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LA MEDIAZIONE
NEL PROCESSO TRIBUTARIO
(ABSTRACT)

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1. Outline of the complaint and mediation institution

With art. 39, decree law n. 98/2011, converted with amendments by law n. 111/2011, art. 17-*bis*, entitled “*Complaint and mediation*”, has been introduced, into legislative decree n. 546/1992,.

The said institution is applied every time a taxpayer intends to appeal against a “*deed issued*” by the Revenue Agency providing the value of the deed does not exceed twenty thousand Euro (excluding sanctions and interests). The limits set out in the article in question, without a shadow of doubt, lead to certain reflections on its implementation in our legal system.

With regard to the first limit, of a purely objective nature, one must observe that the term “*deeds issued*” must be understood in the wider sense, therefore also including the cases of “*silence*”, that the said art. 19, by means of a *fiction iuris*, has qualified as a “*tacit denial*” on the part of the Administration and, therefore, a deed that can be impugned autonomously.

However, the inclusion of the deeds for collection, among the deeds subject to complaint and mediation, could certainly present greater difficulty. One could admit that they were subject to appeal if two conditions were met.

- (i) The taxpayer intends to object to flaws relative to the registration of the debt and the addressee has not been informed of the deed in question, or
- (ii) the deed of collection (the payment order) is, by provisions of law, the first deed in which it is possible to challenge the tax demand.

Also in this case, it is certainly necessary to apply a less rigid meaning to the term “deeds issued”, to avoid limiting the application of the said institution, thanks to the application of paragraph 3 of the said art. 19, in as much as compatible.

One must also note that a recent opinion of the Supreme Court (Judgement of the Court of Cassation n° 7344/2012) admitted the impugment of “communications of irregularities” – which impugment, for that matter, according to the Judges themselves, would be “optional” – and poses problems, which are neither few nor marginal, also with regard to the application of art. 17-*bis* which could represent an aggravation of the taxpayer's position in the temporal succession of the deeds that can be impugned autonomously.

With regard to the subjective limit, it undoubtedly appears to be necessary to point out the problems relative to the possible presence of several "defendants" in the tax lawsuit and the feasible solutions proposed on the occasion of complaint and mediation.

In fact, when the taxpayer, in the light of the above, intends to object to flaws regarding the registration of the debt and, simultaneously, also in the deed of collection itself, these should involve both the tax imposing body and the collection agent. Since there are no references in this sense, that is to say regarding cases of necessary joinder of cases, a shortcoming comes to light in respect of the law, which has been solved by imagining a sort of "duplication" of the procedure, first, for flaws relative to the registration, before the office with competence for the complaint and the mediation, and with regard to the flaws precisely in the deed of collection, before the tax court. Thus, the aim of

reducing the possible occasions for litigation certainly cannot be considered as fully achieved. Confirmation also comes from the absence of a regulation of the necessary joinder in the case of several taxpayers.

The legislator (pursuant to art. 1, paragraph 611, letters *a*) and *b*), of law n. 147/2013), with the intention of improving the letter of the law, has introduced the amendments which, without a shadow of doubt, can be appreciated.

In fact, in addition to the change in the condition of admissibility into the condition of preclusion - which will be mentioned below - it has been expressly contemplated (i) that the terms for the execution of the procedure follow the provisions on the terms of court proceedings (including the so-called "holiday suspension"), (ii) that the effects of the tax demand must be suspended until the conclusion of the complaint and the mediation and, lastly, (iii) that the positive effects of the procedure must also extend to the recalculation of the taxable income for welfare purposes.

2. The nature of the procedure

2.1. (cont.) On the complaint

The objections that can be raised in respect of the complaint and mediation institution also regard the procedure contemplated for the same.

It must be noted that the institution in question, which is commonly known as "tax mediation", comprises two separate institutions: the complaint and the mediation. Within this phase prior to court proceedings, they have

different functions. The first, considered by many as similar to an "obligatory" instance of self protection, which acts as a "filter", is a deed which presents in advance certain effects of the appeal such as pendency and, after the administrative procedure in question, produces the same effects of the appeal with the plaintiff being obliged to file its appearance before the court within thirty days. The objections that the taxpayer intends to enforce must be contained precisely in the instance of the complaint, since the *petitum* and the *causa petendi* cannot be modified at a later stage in the procedure and certainly not once the case has been brought before the court.

The close link between the complaint and the appeal is demonstrated by the fact that the presentation of the complaint (and not the mediation) is a condition for the admission of the appeal (before the intervention of law n. 147/2013 and of the Constitutional Court, with judgement n. 98/2014, this was a condition of admissibility).

2.2.(cont.) On the mediation

The mediation proposal, which appears *ictu oculi* "optional", can be presented together with the instance of the appeal and it can be assessed by the Administration for redetermining the tax demand. In this sense, the legislator has recalled, in as much as compatible, the provisions on judicial conciliation (pursuant to art. 48 of legislative decree n. 546/1992), with the particular feature that, in the case of tax mediation (a valid reason also for the appeal), the presence of a "third party" is not contemplated, even for verifying the formal conditions for access to this streamlining instrument.

Therefore, tax mediation, in view of the reference made by the legislator, cannot go hand in hand with judicial conciliation and, more in general, all those forms of amicable composition alternative to a lawsuit or which condition access to the same, which, in any case, require, to differing extents, the presence of a "third party" (mediator, conciliator, judge, arbitrator etc.). One can notice, however, greater similarity with the settlement proposal which, for that matter, is carried out prior to the complaint/mediation. However, this latter differs from the settlement proposal because additions to the original assessment are not admitted (art. 2, paragraph 4, of legislative decree n. 218/1997), attributing to the agreement reached between the Administration and the taxpayer greater stability to the redetermined tax demand.

Thus, the undoubted transactional nature of tax mediation could be noted. Consequently several problems are posed relative to the (un)availability of the tax obligation, considering that art. 17-*bis*, unlike the "tax transaction" (pursuant to art. 182-*ter* of the "Bankruptcy Law"), introduces certain parameters to limit the power of discretion of the office in the mediation phase, namely: (i) the uncertainty of the disputed questions, (ii) the sustainability of the claim and (iii) the principle of the economics of the administrative action.

3. Reflections on the taxpayer's participation in the complaint and in the mediation

The two institutions, therefore, performing different functions in the same phase, would have been worthy of greater attention on the procedural

level. In fact, the role played by both institutions in that phase, prior to court proceedings but after the issue of the demand, requires necessary reflection in terms of the procedure and of court proceedings.

With regard to the first aspect, the following must be noted. Firstly, the complaint and the mediation can be understood and analysed from the aspect of the protection of the debate, allowing for the taxpayer to participate in his/her defence, in the (endo)procedural phase. The conclusions reached by European case law and, recently, by the Supreme Court imply the need for a revision of the right to defence and to debate, not as strictly connected to the court proceedings, but also during the execution of the procedure with the function of allowing for greater impartiality on the part of the Administration (art. 97 of the Constitution) and for "equality between the parties" (art. 24 of the Constitution). To this regard, there are several evident critical aspects in the complaint and mediation institution.

For the purposes of this investigation, the role of the so-called "collaborative" participation is also relevant, amplified by the recent amendments introduced into the discipline of the so-called "voluntary correction of tax return" (law n. 190/2014) and the launch of a "pilot project" on the so-called "cooperative compliance", subsequent to the publication of the OECD guidelines, introduced in 2013 and implemented in the "tax delegation" (art. 6, law n. 23/2014). These forms of participation, taking place before the issue of the assessment notice and contemplating effective occasions for "contact" with the Revenue Administration, allow for reaching two important goals, which, in fact, do not seem to have been reached by the complaint and mediation institution, namely (i) a reduction in disputes and

conflict in relations with the Tax Authority and (ii) collaboration to obtain the correct taxation and the effective capacity to pay (art. 53 of the Constitution).

From the view of court proceedings, it is necessary to emphasise, first of all, that the decision of the Constitutional Court n. 98/2014 recognises as constitutionally illegitimate art. 17-*bis*, in the part in which the presentation of the complaint is a condition for the admissibility of the appeal.

The Constitutional Court, adhering to a case law opinion consolidated over time, has maintained that such cases of "conditioned jurisdiction", which limit the right to defence and determine (irremediable) preclusion from court protection do not conform to the Constitution. The questions regarding the reasonable duration of a lawsuit seem still unsolved, if one considers that also with the condition of admissibility, and taking avail of the settlement proposal, with a holiday suspension and ninety days for the execution of the complaint and mediation procedure, about two hundred and eighty-five days can pass before arriving before the tax judge.

Furthermore, it must be noted that the complaint and mediation procedure is subjected by law to an automatic suspension of the effects of the deed of assessment, which, however, is not applied if the tax judge ascertains that the mediation phase has not been carried out. In the case of referral to a court, in fact, the deed is not suspended.

In addition, due consideration has not been given to the questions relative to the limited implementation of the institute only to deeds issued by the Revenue Agency, without including the demands relative to local taxes and cases of an indeterminable value.

Lastly, another question remaining unsolved is that of legal expenses which the applicant must bear starting from the complaint and mediation phase, since he/she must be assisted by a qualified defence counsel, pursuant to art. 12 of legislative decree n. 546/1992, when the procedure concludes positively in the administrative phase - if the tax demand was entirely or partly annulled, or if an agreement is reached by tax mediation and, therefore, there is no interest in continuing the dispute before the tax judge.

4. The German system: points for improving the complaint and mediation institution

For this examination, a comparative analysis with the German tax system seemed extremely useful, to analyse the salient points in terms of collaboration, cooperation and protection of the debate in the administrative procedure relative to taxation (*Voverfahren*) and in the phase of opposition against the administration (*Einspruch*) rendered obligatory for all deeds of a tax content (par. 347 *et seqq.* AO). The non-presentation of the opposition is a cause for inadmissibility (par. 44 FGO). The investigation carried out shows that the German legislator has, in fact, generalised the protection of the debate in the "endo-procedural" phase, ensuring the taxpayer's active, defensive and collaborative participation in order to reach correct and real taxation. In addition to this, the filter introduced features strong jurisdictionalisation, thanks to (i) the obligation of the subjects concerned to appear, (ii) the integration of the debate, recognising the implementation, also in the administrative phase, of the necessary joinder of cases, (iii) the powers of

investigation of the Tax Administration and (iv) a formal decision to be issued within a pre-established term of lapse. Furthermore, precautionary protection is admitted in the administrative phase. If the application for the suspension of the deed referred to is rejected or the Administration is silent on this point, the subject concerned can refer to the tax judge.

The elements described have the evident purpose of re-balancing the parties in the administrative procedure for the determination of the demand and in the "filter" phase. This balance allows for a greater reduction of conflict and of litigiousness between the parties, with an improvement in the relationship between the taxpayer and the Administration.

5. Conclusions

In conclusion, the analysis brings to light various problematic aspects of art. 17-*bis*, linked to the legislative technique and to a lack of coordination with the provisions relative to the streamlining instruments of the dispute, in the cases disciplined by debate and collaboration in the administrative phase, also on the basis of the more recent case law opinions of the Supreme Court. Thus, a general re-thinking of the implementation phase of the tax laws would be necessary, favouring, through the introduction of suitable instruments which do not conflict with the principles of the Constitution, greater communication, transparency and participation on the part of the taxpayer to allow for a real reduction in litigiousness and fairer taxation which, as far as can be seen, do not seem to have been reached by the complaint and mediation institution - although at the moment of their introduction they did have these purposes.