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TRUST: SOGGETTIVITÀ TRIBUTARIA E COMMERCIALITÀ

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Abstract

This work has as its main objective to analyze some of the most important issues related to the establishment of the l. 27 December 2006, n. 296, that, as is known, modifying the art. 73, d.P.R. 22 December 1986, n. 917, affirmed the general inclusion of the trust between taxpayers of IRES.

And it is precisely the congruence of the choice to give subjectivity (for the purposes of income tax) at the Anglo-Saxon background institute to be an interesting field of investigation.

In particular, the option exercised by the l. n. 296/06 reports in the popular long-running issue of the possibility of attributing subjectivity to tax entities, such as trusts, are unregulated in law: there is questionable whether the decision to reformulate the wording of the art. 73 Tuir finds its *ratio* in the opportunity to compare the trust of other organizations not belonging to third parties in respect of which the condition occurs in a uniform and autonomous way, or whether it expresses a willingness to give to persons and entities named in any legal tax capacity whether the connotation of otherness in relation to third parties.

In favor of this second alternative it militates, of course, the finding that the trust, despite the various attempts to bring him back to schools for some time already existing or newly introduced, has not, today, a specific regulation in civil law. Thus, adhering to the view ⁽¹⁾ for which recognition of the subjectivity of tax law is subject to verification

⁽¹⁾ Cfr. F. GALLO, *I soggetti del libro primo del codice civile e l'Irpeg: problematiche e possibili evoluzioni*, in Riv. dir. trib., 1993, III, 345 ss.

in the field of civil law - by virtue of the cross-reference in art. 73, paragraph 2, Tuir - a center of self-attribution of legal effects (although not personified), just the lack of regulation of trust in the positive could testify against the inclusion in the same group of entities under IRES under subjectivation criterion in rule least cited.

On the other hand, in this respect, we can not see how to avoid the detection of *rationes* up the legislative choice should not matter and can not even accurate exegesis of the estimates contained in the latter part of that paragraph 2 of the art. 73, Tuir: it establishes, in fact, that if the trust has identified beneficiaries, the income from the same must be achieved for these defendants in proportion to the shares held. The last reported forecast leads, in turn, to ask whether the types of trusts in question should be recognized as income tax liability provided that if it were not, in any case, if the possible assimilation of the trust to a non - belonging to third parties, from a systematic, is not, by itself, a sufficient argument to justify the inclusion of the common law between taxpayers of IRES, which, in view of the fact that the organizational factor, there also in cases where the recipients were identified, and where, by assumption, the tax liability should be denied.

In particular, in this respect, it can be legitimately argued that, in trusts transparent, like what happens in companies and institutions referred to in art. 5, 115 and 116, Tuir, the existence of an incompressible and some of the beneficiaries by the trustee to receive the fruits arising from the management of the assets of the fund means that the intermediate structure in the analysis loses the ability to express the completion of prerequisite taxation - the possession of the income - to the beneficiaries in establishing defined for this purpose.

As a result, a closure made of circular reasoning that the fact that the trusts transparent have not subjectivity in the sense represented just provides additional and decisive argument to support that in any case, the hypothetical opportunity to compare other organizations referred to in paragraph 2 of art. 73, Tuir is unable, by itself, to ensure recognition of subjectivity generally to intermediate structures which are on.

As just reported integrates logic necessary precondition to the consideration that the form of “trasparenza” of the trusts do not constitute a waiver with respect to the trust “opaco”; in the sense that there would be an autonomous subject of tax law and its importance is, for various reasons, beyond the use of certain conditions, but rather, it seems consistent to argue the opposite, *id est* that the “trasparenza”, in the same connotations that takes in relation to the taxation of trusts, is - like what happens when there is ownership of assets held in the others - the natural scheme of taxation of the trust waived only in cases where it is not possible to identify the person in whose interest one third owns and manages the property from which the income arises.

It militates in favor of the idea that the subjectivity of the trust is a rule of all residual, primarily, the fact that the rule that stipulates the allocation of income to the beneficiaries identified is contained in paragraph 2 of art. 73, the provision that, by unanimous opinion, establishes the general rules of the tax liability.

Moreover, confirming the thesis proposed here should be adequate emphasis on finding - already made in the preceding paragraphs - that the idea of the integration of the trust can not be the case due to other organizations not belonging to other persons to whom the assumption is verified on a unitary and autonomous way. However, if the opportunity to report to them is, as it must be considered, given the

crucial reference for the detection of subjectivity, not the trusts - broadly considered - equivalent to such entities, it must conclude that the exceptional nature of the underlying assumptions subjectivation not attributable to the same organizations.

In particular, the consideration for which the common law institute can not generally be regarded as comparable to the organizations of art. 73, paragraph 2, is comforted by the fact that the same defects in the general sense of capital and asset management autonomy.

In relation to capital autonomy, we must stress that a capital is independent when self-identified in the legal sphere of a person without retaining any connection with the original, or possibly limited availability of opposable to third parties. Well, the particularity of the transfer of funds from the settlor to the trustee shall cause to believe that the trust is free of the requirement set out in question. Conversely, in trust, which is primarily a destination institute, the implementation is undeniable phenomenon of separation (or segregation) assets that occurs in all cases where there is the enslavement of a given asset at a specific purpose or function rather than to a person (in which case there would be assets) and that, by itself, does not apply to ensure the allocation of tax liability.

Moreover, the fact that the separation sheet is not sufficient to confer autonomous legal tax is further corroborated by the legislative choice not to include the assets to a specific business in art. 2447-bis c.c. - such as trusts separation phenomenon characterized by capital - the taxpayers of income tax.

As for the connotation of autonomy of management, should be noted that, in principle, it should be considered to exist if the management of an organization is managed by persons other than those who are bodies of other taxable and it can be shown the head in the same

organization of a decision-making body for the formation of an autonomous business address. In this regard, it is undeniable that the trust is free of such an internal body to witness the occurrence of an event with legal significance outside addressed to third parties, especially since the management activities conducted by the trustee appears to depend upon their satisfaction of the interests of the latter and not the trust itself.

It is undeniable that the trusts with the beneficiaries identified realized a substantial separation between ownership of the source (related to the trust by the legislature) and increase attributable to capital (as reported, conversely, to the beneficiaries identified) from what it could legitimately infer that, in confirmation of what previously argued, the intermediate structure does not achieve the requirement of the tax and therefore can not be included among the taxpayers.

Moreover, under the particular structure of the Anglo-Saxon derivation, which is characterized, *inter alia*, for general and unspecified definable reference to property that was trustee of the fund - source capital increase - and for the fact that the property in trust is experiencing this phenomenon, commonly called of dual ownership - expressive of a sort of dual ownership is claimed by the settlor to the beneficiaries - is there to believe that even in the presence of trusts, it assists the phenomenon of separation between ownership of the source (refer to the above, the combination of settlor-beneficiary) and income (due to trust), concluding from this that even in the head with that kind of trust not realize the condition of taxation.

The arguments above are able to support the thesis for which the category of reference must be detected in that of the trusts with the beneficiaries identified that, like what happens to a company and the entities referred to in art. 5, 115 and 116, Tuir - in-chief that, in their

inability to retain the income, not the assumption is made of - can not be included in the taxable persons. Conversely, it is only to discretionary trusts - *id est*, with no identified beneficiaries - who should be recognized subjective self-importance, which, as mentioned, also in accordance with the doctrine sustained by attention ⁽²⁾, must be considered as an independent not because it is based on the homogeneous character than other taxpayers, depending on the contrary, the need to provide such a closure rule related to the possibility that the form provided for the beneficiaries identified by trusts can not operate in practice.

Moreover, the reported conclusions reached are further supported by the fact that in the absence of an explicit exclusion from the legislature, it would have considered that the provision of art. 47, Tuir on procedures for the taxation of capital gains from participation, it was reported also to income from the trusts with no beneficiaries identified. In particular, the application of the rule last cited would have meant that the amounts paid by the trusts “opachi” to its beneficiaries are taxed first at the head intermediate structure and, subsequently, even if for a party, on the part of beneficiaries themselves. The peaceful exclusion of circumstance last represented confirms the view that the inclusion of trusts with beneficiaries selected from the taxpayers IRES is due to mere technical requirements of tax rather than a systematic reasons.

⁽²⁾ Tale tesi è sostenuta da G. FRANSONI, *La disciplina del trust nelle imposte dirette*, in Riv. dir. trib., II, 2007, 227 ss. e ID, *L'individuazione dei beneficiari e il regime della “trasparenza”*, in *Teorica e pratica della fiscalità dei Trust*, Quaderni di Trusts e attività fiduciarie, 2008, 35 ss.

Another issue worthy of proper investigation is complemented by the identification of criteria to be used to verify whether a trust can be assimilated to commercial entities rather than to non-commercial.

In particular, in this regard, it should be noted that inclusion in either category subjective, of course fraught with serious consequences in relation to the criteria for determining the tax base that the use of provisions of benefit (see, i.e., the rule requires the halving of IRES contained art. 6 of DPR 29 September 1973, n. 601), it is not always easy and quick especially in cases where the assets entrusted to the management of the trustee are many and between their different under these circumstances, it may not be easy to identify the activities that the trust must play in order to pursue its aim being thus very complex to determine whether the income of the intermediate structure should be determined by the rules of the entities engaged in business or in pursuance of the provisions for those who are classified as non-commercial bodies.

Similarly, the definition of the functional to achieve the goal can also connect fulfilments documentary in nature since it is only in the case of conducting business that trusts will be subject to the normal duties of representation and accounting documents which must be observed by all entities carrying out such activities.

The solution of the question passes necessarily through the verification of the sole or primary meaning for this, the instrumental activities specifically conducted for the implementation of the will from time to time identified by the settlor.

As to the criteria used to determine the object of the trust, it is proper to note that it must be identified in advance, based on what is indicated in establishing that the subsequent acts of disposition or in the

letter of wishes in the event those documents which involve additions and/or changes with respect to the stipulated in the original.

On the other hand, as already happens with respect to other subjects in art. 73, Tuir it is nothing to believe that even with respect to trusts, we can not restrict it to a mere examination of the indications emerging from the instrument to see what its purpose - to be considered, for the most part, as indices formal - it being, at any rate, confirm the work carried out in practice. It follows that, also with the institute of Anglo-Saxon world, the prevalence of commercial activity will be determined on the basis of quantitative criteria so that, even for a trust, the carrying out of even a small business may be worth to consider the same as commercial where the same entity is more valuable compared to non-commercial use.

Outlined the methods used to define the object of trust is crucial to unravel the knot of the identification of interpretative criteria for checking whether the activities specified in the instrument - that is, as mentioned, even in its corollaries - or concrete carried integrate or not the exercise of a commercial enterprise. In this regard, there is questionable if the qualification (commercial or non-commercial) nature of the activity of trusts is a function of whether the connotation to be considered as economically integrated in the presence of a targeted market and the least of which is able to remunerate the various inputs used and, therefore, to integrate and raise the capital, this investigation has its rationale in the same peculiar morphology of the Anglo-Saxon derivation institute - which several times during this work it was mentioned - and specifically in the goals that he may have.

It should be emphasized that the legislative formula adopted by the legislature of the l. n. 296/06 seems to distinguish between the trusts

and other entities (commercial and non commercial), which means it takes an argument useful to consider that for the first can not apply the criteria relating to the latter for the qualification of the nature of turning point.

Moreover, it seems proper to consider that, even with respect to trusts, it is not possible to apart from the same criteria qualifiers commercialism established with regard to the generality of taxpayers, because, the commercialism - which assumes the economy - is always and necessarily a particular relevance to the subject of whether it is typical atypical.

From this assumption seems logical to infer that in the absence of any provisions of law to the contrary, any specific subject is able to prevent the consideration that, even with regard to trusts, the commercial qualification of the nature of the employment must depends, ultimately, on the pursuit of an activity directed to the market and the proceeds of which are at least able to remunerate the various factors of production used.

Significant indication of the ability to assign to a trust held by the connotation of commercialism also received regarding the interpretation of the jurisprudence of the Court of Justice that in respect of VAT, it was found on several occasions to address configurability, in-chief at the Anglo-Saxon derivation institute, economic activity relevant to the indirect tax certificate.

Thus, for example, the *Wellcome Trust* decision, the judges in Luxembourg have had occasion to point out that the business of dealing in stocks and other securities by the trustee in the management of the assets of a trust that pursues goals of public utilities (charitable trust)

becomes not operating at the level of economic activity in accordance with art. 4, paragraph 2, of the Sixth Directive.

In the case cited, the trust was treated as a private investor who is limited to managing a portfolio of investments, without therefore engage in any productive to some extent market-oriented. This conclusion is, moreover, consistent with the notion of economic activity that the case law has on countless occasions been able to provide. Thus, for example, as has been confirmed specifically in relation to a trust ruling in *University of Huddersfield* order to carry out important economic activity for VAT have no relevance nor the purpose nor the results thereof. In the context of Community law, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the same and its method of financing.

Deserves mention, with specific reference to the case of substantial shareholdings in corporate management, as embodied in the leading case supplemented by already Polysar Investments ruling that the Courts of Luxembourg came to recognize that the mere financial participation from other companies do not constitutes a case of exploitation of goods aimed at obtaining income therefrom on a continuing basis, as any dividend, the result of such participation, it follows from the mere ownership of the property.

Based on the foregoing, it is proper to infer that management by a trust of a majority in the capital of a company may be considered an enterprise (with all the notes for tax consequences resulting from the above qualification) in the case which interfere in the corporate trustee, exercising the powers arising from the possession of equity in order to achieve specific economic benefits.

The conclusions reached appear to overlap in some respects the results for the developed case law on the recognition of the nature (commercial or non commercial) banking foundations of the business from about the use by those facilities referred in the art. 6 of d.P.R. n. 601/73 and in the art. 10-*bis* of l. n. 1745/62.

Thus, S.C., with subsequent rulings n. 6607, 9 May 2002, n. 19365 of 17 December 2003 and n. 19445 of 18 December 2003, ruled that the conservative management by the founding institutions of investments arising from the transfer of its banking business with the sole purpose of finding the means necessary to achieve its primary purpose is not to rise to the discharge of trade.

Along the same lines is the most recent guidance of the jurisprudence of legitimacy expressed in a variety of judgments (from SS.UU. nos. 1576 to 1594 and nos. 1596 to 1599) of 22 January 2009. It should be noted that, in the case last cited by the Courts, providing a very innovative compared to the past, said the commercial nature of the activity from the foundations on the basis, *inter alia*, on the supposed existence of a legal presumption of conducting banking business from them; that, in clear contradiction with the previous interpretation by courts and with the thought of those who believes that the assessment of the nature of the activity must, however, be conducted with regard to thereof and not on the basis of the statutory purposes, though defined by the law.