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**On measures to avoid tax litigation and the principle of
unavailability of tax liability.**

English abstract

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ABSTRACT

This research aims to examine the main tools for avoiding tax litigation and their relationship with the traditional principle of unavailability of tax liability. In the first part of the study the concept of unavailability of rights examined in general terms. Then there follows an examination of whether it is possible to posit a general category of unavailable rights, which are not susceptible to negotiation. Starting from an analysis of Article 1966 of the Civil Code that distinguishes between rights considered unavailable by their nature and rights qualified as such by virtue of the law, it was concluded that it is impossible to single out a category of unavailable rights and determine once and for all a fluid and evanescent concept of legal unavailability. To understand the true extent of this principle it is necessary to make an analysis of case studies of individual rights which the legislature has, over time, as the historic moments and interests to protect, considered available or unavailable.

The legal nature of tax liability was then analysed, evidencing that in an initial phase, the relationship between the taxpayer, who must pay the taxes, and the tax administration, appointed to collect the money owed, had been assimilated by prevailing doctrine as a common private law relationship between a creditor and a debtor. The fundamental difference has been grasped between obligations under private law and under public law, within which falls the tax liability. The latter, in fact, despite being structurally similar to a private law obligation, has some functional idiosyncrasies: it performs the essential function of allocating the tax burden among all members of the community, on the basis of the constitutional principle of ability to pay. Each taxpayer is required to help fund government spending to varying degrees depending on their financial circumstances and the taxes imposed and demanded from them at any one time; in the interest of fair taxation no person is required to pay more or less than they should under the law. It is from here that the unavailability of a tax liability arises. If, in fact, the Administration disposes of tax credits, by granting exemptions or rebates to individual taxpayers of the tax they owe, this would end by

indirectly prejudicing other taxpayers, who would be forced to pay more to make up for the loss of revenue incurred. All this would entail a violation of the constitutional principle of ability to pay, by altering the overall balance of the tax system.

At this point our attention is drawn to the concept of tax unavailability. It was noted that there are any number of different doctrinal reconstructions on the existence of a general principle in tax law of tax unavailability. The three main theories are then discussed. In the first one unavailability is a founding principle of tax law, in other words, a dogma inherent to the system which, as such, does not require identification of either its legal basis, or its actual content. According to another view, however, the principle has neither theoretical consistency nor conceptual dignity, and only arises from a long-believed myth. The third theory proposes a less radical approach to the problem, going in search of legal basis of the principle, first identified in Article 13 of Royal Decree 3269/1923 and then after 1942, alternately in Articles 23, 53 and 97 of the Constitution, according to reconstructions proposed by doctrine. The analysis of the principle of unavailability of tax liability is then continued by briefly reviewing case law. From an examination of the main direction of both the ordinary courts and the tax courts (Court of Auditors) it can be noted that case law has not reached any satisfactory conclusion regarding the legal basis and scope of the principle, having all the same difficulties encountered by doctrine.

After a quick hint at the conclusion of the first chapter, the problematic relationship between the principle of unavailability and the grant of a tax amnesty, on the one hand and tax agreements, on the other hand, the second chapter goes to the heart of our research, dedicated to analysing the impact that the introduction of measures to avoid tax litigation has had on the principle of unavailability of tax liability. After reviewing in the first introductory paragraph the origin of the measures to avoid tax litigation, recalling the legal context and the cultural background, starting with the introduction of Law 241/90 on administrative procedure, we focus our attention on the main and most widespread measure to avoid litigation, the so-called tax settlement proposal. From this point we can trace the long and troubled regulatory developments that began with the introduction of tax agreements at the end of the 19th century, and ending, after various vicissitudes in 1997, with the final version of the tax agreement currently in force.

We then give an account of the centuries-old debate about the legal nature of the measures which have involved doctrine and case law up to the present day. This debate has always seen a contrast between two different approaches that reflect a different way of understanding the principle of unavailability. On one side are the proponents of the theory of negotiation that associate tax settlements with an agreement between the tax administration and the taxpayer on the amount of tax due: in circumstances when it is not possible to quantify precisely the taxpayer's liability, because

of the difficulty of reconstructing their tax situation at the time, the parties may reach an agreement satisfactory to both of them. While, in fact, the taxpayer gets a reduction of the claim and of the sanctions, the Administration has simply cash out for the sum agreed, albeit lower than originally requested, avoiding so the risk of a possible controversy, indefinitely and uncertain outcome. Such a theory, acknowledging that the Administration the power to dispose of the tax credit, devalues the principle of unavailability, admitting the possibility to derogate from them in the cases provided for by the legislator.

Supporters of the second thesis known as the unilateral-applicable, claim that unavailability is a principle inherent in the tax system and that, since it has a constitutional basis, ordinary law cannot derogate from it. For this reason they reject the categorisation of settlements as agreements between a public and a private party, and argue that any new determination of a tax demand must still be the result of a unilateral choice by the financial administration, to which the taxpayer, individually, has to pay. Indeed, it is from the participation of the taxpayer in the negotiation that there emerge those items that allow the Administration to review previous actions and correct them in order to arrive at the correct determination of the tax due. The new amount so determined is not the result of individual negotiations between parties each having their own rights, as this would be precluded for the Administration because of the unavailability of the tax credit, but it is the result of a proper assessment of the tax, made possible by the collaboration of the taxpayer in the investigation.

After examining the limits of opposing theories, highlighted by their detractors, we have focused on the attempt, made by more recent doctrine to overcome received opinions. These latter had ossified into a rigid, sterile debate, linked to the different importance attributed to the principle of unavailability, between the ‘temporary negotiation’ model and the ‘unilateral authority’ model. The new proposal is a theory of the bilateral agreement, consensual in nature but not negotiated, concluded between two *different* parties, the public administration and the taxpayer, that operate on different planes and, as such, cannot be compared to two municipalities contracting under private law. According to this theory, in addition, an agreement does not have as its object a tax credit but something else; if the tax owed has not been exactly documented, but its exact amount is still uncertain because the investigation phase has not been completed, then no tax credit has yet been created. Only when the demand has been definitely decided, then the credit, being now certain, with a fixed amount and due, does it acquire the character of unavailability.

This new perspective, along with the doctrine concerning tax settlement, has been developed with reference to the court imposed settlements and mediation, which latter are covered in the third chapter. The first paragraph covers the evolution of tax settlements, up to the most recent changes

introduced on 1st January 2016. Then we move on to the doctrinal debate on the legal nature of settlement, verifying the compatibility of the various theories with the principle of unavailability. Noting that the guidelines that contend the field playing the positions already expressed with reference to the establishment, with which the conciliation has many points of contact, we focused on the peculiarities of the tax settlement. We pay particular attention to the role played by the courts in perfecting the conciliatory agreement and the varying importance attributed to the function performed by the Provincial Tax Commission. These depend once again on a different approach to the principle of unavailability. Indeed, for some authors, a Provincial Tax Commission, as well as the Constitutional Court, should confine itself to a mere check of the external legality of the proceedings, while for others it should go further, up to reviewing the merits of the content of the agreement, namely to assess the adequacy of the amount determined therein. It is clear that the latter conclusion is inspired by the need not to allow the parties the right to dispose of the claim, so that there is always substantive legal control by the judiciary over the terms of the agreement reached.

At this point we move on to examine tax mediation, the legislature's latest measure to avoid of tax litigation. After having traced its origins, highlighting the differences with civil mediation, with which it shares a name more for reasons of media appeal than any real structural affinity, we focus on some of the many issues raised by this measure. These occasioned an important ruling by the Constitutional Court in 2014. We then look at those aspects which most affect the unavailability of tax credit. In this regard we focus on the three assessment criteria of any proposed mediation, dictated by Article 17 *bis* of Legislative Decree 546/92. These for the first time allowed the Administration to base itself, when deciding whether to conclude mediation or move on to litigation, on regulatory parameters which limit its discretion. The absence of regulatory policy, in fact, had been considered by academic writers as one of the most serious shortcomings in the area of tax settlement: it gave too much discretion to the authorities and this power to decide whether or not to allow a tax settlement in the first place, represented, according to prevailing opinion, the main cause of abuses of power and unfair treatment encountered in practice.

So therefore the legislator seems to open a new form of tax credit availability, under the requirements of the regulatory norms, contained in the three parameters given in Article 17 *bis*. It seems that doctrine is moving towards establishing new boundaries for the principle of unavailability, under a more modern and advanced understanding and compatible with legislative changes.

Our research is completed, at the end of the chapter, with a brief reference to a subject traditionally neglected by legal doctrine, but topical since 2002: we refer to the issue of the eligibility of agreements at the stage of collection and their compatibility or incompatibility with the

principle of unavailability. Following the introduction of fiscal transaction in 2002, doctrine returned to this issue, highlighting the difficulty of reconciling the rules for bankruptcy proceedings with the key principles of tax law. Among these, just the principle of unavailability of credit is called into question by the Administration's having the power under certain conditions to dispense with a portion of the tax demanded, for companies in a state of crisis. Also in this case the law seems to admit the power of the tax authorities to make an assessment of convenience, when the surrender of part of a tax claim is justified when it has no chance of being paid in full, in exchange for certain and timely collection of the remaining part. This also arises from a further development of the principle of unavailability, not into dissolution, just into an adaptation to reality and the changed regulatory framework.