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**Protection
of Taxpayer's Rights**
European, International
and Domestic Tax Law
Perspective

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 **Oficyna**
a Wolters Kluwer business

Warszawa 2009

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National Report on Taxpayer Protection in Italy

1. Basic features of the Italian tax system

Pursuant to the Italian Constitution, the payment of tax is the fulfilment of a civic duty of solidarity consisting in contribution to public expenses according to one's ability to pay. This notion results from the combined provisions of Art. 2 (duties of economic, political and social solidarity) and Art. 53 (ability to pay). The latter provides that "everybody shall contribute to public expenditures according to his personal ability to pay" and that "the fiscal system is based on progressive criteria". The ability-to-pay principle is the fundamental guidance for the tax legislator and implies evaluating the personal and economic situation of the taxpayers.

The social and economic function of the Italian tax system as a means of economic policy and solidarity is also driven by the principle of equality (Art. 3) and the principle of legality (Art. 23). Article 3 of the Italian Constitution provides that, "all citizens have the same social dignity. They are considered equal before the law without any difference of sex, race, language, religion, political opinion, personal or social condition". The principle of equality is applied to the entire legal system, including tax law. The Constitutional Court has always considered that principle as strictly related to the ability-to-pay principle.

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The principle of legality and the reservation to statutory laws as far as tax law is concerned that is contained in Art. 23 of the Constitution mean that no taxes may be imposed through means other than statutory law. Strictly connected with the principle of legality is the right of defense (Arts. 24 and 113), which ensures legal protection of rights and legitimate interests before the courts. The principle of legality also implies that each administrative function must be based on the law. Administrative functions are also governed by the principle of legality. The legal basis for the operation of this principle with respect to administrative functions is identified in Art. 97 Italian Constitution, that provides: "The public authorities are organised by law in a way as to ensure the good operation [i.e. *buon andamento*] and impartiality of the administration". This means that the public administration may interfere in the freedom and rights of the citizens only where it has the statutory authority to do so.

Good operation of the public administration has been defined as the general duties of the public authorities to carry on their tasks with diligence, efficiency and effectiveness. Efficiency concerns the relation between the results obtained and all the instruments used. Effectiveness thus describes the ability of the public administration to reach its goals.

The constitutional principle of impartiality of the public administration implies a general obligation of taking into account the several interests involved in the administrative activities, and making a choice among them by virtue of the criteria provided by law, such as reasonableness and equal treatment. The principle of impartiality has its foundations in the principles of transparency, publicity, right of access, and participation in administrative proceedings. These foundations are considered specific aspects of the broader principle of citizens' awareness and knowledge of administrative activities. The latter principle implies the necessary visibility of the administrative activity, which means that citizens must be informed of administrative activities, and of the persons responsible for it, in a simple and complete manner.

The constitutional basis of these principles puts them on a higher level in the hierarchy of legal sources than ordinary laws or regulations.

A central role among these principles is certainly played by the principle of reasonableness. This is also the most important criterion for the control of the constitutionality of a law by the Italian Constitutional Court. It has its constitutional link to the principle of equality beside the impartiality and good operation of the administrative activities. Public

authorities cannot simply apply legal rules; these rules must be made concrete and implemented in administrative decisions through logic, necessity, proportionality and adequacy. Reasonableness is a criterion for the identification and the comparison of the interests to be considered in an administrative proceeding and operates also as a limit for the public administration. The principle of reasonableness is characterised as being generally applicable, not subject to derogation by other principles, in continuous development and easily adaptable to new legal rules and new social environment. Moreover, the principle of reasonableness is the general criterion to solve the conflicts among the other principles in the absence of a clear hierarchy among them.

In 1990, on the basis of all the constitutional principles mentioned above, the Italian legislator enacted the Law of 7 August 1990, No. 241, concerning the administrative proceedings with the purpose of giving a concrete meaning to the principles of good operation and impartiality. Several aspects of Law 241/90 are dealt with throughout this report, with particular attention to the provisions applicable to fiscal administrative proceedings.

1.1. The Taxpayer's Bill of Rights

Ten years after Law 241/90, with the aim of introducing general principles for the Italian tax system, and the main rights and duties of the tax administration and taxpayers, the Taxpayer's Bill of Rights was approved by parliament on 12 July 2000.²

Art. 1 of the Taxpayer's Bill of Rights contains general principles for the tax system that may not be derogated from or modified by special laws, and encompasses the main rights of taxpayers in relation to the tax authorities. Arts. 2, 3 and 4 include the general principles that should guide the development of tax laws. These provisions appear to be addressed to

² The Taxpayer's Bill of Rights was enacted by Law of 27 July 2000, No. 241, published in Official Gazette No. 177 of 31 July 2000. A first bill drafted by the government was already presented to the Senate in September 1996. For the operation of the Taxpayer's Bill of Rights, the following instruments were enacted: legislative Decree 32 of 26 January 2001 containing several amendments to tax law provisions to make them compatible with the Taxpayer's Bill of Rights, and Ministerial Decree 209 of 26 April 2001, published in the Official Gazette No. 128 of 5 June 2001, for the implementation of the new open rulings procedure.

the legislator himself. In particular, Art. 2, under the heading "clarity and transparency of tax provisions", provides that:

- provisions that contain tax regulations must explicitly state this in their headings;
- non-tax laws may not include tax provisions, unless those rules are strictly linked to the subject matter of the law;
- any tax provision that refers to another provision must contain a summary of the latter; and
- any law that modifies a tax law must explicitly indicate the text of the amended provisions.

In addition, Art. 3 provides that tax provisions may not have retrospective effect or contain tax obligations taking effect more than 60 days after the date on which the provision enters into force. Moreover, it provides that the statute of limitations for tax assessments may not be extended. Art. 4 provides that tax laws may not be enacted by law decree, i.e. by laws with immediate effect that are adopted by the government and which must be submitted to parliament for definitive approval.

The Taxpayer's Bill of Rights contains, *inter alia*, several provisions addressed to the tax authorities, such as the duty to inform taxpayers (Art. 5), the duty to make known its actions to the taxpayer (Art. 6), and the duty to justify its actions, which should be clear and motivated (Art. 7). Moreover, it provides for the rights of, and guarantees for, taxpayers in respect of tax proceedings (Art. 12) under which, for example, taxpayers have the right not to be required to provide additional copies of tax documentation already supplied to, or at the disposal of, the tax authorities.

Further considerations on these and other provisions of the Taxpayer's Bill of Rights are to be found throughout this report.

1.2. Method of assessment and collection of taxes

In principle, the self-assessment method is used. Withholding taxes are applied in various circumstances and are normally creditable against the recipient's income tax liability (e.g. employment income, professional fees, interest on loans). In some cases, final withholding taxes or substitute taxes are provided for (such as for interest on certain current accounts or bonds, on State bonds or generally for payments to non-resident persons). If the tax authorities find that a tax return or a withholding tax return has

not been filed or was filed incorrectly, they issue a notice of assessment to the taxpayer.

2. Tax proceedings, administrative and judicial review

2.1. Tax proceedings

The most significant steps towards an active participation of taxpayers in tax proceedings were identified only in the mid-1950s³. It could be argued that, up to that time, the taxpayer's position was the weak situation of a person obliged to cooperate with the tax administration through the supply of data, documents and information, and thus just the "passive object" of the tax authorities' decision-making process.

The keystone of the tax system enacted in the 1950s (*Riforma Vanoni* of 1951) was already represented by an efficient dialogue between tax authorities and taxpayers. This dialogue was expressed, on the one hand, through the powers attributed to the tax administration as, for example, the possibility to ask taxpayers for clarifications, a meeting, new documents, data, information, and so on,⁴ and, on the other hand, through the possibility of concluding a fiscal compromise in order to avoid tax litigation⁵. After that, in the 1970s (*Riforma Preti* of 1971–73) the dialogue between tax administration and taxpayers was drastically reduced; the strongest input towards an efficient relationship came in the 1990s, and continues to date. In this period, indeed, new legal instruments aimed at improving the dialogue with the taxpayers and at avoiding tax litigation were enacted, such as the taxpayer's active repenting (*ravvedimento*

³ See further L. Salvini, *La "Nuova" Partecipazione del Contribuente*, [in:] *L'Evoluzione dell'Ordinamento Tributario Italiano*, CEDAM, Milan, 2000, pp. 577-603. The author mentions as an example Art. 2 of Law No. 17 of 1985, which introduced the possibility of the tax administration asking for clarifications from taxpayers. For the participation of the taxpayer in audit procedures, see A. Di Pietro, *Il Contribuente nell'Accertamento delle Imposte sui Redditi: dalla Collaborazione al Contraddittorio*, [in:] *L'Evoluzione dell'Ordinamento Tributario Italiano* op. cit., pp. 531-539; L.F. Natoli, *La Rilevanza del Principio del Contraddittorio nel Procedimento di Accertamento Tributario*, [in:] *L'Evoluzione dell'Ordinamento Tributario Italiano*, op. cit., pp. 541-552.

⁴ Art. 39 of the Consolidated Text (*Testo Unico*) No. 645 of 1958.

⁵ Art. 34 of the Consolidated Text (*Testo Unico*) No. 645 of 1958 also provided for a fiscal compromise when a tax litigation procedure was already started (contrary to the fiscal compromise provided for today).

operoso)⁶, the assessment with consent (*accertamento con adesione*; also called *concordato tributario*, i.e. fiscal compromise)⁷, and the self-correction procedure (*autotutela*)⁸.

It is also due to the development of the legal instruments improving the participation of citizens in Italian administrative law that the matter became of significance in tax law. Since the enactment of Law 241/90, the relationships between public administration and citizens have been redrafted in line with the general principles of good administration such as transparency, economic efficiency, certainty and equal treatment. With respect to the limited application of this law to tax law, it is sufficient to stress now that, although Art. 13 of Law 241/90 excludes the application of the provisions on the participation of the citizens in administrative proceedings (in Title III, Arts. 7–13) to tax law, the evolution of the Italian tax system has strictly followed the same principles of administrative law, even before the Taxpayer's Bill of Rights⁹.

It could be said that, up to the 1990s, the necessity of a dialogue between tax administration and taxpayer (*rectius: principio del contraddittorio*)¹⁰ was felt only with respect to the assessment and audit procedures. Examples may be found in Art. 32 of Presidential decree No. 600/73, whereby tax offices may invite taxpayers to be heard, to supply data and information which are relevant for the assessment, or in Art. 12 of Law decree No. 69/1989, which introduced, with respect to an assessment procedure based

⁶ Art. 14 of Law No. 408 of 29 December 1990. See Ferlazzo Natoli-Serranò, *Considerazioni sul c.d. "ravvedimento operoso" ex art. 14 legge n. 408/1990*, [in:] *Bollettino Tributario* No. 22/1995.

⁷ Art. 2-bis of Law No. 564 of 1994. Then, regulated by the Legislative decree No. 218/97 and Circular No. 237/97. For a recent comprehensive study of the fiscal compromise, see E. Marellò, *L'accertamento con adesione*, Giappichelli Turin, 2000.

⁸ Art. 68 of Presidential decree No. 287 of 1992, and Art. 2-quarter of Law No. 564 of 1994. See also Ministerial Decree No. 37 of 11 February 1997. For a study on the self-correction, see V. Ficari, *Autotutela e riesame nell'accertamento tributario*, Milan, 1999.

⁹ Ministerial decree No. 678 of 19 October 1994 regulated, based on the above-mentioned Law, the competence of various public bodies of the tax authorities, including tax police (*Guardia di Finanza*) and Autonomous Administration of Monopolies (*Amministrazione Autonoma dei Monopoli di Stato*).

¹⁰ This principle is also provided by Art. 24(2) of the Italian constitution with respect to all judicial procedures. Italian scholars have also argued for the operation of this principle as far as the pre-assessment procedures are concerned. L.F. Natoli, *La Rilevanza del Principio del Contraddittorio nel Procedimento di Accertamento Tributario*, op. cit., [in:] *L'Evoluzione dell'Ordinamento Tributario Italiano*, op. cit., p. 552. This principle constitutes an inherent principle to the advance ruling procedure according to P. Adonnino, *Parere del Ministero delle finanze e del Comitato Consultivo per l'applicazione delle norme antielusive e rilevanza penale dell'elusione*, [in:] *Rivista di Diritto Tributario*, Vol. XI, February 2001, p. 245.

on presumptive coefficients, the obligation for the tax authorities to ask for clarifications from the taxpayer¹¹.

As mentioned in paragraph 1.1. above, substantive rights and procedural guarantees for taxpayers in tax proceedings are now provided for by the Taxpayers' Bill of Rights.

2.1.1. Burden of proof

In the case of assessment, the burden of proof normally relies on the tax authorities. This has been clearly held by the Italian Supreme Court in several cases dealing with anti-avoidance rules (No. 4317/2003) and transfer pricing (No. 11226/2007). However, on the basis of some Supreme Court jurisprudence it has been argued that if the tax authorities assess a higher income, the burden of proof is on the tax authorities, whereas in the case of the denial of deducibility of costs the burden of proof lies on the taxpayer (see for all No. 10257/2008).

However, it should be considered that the burden of proof rules should not be misused by tax administrations or taxpayers as a justification for making groundless or unverifiable assertions. The burden of proof rules should be always interpreted in light of the principle of good faith and of cooperation between the tax authorities and taxpayers (as also provided for by Art. 10 of the Taxpayer's Bill of Rights). It is important to note that the principle of good faith, originating in civil law, also operated in tax law even before its explicit implementation in the Taxpayer's Bill of Rights in 2000 since it was considered an application of the constitutional principle of impartiality¹².

¹¹ See also Art. 52(6) of Presidential decree No. 633 of 26 October 1972. Furthermore, in the more recent sectoral studies (*studi di settore*) introduced by Law No. 146 of 8 May 1998 providing for a presumptive assessment procedure, the taxpayer has the possibility of explaining his position upon invitation of the tax authorities. L.F. Natoli, *La Rilevanza del Principio del Contraddittorio nel Procedimento di Accertamento Tributario*, *op. cit.*, [in:] *L'Evoluzione dell'Ordinamento Tributario Italiano*, *op. cit.*, pp. 544-551.

¹² See E. De Mita, *La buona fede nel diritto tributario*, [in:] *Interesse fiscale e tutela del contribuente*, Milan, 1991, p. 171. For a discussion on the operation of this principle in administrative law, see E. Della Valle, *Revirement ministeriale e buona fede nell'esercizio della funzione impositiva*, pp. 600-612. The author rejects the contrasts in the traditional literature on the operation of this principle in administrative and tax law that were based either on the absence of a civil law contractual relationship, or on incompatibility with the public interest pursued by the public administration. The author refers in particular to Allegretti, *L'imparzialità amministrativa*, Padua, 1965, and Merusi,

2.1.2. Right to be heard and actively participate in proceedings

In Italy, since the enactment of Law 241/90 there has been a general right of a citizen to participate in administrative proceedings¹³. This primarily implies an obligation to inform the citizen (as an interested party) about the start of an administrative proceeding, the right for the interested party to take part in the proceedings, to look over the acts of the proceedings, to present records and documents. However, with respect to tax proceedings, these provisions are not applicable. Tax proceedings are special administrative proceedings regulated by specific provisions, supported by an *ad hoc* judicial system, and based on self-assessment, where the taxable income and the tax due are determined by the taxpayers¹⁴.

As from the enactment of the Taxpayer's Bill of Rights, various statutory provisions contained therein (e.g. Art. 12 on the rights and guarantees of the taxpayer subject to tax audits) are aimed at ensuring the taxpayer's right to be heard and to actively participate in tax proceedings.

2.2. Administrative and judicial review

If a taxpayer believes that a notice of assessment is unjustified or incorrect, he may file:

- an application for the self-correction procedure (*autotutela*), which consists in a review of the notice of assessment¹⁵;
- an application for the assessment-with-consent procedure (*accertamento con adesione*; also called *concordato tributario*), which, very briefly, may result in a fiscal compromise on the taxable base and a reduction of the tax penalties contained in the deed of assessment¹⁶;

L'affidamento del cittadino, Milan, 1970. See also the Decision of the Supreme Court of 29 May 1993, No. 1758.

¹³ Arts. 7-13 (Title III) of Law 241/90. Before this law, there were only some specific provisions concerning the right to participate to an administrative proceeding.

¹⁴ Art. 13 (2) of Law 241/90.

¹⁵ Art. 68 of Presidential decree No. 287 of 1992, and Art. 2-quarter of Law No. 564 of 1994. See also Ministerial decree No. 37 of 11 February 1997. For a study on the self-correction, see V. Ficari, *Autotutela e riesame nell'accertamento tributario*, *op. cit.*

¹⁶ Art. 2-bis Law No. 564 of 1994. Then, regulated by Legislative decree No. 218/97 and Circular No. 237/97. For a recent comprehensive study of the fiscal compromise, see E. Marellò, *L'accertamento con adesione*, *op. cit.*

- an appeal within 60 days before the Provincial Tax Court. This is the court of first instance of the place where the office that issued the notice of assessment is situated. An appeal from the decision of the court of first instance may be lodged before the Regional Tax Court, whose judgments may be contested (though only on legal questions and not on the merits) before the Supreme Court (i.e. *Corte di Cassazione*).

In addition to existing judiciary or internal objections procedures, Italy has established an independent body in order to give taxpayers an opportunity to place complaints about the practices of the tax administration. On the basis of Art. 13 of the Taxpayer's Bill of Rights, a kind of Ombudsman (i.e. *Garante del contribuente*) has been established in the various regions of Italy. Broadly, the Ombudsman's task is to verify situations of unfair administration indicated by taxpayers.

2.2.1. Costs

The self-correction, the assessment with consent and the Ombudsman procedures are free of charge. Some minor costs (mainly paid through stamp duties) must be borne if an appeal is filed before the tax courts. A special contribution based on the value of the tax litigation must be paid for the proceedings before the Supreme Court.

2.2.2. Suspension of enforcement upon filing a petition for review

Normally, the filing of a petition for review or of an appeal before a tax court does not suspend the collection of tax. However, a specific request for suspension may be addressed to the tax court of first instance. In this case, the requesting taxpayer should give evidence of the soundness of his appeal (i.e. *fumus boni iuris*) and of the grave and irreparable damage entailed by the enforcement of the notice of assessment.

Special rules are provided for the fractional payment of taxes after the decisions of the Provincial and Regional Tax Courts (Art. 68 of Legislative Decree No. 546/1992).

2.3. Extraordinary measures against a final tax decision

The judgments rendered by Italian tax courts become final after 60 days from their notification or, if not notified to the other party, after one year and 45 days from the date on which the decision is published (i.e. deposited). The one-year term is extended by 45 days to take into account the period of inactivity of the courts due to summer holidays (legally provided for from 1 August through 15 September).

The legal instrument provided for under Italian tax law to appeal from final tax judgments is the revocation procedure (i.e. *revocazione*) governed by Arts. 64 et seq. of Legislative Decree No. 546/1992 and by the civil procedure code. The losing party in tax litigation is entitled to initiate this procedure by applying to the same court that rendered the judgment to be overturned. This procedure may be initiated in exceptional circumstances, such as for example fraud of one party against the other, fraud of the judge, discovery of new decisive documents after the judgment, etc.

3. Tax refund

The taxpayer may claim a refund if a mistake was made when calculating the tax amount due or when filling out the payment form, and if payment was made twice or made for a partially or totally undue tax.

The tax refund claim must be submitted to the local office of the tax authority having jurisdiction under the fiscal domicile of the taxpayer at the time of the claim and must include the grounds on which the claimant bases his right to the refund. A copy of the receipts of the payments made and certifications of the passive withholding taxes must be enclosed in the claim.

If the tax authority rejects the claim, the taxpayer may appeal against the rejection to the Tax Court of first instance within 60 days from the notice of the rejection. If the tax authority does not give an answer to the claim, the taxpayer may appeal to the tax court after 90 days from the date of the deduction. If the refund claim is for direct deductions (Art. 37 of DPR N. 602/73), the application is to be submitted within 48 months from the date of the deduction. If the refund claim is for direct payment (Art. 38 of DPR N. 602/73), the application is to be submitted within 48 months from the date of payment. For payments of indirect taxation, the term for claiming a refund is 36 months from the date of payment. In the case of deductions,

refund applications may be submitted either by the payer or by the payee of the sums subject to the deduction in question.

A VAT refund may be claimed for a credit resulting from the annual VAT return or from the quarter's deductible surplus. In many instances, a suitable guarantee or a fiduciary contract is necessary in order to receive a VAT refund, signed by the legal representative or owner of the company and released by a banking establishment, financial intermediary or an insurance company.

In the case of delayed tax refunds, the taxpayer is also entitled to receive interest for late payments.

4. Statute of limitations

With respect to the statute of limitations, the deeds of assessment for income tax purposes must be notified by 31 December of the fourth year following that of the filing of the tax return. In the case of failure to file the tax return, the final term is 31 December of the fifth year following that in which the tax return was due to be filed. However, these terms are doubled in the case of criminal prosecution.

5. Individual tax law interpretations

There are several instruments through which taxpayers in Italy are made aware of the position of the tax authorities on controversial tax issues. Even before a private tax rulings system was introduced, taxpayers could already refer to ministerial circulars (*circolari ministeriali*), ministerial resolutions (*risoluzioni ministeriali*) and interpretive notes (*note interpretative*)¹⁷. Through these administrative instruments, taxpayers are informed of the manner in which the tax authorities interpret and apply specific tax provisions. All these administrative instruments are sometimes collectively referred to as circulars (*circolari*)¹⁸.

¹⁷ The official position of the government or ministers on the interpretation and application of tax law provisions may be also contained in Governmental and Ministerial Regulations (*Regolamenti governativi e ministeriali*).

¹⁸ The Italian tax literature distinguishes between various types of circulars: organisational circulars (*circolari di organizzazione*), which deal with the internal organisation of tax offices;

Law No. 413 of 30 December 1991 introduced for the first time in the Italian legal system the advance ruling system (*diritto di interpello*)¹⁹. Before the enactment of Law 413/91, taxpayers could already request the opinion of the tax authorities, addressing the request to the competent office, mainly the Regional Directorate of Revenue (*Direzione Regionale delle Entrate*), on specific cases, but the limitations, conditions and procedures were not formalised. In this case, the taxpayer did not have certainty if, or when, an answer would be given. There were, moreover, no legal consequences either for the taxpayer or for the tax administration if an answer was, or was not, given.

The main reasons for introducing a formal rulings system in Italy appear to be to foster the transparency of the relation between taxpayers and tax administration, to discourage tax litigation and to reduce the number of conflicting interpretations and applications of law by the tax administration, taxpayers, scholars and tax courts²⁰. Thus, such a legal instrument is also aimed at bring uniformity in the interpretation of tax provisions. The implementation of a tax rulings system in Italy derives from a process that has taken place over a number of years. Different rules have been introduced at different stages and each rule applies to different cases. At present, advance rulings may be requested on the basis of the different rules, depending on the applicable legislation and the tax issue to which they apply.

In 1991 Art. 21 of Law 413/91 established for the first time a legal procedure for obtaining the position of the tax administration on the tax treatment of a set of facts, either before or after certain transactions took place. According to this anti-avoidance rulings procedure, a ruling may be issued only with regard to a specific set of topics related to anti-avoidance provisions in the field of income taxes.

interpretative circulars (*circolari interpretative*), which interpret legal rules; and supplementary circulars (*circolari attuative*), which provide further details on legal provisions.

¹⁹ This law contains provisions to widen the tax base, rationalise, simplify and strengthen the assessment procedure and provisions to reform tax litigation and facilitate the settlement of outstanding issues between taxpayers and the tax administration.

²⁰ This is evident from the general purpose of Law 413/91 (see previous footnote), and from the specific wording of Title III of Law 413/91, where the provisions on advance tax rulings are to be found, which refers explicitly to "Provisions for the transparency of the relations between tax administration and taxpayers". Italian scholars agree on the reasons for the introduction of this advance tax rulings procedure. For all, see P. Adonnino, *Parere del Ministero delle finanze e del Comitato Consultivo per l'applicazione delle norme antielusive e rilevanza penale dell'elusione*, [in:] *Rivista di Diritto Tributario*, Vol. XI, February 2001, pp. 239-259; P. Russo, *Manuale di Diritto Tributario*, Milano, 1999, p. 351.

In 1997 a special rulings procedure was introduced for the non-application of specific anti-avoidance rules that limit tax deductions and tax credits or other rights of taxpayers. According to this special rulings procedure, a taxpayer may seek an *ad hoc* ruling stating that a specific anti-avoidance rule does not apply in a specified case if the application of these rules would result in an unfair disadvantage for the taxpayer and the taxpayer can demonstrate that his behaviour did not have a tax avoidance purpose.

The transformation of the Italian rulings system in an open rulings procedure under which taxpayers may ask the opinion of the tax authorities on all kinds of issues related to tax provisions occurred in 2000 with the enactment of the Taxpayer's Bill of Rights (*Statuto del Contribuente*). Throughout this section, reference will be made to this open ruling procedure unless otherwise specified.

Art. 11 of the Taxpayer's Bill of Rights (*Statuto del Contribuente*) provides that: "each taxpayer may submit in writing to the tax administration... requests for a statement of opinion [*istanze di interpello*] on the application of tax provisions to actual and personal cases if there are objective conditions of uncertainty regarding the correct interpretation of tax provisions".

Under the Taxpayer's Bill of Rights, the only requirement to be met in order for a taxpayer to be entitled to request a ruling is the presence of objective conditions of uncertainty regarding the interpretation of tax provisions. A request for a ruling may concern the application and the interpretation of every tax provision and all taxes. Upon the receipt of the request, the tax authorities must produce a written and reasoned reply within 120 days. A reply is only binding on the tax authorities for the case presented and in respect of the requesting taxpayer. If no reply is given within 120 days, it can be assumed that the tax authorities agree with the interpretation of, or the tax treatment proposed by, the requesting taxpayer and that no penalties may be applied. All actions conflicting with an explicit or a *de facto* reply given by the tax authorities are null and void.

The tax authorities are also able to provide a general interpretation through a circular or a resolution, published under Art. 5(2) of the Taxpayer Bill of Rights, as long as a large enough number of taxpayers requests a private ruling on the same or a similar subject (Art. 11(4) Taxpayer's Bill of Rights).

5.1. The legal nature of advance tax rulings

With respect to their legal nature, advance tax rulings might in theory be considered private law agreements (or contracts), public law agreements, or unilateral acts of the public administration.

The characterisation of advance tax rulings as private law agreements cannot be accepted. This does not depend on the public nature of the person who issues tax rulings (i.e. the tax administration). In most (if not all) jurisdictions, indeed, the public administration may also act as a private person by using private law instruments (i.e. *iure privatorum*). The choice between the adoption of a private rather than a public law instrument depends on the purposes that the public administration would like to pursue²¹. The distinction between private and public law instruments is very important, since the principle of legality and the reservation to statutes rule only exists with respect to public powers. These principles are, indeed, limitations of public power and guarantees for citizens that would have no significance if the public administration were to act as a private person on equal footing with other private persons.

The reason why advance tax rulings may not be characterised as private law agreements is that in tax law fundamental public interests are at stake, and it is normally a field that is reserved to statutory law (i.e. passed by parliaments). Thus, only the use of public law instruments is justified. By situating the public administration on equal footing with taxpayers, such as would be the case for private law where the interests of the parties are at the same level, the basic relationship in a modern democratic state between public administration and citizens would be altered. As a matter of principle, the public administration may make use of all private law instruments, taking into account the limitations derived from the legal order. However, certain areas should not be regulated by private law since the public interests involved are central to the life of a state. This is the typical situation of tax law through which the state collects the revenue needed to reach its goals. This fundamental function of tax law leads to the non-negotiable character of the tax obligation.

²¹ One of the major scholars of Italian administrative law has pointed out that it is the need for efficiency of the public administration that imposes this choice. The use of one legal instrument over another must be justified on the basis of the purposes and objectives that the public administration needs to pursue. M.S. Giannini, *Attività amministrativa*, [in:] *Enciclopedia del Diritto*, III, Milan, 1958, pp. 95 et seq.

Tax law protects the basic interest of states in the collection of revenue. Such an interest is a collective interest of every citizen, and should not be regarded as disposable by the tax administrations. This public interest could, in principle, be pursued through either administrative law or private law instruments. However, it is commonly held that the use of private law instruments should not be an escape in order to avoid the controls and the guarantees (often stemming from the different national constitutions) that characterise administrative activity. In many instances, such as for the functions performed by the tax administration in tax law, the tax administration stands in a position of supremacy in its relationship with taxpayers and is acting in order to realise the collective interest of all citizens. Thus, the basic guarantees for citizens under procedural administrative law, such as those derived from the legality, impartiality and transparency of the administrative activities, should be applied, rather than the weak guarantees provided for under civil law²². As an example of the different system of controls and guarantees, it could be mentioned that an administrative act is generally invalid if enacted for purposes other than those contemplated by the empowering provision, whereas a private law contract is valid regardless of its capability to pursue public goals. However, there must also be a recognition of the greater flexibility of private law instruments as compared with administrative law instruments that could lead to the optimization of the efficiency of the public (and tax administration's) activities.

The characterisation of advance tax rulings as public law agreements should also be rejected²³. A public law agreement includes private and public law elements. Thus, the actual aim to be pursued, the type of contract and its basic elements are normally provided for by

²² This idea seems to have been developed in the German literature in particular, where the necessity is pointed out to ensure the operation of the entire system of guarantees provided by administrative law (*rectius: Hoheitsverwaltung*) for the public administration's activities, and to limit the use of private law instruments (*Flucht ins Privatrecht*). See Fleiner, *Institutionen des Deutschen Verwaltungsrecht*, Tübingen, 1928, pp. 326 et seq.; Ipsen, *Öffentliche Subventionierung Privater*, Berlin-Cologne, 1956, pp. 12 et seq., both quoted by L. Mazzaroli, G. Pericu, A. Romano, F.A. Roversi Monaco, F.G. Scoca, *Diritto Amministrativo*, Monduzzi 1998, p. 1566, footnote 16.

²³ The public law agreement originated in Germany (*Öffentlicher Vertrag*, under Secs. 54 et seq. of the Federal Law of 25 May 1976 on the Administrative Proceeding), and also used in Italy (*contratto di diritto pubblico*), France, Belgium (*contrat administratif*) and the Netherlands, is characterised by its public object (non-negotiable between private parties). The development of the public law agreement reflects the trend mentioned in section 1 towards the democratisation of the public administration.

administrative law, whereas the agreement as such is regulated by private law. However, the consent of the taxpayer within an advance rulings procedure, which is one of the basic aspects of a private law contract, is missing. An issued tax ruling has effects regardless of the will of the taxpayer. The participation of the taxpayer in a rulings procedure is generally limited to the presentation of the request for a ruling, which is certainly a necessary condition for regarding the administrative act containing the interpretation of the tax administration as an advance tax ruling. This participation in the issue of the ruling is limited to the initial stage of the rulings process. The interest of the private person (taxpayer) and that of the tax administration are not unified in a common interest resulting from a contract, but remain legally independent. Taxpayers should remain free to take a position that deviates from the ruling obtained and to file their tax return accordingly.

It might be argued that, in some jurisdictions where rulings are to a certain extent also binding on the taxpayers, advance tax rulings should be regarded as unilateral administrative acts with bilateral effects. However, it could be said that the prevalent opinion is to consider tax rulings as unilateral acts of the public administration (i.e. an administrative act, *atto amministrativo* in Italy, *Verwaltungsakt* in Germany)²⁴. By issuing a ruling, the tax administration is normally not considered to be entering into a contractual relationship with a taxpayer. As said above, an advance tax ruling is valid even without the consent of the requesting taxpayer. The binding effects of rulings result either directly from a specific legal provision or, in the absence of such a legal provision, from unwritten general principles of proper administration.

²⁴ In Germany, many scholars and lower tax courts consider tax rulings to be administrative acts under Sec. 118 AO as a measure of a public authority in the public law area destined to produce effects outside the body public. Tipke-Kruse, *Abgabenordnung, Finanzgerichtsordnung*, Commentary, loose-leaf, Cologne, 2000. Tax Court of Cologne of 31 January 1984, *Entscheidungen der Finanzgerichte* 1984, p. 426; Tax Court of Brandenburg of 2 February 1996, EFG 1996, p. = 403. For other scholars' opinions and courts decisions, see S. Eilers-M. Schiessl, Germany, in *The International Guide to Advance Rulings*, 2001, p. 15. The authors pointed out that the Federal Tax Court does not agree with this and that it considers such rulings to be mere statements of knowledge (*Wissenserklärung*) binding on equity considerations (*Treu und Glauben*).

5.2. Subjective scope: applicants entitled to obtain a ruling

A fundamental aspect of the advance tax rulings procedure is the initiation of, and participation in, the procedure by the taxpayer. It is normally up to the taxpayer to decide whether to ask for a ruling, except in the few rulings systems where the tax administration is also entitled to request a ruling. Thus, normally an action by the taxpayer is necessary in each rulings procedure, at least with respect to the initiation of the procedure²⁵.

In Italy the taxpayer concerned and his legal representative are the only persons entitled to apply (in writing) for a ruling. This is legally justified in the light of the administrative law doctrines under which only citizens who have an interest, directly or indirectly protected by the law, are entitled to request the issue of an administrative act or the exercise of an administrative activity. Although this is a limitation of the rulings process, it should be considered a necessary limitation that may prevent superfluous applications by citizens not directly interested in the ruling requested.

However, in a number of circumstances corrections to such a general rule are provided. In the case of a tax agent, such as for example a withholding tax agent, taking part in the tax collection procedure and collecting the tax on behalf of the taxpayer, the tax agent is entitled to apply for a ruling. This solution has been adopted in the Italian open rulings system, under which the request for a ruling may be submitted by all persons other than the taxpayer who are legally obliged to act (e.g. by computing and collecting the taxes due) on behalf of a taxpayer²⁶.

²⁵ In practice, most rulings applications are made by a representative of the taxpayer, usually an accounting or law firm. If the rulings request is made by the taxpayer's representative, it is normally necessary that the taxpayer furnish written authorisation.

²⁶ Art. 3 (3) of Regulation No. 209/2001. Circular No. 50/2001 clarifies that withholding tax agents, notaries obliged to pay taxes on behalf of their clients, general or special representatives (i.e. *procuratori generali e speciali*) of the taxpayer, or co-debtors for tax obligations are entitled to ask for a ruling. It must be pointed out that a ruling may be requested by the person in charge of a bankruptcy procedure on behalf of the person subject to such a procedure, by heirs of the taxpayer, or by the surviving entity in the case of a merger or split-off with dissolution of an entity on behalf of the latter. G. Pasquale, *Interpello previsto dallo statuto del contribuente: il procedimento*, [in:] *Il diritto di interpello*, Rome 2001, pp. 146-147. However, the rulings request under this open rulings procedure must refer to the taxpayer's personal case. This requirement excludes the possibility of a third party, such as the tax advisor, asking for a ruling on behalf of his client without the latter's approval. For the same reason, labour unions, professional associations, and other private or public entities protecting the collective interest, may ask for a ruling as taxpayers, but not in the name of

5.3. The objective scope: issues for which a ruling may be requested

In Italy a request for a ruling may concern the application and the interpretation of every tax provision and all taxes. However, in order to avoid the inherent inefficiencies of a purely open rulings system without any limitation of the subjects on which a ruling may be sought, a ruling may be requested whenever objective conditions of uncertainty in the interpretation and application of tax provisions exist. The notion of objective conditions of uncertainty, however, appears to be very difficult to define²⁷. The Italian Ministry of Finance has clarified that the objective conditions of uncertainty are not deemed to exist when the tax authorities have already provided, based on the set of facts presented by the taxpayer, extensive explanations and interpretative documents by means of official instructions (i.e. circulars, resolutions, instructions and notes). These documents must have been brought to the attention of the taxpayers through the publication on the Ministry's website (www.finanze.it) and must still be available there for consultation, or otherwise be accessible at the tax administration offices (i.e. *Direzione Regionale dell'Agenzia delle*

their associates. See Circular of the Revenue Agency No. 50/E of 31 May 2001 and Circular of the Territory Agency No. 7 of 7 August 2001.

²⁷ The concept of objective conditions of uncertainty is not new in the Italian legal system, and is used in administrative and criminal law. In the tax field, the same concept was used for indirect taxes in Art. 2 of Royal Decree No. 360 of 28 January 1929 to exclude the application of monetary sanctions, and in Art. 248 of DPR No. 645 of 29 January 1958 with respect to the income tax return. Then, the rule of non-applicability of administrative penalties in cases of objective conditions of uncertainty was introduced for direct taxes by Art. 55 of DPR No. 600 of 29 September 1973, for VAT by Art. 48 of DPR No. 633 of 26 October 1972, and in the tax litigation procedure by Art. 39-bis of DPR No. 636 of 26 October 1972, as reproduced by Art. 8 of Legislative Decree No. 546 of 31 December 1992. See C. Glendi, *L'errore sulla norma tributaria*, [in:] *Corriere Tributario* No. 22/1997, p. 1612; M. Carbone, *Le cause di non punibilità nel nuovo sistema sanzionatorio non penale*, [in:] *Il fisco*, 1998, No. 23, pp. 7609 et seq.; Logozzo, *L'obiettivo-incertezza della legge nella violazione degli obblighi tributari*, [in:] *Rassegna Tributaria* No. 4/1998, p. 975. Furthermore, the concept of objective conditions of uncertainty is still used for the non-applicability of administrative penalties in case of mistaken interpretation of the law under Art. 6 (2) of Legislative Decree No. 472/1997. A clarification of this latter provision is contained in the Ministerial Circular No. 180/E of 10 July 1998. See P. Anello, *La rilevanza del concetto di obiettive condizioni di incertezza dell'interpello*, [in:] *Corriere Tributario* 29/2001, pp. 2169-2175, where this author argues that the concept of objective conditions of uncertainty may differ: while for the entitlement to the open rulings procedure it is sufficient in cases of ambiguous interpretation of tax law provisions that no official position of the tax administration exists, for the non-applicability of administrative penalties. Although an official interpretation was suggested by the tax administration, administrative penalties will not be applicable if there is a conflicting interpretation between ministerial scholarly and judicial positions.

Entrate and Direzioni Compartimentali)²⁸. The tax authority has also stated that, in the absence of an official interpretation by the tax administration, objective conditions of uncertainty occur in the case of ambiguous tax provisions, which may imply several different interpretations and do not allow a specific meaning to be given to the provision. As an example, this situation may occur for statutory provisions regarding which no official interpretation has been suggested, or when contradictory interpretations exist²⁹.

Italian jurisprudence has also clarified that, in order to exclude objective conditions of uncertainty, the wording of the legal provisions must be unmistakably clear³⁰. Obviously, the objective conditions of uncertainty may more easily occur in cases of newly enacted rules on which no official positions or case law exist³¹, or in cases of conflicting judicial decisions³² or administrative practices³³.

Italian scholars have followed three different lines of reasoning on the concept of conditions of uncertainty (which, inter alia, may justify the non-applicability of administrative penalties). According to some scholars³⁴, these conditions must necessarily be objective. This means that they depend on a confusing wording of the law which could lead to several possible interpretations. For other scholars³⁵, the conditions of

²⁸ Art. 3 (5) of Ministerial Decree No. 209/2001 and Circular of the Revenue Agency No. 50 of 31 May 2001. In the latter, the Ministry of Finance has clarified that the competent authority should in any case answer a rulings request even in the absence of objective conditions of uncertainty, or even though the request is not admissible.

²⁹ The ambiguity of tax provisions may also derive from conflicting tax administration positions. See Circular of the Revenue Agency No. 50 of 31 May 2001.

³⁰ See decisions of the Supreme Court (i.e. *Corte di Cassazione*) No. 3713 of 9 April 1991, No. 5642 of 9 June 1990, and the decisions of the Central Tax Commission (i.e. *Commissione Tributaria Centrale*) No. 7520 of 20 November 1990, No. 4006 of 12 May 1988, and No. 1512 of 3 April 1993; No. 9240 of 7 September 1990. In another decision (No. 9240/1990), the Supreme Court also recognised the presence of objective conditions of uncertainty when there is authoritative scholarly opinion pointing out the objective difficulties in the interpretation of tax law provisions.

³¹ See the decisions of the Central Tax Commission (i.e. *Commissione Tributaria Centrale*) No. 1512 of 3 April 1993, No. 3148 of 8 February 1994, No. 7117 of 31 October 1990, No. 3229 of 5 April 1985.

³² Decision of the Supreme Court No. 2301 of 30 March 1983, and of the Central Tax Commission of 21 May 1986.

³³ See the decisions of the Central Tax Commission of 12 May 1988, and of 21 May 1986.

³⁴ F. Tesaro, *Istituzioni di diritto tributario*, Vol. I, Parte Generale, Utet, Turin, 1999, p. 281; R. Lupi, *Diritto Tributario*, Parte Generale, Giuffrè, Milan, 2000, p. 334; M. Carbone-S. Screpanti, *Statuto dei diritti del contribuente, Il fisco*, Rome-Milan, 2000, p. 141.

³⁵ P. Russo, *Manuale di diritto tributario*, Giuffrè, Milan, 1999, p. 412; G. Mandò, Iva. *Note minime sull' u.c. dell' art. 48 del D.P.R. 26 ottobre 1972, n. 633 sost. Dal D.P.R. 29 gennaio 1979 n. 94*, [in:] *Bollettino*

uncertainty should be tested subjectively by looking at the taxpayer's position, thus identifying these conditions with the taxpayer's good faith. This view implies, for example, that no penalties will be applied in the case of a taxpayer's mistaken interpretation of the law if no intention or responsibility for the error may be ascribed to him (i.e. *dolus* and *culpa*). Finally, some scholars have argued that both the objective and subjective elements are necessary to constitute legally relevant conditions of uncertainty³⁶. According to this view, there must be special circumstances that undermine the intelligibility of the law (objective element) and the person committing the error must not be legally liable for the mistake (subjective element).

The taxpayer must present his application before his actions or transactions have taken place³⁷.

5.4. Fees

No fees are charged for a ruling. It is generally held that since an advance tax ruling is aimed at giving certainty to the taxpayers, and since the latter have a right to certainty, no costs should be borne by them. Also on the basis of a fundamental Constitutional Court decision³⁸, it could be said that there is a general obligation of the state to be clear in its legislation and to give certainty in its application. The service provided by the rulings authority should be regarded as an ordinary service of the state in order to provide guidance to the taxpayers in the fulfilment of their tax obligations.

Tributario, 1980, No. 5, p. 352.

³⁶ G. Falsitta, *Manuale di diritto tributario*, Parte Generale, Cedam, Padova, 1997, p. 17. This author also argued that objective conditions of uncertainty occur in cases of conflicting opinions between judicial and administrative positions; G. Gaffuri, *Lezioni di diritto tributario*, Cedam, Padova, 1994, pp. 181 et seq.; Giuliani, *Violazioni e sanzioni delle leggi tributarie*, Giuffrè, Milano, 2000, pp. 189 et seq.; M. Logozzo, *Appunti in tema di ignoranza della legge tributaria*, [in:] *Rivista di Diritto Tributario*, 1992, I, pp. 55 et seq.; F. Randazzo, *L'inapplicabilità delle sanzioni per obiettive condizioni di incertezza delle norme*, [in:] *Corriere Tributario*, 1986, No. 44, pp. 3010 et seq.

³⁷ Although this requirement was not introduced in the statutory provisions of the Taxpayer's Bill of Rights, the ministerial decree implementing this open ruling procedure explicitly contains this condition (Art. 1(2) of Ministerial Decree No. 209/2001).

³⁸ Decision of the Constitutional Court (i.e. *Corte Costituzionale*) No. 94 of 31 March 1995.

5.5. Issuing authority

Under the Italian open ruling procedure, advance tax rulings are generally issued by the Regional Department of the Revenue Agency competent in relation to the fiscal domicile of the requesting taxpayer. However, there is a centralisation of the ruling powers in the Central Revenue Directorate for non-resident taxpayers. Thus, non-resident taxpayers, or their representatives, must address the rulings request to the Central Revenue Directorate.

In addition, public bodies, central administrations and taxpayers who realised proceeds higher than EUR 258.228.449,54 in the fiscal year preceding the request must submit the rulings request to the Central Revenue Directorate.

5.6. Timing: deadlines for issuing a ruling, deemed approval of applicant's opinion in the case of delay in issuing

The period of time that elapses between the submission of a request for a ruling and the issuance of the ruling is particularly important for the functioning of the rulings system, especially in the rapidly evolving business area regulated by tax law, and may be a deterrent for taxpayers to not ask for a ruling at all. Transactions for which rulings are sought usually are those for which the ruling is the final step prior to completion, and the related prospective transactions may be under strict time constraints. Moreover, extended periods of time between the issue of the ruling and completion of the transaction raise the possibility of facts changing in the interim, the tax administration changing its view of the transaction before it proceeds, or even changes in the law or in judicial interpretations. All these circumstances may have an impact on the rulings procedure and on the taxpayer's right to rely on the advance tax ruling.

The rapidity of the decision-making process within the tax administration with respect to the rulings procedure may also depend on the taxpayer's request. To ensure that the request is dealt with as expeditiously as possible, the rulings application must be well written and carefully reasoned. The applicant should give clear and concise reasons for

his proposed interpretation and possibly include statutory, administrative and judicial authority supporting his view.

Under the Italian open rulings procedure introduced by the Taxpayer's Bill of Rights, it is provided that, if no reply is received by the taxpayer within 120 days of the filing of the request, the taxpayer's position on the tax treatment of the facts contained in the request is deemed to have been approved by the tax authorities.³⁹

5.7. Protection enjoyed by the addressee of the ruling

Advance tax rulings are generally binding on the tax administration in respect of the issues for which they have been given. Under the Italian open rulings procedure provided for by Art. 11 of the Taxpayer's Bill of Rights, it is stated that the written and reasoned reply of the tax administration is binding with exclusive reference to the matter on which the ruling has been issued (and in respect of the applicant). Any act, regarding an assessment or sanctions, which does not conform with the ruling is null and void.

With respect to the time window given to the tax administration to change an opinion, it is fundamental to ascertain whether the taxpayer has relied on the ruling obtained. Thus, it appears appropriate to distinguish the situation in which the transactions contemplated in the rulings request have already been carried out from that in which the taxpayer did not carry out his transaction in accordance with the ruling. Such a distinction has been implemented in the Italian open rulings system, whereby a stronger protection is afforded to the taxpayer who had already carried out his transactions⁴⁰. If the facts or transactions have not yet occurred at the time of the revocation (cancellation or modification), the tax authorities may eventually levy and collect the taxes and the interest on late payment, but may not impose penalties⁴¹. On the contrary, after the completion of the transactions as described by the taxpayer in his request, any divergent act of the tax administration is void⁴².

³⁹ See C. Romano-A. Sfondrini, Italy, in *The International Guide to Advance Rulings*, 2001, p. 35.

⁴⁰ Similarly, under US rules, a letter ruling may be revoked if, at the time of the revocation, the transaction has not yet been entered into in reliance of the ruling.

⁴¹ Art. 5(3) of Ministerial Decree No. 209/2001.

⁴² An exception to this rule is provided when the taxpayer did not include a proposed legal interpretation in the application. In this case, the tax authorities may levy the taxes plus interest

In addition, it should be noted that the legal effects of advance rulings may also consist in an inversion of the burden of proof that, in the case of tax litigation, rests on the party that did not comply with the ruling. In other words, the taxpayer may take a position that deviates from the statements contained in the ruling issued, and, as a consequence, the burden of proof shifts from the tax administration to the taxpayer in the litigation procedure. This situation occurs, for example, in Italy, under the special anti-avoidance rulings procedure, which generates a shifting of the burden of proof, in the event of litigation, to the party that did not comply with the ruling.

5.8. Validity period

There is no statutory or regulatory term of validity for advance tax rulings. Although it could be argued that, since the tax obligation is limited in time to the tax year, the ruling's validity should also be considered limited to the fiscal year concerned, but there are no reasons why the ruling should not maintain its validity if the facts described in the rulings request are still the same. It would be inefficient to force a taxpayer to ask for a new ruling each year if the legal scenario and the situation of the taxpayer have remained unchanged.

6. National issues of taxpayer protection currently in focus

The most debated issue in the field of taxpayer protection currently being discussed in Italy has arisen from the sudden and unexpected decision of the Italian Revenue Agency to publish on 30 April 2008 all tax returns filed by taxpayers for the year 2005 on the Agency's website. All tax returns for the fiscal year 2005 filed by individuals and companies were made freely available to any internet user, and users also had the possibility of copying them. Due to the prompt intervention on the same date of the

for late payment (which are eventually due according to the amended interpretation) even if the transactions have already been carried out. See A. Russo, *New Advance Ruling Scheme Implemented*, [in:] *European Taxation*, vol. 41, 2001, No. 10, pp. 399-403.

Controller for Privacy (the *Garante per la privacy*), the publication of the tax returns on the Agency's website was suspended in order to further investigate the matter. Various judicial proceedings were opened and are still pending.