



Dottorato di ricerca in Diritto tributario delle società – XXI Ciclo

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La rilevanza della sostanza economica nel reddito d'impresa

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Anno Accademico 2008/2009

ABSTRACT

This work focuses on tax law provisions involving economic substance in the context of the corporate income taxation.

In the Italian tax law system, various rules require the existence of an economic benefit different from tax reduction. That happens not only in order to prevent abusive tax avoidance but also as a line of defence against tax evasion. A general scheme is therefore adopted in chapter I in order to classify all relevant cases in which the economic substance of a transaction overrides the form. A fundamental distinction is pointed out between two alternative cases: sometimes the economic substance is stated as a component of the substantial tax rule; otherwise the economic substance aims to be only an evidence of different facts which leads to some tax treatment. In these cases the economic benefit is a general standard not always necessary for applying the intended regime.

Under this framework, the further analysis deals with the rules regarding transactions between resident subjects. In this context, for example, the economic substance seems to play a substantial role when art. 109, par.5 of Income Tax Code states that expenses non related with the business cannot be deducted. On the other hand contracts lacking of non-tax advantages are still valid under a civil point of view because tax reduction is already a sufficient economic scope; consequently economic substance becomes no more than a possible evidence of the contractual cause.

Coming to the transaction with non resident parties chapter III demonstrates that economic substance has to be intended “substantially” with reference to the *transfer pricing* discipline and the *CFC legislation*, while in the limitation rule concerning *black list* cost seems to have a different nature and to be considered as a demonstration of a good-faith and effective transaction.

Chapter IV is dedicated to the special and the “general” anti avoidance rules and the theme is completed with a discussion on the recent jurisprudential theory of the “abuse of law”. In this area the economic substance reveals itself as proof of the subjective component of the abusive behaviour: the intention to violate the law spirit.

In the last part of the paper, are investigated the practical consequences of all our considerations. When the economic substance is a symptom of other factors it works as a relative presumption which admits counterproof. It's only a way to simplify the demonstration of relevant facts for a tax treatment. The taxpayer should be allowed to give evidence of these facts even if economic substance is lacking. As an instance, it should be possible to rebut the presumption of an elusive purpose even if no economic benefit is obtained, whenever the consequence of the transaction is a non marginal loss, since a negative performance significantly higher than the tax benefit makes not plausible to think that the transaction was driven by a tax purpose.