CONSTITUTIONAL PROBLEMS IN THE FIELD OF TAX RELIEF

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ABSTRACT: *The present study analyzes the constitutional issues relating to tax relief. We highlight how the doctrine and case law have raised particular problems relating to the constitutionality of the rules under consideration and especially how they create interference with the principle of saving clause and the principle of equality with regard to ability to pay.*

KEYWORDS: *tax relief, principle of saving clause, principle of equality, ability to pay*

JEL CLASSIFICATION: *K 10, K 36*

1. INTRODUCTORY REMARKS ON TAX RELIEFS

In common speech the term "facility" means any "special treatment" intended to "help" or "make something easy" [1]. Even though this concept appears to be clear from the literal point of view, it creates from the legal point of view many problems of interpretation. Even up to these days the doctrine and jurisprudence, haven't reached a unanimous point of view on this matter.

The basic problem stems from the fact that the term "facilitation" doesn't have a complete definition in the given legal sense[2]. Therefore finding a general law applicable to this problem stays as a very complex problem.

Tax reliefs, therefore, do not respond to a harmonious and unified design, but are the result of political considerations that protect the interests of a particular class, other than the ordinary taxpayers' interests[3]. In this sense, we can find, in our legal system, rules with

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[1] See "Dizionario Garzanti di italiano 2009".

[2] See Basilavecchia M., *Agevolazioni, esclusioni ed esenzioni,* in *Enciclopedia del Diritto*, V, agg. 2001, Milano. p.52 ss. Read also ID. *Agevolazioni, esenzioni ed esclusioni*, in *Rass. Trib*., 2002, 2, p.431 ss.

[3] In this sense Boria P., *Il sistema tributario*, 2008, Torino, p 1093 ss. Analyze also the sentence of Corte Costituzionale n.346 of 28-11-2003 and the sentence n. 431 of 23-12-1997.

the aim to promote the achievement of a goal or encourage the conduct of human activity. Consider, for example, the tax reliefs intended to attenuate the social differences[4] or intended for the development of a market. This technique of incentives reflects a change in the social system and activates a mechanism for active control[5]. At one time the law was aimed solely at restricting the opportunities for wrongful actions, now it seeks to widen the opportunity of favorable actions to stimulate and promote them.[6] We speak in this sense about the "functionality" of the law[7] and about functional tax relief, with the latter term indicating the rules related to this phenomenon. The functional tax relief can be realized through two different methods: through the technique of compensation, intended to mitigate a pre-existing disadvantage; or through the granting of incentives. Both techniques are designed to achieve social and political objectives, despite having different characteristics.

The technique of compensation or facilitation operates *ex post* giving benefits to those who are involuntarily in situations of disadvantage, in order to reduce the differences within the social background to normal. In connection with this technique we can speak about a "compensatory tax reliefs". The technique of incentives or promotion, on the contrary, acts *ex ante* by providing a benefit to groups of persons who achieve certain desired behaviors by the legislature. In connection with this technique we can speak about "incentive tax reliefs".

Although it is difficult to identify a pattern of the tax relief, one can identify within them, some recurring figures. From an "objective" point of view one must distinguish the concept of "facilitated action" from that of "facilitator element". The first refers to the activities carried out by the private persons who want to benefit from these reliefs, while the second refers to the benefit granted. The latter can take many forms: the faculty to use simplified procedures, allocation of goods or money. From a "subjective" point of view we can distinguish two important figures: the subject "facilitator" and the subject "facilitated". The first, also known as passive subject, is the one who introduces the tax reliefs and is honored to give the benefits, such as, for example, the State. This category of persons must be defined ex ante by the law[8].The second, which is considered an active subject is the one who benefits of the tax relief.

Many, then, are the sectors of the law system in which the legislature may introduce rules to facilitate and intervene in social relations.

We can understand why the matter of the tax relief isn't only the subject of the study of fiscal law, but it is also an interdisciplinary area that includes economics, accounting, administrative law and constitutional law[9].

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[4] Think about the tax reliefs of the handicap people provided by Circolare Ministeriale 23/E/2010 point 5, or think the benefits for numerous families introduced by the Finance Act 2008.

[5] See Jori M., Esiste una funzione promozionale del diritto?, in Soc. dir., 1977, p.405 ss.

[6] See. Bobbio N., Dalla struttura alla funzione, 1977, Milano, p.15. Read also ID, Contributi ad un dizionario giuridico, 1994, Torino, p.316 s.This author defines as "positive sanction" the advantage that the legal system offers to the private that realize the action object of the tax. In this sense see ID., Sulle sanzioni positive, in Scritti Raselli, 1971, Milano, I, p. 227 ss

[7] See Bin R. e Pitruzzella G., Diritto costituzionale, 2007, Torino, p.57

[8] A rule that introduces incentives in favor of predetermined individuals violates the principle of equality under article 3 of the Constitution so it would be inadmissible.

[9] See Basilavecchia M., Agevolazioni, esclusioni ed esenzioni, in Enciclopedia del Diritto, V, agg. 2001, Milano. p.48

Moreover, it should be noted that the doctrine and case law have raised particular problems relating to the constitutionality of the rules under consideration, and especially the fact that they create interference with the principle of saving clause and the principle of equality with regard to ability to pay[10].

2. TAX RELIEFS AND CONSTITUTIONAL PRINCIPLES

The matter of tax relief, as summarized by the Constitutional Court «is itself very sensitive, because it necessarily involves unequal treatment compared to similar situations, which must be considered carefully and with an overall and unified vision: only who has before him the picture of all situations can grasp the differences between the one and the other in relation to categories of individuals and local circumstances, and can predict the direct and indirect effects of proposed tax reliefs, without violating the principles of equality and justice without seriously damaging the interests worthy of protection»[11].

Therefore the tax reliefs existing in our system are obliged to respect the Constitution in various ways: from the exercise of legislative power, to the constitutional protection of the taxpayer as a recipient of favorable treatment.

However, it necessary to say that are rare cases in which the legislation on tax relief is subject to the judicial review exercised by the Constitutional Court, therefore, eliminated because unconstitutional[12].

2.1 The principle of saving clause

The first and most important problem that arises in relation to the tax reliefs relates to their interference with the constitutional principle of saving clause. This issue is still controversial[13].

According to some authors because the tax relief is not normally part of the tax universe, it does not apply Article 23 of the Constitution which enshrines the principle of saving clause in the field of taxation. That provision, indeed, seems to apply only to rules of taxation, meaning those that impose a patrimonial performance, and not the rules that lighten the burden of the tax, as for example the tax relief. According to this approach, in fact, «the law should be considered only normal source, and not constitutionally required»[14].

Quite different is the dominant theory, which considers the field of facilitation as part of tax law. «There is no doubt», the Constitutional Court stated in a recent sentence[15],«that the rules of tax relief are, as the rules of taxation, subject to the principle regulated by Article 23 of the Constitution, because they realize an essential integration

[10] See Batistoni Ferrara F., Agevolazioni ed esclusioni fiscali, in Dizionario di Diritto Pubblico, 2006, Milano, p.179.
[11] See Corte Cost., sent. N. 76 del 1958
[12] This is what occurred in the proceedings leading to the Order number 557 of 1987. Another case raised the question of the constitutionality of office stated in the number 221, the same year;
[13] In relation to this issue, we accept the rulings of the Constitutional Court of 26 January 1957, number 4, the decision of March 18, 1957, n. 47, that of June 27, 1959, number 36 and finally the decision of 11 July 1961 n.48.
[14] See La Rosa S., Per una legge generale sulle agevolazioni fiscali, in Rivista di diritto tributario, 1993, II, p. 1259.
[15] See the sentence of Corte Costituzionale n.60 of 25-02-2011.

of the tax. As a result, the discipline's fundamental profiles should be adjusted directly from the legislative source.»

Under this view, all the tax reliefs, particularly those whose effect is to radically exclude the imposition, find in the principle of saving clause the indispensable requirement formal[16].

The newly recognized condition can be best defined as "relative saving clause". According to the Constitutional Court, therefore, this saving clause allows the primary legal instrument to define, albeit partially, the essential features of the tax, leaving to secondary sources regulatory powers. Again the Court, with a constant case law, holds satisfied the saving clause, when the legislature has determined the conditions, criteria and limits of the performance of taxation[17].

2.2. Principle of equality

The most important question refers to the relation that exists between tax reliefs and the principle of equality. If the principle of saving clause is a formal limit, the principle of equality represents a substantial limit[18].

As we know, the tax reliefs treat, by their nature, similar situations in different ways. This, according to many authors, would be a question of conformity with the constitutional principle enshrined in Article 3[19] .

In this case it is not the failure to comply with rules or of not pursuing the constitutional purposes taken as parameters, but the inconsistency and irrationality that vitiate the legislative choices of differentiation compared with, for example, with other choices made by the same ordinary law.

It is therefore necessary to reconcile the principle of equality between taxpayers with the needs policies that encourage exercising legitimate forms of government intervention in economy and society.

In order to better understand the issues involved, it seems necessary to analyze in a different way the tax reliefs-incentive from the compensatory tax reliefs with or without a functional character.

The compensatory tax reliefs without a functional character don't aim to stimulate the conduct of the taxpayer. They merely adjust the tax charging to social conditions. They don't create, therefore, differences in treatment, but modify the abstract model of the tax to existing situations in the real world, where the latter are worthy of legal consideration.[20] For these reasons, the legality of tax reliefs must be examined under

[16] In this sense, see Moschetti F., Problemi di legittimità costituzionale e principi interpretativi in tema di agevolazioni tributarie, on Rassegna tributaria, 1986, I, p.73; Basilavecchia M., Agevolazioni, esclusioni ed esenzioni, in Enciclopedia del Diritto, V, agg. 2001, Milano. p.48; Fichera F. Le agevolazioni fiscali, 1992, Padova,p.125.

[17] Cfr la sentenza della Corte Costituzionale n. 257 del 1982 e la sentenza n. 139 del 1985.

[18] As for the relationship between tax benefits and the principle of equality, see De Mita E., I limiti costituzionale alla tassazione, in Il fisco, 1994, 26, p. 6433; Moschetti F., Capacità contributiva, in Enc. Giur. Treccani, vol V., p.1 ss.

[19] About the principle of equality see Paladin L., Il principio costituzionale di eguaglianza, Milano, 1965 p.132 ss.

[20] For example, in the tax income, the advantage related to the deduction of medical expenses does not create disparity of treatment, but adjusts the levy to the personal situation.

Article 53, Constitution, in conjunction with Article 3, paragraph 1 of the Constitution which enshrines the so-called principle of formal equality. As previously stated in the Court [21], this article obliges to treat equally the same situations and unequally unequal situations. For this purpose, doctrine and jurisprudence agree that the judgment of a similar peculiarity on two different cases requires the application of the so-called *tertium comparationis*, namely a method of comparison. [22] The fiscal doctrine, however, raises the question if the basis of comparison can be only the principle of the ability to pay, or other tax provisions.

According to some writers the method of comparison can be used even having priority over a rule more favorable. We discuss in the latter situation about the *tertium comparationis*. [23]

According to the dominant orientation, however, the method of comparison is allowed to be used by the Article 53 of the Constitution or other constitutional principles[24].

In conclusion we can say that the compensatory tax is therefore subject to the limit specified in article 3, paragraph 1 of the Constitution. It may be regarded as unlawful when it introduces a benefit that can't be justified in relation to any fiscal requirement, or in relation to compliance with other constitutional principles.

Very different is the situation for the compensatory tax reliefs with functional character. The latter for the fact that they realize objectives of substantial equality, find in article 3, paragraph 2 of the Constitution, its foundation. As we all know, in fact, they are intended to compensate the taxpayer that is in an initial disadvantage.

This also applies to the tax incentives, which ascribes functionality to the law. However, it should be pointed out that since these rules don't use the technique of compensation but the technique of incentives, they are not necessarily based on Article 3, paragraph 2. The standards-incentive, therefore, may be generated by social or economic objectives, thus it is not imperious to be regulated by the Constitution [25].It has been said in doctrine, more generally, that the tax reliefs-incentive should be connected to a "worthy purpose." [26]

3. CONCLUSION

As we have seen also in the fiscal domain, the court plays an important role. Numerous decisions have been made clearly on controversial issues, guaranteeing and ensuring compliance with the principles protected by the Constitution.

[21] See the sentence no.3 of 1957.

[22] See Paladin L., Il principio costituzionale di eguaglianza, Milano, 1965 p.132 ss. See also Dagnino A., Agevolazioni fiscali e potestà normativa, 2008, Padova, p. 107.

[23] See Paladin L., Corte costituzionale e principio generale di uguaglianza, in Giur. Cost., 1984, I, p. 241. And also Fichera F. Le agevolazioni fiscali, 1992, Padova, cit. p168.

[24] In this sense see the important sentence of Corte Costituzionale: no. 179 of 1976, no.142 of 1982, no. 76 of 1983.

[25] For a justification of its tax relief based on paragraph 2 of Article 3 of the Constitution, see Potito E., L'ordinamento tributario italiano, 1978, Milano, p. 142. See also La Rosa S., Le agevolazioni tributarie, on Trattato di diritto Tributario, directed by A.Amatucci, 1994, Padova, p. 414; Dagnino A., Agevolazioni fiscali e potestà normativa, 2008, Padova, p. 110.

[26] On the topic see Batistoni Ferrara F., Agevolazioni ed esclusioni fiscali, in Dizionario di Diritto Pubblico, 2006, Milano, p.179.

The action of the Constitutional Court, which is realized with the control of constitutionality of laws, aims to harmonize the legal system avoiding the violation of fundamental human principles. Therefore the Constitutional Court is trying to avoid the adoption of illegal taxes.

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