italy. These were introduced by art. 42 of D.L. 25th June 2008, no. 112 (converted with amendments, L. 6th August 2008, no. 133 – G.U. 21st August 2008, no. 195) following intervention on the part of the Guarantor for Privacy for the publication of income tax returns. ([68]) In France and Germany, however, specific regulations already existed on this area. In France, art. 111 of the Livre des Procédures Fiscales applies, whereas in Germany, art. 30a AO, provides for an analogous applicable regulation. ([69])

We can therefore observe that on this aspect in these three countries, there are regulations which although not perfectly uniform are at least convergent. We also cannot disregard the fact that the principle of reciprocity is one of the fundamental principles upon which community law is based and it cannot be excluded that it does not also operate with regard to the protection of privacy where exchange of information is involved. ([70])

The same homogeneity that has just been examined cannot be found in the area of privacy in the case of exchange of information. It is not possible to make a comparison here with France, although with Italy and Germany it is.

In Italy there are no regulations in this area, which is the result of a conscious decision, as Prof. PUOTI reminded us earlier. In Germany, however, the choice that has been made leads us in precisely the opposite direction by virtue of Art 117 AO, third comma, no. 2, which stipulates that tax return information must remain confidential. ([71])

But in order to gain a better understanding of the complex nature of this subject we must remind ourselves of a recent ruling from the European Court of Justice, 12th September 2007, Case C-73-03. ([72])

([67]) See FORTUNA E., *La pubblicazione on line dei redditi dei contribuenti e l'intervento del Garante*, Il Fisco, 2008, pg. 3781.

([68]) The Guarantor for the protection of personal data intervened with two measures: on the 30th April 2008 it suspended as a precautionary measure the publication of the income tax returns on the Agenzia delle Entrate website. On the 6th of May 2008 it then definitively prohibited the publication of the documentation.

([69]) See TIPKE K., §30a, in AO-FGO Kommentar, by TIPKE K. – KRUSE H.W., Cologne, 2004, from pg. 71 on.

([70]) The possibility of extending the principles of proportionality and reciprocity to privacy is as yet unconfirmed. The problematic areas in this regard are extremely tricky, at least for the moment. Aside from the central role of the reciprocity principle in the field of exchange of information, there generally remains, as also affirmed by the EU Court of Justice, C-451-05, 11th October 2007, PRES. Lenaertis, Rel. Arestis, in Bancadati *Fisconline*, which specifies that "directive 77/799/EEC, as modified by directive 92/12/EEC, and in particular article 8, n. 1 therein, do not prevent two member states from being bound by an international Convention designed to avoid double taxation and to create regulations for mutual administrative assistance regarding income and property taxes, which excludes from its scope of application, for a member state, a category of subjects to whom a tax is applied Directive, if the legislation or the administrative practices of Member state which should provide the information do not authorise the competent authority to gather or to use the said information for the needs of the said Member state". See also FERNANDEZ MARIN F., *Tassazione dei non residenti: tra scambio di informazioni e principio di proporzionalità*, in Bancadati *Fisconline*.

([71]) See SEER R., §117, AO ZPO Kommentar, by TIPKE K.– KRUSE H.W., Cologne, 2008, from pg. 19 on for its numerous bibliographical references, pg. 61, for the limits created by art. 117 AO on the exchange of information. See also National Report Germany, 21 of the manuscript, in preparation of the work for the EATLP Conference, Santiago di Compostela, June 2009, entitled "the exchange of information".

The Ruling take a decision on the request of the European guarantor for data protection to be allowed to intervene in proceedings in which the protection of privacy is at stake, resulting from the sale by a private company of income tax return data filed by taxpayers by means of SMS. The Court rejects the request for intervention on the part of the European guarantor for data protection as it is inadmissible. On this point, suffice to observe that the taxpayer is faced with a serious problem in such cases. It is not clear which body can be consulted in order to obtain legal protection, and whether to go before the guarantor or the tax judge, or instead before the court. Perhaps the competent body is the guarantor of privacy but one must proceed with caution and the answer would not appear to be obvious.

But apart from the Court of Justice decision, the Attorney General's conclusions appear to be particularly significant for the issue we are examining.

As often happens, the conclusions are reiterated albeit to a marginal extent in the ruling and are particularly interesting as they divide tax data into three types according to how they are used:

– commercial use;

– journalistic use;

– institutional use.

The advocate general provides for a different application of privacy law in relation to these three separate cases by evaluating juridically significant issues at stake in a different way on a case-by-case basis. Also notes that the authorities and the courts of the Member States must not only interpret national law in accordance with the directives on data but also to ensure on an interpretation of the law that should not come into conflict with the fundamental rights protected by Community law or with other general principles of Community law. So it is worth noting that on this point by underlining that the schools of thought are still many and widely divergent but that meanwhile on the other hand there are several significant issues as we have attempted to highlight. These issues may suggest a particular direction and may form the basis for future debate that I hope will be conducted with greater harmonisation in mind, even if as we are reminded the existence of the numerous subjects involved in the exchange of information in Italy, could result in fewer guarantees for the taxpayer. ([73])

To bring my talk to a close I would simply like to add a few words.

We have seen that there are also a number of problematic areas also concerning more operative issues. Whilst there are several important issues that may guide the debate so as to promote increasing harmonisation, we cannot, however, ignore the problems that exist and that we have been able to highlight. Nevertheless, there is no lack of significant issues to ensure a constructive debate as we have clearly highlighted.

([72]) Order of the President of the EU Court of Justice, 12th September 2007, Case C-73-03, (Tietosuojavaltuutettu-Saakunnan Markkinapörssi Oy e Satamedia Oy), at www.europa.eu.

([73]) See PATRIZI G., L'Anagrafe tributaria – La Banca dati del Fisco tra indagini e privacy, Il Fisco, 2008, from pg. 6808 on.

The efficiency of the mutual assistance in tax matters: critical analysis and hypothesis of changes*

Pietro Selicato**

Summary: 1. Preliminary remarks; 2. Interests involved in the Mutual Assistance; 3. Efficiency and effectiveness; 4. Legal framework vs. practical issues; 5. Changes are coming?

1. Preliminary remarks

It is very difficult to give a complete answer to the questions asked in the title of this presentation. Is the framework provided at now for mutual assistance really efficient? And what can States do to widen and enforce it? Telling the truth, it is a long time that the Mutual Assistance global network is criticized for its lack of efficiency, under several points of view , and more recently also the European Commission has observed that in many cases cooperation mechanisms may not function in an efficient and satisfactory manner, but that however, Member States cannot rely on deficiencies in the cooperation between their tax authorities in order to justify restrictions on fundamental freedoms[75] .

In this situation, I think that the first step is to consider which are the different interests that are engaged in the exchange of information and in the other activities that can be included in the notion of mutual assistance in tax matters (MA). Only in this way we can clarify if a rule regarding MA has really reached its scope.

To better understand the problem, it must be realized that in this case the notion of "efficiency" must be considered in a wide sense, including a notion of "efficiency in a narrow sense" and a notion of "effectiveness". And the two sub-notions are sometimes in contrast: improving efficiency could reduce effectiveness, and vice-versa; so the legislator needs to consider at the same time the two aspects as pertaining to the same problem[76] .

In this presentation the analysis related to the problems of efficiency (in a wide sense) will be divided into two parts: from one hand, the problems related to the legal framework (i.e. the formal structure of the rules); from the other hand, the problem arising from the practical implementation of the rules. Both formal and practical problems can involve efficiency or effectiveness issues.

In the current analysis the legal framework of the MA will be taken into consideration as the base for further conclusions, following a factual approach in the interpretation of the rules. In this perspective, the MA rules will be analyzed in the light of efficiency more than legality criteria, according to the principles of the Economic Analysis of Law (EAL). In the EAL the legal rule is analyzed using economic criteria: the law is not only considered as a set of rules to interpret and enforce, but

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([74]) On this regard see C. SACCHETTO, *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. inf., 1990, 487 (Part I) e 563 (Part II), on this point, Part I, 488 ss.; P. ADONNINO, *Lo scambio di informazioni fra amministrazioni finanziarie*, in V. UCKMAR (coordinated by), *Diritto tributario internazionale* (Padova, 2005), p. 1125, on this point p. 1160-1161; V. TANZI, *Globalizzazione e sistemi fiscali*, Arezzo, 2002, on this point p. 94 and foll.

([75]) See EUROPEAN COMMISSION, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009, at p. 2.

([76]) On this regard see EUROPEAN COMMISSION, *Third strategic review of Better Regulation in the European Union*, COM(2009) 15 final of 20th January 2009, where efficiency is viewed as the mean to improve the quality of the existing legislation aiming at suppressing unnecessary administrative burdens on businesses and citizens to the minimum necessary.

it is also a system of incentives, that can turn people in their decisions according to the costs of their behaviors[77].

As a conclusion, in a perspective of efficiency, I'll express some thoughts about the consequences that the unanimity rule laid down in articles 93 and 94 of the EC Treaty can have (and really has) on the rules regarding the MA.

2. Interests involved in the Mutual Assistance

It has to be reminded that the most part of the legal instrument ruling the MA is approved by an EC Law or Treaty Law[78]. This common source should give a uniform regulation in all Member States. But its practical enforcement can be different from State to State. Indeed, Prof. Roman Seer, in analyzing our National Reports for the meeting in Santiago is finding many differences from this point of view.

So we have a formal uniformity of regulations but we can see many differences in the substance. This situation can produce (and indeed it produces) a lack of efficiency in reaching the scope of the mutual assistance in the European Union. But if we don't know the scope of the rule we cannot understand if it is efficient.

Considering the source of the rule it is easier to investigate its scope but we can know the scope of a measure only if we find the interest it is given for. Indeed, to reach its scope, each measure, in the field of MA also, recognizes and protects some relevant interests[79].

Each law that rules in the topic of the MA involves and balances more than an interest. A single interest can be treated in different ways in the different laws regarding MA[80].

If we want to synthesize, we can distinguish three different groups of interests:

a) ***The joint interest of all the contracting States:***

All the contracting States share the common interest to avoid double taxation and/or counteract tax evasion. Article 26 of the first release of the OECD Model[82] (1963) was oriented to avoid double taxation and only in a former version (1977) it has been changed to include (also) the scope of counteracting tax evasion and avoidance. EU measures on MA (like Directive No. 77/799/EEC and Regulation No. 2003/1798/EC are specifically oriented to counteract tax evasion and avoidance[81].

b) ***The interests of one (or some) of the contracting States:***

The States involved in the MA are naturally set against in supporting their interests. While the requesting States need to obtain information and have assistance to implement their activities regarding the assessment and recovery, the requested States need to protect the their economic, juridical and administrative system and for this reason they are allowed to refuse the requested assistance. Different limits are ruled in the single legal instruments, but, from a general point of view, Directive No. 77/799/EEC and Regulation No. 2003/1798/EC are more binding for the requested State than Article 26 of the OECD Model is . It must be also noted that the European Commission is engaged to increase the efficiency of the exchange of information by removing the bank secrecy for tax reasons within the EU Member States. According to the Commission, a Member States should not refuse to transmit the information because it has no domestic interest or because the information relating to a resident of the other Member State is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person[83].

([77]) The interpretative theories based on the EAL raised in the U.S.A. around the sixties. In the opinion of R.A. Posner, *The Economic Approach to Law,* 53 Texas Law Review, 757 (1975), founder of the so-called school of Chicago, EAL replaces the justice criterion by the efficiency criterion. In the less radical perspective of the school of New Haven, efficiency and justice don't coincide, but the concept of efficiency is necessarily part of the concept of justice. The school of New Haven was G. Calabresi, *Some thoughts on risk distribution and the law of torts,* 70 Jale Law Journal, 1961, p. 499. The EAL has found a good support also in Italy. In the Italian literature see R. Pardolesi, *Analisi economica del diritto*, in Dig. Disc. priv., Sez. civ., Vol. I, Utet, Torino 1987; Mengaroni F., *Analisi economica del diritto*, in Enc. giur., Vol. II Treccani, Roma, 1988.

([78]) On this regard see M. Barassi, *The legislative framework*, in this issue.

([79]) P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, cit., p. 1127-1129.

([80]) In the opinion of P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, cit., p. 1160, the rules regarding the exchange of information consider as a priority the interests of the States and not those of the taxpayers.

([81]) On this regard see again P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, cit., p. 1135-1141.

([82]) On this point see P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, cit., p. 1135-1141.

([83]) See European Commission, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009, at p. 7.

c) ***The interests of the taxpayers:***

Also the single taxpayer to whom information are referred has more than one interest to protect. Of course the interest to avoid double taxation in a tax assessment is involved. But as it has been already told today , he/she needs also protection in the proceedings related to the MA85 .

d) ***The interests of the persons to whom the information are asked:***

An interesting problem that raises on this regard is also the limit that must be imposed to the requesting State that asks information preserved by an individual or a company or another private body other than the requested State. In these cases we can observe problems related to the duty to respect the privacy of the taxpayer and problems related to the proportionality principle that can affect the efficiency of the legal instrument of MA.[86]

From the first point of view, it is common opinion in Italy that, according to the Law 31th December 1996, No. 675, when the Public Administration needs to treat the data of the taxpayer to carry out its proper functions id doesn't need to ask any permission to the taxpayer[87] .

From the second point of view, the European Commission has stated that every measure regarding MA cannot mean any additional financial and administrative burden for the Community, national governments, regional and local authorities, economic operators and citizens, but should on the contrary rationalize human and financial costs by creating a common approach to international administrative cooperation[88] .

3. Efficiency and effectiveness

To reach the efficiency (in the narrow sense) of a certain rule regarding MA, the legislator has to make a balance between:

- *From one side*, the efforts asked to both the requesting and the requested tax administrations to get the information (or carry out the assistance in recovery, notifications, etc.), to the taxpayer and to the other subjects requested to give their co-operation;
- *From the other side*, the results of the MA activities in terms of assessment (or recovery) of new taxes. The rule can be considered "efficient" as less are the efforts and as more are the results.

It is a need of every legal rule to reach in a fair way the scope it was provided for. In this line, the international organizations (Both OECD and EU) are strongly engaged in the improvement of the quality of their legislation and of the legislations of their Member States. Also in the topic of MA (whose importance is increasing every day, due to the development of the mobility of taxpayers, of the number of cross border transactions and of the internationalization of financial instruments) it is needed an effort to reach a common standard of clearness in the legislation so that the relevant measures could be understood in their real sense in all Member States.

Since 1995, OECD realized that its Member countries had experienced similar and troublesome problems with their use of regulation. Recognizing these problems, as well as the substantial work being carried out by Member countries to improve regulatory quality, the Council of the OECD adopted in 1995 an ad hoc Recommendation[89] . This Recommendation was the first international standard on reg-

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([84]) See the different positions of L. Del Federico, *The legal protection of taxpayers in the mutual assistance procedures*, and G. Puoti, *Debate, first part ending*, both published in this issue.

([85]) A strong assertion of the need to ensure the legal protection of the taxpayer during the MA procedure is made by P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, cit., p. 1161, where it is underlined the lack of protection both in the EU and domestic legislations. In the same sense M. Barassi, *Lo scambio di informazioni tra le amministrazioni finanziarie*, in Riv. dir. trib. int., 1999, No. 3, p. 90, spec. at p. 143 and foll.. The same conclusions about the Spanish law are reached by M.A. Grau Ruiz, *Exchange of information between Spain and other EU Member States*, in Riv. dir. trib. int., 2003, p. 91 and on this point p. 107.

([86]) In the opinion of R. Castiglione, *Cooperazione fiscale nell'Unione Europea ed accertamento tributario* (Edizioni Cannarsa, Vasto, 2006), espec. p. 293 and foll., the European principle of proportionality is a general limit of the MA. For references to the principle of proportionality in the MA see also L. Del Federico, *The legal protection of taxpayers in the mutual assistance procedures*, and F. Amatucci, *Burden of proof and limitation in the exchange of information*, both published in this issue.

([87]) For this opinion see S. Grassi – S.C. De Braco, *La trasparenza amministrativa nel procedimento di accertamento tributario* (Cedam, Padova, 1999), p. 64-71. The problems of privacy related to the use of MA instruments are widely exposed in the presentation of C. Soncini, in this essay.

([88]) See European Commission, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009, at p. 5.

([89]) Oecd, *Improving the Quality of Government Regulation*, C[95]21/FINAL of 9th March 1995.

ulatory quality and among its objectives it explicitly mentioned the strengthening of the effectiveness and legitimacy of the international regulatory system in solving common problems. The Recommendation includes a guiding checklist of good decision-making principles[90].

Of great interest in the perspective of the research of efficiency in the MA rules is also a recent paper of the OECD[91] that raises issues to build a framework useful to conduct a Regulatory Impact Analysis (RIA). In the opinion of the OECD, RIA is a fundamental tool to help governments to assess the impacts of regulations and it should be used by the policy makers to examine and measure the likely benefits, costs and effects of new or existing regulations[92].

Another issue on which I should like to draw Your attention is that, in the perspective of efficiency in MA, the taxpayer's position can be considered as a limit: if the tax offices are not compliant with the taxpayer's rights they have not the right to use information. So that in every opinion about the efficiency of a MA rule must be take into account the need to observe these rules.

Although there isn't in the MA instruments any rule that expressly states about the taxpayer's protection, the balance between the interest of the tax office and the rights of the taxpayer has to be made considering the EU proportionality principle.

Also constitutional principles are involved. In Italy are relevant:

Equality and ability to pay (artt. 3 – 53 Cost.);

- Good performance and impartiality (art. 97 Cost.).
- Our Constitutional Court says that we must look at these two principles balancing them in the light of a principle of "reasonability"[93].

Let's go ahead in our discussion. I have already pointed out that there is a difference between "efficiency in a narrow sense" and "effectiveness". To assess the effectiveness of the MA we need to answer to the following question: "Has the action based on a certain MA instrument given useful results for the tax offices?"

In a first step, more cases are treated more effective can be considered the system of MA (as You can see in the figures, the number of cases is increasing year after year in all the EU, at least in the field of VAT)[94].

In the EU Member States the language can raise problems of effectiveness to the MA practices. As it has already been said[95], according to the existing rules, the requesting States must use one of the "procedural languages" (English, French and German). Given this, some problems in translations could arise (and are arisen in fact) for non-speaking States (included Italy). The need to translate a request or an answer written in an unknown language raise additional costs and increases delay in the answers[96].

These problems involve the more general problem of the multilingualism in the EU and, with more detail, its so-called "third level", related to the language regimes chosen by the EU institutions themselves, in line with the rules in force[97].

As a general rule, with the aim at improving the effectiveness of the MA, Italian administration hopes for a greater flexibility on the part of all Countries in accepting linguistic regimes that allow each of them a rational management of the burdens of translation to and from the languages recognised as procedural languages by the Community (English, French, German). As an example, a principle could

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([90]) In the idea of the Council the checklist "responds to the need to develop and implement better regulations. It contains ten questions about regulatory decisions that can be applied at all levels of decision and policy-making. These questions reflect principles of good decision-making that are used in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent".

([91]) OECD, *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*, July 2008.

([92]) This document is clearly inspired at the principles of the Economic Analysis of Law (EAL) reminded before in para. No. 1.

([93]) On this topic see P. SELICATO, *L'attuazione del tributo nel procedimento amministrativo* (Giuffrè, Milano, 2001), where it is put in light that through this path the tax proceeding is able to produce its effects on the substantial criterion of taxation.

([94]) On this regard see also EUROPEAN COURT OF AUDITORS, *Administrative cooperation in the field of value added tax, together with the Commission's replies*, Special Report No. 8/2007.

([95]) See on this regard the presentation of R. MASSINO, *The Mutual Assistance in tax investigations*, in this issue.

([96]) See the presentations of S. CRISAFULLI and R. MASSINO, in this issue.

([97]) For remarks on this topic see K.J. LÖNNROTH, *Translation practices in the Commission*, paper presented at the CICEB Conference, Committee of the Regions, 21th September 2006, where it is underlined that "the preparatory process would not work with 506 language combinations, so a much reduced system will have to operate in order to guarantee the best "product" in the end.

be established according to which all of the Countries should send the other partners requests in the three languages aforementioned in equal thresholds (33% per language); the answer should be given in the same language of the request[98] . Doing this will sure reduce costs of translation and times of delivery of the answers.

4. Legal framework vs. practical issues

The efficiency (and effectiveness) of the MA instruments is related to different kinds of issues:

a) legal framework issues: this kind of problems of efficiency/effectiveness raises directly from the rule (in the EU these issues are common for all Member States because the legal rule is common);

b) practical issues: the rule is well prepared but its concrete implementation could create some problems of effectiveness (also in an the European environment, where the same Directive and Regulations are applicable, these problems can change State by State due to the different ways that the single States interpret the rule).

Both these kinds of issues can involve question of efficiency and questions of effectiveness. Let's now have a quick overview about the single situations pertaining to the two groups.

4.a) Legal Framework issues

Right to refuse information:

It is stronger in treaty law than in EU Law. Article 26 of OECD Model Convention, according to the general principle of each treaty, is oriented to protect the National economic an juridical system. So under this article the requested State has more chances to refuse information than under other MA instruments based on the European law (Directive No. 77/799/EEC and Regulation No. 1798/EC). Notwithstanding, the European Community is always engaged in improving the effectiveness of its instruments, also with regard to the right of the requesting State to obtain the information. In this sense, the amendment proposal of the Directive No. 77/799/EEC provides that Member States should not refuse to transmit the information, what's more "because it has no domestic interest"[99] . Instead, art. 8(1) of the Council Directive n. 77/799/EEC states that: "This Directive does not impose any obligation upon a Member State from which information is requested to carry out inquiries or to communicate information, if it would be contrary to its legislation or administrative practices for the competent authority of that State to conduct such inquiries or to collect the information sought".

The Directive has been implemented in Italy by art. 31-*bis*, par. 3, D.P.R. 29 September 1973, n. 600,[100] which provides that information (for foreign authorities) "are not transmitted when they may reveal a commercial, industrial or professional secret, or a commercial process, or information whose disclosure would be contrary to public policy". The article goes on saying that "Information transmission may be refused, moreover, when the competent authority of the requesting state cannot provide the same kind of information for reason of law or of fact". The term "moreover" seems to mean that also in this situation the competent authority may refuse to provide information and then, also in the first case (commercial, industrial secret) the competent authority may (but is not obliged to) refuse to provide information[101].

In the OECD Model we face a strict regime of reciprocity, having its legal base on the limitation of the National sovereignty[102] , In the European system, another kind of problem raises: that of "the ap-

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([98]) C. SACCHETTO, *La cooperazione fiscale internazionale. In particolare, lo scambio di informazioni nel contrasto all'evasione*, in Riv. Guardia Fin., 2008, No. 2, p. 206 and foll., on this point p. 223.

([99]) EUROPEAN COMMISSION, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009, p. (18) of the preamble.

([100]) As regards the implementation in Italy and in the other Member States see F. ARDITO, *La cooperazione internazionale in materia tributaria*, cit., p. 161 and foll., where it is stated that Italy has adopted an extensive criterium for the implementation of the Directive.

([101]) The Italian literature is generally oriented in this sense. On this regard see V. UCKMAR – A. MARCHESELLI, *Il diritto tributario tra tutela della riservatezza e trasparenza delle attività economiche*, in Dir. prat. trib., 1998, I, p. 227 and foll., especially p. 254, where the Authors remember that when the requested State is obliged (and not only admitted) to refuse information it is expressly stated by the law, as some bilateral conventions provide (for example the Italy-Switzerland bilateral convention to avoid double taxation, signed the 9th of March 1976 and ratified in Italy by Law 23 December 1978, no. 943.

([102]) About the different concepts of reciprocity to consider in the International treaties see P. SELICATO, *Il modello di convenzione Ocse del 2002 in materia di scambio di informazioni: alla ricerca della reciprocità nei trattati in materia di cooperazione fiscale*, in Riv. dir. trib. int., 2004, no. 1, p. 11.

proximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market"[103]. In Community law there is a significant difference between the concepts of "unification", "approximation" and "harmonisation". In some circumstances the different words "approximation" and "harmonisation" (but sometimes also "coordination") are given a generic meaning. Nevertheless, the juridical meaning of these notions is quite clear and precise[104] .

The notion of harmonisation is commonly and implicitly considered in article 3 (h) as a particular expression of the concept of approximation of national laws mentioned in this rule[105] . Indeed, the two concepts are similar in more than one respect. First of all, it must be noted that neither of these concepts represent the need to realize identical rules in each Member State, being oriented only to promote the convergence of these rules in a common system[106] .

The National rules regarding the bank secrecy are not directly subjected to the harmonisation but, as they are an obstacle to the assessment of the correct taxation (not only in the States where they apply but also in the State where the taxpayers are resident, they can "directly affect the establishment or functioning of the common market". So, the rules in question should need to become object of approximation. For the moment, the Commission[107] has not proposed to remove (or at least approximate) the bank secrecy National rules of all the Member States. As such, the proposal does not attempt to the bank secrecy rules in force in certain Member States (Austria, where bank secrecy is part of the Constitution, Belgium or Luxemburg) for their own taxpayers, but eliminates this obstacle in the cross-border relations for taxpayers of the other Member States.

Limits in the use of information:

Generally speaking, in this field also the EC rules (Directive No. 77/799/EEC and Regulation No. 1798/EC) are more effective than article 26 of the OECD Model Convention.

This topic has been deeply developed in this morning presentation so I don't need to go further.

Assistance in collection

As already put into evidence[108], this is a problematic issue because it needs a strong organization to be correctly implemented. Notwithstanding, in the last years we have more adequate instruments tan before. In the today's version of the OECD Model, we have the new article 27 and Regulation No. 2003/1798/EC has new provisions on this regard. Tax administrations only need to make practice with these new tools and increas number of requests.

Time limits for the answers

They are not always present in the single MA instruments and when they are present they are not always complained with.

It can be pointed out that in an international contest time limits are limitations of the National sovereignty of the contracting States. For this reason they are not present in art. 26 of the OECD Model Convention. In the European rules it is easier to justify the provision of a time limit due to the need to ensure a common legal base in the whole Union. Regulation is, of course, the better instrument to ensure respect to this kind of rule.

([103]) In this sense states art. 94.1 of the EC Treaty. In the Italian literature, a general analysis on the approximation of national rules can be found in M.R. SAULLE, *Ravvicinamento delle legislazioni (diritto comunitario)*, in Enc. dir., Agg., Vol. II, 1998, 899.

([104]) On this topic see ROCCATAGLIATA, *Diritto tributario comunitario*, in UCKMAR V., *Diritto tributario internazionale* (Padova, 2005), p. 1203, especially p. 1229, where it has been noticed on this regard that "harmonisation" is placed at half way between "unification" and "approximation". In the same work, see also at p. 1249 ff., it is pointed out that the concept of fiscal coordination was stated in the "Monti Package" of 1996, where in the absence of any substantial modifications, the Commission asked the Member States for a bigger understanding in the national fiscal policies. On this specific regard, see also ROCCATAGLIATA, *European Community concept of permanent establishment: tax harmonization or coordination?*, in Riv.dir. trib. int., 2002, no. 2, p. 37.

([105]) CASADO OLLERO, *The Community legal system and the internal tax system*, in A. AMATUCCI, *International tax law* (Kluwer Law International, Alphen aan den Rijn, 2006), p. 337 ff., esp. 367.

([106]) This idea has been followed for a long time by the Italian doctrine. On this point see AA.VV., *L'armonizzazione fiscale nel mercato comune europeo*, book of the Conference of Venice, 2-3 May 1964, Napoli, 1964, particularly the paper of FORTE, at pages 35 and 54, and the interventions of MICHELI, at page 111, and MAFFEZZONI, at page 116.

([107]) EUROPEAN COMMISSION, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009.

([108]) See the presentation of C.SONCINI, in this issue.

Procedural rights for the taxpayers

This morning we listened from Prof. Del Federico of that recent judgment of the ECHR (the *Ravon* case) that affirmed the right of the taxpayer to be informed of the beginning of a procedure regarding its tax assessment. Notwithstanding the punctual remarks of Prof Puoti, I think that this issue is still today a critical point in the light of a complete protection of the taxpayer, also during a tax investigation[109].

As a conclusion on this topic I can only say that once more we must face the problem related to a lack of approximation in the EU Member States considered that in some of those the tax office needs to inform the taxpayer of the beginning of a procedure. In Italy we have not a general rule in this sense but only some cases in which the legislator provides this kind of protection (and among those there aren't the MA procedures).

5. Changes are coming?

Of course, this so different situation in the National laws creates non-effectiveness in the MA procedures. And indeed we cannot wait for the next judgment of the ECHR (or the ECJ, at all) to solve the problem. What can we do then to improve the effectiveness in MA rules?

A big effort has been done by the European Commission in the already mentioned proposal for a new Directive in the field of mutual assistance[110]. I have no more time to go into this interesting topic. So I summarize in the following points the contents of the new proposal:

- Overcome bank secrecy for taxpayers of the requesting Member States to eliminate tax obstacles in EU cross-border tax relationships
- Introduce a special "Most Favoured Nation" clause between Member States
- Introduce time limits for the exchanges on request
- Reinforce automatic exchanges
- Introduce standard procedures
- Decentralise CLO's
- Enlarge taxes covered so that MA in the EU will become possible for all existing taxes other than VAT (where Regulation No. 1798 applies)

I only need to underline that at the first position of this list it is mentioned the suppression of bank secrecy in the Member States' relationships. I think that this represents an historical change not only because it solves a big problem of effectiveness in the MA system, but (more) because it overcomes the present limits of the concept of approximation.

In fact, the new proposal seems to shift the limits of the non-discrimination principles when it points out the non-comparability between the position of the taxpayer involved in a domestic assessment (protected by the national rule of the bank secrecy) and the taxpayer involved in a request of information by another Member State (who has not a such protection).

In the idea of the Commission (indeed we have to make a deep thought about it), the two position are different because the latter, since it "directly affects the establishment or functioning of the common market", needs to be removed by the Community based on the art. 94 of the Treaty.

Of a big interest is also the introduction of a really new "Most Favored Nation Clause" in the field of the exchange of information, since it represents a big step towards a multilateral approach in the relationships between the Member States and the non Member States[111].

([109]) Some years ago, I pointed out that it must to be ensured to the taxpayer the right to a fair proceeding both before the judge and before the tax authority. For these remarks see P. SELICATO, *L'attuazione del tributo nel procedimento amministrativo*, cit., p. 269 and foll., and on this specific point, p. p. 295 and foll.

([110]) EUROPEAN COMMISSION, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2nd February 2009.

([111]) About the MFC see the deep analysis of L. MARRA, *La Clausola della Nazione più Favorita e le convenzioni bilaterali contro la doppia imposizione tra i Paesi membri dell'Unione Europea*, in riv. dir. trib., int., 2006, No. 3. p. 191, followed by a note of P. SELICATO, *The "Most Favored Nation Clause" and bilateral double taxation treaties between Member States of the European Union*, in the same issue, at page 217.

Mutual assistance in tax matters and the ECJ*

Prof. Pedro Manuel Herrera Molina**

Ladies and Gentleman, first of all, I would like to express my gratitude to Professor Puoti and Professor Selicato for the kind invitation to take part in this inspiring conference. I will deal with the exchange of information and the fundamental freedoms from the point of view of the case law of the ECJ.

As you can see in this outline, I have divided my presentation in four parts. First of all, I will elaborate on the role of the exchange of information with regards to the proportionality test when Community freedoms are restricted. Then, I will deal with the case law. I will mention four judgments which I think are more representative. Two of them refer to the exchange of information between Member States and two of them refer to the exchange of information with third Countries. Then, I will come to the conclusion. As I anticipated, I think the case law of the Court is not very consistent regarding the exchange of information between Member States and third Countries.

As you know, at least, after *Lankhorst Hohorst* and *Cadbury Schweppes*, it is quite clear that the cross-border anti-abuse clauses are permitted, also when they do not apply to domestic situations but only to European cross-border situations – provided that two requirements are met. First of all, the anti-abuse clauses must be restricted to wholly artificial arrangements and, furthermore, the taxpayer must be given the opportunity to provide evidences that the arrangement is not artificial, that there were sound economic motives for these transactions.

Well, the next question is: once the taxpayer has provided this evidence or the requested information, how can – possibly – the Tax Authorities verify the evidence or the information provided by the taxpayer?

Well, here the Court comes out with a magical answer. It proceeds a rabbit from the hut and it says: "no problem at all", we have the mutual assistance directive, therefore, the Member States have a tool in order to double check the evidence provided by the taxpayer. But, as we know, this is not always true. Of course, it's true that we have the directive, but it does not always work. I'm not meaning that this is not efficient enough – that could be in some cases – but also that it has important limits, and the most important one, which is provided for by article 8, is that the requested State has no obligation to provide the requested information if it cannot obtain and use this information for its own tax purposes. Therefore, if there are bank secrecy or other limits regulated by law or by administrative praxis, the information will not flow to the other Country and the Tax Administration will have no way to verify the evidence provided by the taxpayer. I think that this is the main problem, and which is the approach of the ECJ to this problem.

First of all, regarding the exchange of information between member States, where one of those member States has domestic limitation to obtain tax information.

I will give you two examples and we can discuss, then. The first one is the *Talota Case*. As you recall, Mr. Talota was a resident in Luxembourg who ran a restaurant in Belgium and… well, we have here some Belgian colleagues we could ask, then, if the restaurant was good or not. But, in any case, we know that Mr. Talota failed to submit his tax return in due time. In this case, the Belgian law has a tool to reconstruct the tax assessment and, actually, it works in a different way for residents and non-residents. For residents, they have to compare the business with businesses ran by three taxpayers provided that the businesses have the same size. But in the case of non-residents – and that was the case of Mr. Talota, because he had his residence in Luxembourg – there is a minimum tax which is assessed according to the number of employees and, I think – I don't remember exactly – the turnover and the size of the workforce. Mr. Talota thought that he was discriminated by this provision. Well, of course the Belgian tax au-

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thorities argued that the situation of Talota is not comparable to the situation of the residents because the Tax Administration can check the circumstances of a resident in Belgium but cannot check the circumstances of a resident in Luxembourg.

According to the Court, that is not true because the Belgian Tax Authorities have at their disposal the Mutual Assistance Directive. Well, I think that this is not the whole truth because even if Mr. Talota had his savings in a bank in Luxembourg, the Belgian Tax Administration would have not been able to get this information. Whilst, on the other hand, we can agree – at least – with the result of the judgement. Indeed, probably the Belgian Tax Administration does not need exchange of information to compare a business, a restaurant ran in Belgium with another restaurant ran in Belgium by a Belgian resident. So, I don't think in this case they really need the exchange of information to asses how much this restaurant had, how much profit has been done.

But let's go to the next one, *Elisa*. As you know, Elisa is not a French lady, it's a Luxembourg holding company and the French legislation has introduced an anti-avoidance tax. It's a tax on the immovable properties in France owned by companies. If the company is resident in France or resident in another Member State with an exchange of information Treaty or with a Double Convention – well, even if it is a third Country – then, the way to avoid the tax is to provide information on the immovable property located in France and on the shareholders of the company.

Nevertheless, that does not work if the company is resident in a Country without a Double Taxation Convention or exchange of information Convention. In this case, the holding company was resident in Luxembourg and, even if there is a Double Taxation Convention between France and Luxembourg, the Luxembourg holding companies are excluded from the tax Convention; they are excluded because the Luxembourg tax authorities can not get information about this kind of companies, this is forbidden by law. Then, as you can see, this case is similar to the former one. Elisa argued that it provided information about the immovable property in France and its shareholders. Nevertheless, of course, the French Tax Authorities were not prepared to believe this information because they couldn't double check it through the exchange of information Directive. Therefore, according to the Court, the goal is ok to combat tax fraud but the measure applied is disproportionate because it should be enough for the French Tax Authorities to get the information from the holding company even if the Tax Authorities couldn't verify the reality of such information. I think this is the main flow in this judgement. The Court has an apodictic approach: ok, we have an exchange of information Directive and even if we can't use it, the situation of residents and non-residents within the European Community are comparable.

But let's see what happened with the Third Countries. Of course, when we move to the Third Countries, only the free movement of capital is relevant because, as you know, the other fundamental freedoms do not apply to third Countries but the free movement of capital does. Well, in this case, the case *A*, we have a Swedish resident who owns shares in a Swiss company. The Swiss company distributes dividends and, according to Swiss legislation, said dividends are exempt – provided that they are paid through shares of a subsidiary. Nevertheless, this exemption only applies if the company distributing dividends is resident in the European Community, and that was not the case because the Company was resident in Switzerland.

This is a kind of anti-avoidance provision and Mr. A argued that he could have provided all the information that the tax administration needed so that they could double check everything and the dividends could be exempt. Well, but in this case we don't have the exchange of information Directive. There is really no difference with the former case *Elisa* because in the former case we had exchange of information Directive but it was not operative.

So, the Court discovers another difference: it is true that Mr. A could provide the information and the accounting of the company distributing dividends, but this is useless to the Swedish Tax Authorities because Swiss accounting is not harmonized with the European accounting. We have rules regarding harmonization of accounting within Europe, but this is not the case of Switzerland. Therefore, the information provided by the taxpayer is useless for the Tax Administration. I think we could discuss that, and perhaps so suppose that Swiss accounting rules are inspired by the International Accounting Standards. Probably that is so. They are not so far, then, from the European rules. So, this argument is not very convincing.

The last case I would like to present you is a more recent one. I would like to point out – and I thank professor Amatucci for this kind of argument – that evidence provided by the taxpayer within European Community is always useful for the tax administration because the accounting rules are harmonized.

This argument comes up again in the recent judgment, the case *Société Papillon*. Well, this last case – the test claimants in the CFC and dividend group litigation – is a complicated case but I will sum up. The idea is that dividends distributed by a portfolio investment insurance company are tax exempt in the United Kingdom but only if the company distributing the dividends is a resident in the United Kingdom or a resident in a Member State. In this case, the company has investment in companies resident in third Countries which have no exchange of information Agreements or no Double Taxation Agreements with the United Kingdom.

In this case, there is again a restriction of the free movement of capital but, according to the Court, this restriction is justified because the portfolio investments are located in companies resident in Countries without a Double Taxation Convention and, therefore, they have no obligation to provide information to the United Kingdom; so, the tax authorities of the United Kingdom cannot verify the truth of the evidence provided by the taxpayer.

Ok, I like this explanation but I don't see that this is consistent with the *Elisa* case even if the *Elisa* case regards a case within the European Community and this case, the CFC case, regards a case with third Countries. Moreover, it is also interesting to notice that in this case the argument regarding the accountancy is gone. The Court doesn't mention that. Well, also this Country has different accounting rules and, therefore, the information cannot be useful for the tax administration. Why is it gone? I don't know. Perhaps, the Court has forgotten about it. Although, in the *Société Papillon* case – which, interestingly, regards only Member States – the argument comes back.

Therefore, my conclusion is that here we have heard that tax authorities have two faces: the criminal face, or the criminal investigation face, and the pure tax face. I think the Court of Justice has also two faces: the nice face looks at the Member States. If we are taking into account the restrictions of the fundamental freedoms between Member States, then, in practice, the impossibility for the tax authorities to verify the proofs provided by the taxpayers is irrelevant. It is not irrelevant in theory but it is irrelevant in praxis and, in my view, the *Elisa* case is the best example. On the other hand – or on the other face – where the Court is looking at third Countries it is much stricter. Then, if it's impossible to verify the information, restrictions to the free movement of capitals are justified. I think the explanation is that the legal context is different; nevertheless, it is not so different in those cases within European Union where the exchange of information Directive does not work.

Therefore, I think the flow in the argumentation of the Court refers to restrictions within the European Community. I think that this restriction would be justified when the limits of the exchange of information Directive make it impossible for the interested Member State to verify the information. Of course, this is a controversial idea, but so far I think that I will stick to this idea. I apologize because I have to take a plane and I would have to leave now, but thank you very much for your attention and thank you very much for this nice conference.

Conclusion*

Prof. Roman Seer**

I am deeply impressed by the high quality of the contributions during this congress. It has been very interesting for me to learn something about the structure and organisation of the Italian fiscal administration and its different bodies, like the "Agenzia delle Entrate", "Dipartimento delle Entrate" or the "Guardia di Finanza". The contributions by the members of the fiscal administration pointed out that there is an urged need to improve the mutual assistance. These needs are not only based on the normative level but also on a practical level. It also became clear that one important question is still how to deal with the different languages. However, it makes no sense to use "multi-language-forms" with about 20 languages. This would make the whole procedure even more complicated. Also in the field of direct taxation an electronification of the mutual assistance is a favourite alternative. The model for this procedure can be the VAT where an e-government based on the specific network "CCN" already exists. Very helpful would also be to use standardised forms that are very similar and offer very little space for individual requests and marks all in every Member State. An important goal is furthermore the education and training of the tax agents on all levels not only for the steering groups. If the Member States arranged collective education and training programs this could also have a positive effect on the tax agents' attitude towards working for a foreign tax agency. The tax agents have to deal with these foreign cases and even investigate in cases that are not relevant for him or her. He/she may accept the extra work unwillingly because the European Union is not his/her employer but he/she treats with the tax case for the benefit of a foreign tax authority. Vice versa the requesting state is not in the position to suppress a delayed or deferred assistance efficiently. For this purpose it is – apart from a better technical networking – also relevant that the tax agents change their attitude from a pure domestic thinking to a community thinking based on the principle of reciprocity. In the end they should not feel as a domestic tax agent when they fulfil the need of a foreign country.

Our research project is a picture of the status quo and I hope that the other national reporters will deliver some additional ideas and remarkable results that I can include in the general report.

The lecture by *Prof. Pedro Manuel Herrera Molina* showed us that the relationship between the national tax proceeding rules and the fundamental freedoms of the EC-treaty are still unclear in the jurisdiction of the ECJ. In addition to *Prof. Herrera's* contribution I'd like to point out that there is a new development in the Court's jurisdiction in some cases. Interesting is here the pending case "Persche[80]". According to the general attorney's opinion the Council Directive provides the Member States the possibility for a request but does not oblige them to it. But the tax agencies are not allowed to ignore systematically the means the Council Directive offers either[81]. I think that the general attorney's opinion is correct since we have to balance out between the fundamental freedom of the international jurisdiction of the ECJ and the national clauses that oblige the taxpayer to comply with the shifting of the burden of proof in the following sense: The taxpayer has to provide the evidence and he/she has to bear the burden of proof for all tax-relevant facts and circumstances that will lead to his/her advantage like a tax reduction, a tax benefit and so on. Concerning the facts and circumstances that are tax-relevant and influence the taxpayer in a disadvantageous way it should be possible to shift the burden of proof and oblige him/her for the evidences if the facts and circumstances are located in his/her sphere. But in cases where

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the facts and circumstances are outside his/her sphere the tax authority has to use the means of the mutual assistance that the Council Directive and other sources provide. It is a violation of European law if a national tax authority does systematically not apply these means. A last area will be the question of the bank secrecies in countries like Luxemburg, Belgium and Switzerland. At least in the relationship to third countries like Switzerland or Liechtenstein the ECJ seems to reduce the scope of the capital freedom. It is still an open question if the ECJ accepted as a justification to shift the burden of proof in cross-border cases to the disadvantage of the taxpayer that the other Member State involved still keeps a national bank secrecy, like Austria or Belgium. In my opinion such a different treatment of a cross-border case will be justified here because of the lack of reciprocity. Sec. 160 (1) of the German General Fiscal Code states that various expenses and expenditures, like debts or income-related expenses, must not be taken into account for tax reasons if the taxable person does not provide the tax agency on its demand the creditor or the recipient. It is not acceptable that a state is limited in its national behaviour because the three Member States Austria, Belgium and Luxemburg keep the bank secrecy. Information that is "caught" by the bank secrecy is outside the sphere of the tax authority because the tax authority is unable to get the information. This is caused by pure national specifics of these three countries. Shifting the burden of proof in these cases corresponds with the *theory of spheres*.

[112] C-318/07.

[113] The ECJ decided this case one day after the conference, on the 27th of January 2009. Here the Court ruled referring to the legal case "Twoh International" that the word "may" in Art. 2 (1) of the Council Directive 77/799 indicates that, whilst the Member States' authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. Every Member State can decide depending on the single case whether to use the means the Directive offers or not if relevant information concerning transactions by taxable persons in its territory is lacking. Cp. paragraph 65.

Conclusion[*]

Prof. Giovanni Puoti[**]

I hope that this meeting has given *Prof. Seer* and the other foreign colleagues the possibility of understanding the mechanisms and the functions of the Italian structures. Even because there are here a lot of subjects working together: the Economy Ministry and the Finance Department, the Revenue Agency and the "Guardia di Finanza". All of these institutions ensure the efficiency of the fiscal activities.

I have caught a *Prof. Seer*'s observation about the training of those that develop this activity in the international field, which must be not only a technical training but also a cultural one because it is based on the idea of a united Europe. I would make sure to him that in Italy we have an adequate training activity in the field of International Tax Law, especially in Rome because, as I have already said, we have a Master course in International Tax Planning, which is organised by Sapienza University in collaboration with the "Scuola Superiore dell'Economia e delle Finanze" the cultural institute of the Economy and Finance Ministry. This course allows a collaboration between University and Public Administration with a continuous exchange of ideas, because the people who attend it are either graduated or professionals and in part functionaries of the fiscal Administration. We follow this aim not only in Rome but in other Italian Universities too. So I believe that Italy must be considered a Country that gives a strong cultural contribute to the exchange of information and to collaboration and unity at the European level.

After that I would also observe that a lot of interesting topics arose from the reports and the statements that we have been listening today.

Starting with the interesting topics that have been pointed out by *Prof. Sacchetto*'s report about the relationship between tax treaties and the Constitutional principles of the Member States. He has presented the example of the bank secrecy referring to Austria, which protects this matter in his Constitution. I think that this theme should be studied in depth and analyzed in close connection with another theme that has not been sufficiently studied by the researchers from all the Countries: the relationship among the Constitutional principles, those that are part of the same Act (the Constitution) and that could integrate or derogate to another one. This is a fundamental aspect because if the bank secrecy becomes a Constitutional principle it might rise a problem of legitimacy of a convention or of a request of information about bank matter in connection with that principle. Furthermore, some researchers have stated that it would be possible in this case to refer to the principle of the ability-to-pay principle that forces the Administration to exactly determine the taxable income. In this way, article 53 of the Italian Constitution can be seen as a "super" constitutional rule, a far stronger disposition than the others. So I think it cold be very useful to study the aspects of the interrelation among the Constitutional principles.

Last but not least, some other important issues are the ones proposed by *Prof. Amatucci* with reference to the burden of proof and the limits in the exchange of information among States and the ones of *Prof. Del Federico* about the protection of the taxpayer in the mutual assistance procedures.

What has really impressed me today is the possibility of a different treatment among taxpayers. Indeed, the one for which it is not requested the exchange of information can't intervene in the Inquiry Activity and has to wait the Final Act of the procedure to lodge an appeal whilst the one for which information are requested from a foreign Country could react immediately stopping the Administration's activity. This causes of course a problem of inequality.

In conclusion, today has been a useful day, full of achievements, and I hope that there will be in the future other chances to propose these matters again and to analyze in depth them, maybe, taking advantage of the kindness of our foreign colleagues, which I thank once again.

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