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ABUSE OF RIGHT AND TAX AVOIDANCE: AN ONLY THING

In light of tax reform, abuse of right and tax avoidance have been unified according to their meanings. Legislative Decree No.156/ 2015 introduced Art. 10 bis in the Taxpayer's Bill of Rights, which regulates tax avoidance. The insertion in the Law 212/ 2000, including constitutional principles, proves that the aim is to prevent from possible evasive conducts.

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1) Abuse of right and tax avoidance.

As explicitly provided by Art. 10 of the Law 212/2000, relationships between Tax Authority and taxpayer should be characterized by loyal collaboration and good faith, for which reason both Financial Administration and taxpayer should behave in order to respect each other. The Financial Administration should not abuse of its powers and this obligation implies the duty of the Office to issue a notice of assessment that has to be as close as possible to a real and fair fiscal recovery. In the same way, taxpayers should contribute to the State expenses and they are subjected to taxation, even if they can avail themselves of some advantages such as deduction, detraction or, rather, tax credit. However, these rights explicitly recognized to the taxpayers should not be misused by them. In order to protect the Office from possible abuses by these people, a declared and particular regulation of the so-called evasive conduct has been provided. Avoidance represents a circumvention of the legal rule, that is an indirect violation of the tax rule. It is included in Art. 10 bis of the Law 212/ 2012 titled "*Abuse of right and tax avoidance*", and it consists of a regular anti abuse rule. Art. 10 bis was introduced following the Law 23/ 2014, tax enabling act, and it allows the unification of abuse of right and tax avoidance, whereas before the reform, tax avoidance was allocated in Art. 37 bis of DPR. 600/ 73 and the idea of abuse of right was not provided for. It is clear that the lawmaker, introducing the tax avoidance in the Taxpayer's Bill of Rights (that adopts constitutional principles), wanted to increase the protection of the Office. According to the foresaid provision of the law, "*one or more economic procedures lacking of economic essence, that even in the formal observance of tax rules mostly achieve illegal tax advantages, are considered abuse of right*".

The subsection 2 describes in detail the procedures that lack of valid economic reasons, especially *"facts, acts and contracts, also connected together, unsuitable for provide important effects, different from tax advantages*". All those "benefits, also not immediate, made in conflict with the objectives of tax rules or with principles of taxing system" can be considered as illegal tax advantages. The Civil Court of Cassation sez. Trib. 15 July 2015 n. 14761 stated that "*the abuse of right is related only to "pathological"*

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circumvention of tax rule. This institution works only if the carried out procedure can be explained uniquely with the aim of achieving tax saving. It is necessary to exclude tax avoidance borne by society which, at first, decreases the capital in order to allocate it among partners, and then issues a bond loan that is subscribed by them in favour of the group; just the company, indeed, can decide if there is the possibility to finance oneself using one's own or third parties resources".

Acts lacking of valid economic reasons prove to be unreal *ab origine,* that is as if the taxpayer would never have carried them out. Moreover, the Supreme Court sez. VI 22 June 2015 n. 12844 specified that "*the ban of abuse of right does not allow the achievement of tax advantages by the taxpayer, those obtained by the misuse of suitable legal deeds useful to achieve benefits or tax saving, even if they are not opposed to any particular provision, in fault of different reasons from the mere expectation of those benefits. Among all procedures that can entail a violation of the ban in question, there can be found budgets about transfer pricing in internal links (the so-called domestic transfer pricing). When it is time to analyse the conduct of the involved companies, it is necessary to refer to the principle, having general value, fixed by Art. 9 d. P. R. n. 917 of 1986. The trial judge should proceed with a new analysis of circumstances, evaluating if there have been some tax advantages for the taxpayer from the accomplished procedure*." Contrary to the evasion that is connected to a direct hypothesis of violation of the tax rule, avoidance stands for an indirect violation, given that the taxpayer is holder of a right he misuses.

2) Anti- tax avoidance ruling.

As regard the principle of loyal collaboration previously expressed, the taxpayer has the right to "consult" the Financial Administration to obtain some clarifications about the interpretation of a legal rule, whose meaning *prima facie* seem to be unclear, or in order

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to understand if a certain conduct is remarkable from the tax point of view. In order to avoid assuming a behaviour that includes the extremes of evasive conduct, the taxpayer has the right to ask the Financial Administration through the so-called anti-tax avoidance ruling. In particular, he can exercise his own right of ruling (art. 11 Law 212/ 2000), presenting his behaviour to the Office and asking if it accounts for a case of evasive conduct. The application of ruling should contain the exact information of the behaviour carried out by the person, the clear presentation of the request, the declaration of domicile where the answer has to be addressed to and, in the end, the signature of the applicant. To be accepted, it should be presented in advance. As the Supreme Court asserted, "*the taxpayer has to propose ruling ex Art. 11, Law 27 July 2000 n. 212, in conducting his own business activity, before carrying out the conduct matter of the request to the Financial Administration, given that, for both parties of the tax relationship, the binding validity of interpretation, provided by the same administration of rules and applicable to the particular concrete case, would not be justified."*(Rigetta, Comm. Trib. Reg. Marche, 25/05/ 2007 (Court of Cassation sez. Trib. 17 July 2014 n. 16331).

As a consequence of the Law 23/ 2014 of tax mandate, Art. 11 of the Law 212/ 2000 underwent a modification in its title changing from "*taxpayer ruling*" to "*right of ruling*". This is a sign of transfer from an important legal situation admitted for the taxpayer to a veritable right to ask a comparison with the Financial Administration, widely protected. The Office, in case of anti-tax avoidance ruling, has 120 days to provide an answer to the question presented by the taxpayer, the answer is binding and the person cannot reply.

The answer provided by the Office seems to be binding, with reference to the question exposed earlier, and to the taxpayer who has presented the motion. The Office can reply through circular whenever the motion is presented by one person, or through cancellation when it is presented by many people, with the aim to respect the economy. In case of Financial Administration omits to reply, there is the hypothesis of the so-called tacit approval. Before releasing a notice of assessment related to an evasive conduct by the

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taxpayer, the Financial Administration will be required to convene him about the opposition. Even though the opposition does not represent a general duty in the taxing system, there is some obligatory hypothesis for which it has to be necessarily adopted. Among these, there is the idea about the anti-tax avoidance assessment, according to which the taxpayer has to be contacted in advance, and in order to avoid taxing if it occurs. Since just because the evasive conduct represents an indirect violation of a tax rule and the taxpayer should have the right to explain the motivations of his behaviour, even before undergoing negative consequences of a notice of assessment. The taxpayer, indeed, is holder of a right which, according to the Financial Administration, he tends to misuse. So, it is necessary that the Financial Administration allows the person to explain his own conduct, which is supposed to be evasive.

3) Results.

For a long time, avoidance was subject of reforms and legal interventions. The aim of these modifications is to guarantee a double defence: from the Financial Administration against the tax- avoidance conduct of the taxpayer and, on the other hand, from the taxpayer himself when he has realised conducts only apparently evasive, about which he can provide some explanations. Anti- tax avoidance ruling represents a wide form of defence for taxpayers; in case their conduct is considered evasive because of the presence of some extremes, they can change behaviour so as not to be ratified. Moreover, taxpayers have the right to be arraigned to provide explanations about their own conduct to escape a taxing act.