

Subjectivity and ability to pay tax in Consolidated ⁽¹⁾.

The objective of this study is to assess the national institute of Consolidated governed by art. 117 ff. Tuir, with a view to resolving the sensitive issues that arise, since the first reading of the rules, in order to subjectivity and the ability to pay.

Before still to face such profiles is necessary to comprise which it is the context in which the inserted consolidated.

The introduction of the institute of the consolidated is placed in fact in the widest context than a reform that has involved the passage from the method of the imputation to the method of the exemption.

As it is very famous the final order of the reform is that one of a system of imposition directed to exclusively real character in which the fiscal withdrawal of money the yield is carried out alone when is produced.

Such intention comes synthetized with the formula "from the persons to the things". Draft of one elaborated philosophy, in 1990 from the Prof. Tremonti and then put into effect in quality of Minister, with the reform of 2003.

It is necessary to comprise if such passage from a system of imposition of personal type, as it is what it emerges from the reform of years 70, to a system to exclusively real character, effectively has been come true. Such aspect is important in how much in a system of imposition of real type - it has been observed from authoritative doctrine - is not necessary to assure one tight coherence between title of the productive source of yield and title of the fiscal obligation.

That could help to more easily explain not the coincidence that emerges from the discipline of the national consolidated one, between subject that produces the yield and subject that is obliged to also pour the taxes not having necessarily the integral possession of the yield of the controlled one.

⁽¹⁾ Abstract doctoral thesis Luca Peverini

It goes but said that the reform has not been entire put into effect and it does not seem can be asserted totally of being passes you to a system of imposition of real type. From the study lead in the first one understood it with regard to the real distinction between taxes and personal taxes it emerges that, for a corrected organization of the issue, it must escape again from the temptation to operate clean contrasts. The personality or the reality is two ends of a scale to the inside of which the income taxes are placed normally. Just leaving from such it is premised that it is comprised like, in the tributaristica doctrine that has been taken care of the topic before the reform of 2004, not is full agreement on the real or personal nature of the Irpeg. That depends on the fact that in such tax some lack the main indices of personalities that are, to the contrary, present in the Irpef. Tasks in particular to the progressivenesses, lessened vital, absent in the Irpeg, or to the deductible burdens and the deductions of tax, only recognized to some subjects (agencies do not trade them) and not to all. The lack of some of such requirement explains in reason of the different nature of the passive subject of the tax. The case - as an example - of the "vital minimum" is this, whose protection "is prevailed", from the constitutional point of view, in the comparisons of the physical persons and not of the legal entities; it will not be able therefore to be argued from the lack of such index of "personality" in the Irpeg to deduce that it was intention of the legislator to create a tax of real type. It emerges however from the lead analysis that, in the complex, the Irpeg (and in particular the Irpeg weighing on the societies and agencies trades them) is a tax characterized in mainly real sense regarding the Irpef. The successive step to such deepening consists in confronting the Ires new with the Irpeg in order to comprise in that sense before can be shaped as sets up mainly real regarding the second one. In the first place all the indices of personality or realtà that were present in the Irpeg are remained invariati in the Ires. That that it changes is instead the coordination between the taxation of the societies and the taxation of the associates (passage from the method of the imputation to the method of the exemption), and the introduction of some new institutes between which it enunciates for importance, to the ends of our search, the consolidated one. It is therefore on such innovaciones, and the reasons of their introduction, that it must pin our attention in order to comprise if they can induce the interpreter to think that it is in presence of a system connoted in "mainly real" sense regarding that preenforced one.

In truth some steps in ahead towards a real system are found. The being free from imposition the dividends distributed to an associate who is in its turn society is sure a step ahead towards a system of real type. It allows to assert us that the Ires, in the cases in which he is in presence of a society participated from an other society, it only hits the wealth where is produced and not also in its successes to you passages. Not equally but it can be asserted for the hypotheses in which the associate physical person is not one society but one. In this case one is not had - as it is famous - exemption only partial total but. The reasons are famous and also justifiable in how much draft in the first place to safeguard the progressivenesses of the system. That does not prevent but to assert that not always the Ires can be considered a tax of real type. There are then of the innovations introduced from the reform of the Tuir, that they go exactly in the opposite sense to that one of the taxation of real type. The case of the institute of the "transparency" of the societies of understood them is this in which - like it is famous - the yield comes directly chargeed in head the associates and therefore it does not come taxed laddove it is produced, that is in head to the society.

If therefore with it it puts into effect them reform have been some steps ahead towards a model of taxation of real type, it cannot assert that such model has been realized totally. That prevents to justify the institute of the consolidated one arguing exclusively from the "reality" of the system.

An ulterior profile of which we have had to occupy is that one of the fiscal facilities.

According to some authors in fact, ulterior a possible explanation of the "anomalies" that are found in the consolidated one, consists in the fact that the consolidated one would be an institute face to introduce a facility for the groups of society.

One however shows how of facility to speak cannot, nor with generally regard to the taxation of the companies, nor with regard to the national funded debt especially.

The fact that dividends perceived by a company are excluded from imposition simply comes from the demand to remove the double economic imposition.

The double economic imposition, with the exception of how much could be supported for the double legal imposition, cannot sure be considered prohibited from the Constitution. That does not mean but that the legislator cannot prepare of the remedies

in order to eliminate it, in fact the double economic imposition that is had in the imposition of the societies and the associates, involves a discrimination of the exercised economic activities in society shape, regarding those exercised in shape characterizes them.

The method of the exemption is not therefore a tax allowance instrument, but it is simply an instrument in order to make up for to the disadvantage that otherwise would be derived from the abandonment of the tax credit.

Therefore as it cannot be spoken in a generalized manner about facility for the societies, it cannot be spoken about facility not even for the consolidated one.

Also such institute is introduced in order to make up for to the disadvantages that derive to the groups of society with the passage to the method of the exemption. With the abandonment of the tax credit in fact not there is more the possibility than to use the losses of the societies participated through the instrument of the devaluation of the participation. Therefore the only remedy remains to adhere to the funded debt which allows the possibility of offsetting profits and losses of all the group companies.

Once again we are but in presence of an institute face to make up for to the "disadvantages" that would be it derives to you from the new system of imposition, but it is not face instead recognizing "fiscal facilities".

Also the tax allowance purpose cannot therefore be adduce in order to justify the institute of the national consolidated one.

In the second chapter the subjectivity matter is faced in the national funded debt. What to we it interests is relating to the substantial subjetiveness.

Draft to comprise itself in other words if subject liabilities must be considered of I pay the single controlling society or if instead they are not from considering subject it passes also the controlled societies to you. The doubts are born from the fact that in head to controlling only burdens the obligation of deposit of the taxes to the state treasury.

In the understood one it it is demonstrated like, in spite of the obligation of deposit in controlling head to the single one, also the controlled societies must be considered subject pass you of tax.

Caught up such conclusions the problem is placed to establish to that reason it controlling is held to pour the taxes for own incomes of the controlled ones. Two are the possible alternatives: that controlling acts which responsible tax or which substitute tax.

To favor of the second hypothesis the fact supports that controlling is not held to pour the tax with to the controlled ones, like happens for the figure of the responsible of tax previewed from the art. 64, co. 3 of D.P.R. 29 september 1973, n. 600. The held subject to pour the taxes, not with others, but in place of others, for facts or situations to these reporting is the substitute of tax (art. 64, co. 1 D.P.R. n. 600/73).

It would seem then that the parent company should be treated as such. However there are several elements of differentiation between the traditional figure of substitute tax, and the figure of the consolidated parent company.

It is therefore to analyse these elements individually to determine whether they can be considered decisive in order to be able to continue to consider controlling a replacement tax or not. The most characteristic element of the figure is considered substitute.

It is - as is well known - one of the possible ways in which it can exercise the recoupment. In the case of substitution provided by Articles. 23 to 30 of D.P.R. n. 600/73 the claim ends with the generally identify with the deduction, then inserted on a pre-existing relationship between debt-credit substitute and replaced, which justifies hiring an independent obligation on the part of such replacement.

However in consolidated national parent company does not exercise any deduction in respect of subsidiaries. It could not be otherwise in the rest as the parent must not correspond to the subsidiaries of large sums of money, with the result that is less rooted in the possibility of providing an obligation or a right to operate the withholding tax.

But this is not in itself sufficient to exclude that is the parent qualifies as a substitute tax. Firstly because there are cases of "substitution" - such as those where there is a transfer of assets in kind instead of cash - in which there is the application of withholding and yet there is no doubt in order to the fact that it is replacing.

This may already be sufficient to say that the "retention" is not an essential element of the phenomenon of replacement tax. The chapter also held additional considerations in favour of that assertion.

The other element that characterizes the idea of replacing the detention by the replacement of wealth, which is income for the replaced.

Even this figure, however, does not seem sufficient to exclude that has been in the presence of a replacement tax. In light of the definition contained in (implicitly). 64, co. 1 of D.P.R. n. 600/73 is deputy who is required to pay taxes instead of others, or facts related to these situations. It is this requirement that allows you to classify a person in the category of "substitutes".

Much more delicate is the subject of recoupment. The absence of the deduction is in itself enough that it can also ruled out the existence of an obligation to carry out recoupment. Duty that could be done to derive from general forecast of art. 64, co. 1 of D.P.R. n. 600/73.

It shows, however, as the second chapter in the art. 64, co. 1 is not in itself sufficient to consider existing obligation of a parent company to exercise recoupment. At the same time, however, it also shows that the lack of an obligation to recoupment, does not apply to deny the parent as a substitute. As part of. 64, co. 1 indeed we must distinguish between the provision contains a "definition", which contains part of a "precept" providing for the requirement of recoupment.

To determine if the parent company is a replacement tax must have regard only to the definition of substitute and not its obligations. The lack of recourse if anything goes assessed from another angle, that of respecting the principle of capacity to pay. It is precisely this aspect that we are into the third chapter.

Of course, everything said in the second chapter takes value preclinical respect to the issue of ability to pay. In particular, we must tackle the issue of ability to pay whereas the parent pays for income taxes related to other subjects as a substitute tax.

The first issue that arises is based on the fact that in the Consolidated missing express provision of a mechanism for recoupment. In the first place can not construed as referring implicitly to claim the art. 118, co. 4 Tuir providing for the compensation of intra neutrality.

If those contemplated by art. 118, co. 4 is a way to exert recoupment it might be argued by art. 64, co. 1 D.P.R. n. 600/73 to support that the agreements of art. 118 are required and must be formulated in such a way as to ensure that the parent company provided to pay taxes. However this reading does not seem correct for the reasons that

are set out in chapter to which they refer. If lacking in the arts. 117 ff. a mechanism to secure recoupment, it is still possible that there is a different possibility for the parent to secure the borrowings to meet the tax obligations that weigh on it as a substitute for taxation.

One possibility in this respect is actually controlling the offer under its inspection report. The parent company is necessarily based on the provisions of art. 120 Tuir, a majority shareholder of all the companies joining the consolidated as subsidiaries. It is in that capacity that the parent can secure the provision for taxes you pay instead of others. The parent should make sure that is, through their voting rights in general, which controlled the ways the quantum of tax payable in respect of income produced by the subsidiary.

This is a solution that, if it is appropriate to solve the problem of hacking tribute from an economic point of view, does not apply to resolve the constitutional point of view. It demonstrates the thesis that in order for the legislation to be considered according to article. 53, co. 1 Const. would require the express provision for a right of recoupment.

Another hypothesis that could represent the solution to doubt the constitutionality of Consolidated is the consideration for which, having consolidated the optional nature, which is realized through the option to the Consolidated is a "take on tax."

To determine whether this is sufficient to resolve the problem of constitutionality you must first determine whether the pacts take on tax are in accordance with art. 53, co. 1 Const.

This is an issue on which - as you know - have not yet been achieved in teaching unique results.

It seems, however, that there are arguments in favour of this thesis considers that the legitimate pacts take on tax.

The art. 53, co. 1 Const. is a standard that refers to the obligations of tax, namely those relating to tax, and not to those type of civil law. The tax obligation referred to in art. 53, co. 1 Const. Is that the competition aimed to public expenditure, the private debt has obviously not the purpose. Notwithstanding that, against the debtor is and must remain the holder of ability, the fact remains that in turn the taxpayer-debtor can not

establish itself creditor to a third which is committed to pay a sum equal to the tax due by the first the public purse.

The first mandatory relationship, the one between taxpayers and tax authorities can not be waived nor the legislature, nor by the parties, the private relationship between taxpayer and the third hand, is not covered by. 53, co. 1 Const. And therefore not subject to that principle.

In chapter is then conducted further consideration. It is well known that - despite the different view of the doctrine - according to the Constitutional Court art. 53, co. 1 Const. not all obligations relating to tax because it refers only to taxes and not to taxes. It therefore appears that article. 53, co. 1 Const. Has a limited scope, which does not extend to all types of debt, surely - also will not accept the thesis of the Court constitution - does not extend to civil obligations. One can not see how we can then consider the applicable art. 53, co. 1 Const. agreements between private and, as such, will not object to a tribute, in particular tax, but only a sum equal to the exchequer due by the taxpayer. There will object to a "tax" because, in the first place - as has been said above - the amount that the third party is obligated to pay the taxpayer is not intended to contribute to public expenditure - certainly not the case this negotiation - but is aimed at catering to the one who contributes to public expenditure and there is tax because the tax is only one that has its source in a piece of legislation while the sum agreed between the parties has its source in the contract or contract terms.

It seems then who writes that rather than about the applicability or otherwise of constitutional relations between individuals, the issue of tax take on agreement be resolved in the sense just described, distinguishing tribute and respect of law, and between tax obligation and debt civil law. The scope of civil law, including the pacts take on tax is not covered by art. 53, co. 1 Const.

Resolved that way the question of compliance with the Constitution agreements take on tax but it must be noted that this is not a solution that can be extended to particular assumptions "take on tax" which is realized in Consolidated. The obligation of the parent is in fact a tax, because required by law, and what the parent has to bring the public purse is, in fact, a "take on tax".

It then returns to the starting point. The tax laws provide that a person is required to pay a tax for their ability to contribute should not recognize such an entity, if not an obligation, at least a right of recoupment.

In the second section of the third chapter then we move to further analyze possible explanations that have been offered by doctrine or could be obtained without reference to the "new" readings. 53, co. 1 Const. emerged especially with regard to Irap.

In particular there are some who said that what justifies contribution to controlling in-chief is the power management that it has on the economic activity of companies. This could, according to this author, justify charging the member of the performance of social meeting "a rational consistency and equity distribution."

The main objection that one can move to this thesis is that the index of ability that would be so identified by the legislature, is not consistent with the constituent elements of the tax base. In particular, the tax which pays the parent is calculated on the sum of the income of all member companies to consolidated.

The need for coherence from within doctrine seems to be satisfied in the first place with regard to the relationship between ability and de facto assumption of the tax. If the assumption is that the income it is difficult to see how we can say that the ability to pay is given by an index other than income.

A follow that argument then further considerations which go well against the argument that identifies the power management parent's ability to contribute in consolidated national hit.

Another possible explanation, in line with the new concepts of the principle of ability to pay, it may be to believe that the ability to contribute both on the status of parent. Tremonti is the same, and as you know was one of founding father reform Tuir of 2004, for having suggested in the past to consider the "social positions" which indexes ability.

The thesis status as a sign of ability to pay could be consistent with the fact that the tax base is income. One could assume that that is, the higher income group, the greater the ability that has the controlling if it is identified in the "social relevance" of persons affected by the tax.

However such a reconstruction fails to explain how, if it affected the ability to contribute on the status of controlling, we can measure the ability to pay having regard

to income products only from some of its subsidiaries. The consolidated national does not require that all group companies adhere to this model of taxation. But if the ability to pay is given the status of controlling the tax should be proportionate to the income produced by all companies, not just those that belong to consolidated.

Therefore remains as the only hypothesis reconstructive able to reconcile the institution of consolidated with the principles of ability to pay, which was outlined in the first chapter. It is necessary for the legislature to intervene controlling expressly recognizing a right of recoupment. Right then the parent may well exercise - as already can do even in the absence of such a prediction - by exercising its right to vote at the parent company.