

## **“THE CONDITION OF HARMONISED EXCISE”**

### **Abstract**

One problem that has attracted more attention in the field of excise duties "harmonized" is certainly relative to the identification of the condition of the same, and accordingly, the event considered by the legislature as an index of ability for contributions.

At the heart of these debates is, firstly, the interpretation of Article. 2 of t.u.a.. That article provides that the tax obligation arises at the time of manufacture or import of excise goods and, with effect from 1 April 2010, "including extraction from subsoil where excise duty is applicable " ( art. 2 of your own) The tax is, however, payable only at the time of release for consumption of the same products in the State. And it is the letter and the reading of that provision to "divide" the most authoritative teaching concerning the identification of the condition of the excise.

This is because the split time between the birth of the tax on the tax so as el'esigibilità explicit art. 2 cited above, gives rise to doubt as to the role to be attributed to the so-called phase "home use".

In the past authoritative doctrine had identified the condition of the taxes in question and identified with "the final act of a production process or processing of raw materials or raw. " accordingly, the next release for consumption was only true - and exclusively - to amount to Inland Revenue to claim the tax law.

On the other hand, the (newer) major doctrine, believes that the condition of the taxes in question is complex and consists of a situation given by a progressive coordination of the two stages of manufacture and for consumption goods. ☒

The release of consumer goods, ie, perfect the tax case began with the manufacture of the same. According to this doctrine is from the reading of the provisions of your it is clear that assumption, and in particular Articles. 2, 3 and 4.

First, art. 2 mentioned, who, on several occasions, confirming the view above.

The wording of Article. 2 connects the sample to a multi-staged case (that a progressive), provides in paragraphs 1 and 2, which event the tax is represented by the manufacture (import or extraction) and that the excise duty is chargeable on release for consumption of the product within the state. The assumption, therefore, it is to be realized - in the view shown here - when the product is made and entered into consumption.

And yet, even the paragraph 4 of that Article. 2, selected from the taxpayers of the tax is also the holder of the tax warehouse from where they were released for consumption goods (even if different from the manufacturer of the product) demonstrates the validity of the thesis.

The subject to tax even those who enter into consumer products, when differ from manufacturer does is recognize the stage of release for consumption function coelemento essential assumption of duties.

Another provision cited in support of that thesis, is given by art. 3, paragraph 3, of t.u.a. (as well as art. 6, paragraph 2 of Directive 92/12/EEC, 1992) according to which, before 1 April 2010, provided that the tax clearance is done by multiplying the quantity of product, or the tax base, the rate at the time of release for consumption "and, if different, the force at the time of manufacture. "

This latest specification, failed with the reform of 2010, as a matter of that doctrine, confirmed the nature of release for consumption of refined products from their manufacture phase, the latter, they can not take on alone to the assumption of tax .

As, however, from 1 April 2010, Article. 3, paragraph 3, of t.u.a. no longer any mention of the manufacturing phase of products by specifying only that the tax rate applicable in their assessment of the tax is to force the release for consumption of goods.

And finally, the doctrine of majority opinion lined up to its claims and the provisions of Art. 4 yours, which governs the institute dell'abbuono excise.

This article provides that, in the event of total destruction or irretrievable loss of goods which are under suspension (ie natural losses or physiological) is granted a tax exemption when the subject required evidence that the loss or destruction of these products has occurred by accident or force majeure.

With the establishment of the rebate, the legislature, in fact, has bothered to point out that the goods lost, destroyed or who have suffered natural losses, may not be subject to excise duty in that, although completion of the manufacturing process is less for these products, the factual element for consumption, or, in the prevailing opinion of the thesis, an improved condition of excise duties.

Sharing the view of other authoritative teaching, in fact, there may not be considered dall'evidenziare profile critics of the prevailing doctrine of interpretation and doctrine of that first mentioned.

From an analytical reading of the provisions of yours, in fact, may well reach a different conclusion from that reached by the two doctrines discussed. Subject to approval, however, a significant position in the manufacture of products in the excise system being connected to the birth of the tax (pursuant to Art. 2 of you), the same rules can be inferred, not only the centrality of the phase release for consumption of goods for reconstruction of the condition, but that the same is achieved even with only home use of goods or services. The positions of the doctrines mentioned, in fact, may well be contradicted by the same legislative provisions are used in support of this thesis, using a different key to understanding and opinion of the writer, more consistent with the letter of the law, with the intention of the legislator and constitutional principles as well as tributaries.

A closer look, in fact, the letter 's art. 2 t.u.a. concerns, on the one hand, the production tax obligation, identifying the event itself, and, secondly, the chargeability to tax is connected to the final consumer goods. From this we can infer that the term of the production cycle, then, comes into being only the object of the tax or the tax base, on which the excise duty will be applied, but only at the time of release for consumption of products can be said made the condition of the tax. The provision on taxable status, then, under art. 2,

paragraph 4, is shaped, in fact, about entering into the manufacture and consumption (as stated by the doctrines criticized).

Among the excise taxpayers) there are, in fact, the person who has pledged the payment of the charge, the person against whom you experience the conditions for the enforceability of the tax both jointly and severally with the owner of the tax filing which they were released for consumption (and from 1 April 2010, the recipient also registered and recorded by the consignor). The latter is required to pay the duty if home use is attributable to him, whatever, and then, on whether or not to have manufactured the products to be released for consumption on the market.

And yet the art. 3, paragraph 3, of t.u.a. (as well as art. 6, paragraph 2, of Directive 92/12/EEC, 1992) according to which the tax is paid by applying the tax base (the products) the rate at the time of release for consumption . As we have seen, this paragraph provided for a further specification, which was repealed by Legislative Decree no. 48/2010, which was excluded on the basis of the application of force at the time of manufacture.

Well, you want the previously existing term, you want the rule as amended prove that thesis, which we seem to have to pay attention, he says, or that the release for consumption of goods to make the assumption of duties and to determine the 'tax due, without the need to find another reading of the mens legis. And finally, the provision - before mentioned - that recognizes the tax rebate as provided by art. 4 of yours, which among others, the loss and dispersal of goods subject to excise duty for unforeseeable circumstances or force majeure beyond the party responsible, does nothing to recognize, with greater emphasis on the centrality and exclusivity of entry for consumption (of goods) to the detection of the condition of the excise.

That article, in recognition of a tax rebate to the occurrence of one of the facts therein, preclude the realization of the assumption of excise duty, or home use, where it is no longer possible, either because the goods have been destroyed Or because they lost or why the subject of declines. The conclusions of the latter view (shared by the writer) seem, therefore, can be held more consistent with the regulatory fabric mentioned, and so you can

single out: the assumption of duty coincides with the release for consumption of products and, therefore, what arises from the mere manufacture of products is the subject of the tax, or manufacture such agreement is defined as "instrumental" to the identification of the tax base on which the charge will be dismissed.

The ability to pay is made from such affected by the person who places the same products for consumption (although not the same as the manufacturer of the same).

One of the institutions, for our purposes analyzed, which has placed more attention on the case not only legitimacy but also on the tax exemption was provided for in art. 4 of yours, provided in case of loss or destruction of goods which are under suspension (when the party responsible for the facts prove that these are due to unforeseeable circumstances or force majeure, whenever it appears to be involved in the events themselves).

In particular, the issue that has raised more doubts arise from the interpretation was that or less from excise duty on products subject to theft. The Supreme Court, recently, in two rulings in 2007 and 2009 rejected the application from excise duty in case of theft of goods subject to excise duty, recognizing, then, debenza of the latter, contrary to position taken by the Court on the same issue on the merits.

In the field it was, then, had surgery, Directive No. 2008/118 to which paragraph 4 of art. 7 explained that "the total destruction or irretrievable loss of excise goods in duty suspension arrangement for a cause in the very nature of such products, by accident or house of God, or as a result of 'authorization of the competent authorities of the Member State shall not be considered for release for consumption "and yet the paragraph 5 and 6 have dictated the term you want is total destruction, either expressly link all'inutilizzabilità irretrievable loss of goods such as excise goods (provided that usability is proven).

In order not to incur further infringement proceedings for the Italian state has found it necessary to amend Art. 4 of t.u.a. to remove that provision from the additions introduced by the Articles. 59 of Law No 342/2000 and 1,

paragraph 472, of Law 311/2004 (which had originated from the doctrinal and jurisprudential debates), upholding a restrictive interpretation of the words used in the amended and clearly excluding the allowance for the possibility of stolen goods.

In the second chapter, still following assumptions made concerning the identification of the assumption of duty, has been able to verify the consistency of the various arguments to the constitutional principles of tax law and community in general. First, the principle of ability to pay. In this regard, we shared the view that describes the ability to pay as the "economic capacity ", provided that the cost involves only the measurability and the evaluability of the condition and the identification of the index of economic potential with the assets of the taxpayer of the tax. Prima facie, might well be said that the doctrinal argument, often cited, are consistent with the principle of ability to pay as understood here.

The assumption of duties, in fact, as already mentioned, does not present any evidence of asset, or if detected only in case of manufacturing the product, or if identified - as the doctrine of majority - in this case a progressive (manufacturing - home use ) And, finally, if you feel you made the assumption - shared according to the thesis here - with the release for consumption of goods. In any case what is relevant as an indicator of ability to pay, then, is the economic ability of manufacturers and / or consumption of those who place products on the market to sell products to third parties. And it is the conduct of business which is the economic force that the legislature takes as its premise the tax.

It 'necessary to emphasize how each doctrine credits also leveraging its case on the other provisions of yours, already mentioned, primarily the art. 2 of t.u.a. According to the prevailing doctrine, in fact, paragraph 4 of Article. 2, identified in terms of excise duty between taxpayers such taxes also the holder of the tax warehouse from where they were released for consumption, not only credits the argument, but also highlights the consistency argument with the principle of ability to pay . In other words, the doctrine considers that, from reading that article, it appears on the one hand, that the release for

goods become part of the assumption of duty as an element of the case completed, and on the other hand, allows to identify affected by ability to pay tax when you run out of the production cycle.

Wealth is taxed, then, consists of the product itself as capable of being sold. The logical consequence of this assumption is that the person identified as "passive" tax is the only manufacturer who is obligated to pay for events and situations prior to when they may be passed on to consumers. The next phase of home use does nothing but improve the condition of taxation which is already created through the manufacture of products.

Even the argument that identifies the condition of excise only in manufacturing, identifies the person with the ability to pay subject to tax in the manufacturer of the goods, albeit not the "right " pad - the writer's opinion - the stage of eating the same .

The reading of Article. 2, paragraph 4, of yours, as made by the dominant doctrine may well be criticized in some respects.

The provision referred to in paragraph 4 of Article. 2, a careful analysis and in conjunction with other provisions contained in Article 2 and the same in your in general seems to express a different concept. According to the view shared here, in fact, the provision referred further acknowledgment of the role of sole and exclusive home use products in order to identify the assumption of duties, and simultaneously makes it hit from tax those who actually puts in place a prerequisite, those who manifest ability to pay, id est: the holder of the tax warehouse from where they were released for consumption (although it may be someone other than the manufacturer of the product).

Ultimately, the ability to pay affected by taxation, appears to be, then, that expressed by the person who enters into consumer products. This is justified by the possibility that the same person has to pass on to consumers the burden of the tax by increasing the sale price of the value of the tax. Further confirmation of compatibility of the approach described in the principle expressed in art. 53 of the Constitution, is the prediction of the mechanism by which the recording of those who enter into consumer products is justified by the possibility - given to them - to pass on to

consumers the burden of the tax by increasing the sale price of the asset the amount of the tax, or using the tool of the cd revenge.

In the area of excise duty, the instrument of revenge by a rule, through the transfer only "loss " of the tax burden, and is, therefore, the increase of the amount - consideration - that the taxpayer should pay the actor, equal to the amount of the tax burden on the operation. So clearly, there is no general provision of legislative retaliation itself, even if two of your articles recognize a right of redress in specific cases (Article 16, paragraph 3, and 56 commas 1 of yours).

Subject to the analysis of existing theory on the recognition of an obligation or a right of redress to be compatible with art. 53 Constitution

Join the first approach, the restrictive, whereby it has pursuant to Art. 53 of the Constitution, only the anticipation of an obligation of revenge, it means the excise duty structure be considered unconstitutional. The transfer of the tax in the two standards mentioned receives less legal protection than other cases provided for translation into the tax or the taxpayer may choose not to exercise this right being facoltizzato so. Consequently he would be affected by the tax, thereby denounced as unconstitutional a policy that provides a right and not an obligation of recourse to the principle of ability to pay. And to compensate for the absence of law with the interpretation of the mens legis in the sense above, or contained in the will of the legislature to expressly confer a right to compensation only for certain options under a general and implicit obligation of revenge, does not seem to be able to justify or be based on the letter of the law of your

On the other hand, also adhere to the belief that it is legitimate to estimate even a right to compensation, does not remove the doubts of constitutionality with respect to the principle of ability to pay. This is because according to this argument, it is necessary to forecast at least a right of recourse in the framework, which, instead, in the excise duty is expected in the two cases cited above.

Will, therefore, adhere to one or another argument means coming to the same solution: necessity of an ad hoc legislative intervention. This means



that the legislature should expressly recognize a general obligation to want revenge, with a prediction very similar to that laid on VAT. (thus legitimizing the only two types of lien mentioned several times) or at least a general lien on excise duties.

Soon, however, attention to authoritative doctrine, may share the assumption according to which, the rules of your analysis, the provision of a legal recourse is not necessary for identification of ability to pay such taxes or affected by the reconstruction of the mechanical application of such taxes. This is because the taxpayer is still "the holder of the tax warehouse from which they were released for consumption and, jointly, the person who has been the guarantor of such payment or the person against whom you experience the conditions for 'chargeability to tax and the transfer of the charge takes only an economic function. The Depositary, in fact, fulfills the requirement of taxation towards the tax and is legally irrelevant whether his move forward tax. Only those duties expressly provide that the compensation (although as a right) can speak of legal significance because it occurs in the split between taxable and subject to the tax liability of the charge, allowing you to report on ability to pay the affected .

In the Community, addressed the theme here (the identification of the assumption of duties) are most relevant to the question of reimbursement of tax paid. Without prejudice to the principle that, when the taxes paid are declared incompatible with Community law, the State is required to repay the same charges, relating to refund of excise duties, the focus of the European Court of Justice and Courts Supreme Italian was the provision in national legislation and, more specifically, in art. 29, paragraph 2, of Law December 29, 1990, No 428 and before art. 19 of Decree-Law, September 30, 1982, No 688. this article does, provided for a particular burden of proof: the taxpayer who acted for the recovery of customs duties, taxes, manufacturing, consumption taxes or State duties, had the burden of proving the non-passing-by carry on to others. Show that was to be provided "documentary. " On the subject of the relevance of evidence of the transfer in cases of refund of charges, takes both the Supreme Court that the Court of Justice. The first

denied the legal significance of the transfer that the right to reimbursement arises as a result of a payment that should not be executed, regardless of whether the solvens has already transferred to the third negative economic impact of the payment. The Court of Justice, for its part, took on another front, namely that of documentary evidence, considered incompatible with the obligations imposed on Member States in the Treaty establishing the EEC, the need for documentary evidence of the lack of translation on third parties burden of taxation, outlining how a national law can not require such evidence as this would make it particularly difficult to reimbursement of the tax, by incorporating this requirement a violation of Community law.

The individual national law may determine for itself how to request the refund, but there can be no less favorable than those applicable to similar claims in law and in any event such as to render virtually impossible the exercise of rights conferred by Community law.

Community law, then - as also specified by the Courts - not prevent any national legal system to refuse reimbursement of charges improperly levied, if this results in an unjust enrichment on the part of claimants and national assessments may take realize that such taxes have become embedded in the resale price of goods, and therefore passed on to buyers. These practices are not contrary to EU principles.

The Court of Justice, then, has not lost the opportunity to reiterate to the Italian State "that the courts of a Member State to recognize the primacy of the direct effectiveness of Community law does not relieve the State to remove itself from its legal Internal provisions incompatible with Community law, they remain in effect creates, in fact, an ambiguous situation, as it leaves the parties concerned in a state of uncertainty about the opportunities available to make use of Community law (...)". The Italian legislature, therefore, to avoid ("more") complaints Community, spoke on the subject, by Art. 29, paragraph 3, of Law December 29, 1990, No 428, entitled "Reimbursement of taxes recognized as incompatible with EU rules, " diversifying the scheme of transferring the burden of proof in

for recovery of tax, or a distinction between taxes and fees Community Affairs.

With this news, the legislature stated that "Customs import duties, excise, consumption taxes, the State duties on sugar and levied under national provisions incompatible with Community rules shall be reimbursed, unless the related expense has not been passed on to others. "And yet, had planned tribute to the inapplicability of Article Community. 19 of d.l. No 688/1982, taking shape as a result any passing-Extinguishing the right to reimbursement and proof rests with the financial defendant. The aforementioned art. 29 was certainly a novelty in the modified rules of evidence which was characterized to be seriously argumentative principles set forth in terms of enforceability of the claim in court, through the provision of a reversal of the burden of proof. It was, in fact, the Administration have to provide evidence of travel to other subjects of rights and duties improperly applied and no longer lies on the taxpayer to prove the non-translation (just as was previously the art. 19, DL 688 / 82).

Article. 29 was mentioned, however, rise to a question of interpretation of no small importance, if indeed it provides the framework in relation to internal taxation and EU did not create processing problems "discriminatory" because of the advantageous position of the person seeking reimbursement of taxes in the Community. than the one who, instead, demanded repayment of internal taxation, and, therefore, was to continue to provide proof of its non-judicially translation. Just with regard to the latter question, the Court of Justice ruled it clear that there is no estoppel on the part of EU law at the national provisions making repayment of customs duties or taxes contrary to Community law in ways less favorable those relating to the action for recovery of the private, provided that the same "(...) apply equally to actions for repayment based on Community law and those based on domestic law and not make it impossible or excessively difficult 'exercise the right to reimbursement (...) ". With the result that the discrimination between Community law and national law, in mind in art. 29, makes this arrangement even in its new formulation, contrary to the principles of Community law.

With particular respect, however, the issue of burden of proof in actions for reimbursement, the Court of Justice has on several occasions, argued that proof of the translation, above, is the sole responsibility of government. In other words, the Court clarified the principle that is contrary to Community law be passed on to the taxpayer the burden of providing evidence to the contrary in the face of the presumption of transfer on the third of the economic significance of the tax.

The condemnation of Italy on the wording of Article. 29, second paragraph, then, arrived with the European Court of Justice on 9 December 2003 C-129/00. On that occasion, the Community Courts, indeed, found that application of Article. 29 constitutes, in fact, a return to "old regime"and, therefore, that we attributed (again and again) relevance to the translation and in particular the proof of which weighed not been passed on the taxpayer, even if only for the taxes Community relevance. Ultimately, the Italian Republic, by failing to amend the wording of Article. Of 29 I. No 428/1990, and by continuing to interpret and apply the rule by making use of these presumptions has violated the obligations imposed by Community rules.

In the third part of the study was analyzed, finally, the field of excise duties on energy products and in particular the assumption of the same to ensure consistency with existing theory. With Directive 2003/96/EC, have been approved a series of measures aimed at restructuring the Community framework for taxation of energy products. And indeed, by Art. 2 of the directive was broadened the range of products subject to excise duty, by entering text in the same article of the new term "energy" instead of the previous "mineral oils". As a result, have gained momentum among the products subject to excise duty, coal and seed oils of plant origin, because of their potential to replace fossil fuels, the ethyl alcohol, natural gas, coke, brown coal and electricity.

The Italian legislature has implemented this Directive through the adoption of Legislative Decree no. 26 of 2007. In relation to excise duties on energy products, the real news that has

with the 2003 directive, first, and Decree No 26 of 2007, after, is on the identification of the tax basis of the same, more specific than the general scheme of excise duty on the subject art. 2 of t.u.a. Article. 21 of Directive 2003/96/EC provides, in fact, the particular provisions regarding the identification of chargeable event and chargeability thereof. In particular, paragraph 1 of that article provides that the tax on energy products shall become due upon the occurrence of one of the chargeable events provided by art. 2, paragraph 3, of the 2003 Directive, or the taxation of any energy product for the combustion and fuel mixture at the rate indicated for the equivalent product. With specific reference to the taxable event, then the second paragraph of that article also includes the concept of manufacturing to mining.

Paragraph 5 of the same article goes on to express that "electricity and natural gas are subject to taxation and become taxable at the time of delivery by the distributor or redistributors. " The latter provision and identifies specific, then, the event el'esigibilità such a tax: for coal, coke and lignite becomes relevant supply by the competent authorities of the companies that have registered for that purpose.

The discipline of excise duties on energy products shall assume, therefore, important for our purposes, because of the different timing of the tax paid to the birth. While, as we saw earlier, the excise duty in general reconnects the incurrance of the tax the manufacture and / or release for consumption of products (depending on which theory one adheres), the excise duty at issue, instead is referred to as "supply by the distributor or redistributors", that refers to a later date than the manufacturing of products.

On this track, the Legislative Decree no. 26 of 2007 has changed, in fact, implementing the EU Directive, the provisions relating to energy products, and in particular Articles. 26, paragraph 1 and 52, paragraph 2, of t.u.a. . Both standards, following the story, identify the basis of taxation at the time of delivery to final consumers, or at the time of consumption (natural gas and electricity) of the product mined or produced for own use (unlike the previous system identified the time of the birth of the tax liability in the manufacture or

importation from third countries). Therefore at any stage prior to delivery to the customer for final consumption, the product has not yet submitted to the tax system harmonized excise duty (id est: to you).

Ultimately, the identification of the condition at a later date than the "production" (extraction or production), confirms, once again, our vision, in order to identify the assumption of duties in the moment of release for consumption. A closer look, in fact, c.d. "provision to the final consumer" means nothing more than refer to the formation of the assumption of taxation at the time the goods (energy and energy products) are offered for consumption, either supplied to final consumers, want used on their own. Some emphasis is placed on the stage before the "supply" to the final consumer. Becomes relevant for tax purposes, in fact, only the supply to final consumers.