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Use of Sensitive Information in Tax Matters: Obligations of Intermediaries and Guarantees of Taxpayers under Verification

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1. *Introduction. – Fighting against tax evasion in modern economies involves the «electronic» monitoring of commercial and financial transactions.* – Even recently, the need to adequately strengthen the fight against tax evasion in our Country, as an ineluctable step to achieve the required balance in public finance, has been reaffirmed in many quarters.

Among other things, the contents of this debate show how widely shared is the conclusion that a significant action in this way should be connected to the strengthening of the use of «electronic» – hence «traceable» – means able to prove the commercial transactions[1], their relevant payments and, more generally, the movements of money.

Furthermore, in a global economy where even small and micro-enterprises (or even individuals) operate (and compete) on an international system, it is crucial to make the mechanisms of cooperation between the different States fully functional as to the monitoring of (commercial or financial) operations carried out by the residents in different Countries[2].

[1] As to trade transaction traceability, it should be highlighted that our law system has undoubtedly gained an (unusual) leading position compared to the other European legal systems thanks to the implementation of the so-called e-invoicing started as from 1.1.2019.

[2] See V. Tanzi, *Globalization, tax competition by the future of tax systems*, in V. Uckmar (ed.), *Corso di diritto tributario internazionale*, Padua, 2002, p. 21 ff.

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This need was explicitly highlighted in the 2018 Report on the General State Accounts sent to the Presidents of the two Houses by Corte dei Conti (the Italian Supreme Audit Institution) on 26 June 2019. Such report strongly warned to step up these control instruments (and, specifically, the financial investigations) that seemed to be improperly «slacked» in recent years. The same Institution reported that: «After the drastic decrease in financial investigations authorised by Agenzia delle Entrate (the Italian Revenue Agency) in 2016 (-56.4% compared to 2015), and a moderate increase in 2017 (+9.2% compared to the previous year), a clear rise was evidenced in 2018 (+113.5% compared to 2017) [...] Albeit small compared to 2017, the investigations ascertained a higher tax amount (+12.2%)», adding, however, that the number of initiatives in this regard «is still very far from those implemented over the 2010-2014 period» and that «all in all, it is confirmed the weakening of the actions of tax controls occurred in recent years and the persistent underuse of a very fruitful instrument of investigation such the Register of Financial Reports that contains all the pieces of information on each financial movement carried out and that, after the appropriate regulatory changes and without prejudice to the necessary measures ensuring confidentiality, could be used as a persuasive instrument in the tax compliance phase even before auditing phase».

These last lines (showing, among other things, a «modern» vision of the relationship between Tax Authorities and taxpayers since it shifts the standpoint from fighting tax evasion through repressive actions to compliance) set the «borders» of the considerations that I want to develop here.

I would like to reflect on the efficacy of these investigation tools in tax matters, even in light of the recent regulatory evolution, not only appreciating their success in bringing out the illegal behaviours of taxpayers but also – if not above all – on how their enforcement must inevitably be harmonised with the rights of the subjects «undergoing» their use, since, although aiming at achieving the general interests of the community, they are clearly invasive of the personal sphere of the individuals.

2. *Regulatory framework.* – 2.1. *The Register of financial reports and communication obligations of the operators.* – First of all, to develop a reflection in a sense just indicated, it is necessary to recall the regulatory framework of reference briefly.

The primary tool gathering the pieces of information required to support the controls of the Tax Administration in our tax system is the Tax Register that was established in the Seventies to allow the collection and

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processing of data to define the taxpayer's position of which the so-called unique archive of the financial reports has become one of its crucial components. It is a methodical collection of the data identifying each subject with a relationship (to be understood in a broader sense) with entities qualified as financial intermediaries. Under the provisions of Article 11 of the D.L. (Italian Law Decree) no. 201/2011, these entities (according to the «traditional» definition the extremely varied typology of subjects facilitating the matching between demand and supply of savings and investment products) are required to disclose to the Register not only the «monetary» movements but also any other information (referred to the relationship) deemed «necessary for tax control purposes»[3].

In our law system, this significant amount of data – not only from a numeral viewpoint – can be used by the Tax Administration:

a) To exercise parts of its powers of inquiry under the provisions of Article 32 of D.P.R. (Italian Presidential Decree) no. 600/1973 (as to income taxes) and Article 51 of the D.P.R. (Italian Presidential Decree) no. 633/1972 (as to V.A.T.), according to which the data are «the base of any adjustments and audits» against the taxpayers not proving of having taken them into account while defining their tax obligations;

b) to assess and reconstruct the taxpayer's «attitude» both in case the financial movements prove an evading behaviour and to monitor the expenses made and the overall standard of living to create a pattern assessing the consistency with the declared taxable amounts;

c) in more general terms, to define specific selective lists of taxpayers who can be deemed exposed to a greater risk of evasion and, therefore, to plan control activities.

2.2. *International cooperation.* – As already mentioned, in the global economy peculiar of our days, the information gathering and monitoring tools briefly recalled above would be totally insufficient if applied only in the «national» sphere of relationships entertained by taxpayers. This is why international fiscal cooperation[4] is another crucial source of

[3] As easily intelligible, the formulation defined by the legislator is very general and includes any «ancillary» services strictly connected to a financial relationship (such as the classic case of opening a safe-deposit box).

[4] For further and broader information, among the various studies generally dealing with the dynamics of international cooperation in tax matters, please refer to: R. Barassi, *Cooperazione tra amministrazioni fiscali*, in S. Cassese (ed.), *Dizionario dir. pubbl.*, Milan, 2006, p. 1525 ff.; P. Mastellone, *La cooperazione fiscale internazionale nello scambio di informazioni*, in R. Cordeiro Guerra, *Diritto tributario internazionale - Istituzioni*,

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information to fight against tax offences through the monitoring of financial transactions.

As far as our purposes are concerned, the international tax organisation deals with the «dialogue» and «mutual aid» among the States to share any relevant pieces of information aimed at fighting against tax offences. This activity has become more and more crucial, due to the increased mobility of productive factors that, among other things, favoured the rise of taxpayers' aggressive behaviours in tax planning that led to:

a) the loss of revenue by single Countries (mostly the industrialised and «mature» ones) becoming a very critical problem when a severe crisis hit the world economy as from 2008 and

b) the problem of collecting the tax amounts due from national taxpayers when their wealth was transferred abroad due to the capital mobility.

In addition to these issues, the urgency to combat terrorism, after the tragic events that occurred on 11 September 2001, has become an additional issue to tackle[5].

More clearly, the exchange of information is the tool used by two or more Countries to make each other available data, news, documentary aspects related to the position of a certain subject, both to avoid the risks of double taxation of wealth and, as to the standpoint under analysis, to successfully counteract illegal practices aimed at relocating the personal wealth to countries different from the Country of residence and, typically, to those ensuring lower taxation or a higher level of secrecy of the positions of those who operate or transfer money and other assets on their territory.

The exchange of information is usually regulated by international treaties stipulated between the single States. In fact, the key regulatory reference to be taken into account to understand the legal dynamics of the relevant procedures is Article 26 of the model convention against double taxation drawn up by the Organisation for Economic Co-operation and Development (OECD). Additional references are:

a) a few multilateral treaties (e.g. the Convention on Mutual Administrative Assistance in Tax Matters dating back 25 January 1988 promoted by the Council of Europe and OECD, the Nordic Convention on

Padua, 2012, p. 213 ff.; S. Dorigo, *L'ordinamento italiano e la cooperazione internazionale*, in C. Sacchetto (ed.), *Principi di diritto tributario europeo e internazionale*, Turin, 2016, p. 155 ff.

[5] Please refer to the considerations arisen in the recent European Parliament resolution dating back 26 March 2019 on financial crimes, tax evasion and tax avoidance.

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Mutual Administrative Assistance in Tax Matters dating back 1989, and *the CIAT Model Agreement on Exchange of Tax Information* dating back 1999);

b) the Tax Information Exchange Agreements (TIEAs) consisting of simplified – but incisive – models of exchange of information aiming at favouring, especially in recent years, the «dialogue» with Countries previously considered tax havens, which were finally «forced» to sign such agreements to avoid the international isolationism (e.g., Italy signed a series of TIEAs with the Principality of Monaco, Isle of Man, Cook Islands, etc.);

c) the Foreign Compliance Act (FACTA) implemented by the U.S.A. in 2010 requiring the foreign financial institutions to disclose to I.R.S. (the U.S.A. Internal Revenue Service) the names of the American tax subjects with foreign banking relationships thus avoiding aggravated taxation.

Many initiatives encouraging the full transparency in the relationships and the constructive cooperation among the Member States were adopted within the European Union. Among the primary sources, it is worth mentioning the Council Regulation no. 1798/2003/EEC and the Savings Income Directive no. 2003/48/EC that allowed to overcome *de facto* the banking secrecy by ensuring, at least verbally, the full knowledge of the crucial pieces of information by each national authority.

This is not the place to go into the contents of these rules, nor the effectiveness of the relevant enforcement tools. As to the purpose of this study, it is enough to recall how the exchange of information is schematically based on three reference methods:

1) the exchange «*upon request*» is still the most widespread methods and consists in the formal request of the Tax Administration of one State to the corresponding body of the other Country to transmit the data in its possession referred to a specific tax subject under the agreement signed between the two Countries. An activation requirement is connected to such a measure if the requested information is not immediately available. In this regard, the Commentary on the OECD Model requires to submit detailed requests, explicitly forbidding the so-called *fishing expeditions*, i.e. merely «exploratory» requests[6];

[6] Therefore, no requests on indistinct groups of taxpayers can be submitted. It should be noted, however, that this limitation was recently mitigated and «group» requests are admitted in any case of «defined» groups: according to this interpretative opening, it is possible, for example, to request pieces of information on all those who closed a current account after a specific date. Of course, the request must comply with the provisions of

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2) the «*spontaneous*» exchange is still uncommon and assumes that while exercising its own controls, the Tax Administration of one State acquires pieces of information useful for another Country and collaboratively transmit them to it;

3) the «*automatic*» exchange is most encouraged today even if it is not yet fully operational. Since 2008, upon request of the U.S.A., the international community has started to consider it a pivotal tool to fight against tax fraud. Hence the OECD has developed special models built on the FACTA experience. The single States are committed to introduce rules requiring the national operators (primarily the financial intermediaries) to collect «sensitive» data to be entered into databases accessible by each tax administration. Such an approach was acknowledged in the contents of Directive 2014/107/EC at E.U. level and transposed into D.Lgs. (the Italian Legislative Decree) no. 29 dating back 4 March 2014, then supplemented by the provisions contained in D.Lgs. (the Italian Legislative Decree) no. 32 dating back 15 March 2017.

3. *Implementation of financial investigation tools from the (recent) standpoint of the Italian Tax Administration.* – Now, it is necessary to take into account how the Italian Tax Administration has implemented the use of the investigation tools (and specifically financial investigation tools) defined by the national and international standards whose general features were outlined so far. We aim not only at understanding how these pivotal tools are actually used in Italy against tax evasion and avoidance, but rather to investigate the other essential issue we promised to consider, namely the assessment of the guarantees granted to the taxpayer whose (clearly «sensitive») data are collected and processed.

Looking at the most recent experience, the following measures are significant: the contents of three Provisions (respectively no. 197357/2018, no. 669173/2019, and no. 247672/2019) enforced by the Director of Agenzia delle Entrate (the Italian Revenue Agency) between 2018 and 2019 and based on the use of data and information obtained due to the effectiveness of the tools monitoring the monetary transactions; the exchange of information at international level; the opinion made by the same Agenzia delle Entrate (the Italian Revenue Agency) expressed in Circular Letter no. 19/E dating back 8 August 2019[7].

Article 26 of the OECD Model requiring a presumed relevance of the information requested, according to a more stringent qualification than the original one referred to mere need.

[7] A comment on the contents of these provisions in the broader context of the use

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Specifically, and in a nutshell, the first two Provisions mentioned above start the experimentation of procedures assessing the risk of evasion of partnerships and limited companies by processing the information received from the operators of the Archive of the financial data, and other elements filed in the Tax Register collected both to assess the consistency of the credit entries in the accounts with the data resulting from the tax returns submitted by such taxpayers and to assess the consistency of the same records with the revenues declared to set the positions requiring to be investigated. The Provision no. 247672/2019, conversely, allows sending a communication to taxpayers who highlighted anomalous positions as to potential income resulting from undeclared transnational activities over the tax year 2016 and arisen from the analysis of the data received by foreign tax authorities in the automatic exchange of information.

According to Agenzia delle Entrate (the Italian Revenue Agency), these measures, together with the monitoring of the information collected by the Archive of the financial data, have given rise to results that start to be significant in defining the inquiry activities. In a recent interview[8], the Director of Agenzia delle Entrate (The Italian Revenue Agency) confirmed this trend pointing out that, at the end of 2018 «about 1,200 reports of potentially at-risk positions that moved more than one million euros in the accounts» were already transmitted to the single departments.

In fact, the Executive Measures above were quoted – and enhanced as means to achieve the objectives of fighting tax offences – also by the aforementioned Circular Letter no. 19/E dating back 8 August 2019, where Agenzia delle Entrate (The Italian Revenue Agency) defined the «operational directions and guidelines on preventing and fighting tax evasion and activity related to advice, litigation and protection of tax credits».

The following two points of this comprehensive document on the procedures are useful for our study:

a) the first establishing that the controls must be targeted «to bring out the real taxpaying capacity of the subject focusing the attention on real circumstances of risk» and that «within the internal activities of assessment, the operating departments will use the financial investigation

of the pieces of information in the Archive of the financial data was written by G. Ferranti, *L'utilizzo dei dati dell'Archivio dei rapporti finanziari*, in *Il Fisco*, 37, 2019, p. 3507 ff.

[8] Interview at page 2 of *Il Sole 24 Ore*, 10.1.2019.

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as the most incisive detecting tool towards specific types of subject vulnerable to a higher risk of evasion», and completing the experimentation set out by the two Provisions mentioned above, including the one referred to «the sample of selective positions identified using the information provided by the Archive of financial data on natural persons relevant to the 2014 tax period»;

b) the second deals with the exchange of information between States, which is defined as «one of the main operating activities to fight tax evasion and avoidance on an international scale», and for which the operational characteristics are detailed in light of the incisive strengthening of the relevant rules, especially at European level. On this aspect, it is significant the fact that Agenzia delle Entrate (The Italian Revenue Agency) brings the attention to the centrality of the processing of the «data on financial accounts held abroad that are exchanged according to the international model - Common Reporting Standard-CRS» highlighting how «the first CRS data received and referred to the year 2016, were used on an experimental basis in December 2017, for a campaign promoting the compliance against natural persons not reporting the assets held abroad in the RW box of the tax return» with satisfying results, taking into account that «as from 2018, these data were used both to define the scope of the requests for information or administrative assistance to be addressed to foreign authorities and in control activities».

This standpoint already emerged in the Circular Letter no. 1/2018 issued by Guardia di Finanza (The Italian military police under the authority of the Minister of Economy and Finance) and containing the operational guide to fight tax evasion and fraud (Manuale operativo in materia di contrasto all'evasione e alle frodi fiscali) that pointed up how the proper data evaluation can spotlight different anomalies, according to the examples given therein:

a) amount declared in the tax return not consistent with the bank movements referred to the financial relationship,

b) inconsistencies between the performance of the financial relationship and the income flows indicated in the tax return,

c) variance between the performance of the relationship compared with the average or the previous performance of the same relationship,

d) discrepancies between the number of asset positions and/or total stocks from a territorial, economic and financial viewpoint,

e) financial expenditures not counterbalanced by expenses or increases in assets identifiable by the Tax Register (such as, for example, the purchase and sale of cars, real estate, financial instruments, shareholdings).

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4. *Use of data and taxpayers' guarantees.* – In short, in light of the above, it emerges that collecting information on the financial relationships held by taxpayers is playing a crucial role in the activity of the Italian Tax Administration. As shown, the data are used both to implement general «risk analysis» required to define the planning of controls and, more in details, as a preliminary procedure against single taxable subjects.

Over the years, the results of these very intruding activities can be assessed, although, from now on, we should understand – as anticipated – what are the guarantees of the subjects against whom they are enforced.

Here, the issue does not just deal with the chance for the data subject to submit contrary evidence as to a disputed tax non-compliance during the examination of a specific transaction, but rather to understand in what terms the processing of the information comply with the right to confidentiality as well as whether its proper collection affects its subsequent use[9].

At least on a formal level, these aspects seem to be adequately monitored since every regulatory source ruling the procedures to collect information requires the strict compliance with the provisions on the protection of sensitive and personal data.

Specifically, the provisions of Article 26 of the OECD Model Tax Convention are in force at international level. The OECD has also published «The Guide on the protection of information exchanged for tax purposes» detailing the procedures that the administrations of each Country must implement to ensure confidentiality and indicating special checklists aimed at assessing the compliance with the relevant fulfilments[10].

[9] A detailed analysis of the acquisition and use of tax-relevant information with specific reference to the exchange of such information in an international context was recently conducted by I. Cugusi, *Le prove atipiche acquisite nello scambio di informazioni e loro rilevanza nel processo tributario*, Rome, 2017.

[10] The key principle on which these rules are based is thus, textually, represented: «Effectively protecting the confidentiality of the information and in particular, any personal information is a key concern for tax administrations. It is, therefore, necessary for tax administrations to develop a comprehensive policy, including procedures to ensure that the legal framework is effectively implemented. Such policy and procedures need to be reviewed and endorsed at the top level of a tax administration. Further, it needs to be clarified who in the organisations responsible for implementing the policy. As discussed in more detail below, the comprehensive policy should cover all aspects relevant to protecting the confidentiality and include background/security checks of employees, employment contracts, training, access to premises, and access to electronic and physi-

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Similar measures can also be found in E.U. rules as to:

1) The need for information to be relevant to be requested;

2) The secrecy of the information and its relevant use while respecting confidentiality;

3) The impossibility for the State to transmit the information when: 3.a) to provide it, the Country should enforce administrative measures derogating from its domestic law in force or administrative practice; 3.b) it could not be obtained under its own law in force or administrative practice; 3.c) the information could disclose a commercial, industrial or professional secret, or if such disclosure would be contrary to public security;

4) The required reciprocity among the States;

5) Some limitations on the use of the information exchanged for non-tax purposes.

At a national level, the Data Protection Authority records several interventions. Among them, the opinion made on 29 April 2019 is specifically interesting since it deals with the provisions mentioned above by the Director of Agenzia delle Entrate (The Italian Revenue Agency). He emphasised the need to introduce special security measures to minimize the risks of unauthorized access, to carry out specific controls on the quality of the data used and the logical processing carried out, as well as on the necessity to grant guarantees to the processing of personal data and to convene the selected taxpayers providing them with «adequate information» on the procedure used.

The aforementioned Circular Letter no. 19/E dating back 2019 also refers to the proper processing of information accenting the need to ensure «the real participation of the taxpayer in the assessment procedure» pointing out that «the right to be heard has a crucial function, also because it allows to properly motivate the formalisation of the possible tax claim after a real confrontation with the taxpayer»[11].

5. *The real enforcement of principles and rules protecting the taxpayers.* – In this (encouraging) regulatory and interpretative framework, we should wonder whether the defined rules and principles are effectively executed in practical application. Nevertheless, following this di-

cal records, departure policies, information disposal policies and managing unauthorised disclosures of confidential».

[11] According to a formulation enhancing the preventive confrontation in the procedure also referred to in the Circular Letter no. 1/2018 by Guardia di Finanza (The Italian military police under the authority of the Minister of Economy and Finance) mentioned earlier.

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rection, the situation radically changes, bringing to light both an attitude of the Tax Administration that is not very devoted to respecting its own declarations of intent (mainly as to the use of the preventive right to be heard) and an attitude of the jurisprudence that seems to let prevail the fiscal interest over the principles it should necessarily take into account in a due balance.

The case of the so-called lists trafficking, which caused a huge outcry in Italy, is significant. It dealt with unfaithful employees – the most famous involved *Heinrich Kieber*, a former employee of LGT Bank of Liechtenstein, and *Hervé Falciani*, a former employee of HSBC Geneva office – who stole the data of the clients of the banks where they worked handing them over to the governments of Germany and France, respectively, for money and protection. The data evidenced that the people on the lists concealed abroad massive capital. So, these two Countries undertook specific tax investigations and also provided these lists to other States (including Italy) to allow them to prosecute their residents.

In our Country, the use of information obtained in this way, to make (legitimate) tax claims against the taxpayers raised a wide-ranging debate both among scholars and in case law finally leading to a very puzzling interpretative position[12].

As to the tax verification, the Corte di Cassazione (The Italian Supreme Court) in a series of consistent rulings[13] expressly affirmed the principle that the use of any element of circumstantial value, even when acquired informally, is legitimate except when the prohibition derives from spe-

[12] On such events and on the wide-ranging debate provoked, among many others please refer to: I. Cugusi, *Le prove atipiche acquisite nell'interscambio di informazioni e la loro rilevanza nel processo tributario*, *cit.*, p. 176; S. Muleo, *Acquisizioni probatorie illegittime e vizi dell'atto: il caso della lista Falciani*, in *Rivista Tributaria*, 1, 2016, p. 147 ff.; A. Caringi, *Lista Falciani e tutela del contribuente: utilizzabilità vs attendibilità dei relativi dati da parte dell'Amministrazione finanziaria*, in SUPSI (University of Applied Sciences and Arts of Southern Switzerland), 2012, p. 12 ff.; F. D'Ayala Valva, *Acquisizione di prove illecite, Un caso pratico: la lista Falciani*, in *Rivista di Diritto Tributario*, 7-8, 2011, p. 402 ff.; P. Mastellone, *Primi orientamenti giurisprudenziali sul caso Liechtenstein: scambio di informazioni, onere della prova e garanzie del contribuente*, in *Rivista di Diritto Tributario*, 1-3, 2011, p. 547 ff.; A. Marcheselli, *Lista Falciani: le prove illecite sono utilizzabili nell'accertamento tributario*, in *Corriere Tributario*, 47, 2011, p. 3910 ff.; Id, *Lista Falciani e diritti del contribuente/indagato*, in *Corriere Tributario*, 31, 2013, p. 2462 ff.

[13] Specifically, the «twin» orders nos. 8605 and 8606 dating back 28 April 2015 published with the comment of A. Turchi, *Legittimi gli accertamenti fiscali basati sulla lista Falciani*, and C. Besso, *Illiceità della prova, segreto bancario e giusto processo*, in *Giur.it.*, 7, 2015, p. 1610 ff.

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cific law provisions (missing in this case[14]) and when the protection of the fundamental rights of constitutional rank is involved. Consequently, the bank data transmitted by the tax administration of an E.U. Country to the Italian Tax Administration, pursuant to Directive 77/799/EEC dating back 19 December 1977, can be used as a basis for the tax claim during the adversarial debate with the taxpayer without the requirement of a prior verification of their legitimacy by the recipient authority, even in case of evidence of unlawful acquisition as well as in case of violation of the right to banking confidentiality.

The Court's reasoning is clear: since the Italian Constitution does not guarantee the banking secrecy, the need to protect the fiscal interest prevails. Therefore the data can be used even if unlawfully acquired at the origin since the transmission by another State complies with the relevant rules. In short, the fact that the exchange of information occurs between the single Countries in compliance with the provisions on tax cooperation, cancels any offence perpetrated at data acquisition and does not conflict with the provisions on confidentiality both because no protection of banking secrecy is envisaged and because the confidentiality obligation binding the banks only deals with security and good business performance thus excluding any issue referred to fighting the tax evasion.

As a matter of fact, the only limit (and therefore the only guarantee) would be to grant the taxpayer with the right to be heard to try to offer proof of the proper behaviour already in the administrative phase of the investigation.

As already said, the disagreement with these conclusions is evident for various reasons that can be summed up as follows:

1) first of all, as mentioned earlier, because it is clear the non-compliance with the provisions contained both in Article 26 of the OECD Model and in Directive 77/799/EEC as well as with those related to the operational indications contained in «The Guide on the protection of information exchanged for tax purposes». It is not clear, in fact, the sense of dictating a detailed set of rules, procedures, and recommendations that should guarantee a limited and circumscribed use of information, imposing strict protocols for filing and transmitting data, when it is allowed to use the data obtained after violating these protection mechanisms (by stealing data);

2) moreover, because the right to privacy is among those guaranteed

[14] Specifically, the Court highlights the absence, in the Italian tax system, of a provision (present in the Code of Criminal Procedure) on the prohibition to use illegally acquired evidence.

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by the European Convention on Human Rights providing that it may be limited only: a) due to an express provision of the law or, b) to achieve public interests, but only if the limitation is required and consistent with a democratic structure of society (principle of proportionality). Taking into account the specific case, the absence of a derogatory rule is undisputed and, as to the other point, the idea that the fiscal interest can justify the limitation raises more than a doubt. Such reason, in fact, complies with the principle of general nature, but not with the principle of proportionality due to the original unlawfulness that led to the data collection from which the tax assessment originated;

3) furthermore, due to the principle of the so-called consequential uselessness according to which if a data or a piece of news was illegally acquired, then it cannot be used, since its subsequent transmission cannot correctly remedy the original illegality. The tax procedure is, indeed, an administrative procedure based on the principle of legality. Therefore, any infringement of the law (that in the initial behaviour is friendly) generates the illegality of each subsequent activity;

4) because the rules of due process and fair trial seem to be trampled upon since they cannot be deemed guaranteed by the mere right to be heard. The issue is not just ensuring that the taxpayer can be heard to explain the evidence found during the investigations, but to prevent the preliminary activity of investigation from being «improperly» conducted. Otherwise, the principles of impartiality, transparency and correctness of the activities of the Public Administration set out by Article 97 of the Italian Constitution are clearly violated. In short, if such a use is admitted, the whole system of guarantees collapses and the sense of anti-democratic management of tax issues and the total absence of the required «equality of arms» between Tax Authorities and taxpayers becomes strong;

5) finally, because such an attitude encourages illegal conducts and disvalues, such as those of unfaithful employees stealing files from the banks to sell them to the tax authorities with the complicity of the States that, in all cases referred, guaranteed them the maximum protection and an adequate «safe-conduct».

6. *The need to strike a balance between general interest and subjective rights: the role played by the right to be heard.* – What pointed out so far shows that one of the conclusive issues on the management of the taxpayers' data from a verification viewpoint is the need to find the proper balance between the general interest in preventing and fighting tax evasion and the rights of the subjects whose data can be read with an adverse significance while disputing an offence.

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The profile of privacy protection should be ensured by the procedures that require the controlled use of information. If it is true that this right may be limited in the pursuit of primary objectives of public interest, including the proper management of tax dynamics[15], it is also true that the involved data (e.g., movements of a current account or credit card) implies the knowledge of habits, tastes, personal inclinations deserving specific attention. In practical terms, it means not only to implement special precautions in the procedures to access to such information but also that any blatant violations (as already happened) of the safeguards brought into being cannot be tolerated[16].

From a more general viewpoint, it is also evident that the preventive right to be heard for a taxpayer is a guarantee of fairness of the process since, among other things, it ensures the absolute right of defence exercised already in the phase preceding the judicial one.

In this regard, however, the problem is still the application of such guarantee that, indeed, seems to be a mere declaration of intents when looking at what is going on in our Country. As a matter of fact, it is not really implemented even by the Tax Administration that tries to consider it as a simple statement of principle.

This is not the place where dealing with such a complicated matter that, to a large extent, lies outside the scope of the reflections we promised to develop here. In this regard, it is enough to recall what has emerged from the most recent interpretative and legislative experience. First of all, it is well known that, after a prolonged (and controversial) jurisprudential debate, the United Sections of Corte di Cassazione (the Italian Supreme Court) through the judgement no. 24823/2015 affirmed the right for the taxpayer to exercise his/her defence through a constructive confrontation with the Authority before receiving the verification notice. Such right tends to always apply in case of a dispute referred to E.U. taxes, whereas as far as the national taxes are concerned, it applies only in the cases expressly provided for by law. One of the application trends has affected, indeed, the case of financial investigations,

[15] In this sense, it is enough to consider the content of Art. 23, paragraph 1, letter e) of the EC Regulation no. 2016/679 dating back 27 April 2016 that clearly includes the tax matters among those of general public interests of the E.U. and the single Member States thus justifying the limitation to the privacy right.

[16] Recently on these issues, please refer to: A. Caringi, *Fisco e privacy: Storia infinita di un apparente ossimoro*, in *Il Fisco*, 46, 2019, p. 4407 ff. The Author arises substantial doubts on the contents of Art. 86 of the draft of 2020 budget law setting out the inclusion of activities to prevent and fight tax evasion among which the authorization to limit the rights and guarantees in terms of privacy.

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since the direction of the same jurisprudence of legitimacy is fully consolidated and preserves the validity of the tax claims issued without any preventive confrontation because this is one of the cases where the law does not impose any obligation[17]. This is even more perplexing when taking into account that, in this case, the same Administration defines the right to be heard as «crucial function» to guarantee «the real participation of the taxpayer in the verification procedure»[18]. However, it demonstrates to disregard its own (fair) intentions regularly.

Even at the regulatory level, things do not seem to be better. Recently, in fact, the Legislator seemed to understand the widely shared need to enhance the centrality of the debate in the phase preceding the issue of the tax claim. Unfortunately, even in this case, the expectations were largely betrayed. Article 4-*octies* of the D.L. (Italian Decree-Law) no. 34 dating back 30 April 2019 (the so-called «Growth» Decree) amended the D.Lgs. (Italian Legislative Decree) no. 218 dating back 19 June 1997 (regarding the definition of verification with acceptance) introducing Article 5-*ter* to regulate the mandatory call to take part in the adversarial debate. It is sad to say, however, that such an obligation is subject to a series of exceptions that, in fact, apply it to a minimal number of cases. Furthermore, indeed, the financial investigations will not be among them, since the adjustments based on them usually trigger the so-called partial assessments not requiring the Administration to convene the taxpayer.

In short, so much is to be done. It cannot be denied that the future of the anti-evasion measures expects to strengthen the monitoring of monetary flows both at national and international level. Nevertheless, it must take place within a framework of rules and guarantees peculiar of a system able to find the proper coordination between general interests and subjective rights being aware that the success of its initiatives will also be conditioned by the way through which the (increasingly broader) public power will be able to enter the private sphere of citizens with moderation and balance. No compliance can be established without the perception of a public administration able to operate using criteria based on impartiality and transparency.

[17] Just taking into account the most recent cases, the orientation of the Corte di Cassazione (The Italian Supreme Court) is highlighted by the following judgements no. 25582 on 13.12.2016, no. 8545 on 31.3.2017, no. 10249 on 26.4.2017, no. 25911 on 31.10.2017, no. 26500 on 8.11.2017, no. 29617 on 11.12.2017, no. 415 on 11.1.2018, no. 12999 on 24.5.2018, no. 5777 on 27.2.2019, no. 11608 on 3.5.2019, and no. 13490 on 18.5.2019.

[18] The words in inverted commas are those that can be read in the Circular Letter no. 19/E dating back 2019 previously mentioned in the text.

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