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"Judge's Investigation Powers in Taxation Cases"

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Preliminary remarks

The judge's investigation powers represent a delicate issue in the tax cases.

From a general point of view, the tax proceeding is a mere eventuality within the framework of the tax juridical relation between a taxpayer and the tax Administration that are the substantial parties of a dispute what's more of conspicuous technicalness.

The tax proceeding is therefore a proceeding of parties, a qualified moment in the fulfilment of the underlying juridical relation, on account of the economic relevance of the substantial public interests - to the fluent and regular collection of revenues - involved in the single controversy, which cannot be voluntarily disposed of.

This peculiarity may have brought the legislator in process of time to shape the tax proceeding in such a way as to preserve the public function of protection of tax revenues and, conversely, somehow to limit the sphere of action of the taxpayer when it comes to reconstruct, by means of proofs, the controversial facts.

By this way an explanation can be found to the limits to the rights of private citizens that eventually are set in the tax proceeding in the matter of deduction and probation faculties, otherwise unjustified in other procedural contexts.

The judge's investigation powers

In tax proceedings the judge is expected not only to solve juridical questions, but also to verify the measure of the tax due in relation to the dimension of the taxable base; the judicial activities shall then consist in finding the legal rules applicable to the single case as well as in

choosing the practical empirical rules more appropriate to represent the economic weight of the fact.

Questions of fact are solved on the basis and by way of proofs, this word indicating both the means and/or the procedures through which demonstrate the existence and consistency of a fact or a factual element or a situation, and the result of the demonstration, namely the value of certainty obtained.

As far as the way of acquisition of the proofs is concerned, generally speaking proofs can be given by the parties or acquired ex officio by the judge.

The parties and the proof -Wideness of the proof ; Limits to the proof (quest. 1 and 2)

The first two questions can be discussed together owing to the logical complementarity of the issues, respectively concerning the wideness and the limits to the faculties of the parties in the matter of evidence.

Most countries have pictured the probation faculties of the parties in the tax proceeding as ample and general ones: any kind of evidence, specifically listed by the single countries, is admitted in Greece, Hungary, Slovenia and Ukraine; no limitation of evidence needs likewise to be reported in Austria, Germany, Luxembourg, Portugal.

As for the kind of evidence, we can conclude that the documentary evidence is at a first rank in all countries; information from public or private entities is widely allowed; expert opinions are of huge use, considering the prevailing technical aspects of the fiscal matter; the testimonial evidence is expressly mentioned by Greece, Hungary, Luxembourg, Portugal, Slovenia, Ukraine.

Italy expressly excludes the testimonial evidence and the oath, owing to the non-disposable character of the public interest involved in the tax case, in which the tax Administration keeps an Authority's role .

The Italian system sets certain general limits to the use of documents in the tax proceeding.

On one hand documents acquired in an unlawful way by the tax administration cannot be used in the proceeding against the taxpayer; on the other hand, the taxpayer cannot rely neither on facts and data not deducted nor on books and records not disclosed during the assessment procedure of the income tax and the value added tax.

The Italian judge shall evaluate the documentary evidence on a discretionary basis, except for public documents bearing witness by a public officer.

The judge and the proof (quest. 3)

Also the tax judge can take the initiative of acquiring proofs. This empirical datum emerges from the answers given by all countries to the questionnaire.

The majority of them seems to describe the investigation powers of the judge as a wide and general instrument, by using expressions like “is free to dispose of every means of evidence necessary..” (Austria), “may require documents, information from public or private entities or order an expert opinion” (Germany), “can order ex officio to provide all the necessary evidence…” (**G**reece), “has the power of exercising all the faculties of access, request for information and explanations conferred by law on local offices and entities and of acquiring all data” (Italy), “is free to request additional evidence, to proceed to specific measures “ (Luxembourg), “may use all means of proof allowed by law” (Portugal), “any kind of evidence” (Slovenia), “shall invite the parties to submit evidence or on his own initiative request evidence that is not enough” (Ukraine) and so on.

In the Hungarian system the court usually orders evidencing on the basis of the parties’ motion and can order evidencing ex officio only if the law specifically allows for it (i.e. in case of nullity of the act, in the interest of a minor and so on).

In Italy the acquisition of proofs by the judge meets the same limits above mentioned.

The outcome of the enquiry could induce a fringe observer to consider the described powers of the judge almost as an absorbing faculty, apt to direct the proceeding apart from claims,

grounds and facts deducted, from probation initiatives taken by the parties. Such an interpretation, however, would recall a model of the process, of inquisitive nature, which is in contrast with the basic principles and the function of the tax proceeding, whose nature is disposable and based on the claims of the parties.

Questions of fact and questions of law (quest. 4 and 5)

Questions four and five concern the twofold issue whether the single law systems give the tax judge the power of going beyond the tax administration's claim by assessing a higher or a different fiscal debt of the taxpayer, on ascertaining facts or on deciding questions of law.

On the first side of the question, the answer generally given by the interviewed countries, though differently grounded, is that the judge cannot review the entire taxation but decide on the legal action brought before him by the taxpayer and, in any case, cannot ascertain a higher fiscal debt. And so, in Luxembourg the tax judge decides whether the claims concerning certain aspects of the taxation of the taxpayer are justified – case in which the judge reduces the tax burden, or not justified – case in which the judge rejects the claims and confirms the fiscal debt fixed by the administration; neither can new facts or a different appreciation of facts be a justification for the judge to increase the tax burden.

Similarly in Hungary the judge's task is to review legality of administrative decisions.

Nor in Ukraine can the judge ascertain a higher taxation than the amount borne by the challenged act, because for assessing taxes there is a strict procedure and only the controlling bodies are empowered to implement such measures.

In Slovenia the tax judge can state the wrongfulness of the tax Administration decision, but the statement cannot have as a consequence a higher debt.

In Italy, the tax judge shall use his powers in the matter of proof "within the scope of investigation and in the limits of the fact allegations of the parties". So the judge cannot investigate on facts not offered by the parties and cannot go beyond the tax claim of the

Administration. On the basis of the proofs given by the party, he can substitute his own evaluation to the one of the Administration and reduce the tax debt, but not increase it, owing to the principle of the claim and the disposable nature of the proceeding.

Other countries, such as Germany, Greece and, again, Slovenia, appeal to the general principle of prohibition of *reformatio in peius* of the challenged act, to found the limit to the power of the judge in determining a higher amount of the tax due.

In Greece the judge cannot put the plaintiff in a worse position, but in some specific cases: incompetence or void composition of the authority adopting the challenged act; lack of legal basis of the act; violation of a binding precedent (res judicata).

In Portugal the judge cannot assess a higher fiscal debt of the taxpayer.

The only exception to the limit generally set to the tax judge to go beyond the tax administration's claim, seems to be represented by the Austrian experience. The Austrian colleagues, in fact, have given a positive answer to the present question.

We think that this faculty of the judge may be considered as the reflection of the legislator's attention to the public interests of the tax Administration, rather than the expression of an inquisitive nature of the proceeding, which would not be reconciled to the essential being of a proceeding of parties, as a tax proceeding should be deemed to be.

Similar answers have been given by the different countries to question five, concerning the power of the judge to go beyond the tax administration's claim on deciding questions of law.

Apart from Austria, where the judge has the freedom to amend any section of the contested assessment act, generally speaking we can state that the court cannot increase the tax burden.

More precisely, in some countries the judge cannot even change the legal basis of an administrative act (Greece, Hungary, Portugal); in other countries, the judge can give a diverse interpretation or application of the law (in Germany, Italy, Luxembourg); in the remaining ones, instead, the tax judge is not limited by the arguments of the tax Administration and shall examine the validity of the claim irrespectively of its grounds

(Ukraine), questions of law being matters of deliberation ex officio (Slovenia): but in all these cases the prohibition of reformation in peius of the challenged act is applicable and so the judge could not, on the basis of a different law or a different interpretation of the law applied by the tax Administration, determine a higher amount of the tax due.

Once again, this conclusion is consistent with the principle of the claim mastering the tax proceeding.

Conclusions

At the end of our survey, we can say that the matter of proofs examined is of direct derivation from the basic principles of the tax proceeding : the principle of the claim (the judge cannot investigate on facts not indicated by the parties), the principle of the debate (the judge cannot assume proofs without giving the parties the possibility of counteracting and giving proofs to the contrary), the limit to the use of private science of the judge (the judge cannot assume initiatives on the basis of his personal private knowledge).

So, given that the tax proceeding is a disposable one, based on the principle of the claim**,** a strict consequence in the matter of proofs is that, as a general rule, the judge shall put at the basis of the decision the means of proof proposed by the parties.

In fact in all the legal systems examined there is a full, general – though not absolute in the concrete applications – right of the parties of the fiscal controversy to produce proofs, whether preconstituted (in general, documents) or to be formed inside the proceeding (like the expert consulting).

The proof of facts has a twofold profile, however, being at the same time a right of the party to demonstrate a favourable fact or situation and, in its procedural shadow, an onus incumbent on the interested party so that the failure to give the prove of the deducted facts brings the judge to disregard them.

So, it can be generally inferred, as clearly expressed by the Luxembourgian colleagues, that the onus of proof of facts which found or increase the tax burden lays with the tax administration whereas the onus of proof of facts which reduce or annihilate the tax burden lays with the taxpayer.

Thus having considered, we can more specifically point out that no countries, apart from Hungary, have signalled the existence of particular conditions for the acquisition ex officio of proof, other than the necessity of deciding the case, where proofs given by the parties are deemed insufficient.

Since the process is a disposable one, dominated by the onus of the proof, we can infer that the investigation powers of the judge are of a supplementary nature, that's to say they are powers of integration of the insufficient probation activity of the parties, and can/shall be exercised in case of an insufficient probation activity of the interested party; whereas the lack of any proof on the part of the taxpayer would lead to the rejection of the complaint, and the failure in proving of the Administration, on the other hand, would bring to the annulment of the act challenged.

So where the law system let the judge "free" to search and dispose the acquisition of proofs to the proceeding, setting aside a party's motion, it is consistent with the "natural laws" of the process that the collection and acquisition of proofs must take place in adherence with the interests and the debate of the parties. The investigative initiative taken by the judge is therefore bound to respect the fundamental principles of the proceeding: the parties fix the object of the proof, the facts to be verified are those indicated as assumptions of the act challenged and those opposed to by the taxpayer; the judge exercises his options on the means and instruments of proof, not on the issues of evidence, provided that the means of proof are those indicated by the law in the different countries.

According to these principles the Italian law expressly disposes that the tax judge shall use his powers in the matter of proof “within the scope of investigation and in the limits of the fact allegations of the parties” (art. 7 of Legislative Decree n. 546/1992), so as to accord the considerable investigation powers of the magistrate with the disposable nature of the tax proceeding.

And the disposable nature of the proceeding would naturally set the ultimate limit to the judge, when rendering his decision, so as to prevent him from ascertaining a higher fiscal debt than the one assessed in the challenged act.

If the process is initiated by the private party to contest an act of the tax Administration and plead for the reduction or the annihilation of the tax claim, the natural application of the disposable principle should bring to maintain the judicial decision within the scope and the boundaries of the plaintiff’s claim; otherwise the judge would proceed ex officio and, by altering the tax claim, would come to replace the Administration in exercising its decision powers.

The practical applications of the disposability principle in the different law systems, however, owing to a particular consideration of the interests of the public party of the proceeding, have not always been rigorous and absolute so as to shape the tax proceeding as a strict proceeding of parties ruled by the principle of the plaintiff’s claim.

To tell the truth, the faculty given to the judge of modifying the tax claim is largely to put in relation with the oncoming evolution of the tax proceeding from a form of judicial revision of the legitimacy of the challenged act to a judgement on the underlying substantial juridical relation between the tax payer and the tax Administration.

But if, from this latter view, a judge intervention on the tax claim to reduce it – within the claim of the plaintiff – can still be justified, on the contrary an increase of the fiscal debt by means of the judge could be ideologically difficult to ground and historically would collide

with the prohibition of the reformation *in peius* of the challenged act, which in time has imposed itself as a general basilar principle in the impugnation proceedings.

To conclude our review of the tax judiciary systems in Europe, we can but wish that the choices of legislative policy in this field be accomplished, though out of respect of the delicate balance between the public and the private interests involved, through the possible application of all the principles of a genuine disposable proceeding.