

Judicial system of Italy

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1. The Judiciary

The Italian judicial system has three main forms of jurisdiction: (i) the civil; (ii) the criminal; and (iii) the administrative one.

Both civil and criminal disputes are dealt with by «ordinary judges», referred to under the Constitution as «magistrates» (*magistratura*). In order to cope with the different nature of the issues arising within the system, the Constitution grants jurisdiction for administrative matters to «special judges» (Art. 103).

Disputes in tax matters are also heard by special judges and do not fall within the jurisdiction of the civil and criminal or administrative courts. The special tax courts are composed of “tax commissions”¹ (*commissioni tributarie*). The underlying reason for the institution of special commissions is the large number of tax disputes, as well as the technical complexity of the issues to be examined.²

Before 1996 tax law procedure was organized in four levels: (i) first instance tax courts (*Commissioni tributarie di primo grado*), with the same seat and competence as other tribunals; (ii) second instance tax courts (*Commissioni tributarie di secondo grado*), which their seat in the capital of the province³ and are competent to hear appeals against the first instance courts’ decisions; (iii) the central tax court (*Commissione tributaria centrale*), with its seat in Rome and competent to hear appeals against the decisions of the second instance courts ; and (iv) the Supreme Court.

¹ The terms “commissions” and “courts” are used interchangeably.

² The Italian Constitution expressly provides that no special courts may be created except those existing at the time of the draft of the Constitution itself (Art. 102 (2) and (6)). The compliance of tax commissions with the constitutional system is no longer under discussion.

³ It should be noted that Italy is subdivided in 20 regions, which are, in turn, subdivided in approximately 100 provinces. Each region and each province has a capital. Provinces are divided into municipalities (*comuni*).

In order to streamline the resolution of tax disputes, two decrees were introduced in 1992, namely Decree No. 545 and No. 546. These Decrees entered into force in 1996.

The introduction of the above decrees modified the system previously in force in the following respects. In the first place, the tax proceeding itself has been reduced from four to three levels: the appeal before the Central Commission (*Commissione Centrale di Roma*) has been abolished, and the third instance is now represented by the Supreme Court (*Corte di Cassazione*). In addition, the first-instance Commissions that have their seat in municipal districts other than a provincial capital, as well as the second-instance Commissions that have their seat in provinces other than the capital of the regions have been abolished. Moreover, the tax commission's jurisdiction has been broadened. This aspect was also modified following the Budget Law 2002, when tax commissions became competent to hear disputes regarding *all* the contributions that are characterized as taxes, including the local and municipal ones.

2. The Courts

2.1 The independence of the tax commissions

Both the first and the second tax commissions, which are independent and impartial, have a judicial nature.

The Italian Constitution provides for the independence of the magistrates. For tax commissions, this is guaranteed by the *Consiglio di Presidenza della Giustizia Tributaria*, a specific body that, *inter alia*, is in charge of deciding any questions dealing with the establishment of the commissions. The appointment of the judges takes place through a Decree of the President of the Republic, upon proposal of the Ministry of Finance. This Decree must have been previously been approved by the *Consiglio di Presidenza*.

Recruitment is, moreover, based on objective criteria.

Art. 6(1) of Decree 546/92 expressly refers to the rules of recusal and objection of a judge (*ricusazione*) set forth in the Italian Civil Procedural Code (CPC). More specifically, a judge has the duty to recuse himself from deciding cases in which he may have a personal interest. Moreover, under Art. 6(2) of said Decree, professional relationships, whether past or on-going, between the judges and one of parties are grounds for an objection against the judge by the other party.

There is, however, debate whether, due to the strong influence of the Ministry of Finance, the independence of the commissions is fully ensured. Thus, the judges of tax courts are appointed by the President of the Republic, upon proposal of the Ministry of Finance and the secretarial staff is directly responsible to the Ministry itself. The Ministry's involvement in the Commissions' formation could represent a strong control of the Ministry on the Commissions' work, which may also have an impact on the fairness of the judgments handed down.

2.2 The First and Second Instance Courts

As already mentioned, the first instance tax courts are organized in every provincial capital and are divided into sections, depending on the volume of tax judgments, as provided for under a decree of the Ministry of Finance and the Ministry of Justice.

The second instance tax courts have their seat in the capital provinces of the regions. They also operate through sections that may be located in cities with seats of the Court of Appeal, or Sections of Administrative Tribunals, or in capital provinces with more than 120,000 inhabitants.

Each commission is assigned a president, a vice-president and no less than four tax judges.

Tax judges are selected on the basis of objective criteria, set forth under Art. 4 of Decree No. 545/1992. Fulfilment of these criteria ensures that the judges have a general legal knowledge, but in no way guarantees a high level of experience in specific tax fields. The judges have only to present certain educational and formal qualifications, but there is not specific examination to check whether these qualifications are met. Indeed, in addition to ordinary judges, others such as professionals, former public administration employees and former tax authorities employees may act as tax judges.

2.3 The Supreme Court

Tax law disputes are dealt with by the Tax Section of the Supreme Court, introduced in conjunction with the abolition of the *Commissione Centrale*. Before the introduction of the Tax Section, tax disputes were dealt with by the Civil Section of the Supreme Court.

2.4 The Constitutional Court

The main function of the Constitutional Court is to ensure that the legislation is in conformity with the content of and principles set forth in the Constitution.⁴

When doubts over the constitutionality of a law arise, ordinary or special courts have both the power and the duty to address the issue to the Constitutional Court. Indeed, they are not empowered to simply cease to apply a law considered to be in conflict with the Constitution, but have to remit the decision to the Constitutional Court.

A question as to the compatibility of a law with the Constitution may also be put forward by one of the parties. Parties, however, may not directly approach the Constitutional Court. In this case, the court has to decide on the legitimacy and the grounds of the claim and, eventually, to remit it to the Constitutional Court. If the court considers the doubt to be without foundation, he has to reject the party's request.

If the Constitutional Court holds a law not to be in conformity with the Constitution, the law ceases automatically to have effect from the day after the publication of the decision in the official journal (*Gazzetta Ufficiale*). The decision of the Constitutional Court has general effect. In other words, a law that has been declared to be in conflict with the Constitution may no longer be applied.

3. Before Appeal

In order to prevent the start of a proceeding, the Italian legal system provides for general instruments aimed at defining, on a consensual basis, the amount of tax due, i.e. a fiscal compromise.

After the 1973 tax reform, which abolished most of the plea-bargaining possibilities for tax purposes, the number of tax disputes to be decided by the courts considerably increased. In order to improve efficiency, in 1997, two new forms of fiscal compromise were introduced, i.e. the tax assessment with assent (*accertamento con adesione*) and the judicial settlement (*conciliazione giudiziale*) (Legislative Decree No. 218 of 28 June 1997). The former, however, may only take place if the taxpayer does not file an objection against the assessment of the tax authorities.

Both instruments aim at encouraging the parties to settle the dispute via an extra-judicial method, when the outcome of the judgment is uncertain.

⁴ The Constitutional Court is also empowered to solve power conflicts between the State and the Regions as well as to decide accusations made against the President of the Republic for criminal acts committed in the exercise of his institutional functions.

The tax assessment with assent applies to each taxpayer and each category of income. As far as its effects are concerned, it may not be appealed by the taxpayer, nor may it be modified by the tax authorities, except in specific circumstances.

The office of the competent tax authorities is the one having its seat in the municipality district where the taxpayer is resident. The procedure may be started at the initiative of either the taxpayer or the tax authorities, depending on the methods of assessment used by the latter. When a dispute is assessed through the assent, the administrative sanctions are reduced to one fourth of the minimum amount applicable.

Once an objection has been filed, the parties may agree to settle the dispute. Unlike the assessment with assent, the judicial settlement takes place under the control of a judge. The provision that governs the settlement does not provide for specific requirements or characteristics in order for a dispute to be solved through this legal instrument; it only sets out some procedural rules (Art. 48).

The settlement may only take place before the provincial commission. Two kinds of settlement may be envisaged: (i) the settlement at the hearing (*conciliazione in udienza*); and (ii) the settlement outside the hearing (*conciliazione fuori udienza*). The former may take place in the following cases: (i) when one of the parties proposes it; (ii) when it is proposed at the initiative of the commission; (iii) when the tax authorities deposit – after the date of the hearing has been established – a settlement proposal that has already been accepted by the other party. The second form of settlement takes place when the tax authorities deposit – before the date of the hearing has been established – a settlement proposal that has already been accepted by the other party. In this case the president of the commission, if he considers the settlement to be admissible, declares the nullification of the judgment.

The benefits of the settlement are less favourable than the ones set for the assessment with assent. Indeed, the administrative sanctions are reduced to one third of the ones imposed by the tax authorities.

4. Appeal to the First Instance Court

4.1 In general

Appearance before this court may only take place as a consequence of an objection of the taxpayer against an act of the tax authorities. The acts against which an objection may be made are listed exhaustively under Decree 546/92.

4.2 The notification of the objections

The objection against an act of the authorities should be first notified, presented or sent to the Tax Administration Office and then deposited at the competent first instance Commission. (Arts. 21-22 of Decree 546/92).

Since the request for reimbursement for excessive tax paid aims at avoiding the start of a proceeding, a taxpayer is allowed to file an objection against the refusal of the tax administration only after an *express refusal* by the tax authorities. However, if they do not respond within 90 days from the submission of the reimbursement request, the taxpayer may object to their *tacit refusal* (Art. 21(2)).

4.3 The counterpart

The tax authorities should submit a defense before the Court within 60 days from the receipt of the taxpayer's appeal, in which they explain on which grounds the assessment is based.

If they do not appear in court, the tax authorities may only be sanctioned by way of procedural measures. The Court will proceed to communicate the date of the hearing and the decision only to the taxpayer in such a case.

If the objection deals with a subject affecting more than one person, the court can put in place a "joinder of action" (*litisconsorzio*) (Art. 14). In other words, the court can order the appearance in court of the parties that did not submit an appeal or which were not called in trial.

After a preliminary consideration regarding its admissibility (Art. 27 et seq.), the objection is assigned to one of the Judging Sections of which the Commission is made up. The chosen section is then in charge of deciding, at its discretion, whether to the objection with other proceedings of a similar nature (objective combination – *connessione oggettiva*) or involving the same taxpayer (subjective combination – *connessione soggettiva*) (Art. 29). The Commission should then proceed to communicate to the taxpayer the date on which the objection will be dealt with.

5. The Hearing

5.1 Before the hearing

Once its admissibility has been verified, the objection is assigned to one of the sections of the Commission, which will communicate the taxpayer the date of the discussion of the case (Art. 31).

The parties may present a notice of appeal and of defense, within 10 or 20 days before the hearing, depending on the nature of the documentation.

Unless the controversy involves an interest amounting to less than EUR 2,500, the taxpayer should be legally defended by a person holding the professional requirements set out under Art. 12.

The Court decides on the legal costs. In principle, these costs are for the losing party, unless, due to the complexity of the case, the Court opts for apportioning their compensation between the parties (Art. 15).

5.2 The investigation powers and the limits of the dispute

Tax Commissions are vested with rather relevant powers of investigation. Courts have access to and may request the same kind of documentation that the tax authorities may consult. However, the same provision sets out a limit on the exercise of such power: the Commissions are only allowed to investigate for the purpose of the trial and on the facts already presented by one of the parties. The Commission should act within the limits of the dispute, as defined both in the tax assessment and in the objection of the taxpayer. In other words, the Commissions should not confirm the assessment or admit the claim of a taxpayer for reasons other than the ones set out in the documentation provided by the parties.

With respect to the nature of the jurisdictional control and of the tax law proceedings, there are two theories. According to one theory, the jurisdictional control is not limited to the submissions by the tax authorities. This implies that the courts have to verify the existence of the taxable event and its related tax debt as such. The other school of thought maintains that courts should confine themselves to resolving the dispute as it is laid before them by the parties.

5.3 Testimony

Finally, it should also be noted that Art. 7 expressly forbids both the witness and the oath in the tax proceedings. The ban on testimony is considered by the majority of the scholars as an advantageous element for the tax authorities since, during the assessment phase, the tax authorities may use declarations made by third parties, which have the same practical value as testimony. The fact that the judge may not evaluate the validity of those declarations by summoning directly the party that has made them puts the tax authorities in an advantageous position with respect to the taxpayer.

5.4 The hearing

Normally, disputes are decided in a closed-door hearing – in the presence of the judges and the secretariat –, unless one of the parties requests a public one. Both the taxpayer and the representative of the tax authorities may take part at the public hearing. After a member of the Commission has presented the case, the parties are allowed to take part in the discussion and the dispute is, generally, decided right away in written form (Art. 35).

It may very well happen, however, that the Commission decides to file a pre-trial investigation request (*richieste istruttorie*) and that, therefore, the date of the decision is postponed.

It should also be noted that even if a public hearing takes place, the Commission must deliberate in secret. Art. 35 expressly refers to the deliberation rules set out in Art. 276 et seq. CPC. Therefore, the decision must be taken by majority.

6. Appeal to a Higher Court

6.1 Formal requirements

The decision must be deposited at the secretariat of the Court within 30 days from the deliberations of the Commission. Subsequently, the parties may appeal before the higher court, within 60 days from the notification of the decision to the parties. The same criteria required for the filing of the objection apply to the appeal from the decision (Art. 53(2) expressly refers to Art. 20).

Whereas the first instance proceedings must be initiated by the taxpayer, an appeal to the provincial tax court may be filed by the tax authorities. In order to limit the administrative burden, the tax authorities may only file an appeal if they

have previously been authorized by the Regional Directorate to do so (Art. 52(2)).

The appellant must deposit the appeal at the Secretariat of the competent Regional Commission, which will request from the Provincial Commission the necessary documentation (Art. 53). Moreover, the appellant should indicate the grounds for the appeal, which will constitute the basis as well as the limits for the higher court's analysis and decision.

Also, the appellate party must appear in court; however, its failure to do so will only trigger countermeasures of a procedural nature.

It should be noted that both the parties might be willing to appeal against the lower court's decision. In this case, the party that first files the appeal forces the other to act through an *incidental appeal* (Art. 54). This type of appeal is filed in the form of an objection not to be notified to the counterpart, but to be simply deposited at the Secretariat of the Commission.

6.2 A new procedure, a new decision

The appeal constitutes a new outcome of the dispute. Generally, its function is not to remedy to specific mistakes in the first instance court's decision, but it constitutes a new judgment, within the limits set out by both the court of first instance and the «specific» motivations of the appeal. It is forbidden to widen the *thema decidendum* by asking new questions (Art. 57(1)) or providing new evidence (Art. 58(1)), unless the judge considers new proof to be necessary or it is demonstrated that the party could not provide it during the hearing before the lower court.

Finally, it should be noted that, in order to further limit the scope of the appeal and to reduce the jurisdictional burden, the questions and the requests addressed by the court of first instance, which have not been indicated in the appeal, may not be dealt with by the Regional Commission.

7. The Decision

Under Art. 36, each decision should address: (i) the members of the Commission; (ii) the parties and their – if any – defense counsel; (iii) a concise description of the trial; (iv) the requests of the parties; (v) the description of the legal and factual motivations; (vi) the issue. More specifically, the part related to the motivation should indicate the relevant facts, the legal reasoning of the Court, the points the Commission touched upon and the provisions and legal principles applied.

Should one of the judges disagree with the decision, he may request that his dissent be registered in the trial record, to be stored by the Secretariat.

In tax proceedings, only one decision is allowed. Under Art. 35(3) decisions that (i) are not final or (ii) deal only with some of the issues addressed by the parties are not admitted.

The Italian language is compulsory in any trial. This rule applies also with respect to tax proceedings and hearings, and consequently, decisions are only published in Italian.

The parties may request the secretariat of the court to enclose in the decision an annotation aimed at avoiding the disclosure of their names and particulars in case of reproduction of the text of the decision for informational purposes.⁵

It should also be noted that the interpretation provided in court is only binding on the taxpayer concerned. It may very well serve as a guide in other cases, but the principles established in each decision should always be analyzed in the light of the underlying facts.

When the case deals with a controversial issue, which has not been unanimously decided by the court, the legal costs can be divided by the court between the parties.

8. The Supreme Court

The judgment of the Regional Tax Court may be appealed before the Supreme Court (Art. 62 et seq.).

The appeal is based on «motivations of objection», each of them covering a logical or juridical error in the decision. In this case, the function of the motivations of the appeal is not – as before the second instance court in which a new judgment is requested – setting the limits of the dispute, but also the

⁵ Legislative Decree of 30 June 2003, No. 196, the so-called “privacy decree”.

identification of specific errors. The motivations may deal with legal mistakes (legitimacy motivations) and the logical of the factual judgment. However, concerning the latter, the Supreme Court can only verify whether the motivations of the contested decision are of a reasonable nature, and, as it is not allowed to decide on factual questions, should remit the decision to the lower court. It will be the *a quo* court that, in the light of the Supreme Court's Decision, will confirm its decision, and thereby eliminate the errors.

Remitting the decision to a different section of the same lower court will also be necessary when, in order to admit an objection regarding a legal question, a further judgment on the facts is necessary.

Obviously, in the case of remittance, the lower court is bound to follow the principles set forth under the Supreme Court's decision.

Despite being of great interpretative value, the Supreme Court's decisions are specifically binding only on the lower court. The same considerations made under para. 6 with respect to the value of the lower courts' decisions are valid also for the Supreme Court.

9. Annotations

Each decision is classified with a docket number. The decisions appealed to higher courts are given a different number.

Two or more decisions may be published with a different docket number, even if they deal with the same issue and the same parties are involved. This may be the case when, for example, the taxable years vary.

In Italy, there are various law reviews publishing and/or commenting on the decisions of the Courts. However, the decisions are not issued under the supervision of the judiciary by a certain private publisher.