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ARTICLE

# Transfer Pricing Audits: Position of the Italian Courts

Piergiorgio Valente*

*The Italian Tax Authorities encounter difficulties in supporting their own transfer pricing audits in an unassailable manner, which is by no means a lesser difficulty than the one the taxpayer has to face when having to structure its own transfer pricing policy, especially if its intention is to adopt traditional methods.*

*With reference to the application of the cost-plus mark-up method, the Italian Courts rejected the Tax Authorities' assessments on the basis that comparability was not absolute. Even when the Tax Authorities – with regard to differences of functions and risks – extensively debated on their irrelevance for the purpose of determining the price, the Judges ultimately ascertained an inadequate motivation for such position.*

## 1 On the Topic of *Conditio Juris*

Italian case law on transfer pricing is rather scarce, and this is confirmed by the fact that the transfer pricing area has been attracting the attention of the Tax Authorities for audit purposes, only especially in the last few years.

What is interesting is how the Courts have been recently interpreting the *conditio juris* with an innovative twist, requesting not to provide evidence as to the subtraction of taxable matter from Italy but rather to prove that taxation in Italy was established, at the time, at higher rates than taxation in force, at the time, in the other foreign country.[1] The Court, in fact, emphasizes quite unequivocally how the Tax Authorities omitted to substantiate the tax advantage (deemed to have been unlawfully) pursued in the case under examination: in particular, the Tax Authorities did not succeed in substantiating the allegedly more favourable tax treatment, which the French entity was charged with, and which the same had presumably achieved through transfer pricing.

As may be observed, the above is a significant step towards the principle's application to situations that are effectively and substantially elusive within the framework of a group, rising above formal positions where, what might even have occurred is that income not subjected to taxation in Italy ended up being taxed at higher rates in the other State and, this notwithstanding, the Italian company was subjected to audit in any case.

The foregoing position was once again confirmed by the Courts in recent decisions, where it was stated that looking beyond *discrepancies and inconsistencies in the behaviour of the resident enterprise*, it was in any event necessary to construe specific arguments regarding the most favourable tax treatment.[2] Quite noteworthy is the manner in which the Bench reached such conclusion by means of an argumentation process in which it asserted that, starting by acknowledging the *dialectical nature* of the burden of proof in transfer pricing, while referring to the contents of the OECD Guidelines, it is the duty of:

- the Tax Authorities, to *outline an avoidance plan as well as the manipulation and alteration procedures of classical schemes, deemed unreasonable pursuant to regular market rationales*;
- the taxpayer, to *prove the existence of valid economic reasons (i.e., sound business purposes), which are either alternative to or may be added to tax savings, and which can justify the specific behaviour involving the transaction under inspection*.

Indeed, the debate progresses from the ascertainment of the anti-avoidance or anti-evasion nature of the transfer pricing regulation and thus, on to the assessment procedures relating to the same. On the basis of statements made so far, the anti-avoidance nature seems to prevail and, as a consequence, the need to verify the taxpayer's intent as well, going beyond the proof of non-compliance with the rule stated ex Article 110, paragraph

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1 See Provincial Tax Commission of Pisa (Decision dated Feb. 26, 2007, No. 52) where the foreign country was France. In such case, the difference of tax rates is '*deemed essential in order to regard the Plaintiff company's transactions as being elusive. Lack of such element entails already a first flaw in the construction performed by the Office* [Tax Authorities]'.

2 See Provincial Tax Commission of Milan, Decision No. 87 of Mar. 13, 2009. The Regional Tax Commission of Piedmont (Decision of Apr. 14, 2010, No. 25), on the contrary stated that '*transfer pricing rules apply despite the existence, in the Countries where the controlled companies are located, of low-tax regimes*'.


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7 of the TUIR (Italian Income Tax Code, hereinafter 'TUIR'), with the result that – although the taxable base and thus the arm's length value was not accurately computed – the rule at issue could not be possibly applied, if the purpose (i.e., the intent) to reduce the total tax burden at group level was lacking.

The Courts expressed their view in 2011, by reiterating once more the importance of the Tax Authorities' verification of *whether taxation in Italy, the Country in which the company has its legal seat, is higher than the one in force in the Country where the goods have been transferred.*[3] In the decisions, the provision under Article 110, paragraph 7 of the TUIR is expressly qualified as an *anti-avoidance clause which is rooted, not only in EC principles on the topic of law abuse especially present in Customs matters, but which is commonly found in various sectors of national tax laws*. Hence, the assertion that it is the Tax Authorities' duty, as established by the Supreme Court, to prove that a given behaviour constitutes abuse of law.

The position that defines the nature of Article 110, paragraph 7 of the TUIR as anti-elusive, cannot be fully shared, although confirming that the evasion (or avoidance) intent remains important, even if inserted within a different context, that is, within an audit. In other words, the rule established ex Article 110, paragraph 7 of the TUIR is by nature a definition rule of the taxable base, given that it imposes upon taxpayer, when computing its taxable income, to determine and apply the arm's length value to cross-border inter-company transactions.

## 2 On analytical-inductive audits

It is widely acknowledged that in matters concerning analytical-inductive audits, the assessment of the arm's length value is never a mere mechanical reconstruction of the company's accounting procedures, but requires, on the contrary, a rather complex assessment of non-accounting motivations, among which, it is actually quite difficult to understand the reasons for which the issue of group taxation, and the consequent unrealized advantage, should not be included in the transfer of proceeds in the foreign Country where taxation is higher.

The foregoing does not mean that such element is sufficient to avoid audits, as the taxpayer is, in any event, required to provide evidence of the transfer pricing application procedures; but, it should however be quite evident that the achievement (or non-achievement) of the tax benefit constitutes a precise indication in favour of taxpayer, which, along with other concurring clues engendered by the transfer pricing documentation, can provide an effectual defensive reconstruction.

A confirmation in that respect may be drawn by a recent Court decision in which the Judge does indeed acknowledge the nature of the taxable base determination ex Article 110, paragraph 7 of the TUIR, defining it a *self-assessment tool*, but imposing, at the same time, that the Tax Authorities, in replacing the transfer pricing method selected by the taxpayer (who therefore proved its having opted for the self-assessment of the taxable base of intercompany transactions), should in any case have provided clear and exhaustive evidence of the alleged avoidance of the taxpayer's behaviour, as well as the inapplicability of criteria adopted by the latter.[4]

To conclude the above analysis, it is perhaps dutiful to observe that a trace of such innovative interpretation may be found in the subject-matter of *conditio juris*, as well as in the Supreme Court's case law, where it was stated that *the Office, in compliance with the cited principles, should have, above all, ensured that taxation in Italy was at the time effectively higher with respect to taxation in force in the source Countries where the vehicles were sold.*[5]

## 3 Burden of proof and comparability analysis

A first point established by the Courts[6] involves the inapplicability of the provision at issue to intercompany relations within the Italian territory.

It is true, in fact, that a rather significant discrepancy between the declared price and the arm's length price may occasionally indicate a concealed or simulated part of the consideration, and would therefore represent a sufficiently reliable presumption; but such kind of possibility is, however, basically precluded where the transactions in question, carried out at values different from those on the market, have not occurred between independent enterprises, but between legal entities belonging to the same group, or can otherwise be justified by virtue of family ties. In such cases, in fact, the very nature of the relations between the parties excludes the possibility of either concealing or simulating the consideration.

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3 See Provincial Tax Commission of Reggio Emilia, Decision dated Mar. 21, 2011, No. 134.

4 As a matter of fact, shortly thereafter, the Judge challenged the Tax Authorities on the basis of the fact that they were neither able to provide evidence of the reasons for which the taxpayer's methods were presumably inaccurate – while their own methods were presumably deemed to be so – nor for the elusive allocation of financial income aimed at achieving undue tax advantages, nor least of all the achievement of such undue advantage. See Provincial Tax Commission of Reggio Emilia, Decision dated Mar. 21, 2011, No. 134.

5 See Supreme Court Decision, Mar. 27, 2007, No. 11226.

6 See Provincial Tax Commission of Milan, Oct. 28, 1997, No. 577. Regional Tax Commission of Palermo (Decision dated Dec. 2, 2005, No. 250) stated that *the freedom under Art. 41 of the Italian Constitution does not allow the Tax Authorities to challenge the remuneration agreed for services rendered by a company to another economic entity*.

The *arm's length* parameter is thus prevalently aimed at anti-avoidance rather than anti-evasion: as remarked, in such cases, it would be misleading to talk about considerations that are covertly shifted from one entity to the next.[7]

Upon a more in-depth examination of transfer pricing rules, the Courts insisted on the need to apply a comparability analysis to obtain a proper reconstruction of the arm's length value.[8] And thus, an objection was raised against the Tax Authorities for not having provided an alternative *evidentiary* element (*the theory pursuant to which . . . the Plaintiff company's not having allegedly applied an arm's length value is settled by a mere statement of the principle*). Should things be thus, the audit was rightly annulled as:

> it is always the Office's duty to carry out a rigorous assessment to ascertain the existence of arm's length value and it is in any case the Tax Authorities' onus to provide indications of a different and more adequate value that is applicable within the context of free competition, for goods at the same phase of distribution.[9]

In the case in point, it seems that the Tax Authorities' investigation stopped midway through, in substantiating the alleged over-invoicing, without however effecting any further analysis regarding the quantification of a different price.

Conversely, in transactions between controlled or non-controlled non-resident companies, the evaluation of the arm's length value of transferred goods entails, ex Article 9 of Pres. Dec. No. 917 of 22 December 1986, an accurate survey and critical analysis by the Tax Authorities and an actual comparison with prices applied by competitors for goods of the same or identical type, under arm's length conditions and at the same stage of distribution.

The assertion that the price applied by the parties does not correspond to the *arm's length value*, unless supported by some evidentiary element, is solved by means of a mere statement of principle and an unjustified intrusion of the determination of *inter-partes* prices.

In this particular case, the Judges pointed out how, for the purpose of identifying interest rates that are generally applicable to mortgages between associated companies belonging to different Countries, reference must be made to the market where the funds pertaining to the loan have been collected, having also regard to other significant factors such as the amount of the loan, duration thereof, lender's financial position, currency used for the computation and exchange risks.[10]

Leaving the above out of consideration, the Judges nonetheless observe, how the Tax Authorities have also effected an unreliable reconstruction in view of its being based on inconsistent data, making comparisons between transactions that are not quite similar, with negative consequences on the proper application of the price comparison method.[11]

To such effect, the Judges remark how there is lack of equivalence in the distribution phase, considering that the controlled company was working as non-exclusive distributor on a foreign market (mainly the French one) towards wholesalers and large-scale distribution enterprises, without stores or sales points, while the other clients carry out their activities at a different stage of distribution such as retailers, selling directly to end-consumers. On the said aspect, the Tax Authorities' motivations were not regarded as being aligned where the same maintained that the different distribution phase occurs subsequently to a transfer and does not directly impact price determination. A similar reasoning, evidently, is carried out for the volumes of goods exchanged and the number of consignments forwarded to independent clients, which turned out as being rather few with respect to the quantities sold to the controlled entity.

It is worth noting that, also on the said point, the Judges did not agree with the Tax Authorities' remarks which tended to highlight how *vis-à-vis* third-party clients, differences of volumes did not generate any discounts: in fact, the Judges deemed that within the context of negotiating autonomy, application of a price reduction in view of larger quantities of sold goods appears to be in any case the expression of a legitimate commercial strategy.

The Judges eventually identified the existence – at the controlled company's level – of ancillary services which were, instead, guaranteed by Plaintiff for third-party clients.

**Notes**

7 On the contrary, *considerations that have been declared are exactly the ones requested and, where these do not correspond to any market logic, it is not because part of the operation was concealed to the Tax Authorities, but rather because the relationship that binds the entities among which the transaction was carried out was such to have influenced in a decisive manner the considerations actually recognized, without subjecting them to market rules*. See Provincial Tax Commission of Milan, Oct. 28, 1997, No. 577.

8 See Provincial Tax Commission of Rome, Decision dated 4th February 1998, No. 342.

9 *Ibid*.

10 On the burden of proof, a 2007 decision develops such issue in great detail and rather exhaustively, asserting that such burden rests with the Tax Authorities, as these latter are *required to prove that the difference between the price applied to inter-company entities compared with ordinary market conditions is not adequately justified from an economic standpoint* (Provincial Tax Commission of Pisa, Decision dated Feb. 26, 2007, No. 52).

11 The similarity was, indeed, only based on the features of the transferred goods, on the reference market and on the timing of the transactions, while other elements were being overlooked which, along with the goods' features, generally contribute to the fixing of a sales price: type of transport, delivery terms and conditions, packaging, advertising, distribution, guarantees, payment terms, quantity discounts.

The Supreme Court[12] also intervened on the issue of the burden of proof which, referring to a number of previous cases,[13] clearly specified that the burden of proof in the recurrence of an avoidance basis rests, in any case, with the Tax Authorities intending to apply the consequent adjustments.[14] Also in the case under examination the Judges' grievances revolved around the gaps in the comparability analysis, given that in the case at issue, the Office upheld its right to the restating of tax by merely referring to special contractual conditions existing between the parties on the topic of excluding guarantee for manufacturing flaws of the vehicles and deducting therefrom the over-invoicing of the vehicles purchased by the Italian company.[15]

## 4 On intercompany interests and royalties

If it is true that it is the Tax Authorities duty to justify the gap between inter-company prices and the arm's length value, it must be just as obvious that – once such logical process has been accomplished by the Tax Authorities – it is the taxpayer's duty to provide the reasons for its own business choices and justify the adequacy of the consideration. This is the case of an assessment in which the financial statements of the controlled company disclosed non-interest-bearing loans issued towards a controlled Luxembourgish company for notable sums, in the presence of a financial exposure of the issuing company, and in the absence of adequate clarifications by taxpayer in view of a behaviour that could not possibly be considered *normal*; the Tax Authorities calculated interest payable at arm's length value, on the basis of the IBA (i.e., Italian Banking Association) prime rate.

To such effect, the Judges[16] asserted that the income adjustment thus performed did not occur by means of a simple presumption, but through due application of the law, so that the results deriving therefrom, i.e., an interest-bearing presumption – accurately quantified by auditors for the non-interest-bearing loan allocated in the financial statements under credits – was identified, in view of the fact that no proof to (possibly) overcome the presumption of law was produced.[17]

A similar line of reasoning may also be found in a case involving the payment of royalties by an Italian company in favour of a foreign company. The Judges,[18] in fact, deemed such royalties as an advance distribution of profits to the shareholders, given that the percentage was not provided for under any of the conditions laid down by the Tax Authorities' Circular No. 32 of 22 September 1980 and given that such behaviour constituted a violation of the provision ex paragraph 5 of Article 76 of the TUIR (Article 110, paragraph 7, of the current numbering). On the said issue, the Court pointed out how the operating sector of the company in question was included under basic chemistry (*commodities*), which is characterized by very strict productive processes and intense exploitation of the equipment, reason for which, in view of the Italian plant's being productive for the longest time and the license agreement's being rather dated, there was no justification, after so many years, for such assiduous assistance since, the technical know-how and the competence to carry out research on an independent basis should have already been acquired, all the more, in view of the fact that the Italian company was directly incurring costs for research and experiments.

Under these circumstances, the Judges deemed that the evaluation method (i.e., price comparison) was accurate and in compliance with the dictates of Circular No. 32, as well as with the OECD transfer pricing principles, as both, technical and legal parameters derived from an analysis of agreements, had been duly kept into account.[19]

## 5 On management fees

The topic under examination, if at all possible, is even more delicate and complex than the previous subjects, given that with regard to the expenses at issue, the heart

**Notes**

12 Supreme Court Decision, Mar. 27, 2007, No. 11226.

13 *Ex multis*, Supreme Court Decision No. 4317/2000.

14 This principle is further confirmed also in transfer pricing, *given that the OECD Guidelines which, for the longest time, have been crafting determination criteria for transfer prices involving international business transactions, expressly underline in their 1995 version that, where the laws of each national jurisdiction provide that the burden of proof rests with the Tax Authorities for its own claims, the taxpayer is not required to prove the accuracy of the transfer prices applied, unless the Tax Authorities themselves have not provided evidence prima facie regarding non-compliance of the arm's length principle*.

15 On the other hand, the rigorous reconstruction of the arm's length value must also involve the taxpayer who, when referring to special discounts under Art. 9 of the TUIR, cannot adopt the ones generally applied within the group, but must rather refer to the ordinary values on the comparable market, which are the ones referred to by Art. 9 above. See Supreme Court Decision, Mar. 31, 2011, No. 7343.

16 Provincial Tax Commission of Ravenna, Decision dated Oct. 18, 2002, No. 253.

17 According to the Provincial Tax Commission (Decision dated Feb. 13, 1997, No. 55), *deemed interest on a loan granted by an Italian parent company to a Luxembourg subsidiary may not be taxed, if the Italian company has unilaterally granted a non-interest-bearing loan. The provision under Arts. 76, Paragraph 5, and 9, Paragraph 3 of the TUIR may not be invoked by the Tax Authorities, since it applies to transactions for the transfer of goods or the supply of services between independent parties*.

18 Provincial Tax Commission of Ravenna, Decision No. 387/1998.

19 It should be noted that, more recently, the reasoning was diametrically overturned by the Courts, while no specific worth should be attributed to *the reference regarding the contents of administrative practice* and, in particular to the mentioned indications regarding the maximum threshold of royalties in function of the nature of the concrete case. See Regional Tax Commission of Piedmont, Decision dated Mar. 16, 2009, No. 11.

of the matter is not only to prove their adequacy but also their tax relevance.

In that regard, positions adopted by the Courts are rather favourable *vis-à-vis* taxpayers. The Court[20] maintained, in fact, that:

> expenses incurred by the foreign parent company and charged back to an Italian subsidiary, although being functional to the coordination of the subsidiary and the main office, may be qualified as being relevant to the subsidiary's proceeds and may, therefore, be deducted from the corporate income relating thereto, provided they be considered as services rendered to the latter. Where, on the other hand, these coincide with management needs of the multinational enterprise, they must be deducted at the central accounting level.[21]

Such theory was corroborated in a subsequent decision[22] in which the Supreme Court stated that:

> it is legitimate for a company operating in international air transport, landing on stopovers of different States, to allocate directly – among the costs of each national company – those incurred at each stopover and determine on the basis of the flights volume the share of general operating costs (management expenses) to be attributed to each national company but incurred by the parent company.[23]

It is interesting to note how the Court deemed legitimate the behaviour of the group in which the foreign parent company assigned management expenses to subsidiaries and permanent establishments, while the Italian entity did not reverse that part of the charges that were not directly ascribable to proceeds realized in Italy, but rather to those realized abroad, judging the criteria underlying the audit, not only arbitrary,[24] but flawed by a violation of the principle according to which the concept of relevance of costs does not refer to proceeds but rather to the corporate purpose.

As a direct corollary, the Supreme Court established in subsequent decisions that:

- the allocation criteria adopted within the group was legitimate, since aligned with the principles set forth by Article 7, paragraph 3, of the OECD Model;[25] the relevance of management services cannot be put into question for the simple reason that all resolutions connected thereto were adopted at the foreign parent company's level, while due consideration should be given to the usefulness engendered by those services,[26] the latter being an infallible basis explicitly invoked by a subsequent decision that was in favour of the Tax Authorities;[27]
- costs deductibility must in any case be allowed (and those also involving management), even if not directly referable to profits or for the purpose of immediate profitability, considering that within the context of group strategies, entrepreneurial activities cannot always be linked to the need of realizing immediate profits, above all when the same operates within broader contexts than the single operator.[28]

Ultimately, the Supreme Court acknowledged, for cost deductibility purposes, the indications expressed in the financial statements and the certification issued by the audit.[29]

The Court's positions were expressed in the same tenor and therefore resolved that advertising and promotional expenses, incurred by an Italian company controlled by a foreign company, also with regard to giveaways and various free gifts to personnel, having the purpose of making the company known in Italy (where the branch operates), are deductible provided they be consistent with the economic activity.[30]

On the subject, further and more recent decisions, which have better clarified the Court's position on the management services issue, should be noted as these establish that:

- a significant aspect regarding relevance/deductibility is to be ascribed to the existence of a foreign ruling on the matter subject to controversy;[31]

**Notes**

20 Supreme Court Decision, July 13, 1999, No. 14016.

21 The Tax Authorities challenged the adequacy of the services rather than their relevance. The Judges' argumentations on the adequacy of the services and related proof are not fully grounded.

22 Supreme Court Decision, May 17, 2000, No. 10062. See also, Supreme Court Decisions, May 17, 2000, No. 11770 and May 17, 2000, No. 11648.

23 In that regard, the Judges referred to the Tax Authorities' Circulars which establish that the relevance of costs in corporate income matters, required by Art. 74 of Pres. Dec. No. 597 of Sept. 29, 1973, must not refer to proceeds but to the corporate purpose.

24 As they impose upon the enterprise a choice within the group's strategy, which is neither censurable by the Tax Authorities, nor by the tax Judge.

25 Supreme Court Decision No. 1133/2001.

26 Supreme Court Decision No. 3861/2001.

27 Supreme Court Decision No. 1709/2007.

28 Supreme Court Decision No. 1465/2009.

29 Supreme Court Decisions No. 5926 and 6532 of 2009. See also, Provincial Tax Commission of Milan, Decision No. 158/2005.

30 Central Tax Commission, Decision dated June 8, 1999, No. 5641.

31 Provincial Tax Commission of Milan, Decision No. 177/2005.

– costs charged to the strategic company within the context of the economic activity carried out by a sole corporate group[32] are also relevant;

– evidence in favour of management services deductibility is the documentation attesting to constant contacts between/among associated enterprises relating to specific services involved, such as contacts that were pre-existent to the rendering of such services and the keeping of a group organization chart indicating functions carried out by the various companies;[33]

– relevance is not in any way nullified by the fact that the supplier company has, in turn, consulted some reliable professionals for single activities requiring specialized services, provided these are included within the same context and set forth in contractual conditions;[34]

– the cost is deductible if there is an *agreement containing an analytical description of the kinds of services . . . and a pre-determined indication of a consideration that is also commensurate to the estimated value of such service* and if the consideration relating thereto has been paid over time without any further challenges;[35]

– the deductibility of intercompany services[36] depends upon the circumstances that the same be specific and contribute a true added value for each single company and not only with a view to being solely useful to the entire group.[37]

## 6 Concluding comments on the courts positions

The analysis carried out thus far, clearly indicates the difficulties encountered by the Tax Authorities in supporting their own transfer pricing audits in an unassailable manner, which is by no means a lesser difficulty than the one the taxpayer has to face when having to structure its own transfer pricing policy, especially if its intention is to adopt traditional methods. These latter, in fact, require the availability of data that are not easily available and when finally found, require in any event a number of deductive-evaluative steps regarding the effects of their actual applicability.

To provide an example, the substantial difficulties connected to the application of the cost-plus mark-up method should be taken into consideration.

On the one hand, in fact, the profit margin – which constitutes a component of the marked-up cost – is strongly influenced by the subjective characteristics of the parties, to the point that it is often quite difficult to quantify such element expressing the characteristics of the free market. On the other hand, any quantification entails a number of misgivings. In the first place, there is no univocal link between costs incurred by the enterprise and prices actually applied. In the second place, an evaluation of the degree of comparability of transactions – and the identification of any possible adjustments – is rather complex: to such end, it is necessary, in fact, to consider the differences existing between the various kinds of costs – operating and non-operating expenses, including financial costs – and linking them with the functions carried out and risks assumed by the parties.

The above comments were entirely endorsed by the Italian Courts which rejected the Tax Authorities' assessments on the basis that comparability was not absolute. It is worth noting that, even when the Tax Authorities – with regard to differences of functions and risks – extensively debated on their irrelevance for the purpose of determining the price, the Judges ultimately ascertained an inadequate motivation of such position. As such, where an assessment was upheld as being legitimate, this occurred for situations in which the taxpayer's behaviour was clearly overstepping the boundaries of established market rules or being overtly anti-economic.

It is thus possible to assert that, where a taxpayer owns the relevant transfer pricing documentation which, although not based on traditional methods, is nevertheless comprehensive and well structured for argumentation purposes, the Tax Authorities' task in proving that by applying a different method, a different price may be established for the intercompany transaction, is far from being simple.

As to management fees, the well-established position by the Supreme Court in favour of a broader interpretation on the concept of relevance, should not refer, strictly speaking, to a specific profit, but in a more or less indirect manner, to the economic activity.

At last, with reference to the *conditio juris*, the position adopted by both, the Courts and the Supreme Court as well, is to be looked upon with a certain satisfaction in these last few years, as both provide an authentic anti-evasion interpretation and not (merely) a limited approach

**Notes**

[32] Provincial Tax Commission of Rome, Decision No. 371/2003.

[33] See Regional Tax Commission of Lombardia, Decision No. 55/2004.

[34] See Provincial Tax Commission of Milan, Decision No. 158/2005.

[35] See Regional Tax Commission of Veneto, Decision No. 94/95 of 2006.

[36] See Regional Tax Commission of Lombardia, Decision No. 82/2008.

[37] It might be worth considering one further decision pronounced by the Courts, in which, although slightly different from the above positions, the Judges re-confirmed that: *the onerous or gratuitous nature of guarantee services for the debt of others within the framework of a corporate group depends upon the verification of whether or not there is a counter-item which must consist of a corresponding and tangible profits increase, albeit in a mediated way, by the controlled company and guarantor given that the advantage indirectly derives, for a fleeting and ill-defined refraction of the Group's or rather of the parent company's interest, from a greater aggregate availability of financial capital*. See Tribunal of Naples, Decision dated Oct. 18, 2000.

to safeguard national interests. In other words, price adjustment is admitted only if evidence may be provided that the agreement between the parties could effectively reduce the tax burden for the entire corporate group, with no significance being ascribed to the fact that a higher income may be determined in Italy, if the share transferred abroad was in any case subjected to higher taxation than in Italy.

This is the only way to punish behaviours that are actually liable to avoidance, taking due care not to confuse such latter behaviours with other situations which might be caused by a different kind of application of the arm's length value and might provoke, as a result, conflicting positions between the Tax Authorities and the interested taxpayer.

## [A] Aim of the Journal

This established international tax journal offers detailed coverage of direct tax, indirect tax, and social security from both legal and economic angles, and provides 12 issues a year of practical, up-to-date, high-level international tax information. Coverage includes all aspects of transnational tax issues. The journal includes authoritative, reliable content, written for tax attorneys, practitioners (litigation and transactional) in other areas where international tax issues are a concern, and academics.

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Manuscripts should be submitted to the General Editor, Fred de Hosson.
E-mail address: Fred.deHosson@bakermckenzie.com

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