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The family enterprise: civil law and tax law issues

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Abstract

In the Italian legal system a specific and particular discipline has been in force for a long time for family enterprises. From the point of view of civil law this institution (regulated by Art. 230-bis and 230-ter of the Civil Code) has as its primary aim to protect not so much the position of the entrepreneur, as that of the family members working in various capacities in the same enterprise, while from the point of view of tax law the aim is, on the one hand to regulate taxation according to the principle of transparency typical of income produced in associated form governed by Art. 5 of Presidential Decree no. 917 dated 22 December 1986, (Income Tax Law), but also and above all, avoid — with the attribution by law of 51 percent of the income to the entrepreneur — maneuvers to reduce the tax burden through forms of undue splitting among the family members. In particular, in order to be able to consider a family enterprise as also existing for tax purposes, tax legislation is more stringent as regards formal requirements.

Keywords: Family Enterprise; Family Business; Taxation; Relationships between tax law and civil law.

Summary: 1. Foreword – 2. The family enterprise and the definitive abandonment of the patriarchal family business model – 3. The family enterprise in the Italian Civil Code: general framework – 4. Taxation of the family enterprise – 5. Conclusions

1. Foreword

Companies with a family dimension are present in many countries, regardless of their cultural and economic background, and are still the most common form of business organization, contributing substantially to the formation of gross domestic product[1]. Frequent cases do in fact exist of businesses set up by one or more family members[2]. Such businesses can remain and thrive for decades within the family circle, or expand over time, to evolve into more complex structures, and, in some cases, acquire the size of multinational groups.

In Italian private entrepreneurship this phenomenon is common, especially in the more traditional sectors of industry, while it is less frequent in the most recent forms of enterprise set up by and

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1. F.G. ALBERTI, F. G., E. PIZZURNO, *Technology, innovation and performance in family firms*, in *International Journal of Entrepreneurship and Innovation Management*, 2013, Vol. 17, p. 142 ff., estimated that family-owned enterprises or those where one or more households constitute an important reference point for management were widely present throughout the world, where they represent between 65 and 80 percent of the total number of companies in the world. Significantly, the country with the greatest spread of family businesses is still the United States. See also D. KENYON-ROUVINEZ- J.L. WARD, *Family Business,* Palgrave Macmillan, London, 2005, p. 1 ff., according to whom "The family business is the most prevalent and pervasive form of business throughout history, yet the world has only recently begun to recognize the importance and distinctiveness of the family-controlled firm".

2. See S. SCIASCIA et al., *Le PMI familiari nel new normal: armonia, governance e strategia,* in *Quaderni di ricerca sull'artigianato*, Il Mulino ed., 2022, p. 7 ff., who noted that the definitions of family business are varied, but are generally united by the fact that the property is controlled by a group of people linked by family relationships. In Italy, this phenomenon is particularly present in small and medium-sized enterprises.

within the digital world, and is the subject of growing interest in the field of economics, and not only, where the need is also emphasized for a multidisciplinary approach to the topic[3].

Indeed, many ways exist of approaching the subject, as well as many problems that a family business poses[4]. It is also difficult to identify a certain perimeter within which to place this phenomenon, given that it has no unambiguous definition at regulatory level[5].

It has been seen, moreover, that a very delicate phase can be represented by the generational transition of an enterprise[6]: the moment of "crisis" is manifested more frequently when the enterprise, handed down from one generation to another, reaches the third generation or more[7]: here the inspiration that had pushed the founder or founders to undertake a sometimes pioneering activity — also characterized by an often fortunate combination of vision, ability and responsibility, together in many cases with spirit of sacrifice and flair for business — tends to fade, just as contrasts may arise between ownership (the family) and management that cannot be absorbed by the presence of the promoter, which often — even when control is handed over to third parties — continues to play a charismatic role within the company.

This assumption should not however be taken for granted. Recent studies have shown that the new generations can on the contrary represent the key element of value creation, contributing to the success of the family business thanks to process and product innovation, the development of a new strategic plan and the transformation of the business model. The term "transgenerational value" has been coined for this purpose. From this point of view, aspects such as digitalization, managerial approach and internationalization, as well as the adoption of strategies oriented towards sustainability and social responsibility, gain importance[8].

It is not at all coincidental therefore that the Italian tax legislator — after various requests from both operators and scholars — has finally provided a favorable regime for this type of generational

3. See J.J. CHRISMAN, H. FANG, S. VISMARA *et al., New insights on economic theories of the family firm*, in *Small Bus. Econ.,* 2024.

4. R.G. DONNELLEY, *The Family Business*, in *Family Business Review*, 1988, vol. I, no. 4, p. 427 ff., in which the pros and cons of a family-run business were examined in the light of doubts and concerns about this phenomenon: "Is family management contrary to the fundamental American creed advocating free competition, equality of opportunity and the best man for the job? Is the value of a tradition of family management largely illusory, a product of self-interested rationalization by the families involved? Does family influence contradict all precepts of professional management? Do the complexities and demands of today's business environment make it foolish to attempt to perpetuate family influence in any firms?". On the strengths and weaknesses of family businesses see also, in historical perspective, A. COLLI – M. ROSE, *Family Business,* in G. Jones – J. Zeitlin (editors), *The Oxford Handbook,* Oxford University Press, 2008.

5. D. KENYON-ROUVINEZ- J.L. WARD, *Family Business, cit.*, p. 1 ff., refer to the studies of the Stockholm School of Economics, according to which a family business is characterized by the presence of at least three elements: "(1) three or more family members all active in the business; or (2) two or more generations of family control; or (3) current family owners intend to pass on control to another generation of the family".

6. F.G. ALBERTI, *Il passaggio generazionale nelle imprese artigiane familiari: profili gestionali e strategici,* in *Quaderni di ricerca sull'artigianato,* Il Mulino ed., 2013, p. 125 ff.

7. See F. MIRONE, *Impresa familiare e longevità. I driver per vincere la sfida del tempo,* Franco Angeli, Milan, 2022, who noted that the long-lived family business represents a successful business model, both in Italy and in the rest of the world. The Author tries to identify those factors of longevity that allow family businesses to survive over time thanks to a unique heritage of traditions, values and knowledge capable of generating a competitive edge that is difficult to achieve for non-family businesses. To this end, the Author makes a comparison between centuries-old family businesses in different geographical areas, namely Campania and Andalusia, in order to understand how these enterprises, despite intense competition and rapid and continuous market changes, can survive in the long run.

8. See in particular V. LAZZAROTTI – S. SCIASCIA, *Imprese familiari e creazione di valore. Il contributo delle nuove generazioni,* Guerini Next, Milan, 2023, who analyze a number of cases in which the new generations have actively participated in the change and success of the family business. See also G. CORBETTA, *Le aziende familiari. Strategie per un lungo period,* Egea, Milan, 2010.

   See also, more in general, D. KENYON-ROUVINEZ- J.L. WARD, *op. cit.,* p. 2, according to whom: "Family businesses are not only pervasive and important, but also perform well economically. Recent studies of family controlled firms on the CAC 40 and the S&P 500 have surprised many with the conclusion that family firms have outperformed non-family firms. Another study of private companies in the United States shows family firms average 25 percent more return on investment".

transition: the transfer of the company within a family does in fact produce considerable advantages, both in terms of inheritance and donation taxes and of direct taxes[9].

Already in this introduction, it should be noted — in order to clear the field from any misunderstandings determined by the uniqueness of the definition — that the institution of the family enterprise that I will address in these pages is completely unique and specific to the Italian context, in so far as special rules have been expressly laid down for family enterprises with particular characteristics, both from the civil and taxation points of view.

Family enterprise is an institution of a residual nature, although still present in the Italian economic environment, to which a special regime applies[10]. Given that one or more members of the same household may form an undertaking in the forms (partnerships, limited companies, including single-person limited liability companies, etc.) freely chosen by them on the basis of size and convenience, the family enterprise described below is distinguished by its own characteristics, as analyzed below.

2. The family enterprise and the definitive abandonment of the patriarchal family business model

In this paragraph, before analyzing the requirements needed to be eligible for the special regime linked to the family enterprise from the tax point of view, it will be necessary to briefly give account of the reasons why the Italian legislator has reserved a specific tax regime for this phenomenon.

In essence, the reasons must be identified as an attempt to overcome an archaic family model, often linked to a predominantly agrarian economy, as well as to numerous offspring. It was patriarchal type model of ancient tradition (dating back as far as Roman times and to late ancient history), in which the *pater familias* was the center of imputation of legal property relations, and could freely organize its business around the family unit, specifying tasks and dislocating its representatives over the territory[11]. In the patriarchal family model that characterized Italian history until 1975, the so-called *pater familias* was therefore the driving force of the economic and managerial direction of the company, where the rights of the partners were almost marginal and subject to the will and the directives of the latter, and a kind of gratuitousness was presumed as regards the work performed by the family members at the service of the company.

The Italian Civil Code of 1942, although very advanced in many parts, reflected this ancient conception of family law, and attributed to the *pater familias* the domination over the family so that, from an economic point of view, the work of family members did not find recognition and specific legal

9. Article 3 paragraph 4-ter of the Law on Succession and Donations Taxation (Legislative Decree no. 346 dated 31 October 1990) is a fundamental rule in the so-called "generational transition". The legislator has provided that under certain conditions transfers of companies, branches of companies, shares in favor of descendants and spouse are not subject to inheritance tax and donations. Through this provision it is therefore possible to arrive at total tax exemption, for the purposes of indirect taxes of company generational changes.

   As for income taxes, the provision contained in art. 58, paragraph 1 of Presidential Decree no. 917 dated 22 December 1986 may also apply to family transfer. According to this decree, the transfer of the company due to death or gratuitous deed does not constitute a realization of capital gains of the company itself; for tax purposes, the company is assumed to be of the same value as that given to the applicant. The criteria laid down in the preceding paragraph also apply where, following the dissolution, within five years of the opening of the succession, of the existing partnership between the heirs, the business remains acquired by only one of them. See A. TURCHI, *La famiglia nell'ordinamento tributario.* Part II, Giappichelli, Turin, 2015, p. 331 ff.

10. This form of entrepreneurial aggregation is still popular especially among farmers and families managing retail stores, craft shops, small hotels and restaurants.

11. See A. DI PORTO, *Impresa collettiva e schiavo "manager" in Roma antica*, Giuffrè, Milan, 1984, *passim*; F. SERRAO, *Impresa e responsabilità a Roma nell'età commerciale,* Pacini, Pisa, 2002, *passim*; P. CERAMI-A. PETRUCCI, *Diritto commerciale romano. Profilo storico,* Giappichelli, Turin, 3rd ed., 2010.

basis[12]. In other words, the work carried out by the family members within the company could not receive those safeguards — including at retribution and social security level — generally assigned to third parties, precisely because of unbalanced intra-family relations. In general, work performed within the undertaking was considered to be free of charge and the existence of an employment relationship was not presumed, but had to be proved in order to ascertain any right to remuneration. In other words, a presumption of gratuitousness existed which marked the services provided by the family member, always considered based on mutual affection (*affectionis vel benevolentiae causa*).

From this conception, generally linked to extended families, with the 1975 reform we move on to a more circumscribed, nuclear family model, where everyone has rights and duties, and where the entrepreneur cannot exercise a *patria potestas* in the request to perform the tasks assigned to the family members within the enterprise. Only with the reform of 1975, which precisely marks the decline of the patriarchal era, was protection therefore conferred to the work performed by family members, through the introduction of art. 230-bis of the Italian civil code which recognizes a series of rights to those who work in a continuous manner within the family enterprise, provided there is no subordination, either corporate or associative.

We are thus witnessing the definitive closure of a circle with centuries-old roots marked by the arbitrary government of the family enterprise by the head of the family. Moreover, a form of protection of the work done by the family member is recognized as well as a series of rights, of both a patrimonial and a decision-making nature. As regards assets, the family members are granted the right to participate in profits in proportion to the amount of work done and the assets acquired from them, as well as being entitled to asset increases and the right to maintenance according to the patrimonial condition of the family undertaking. On a managerial level, the decisions are taken by the majority of the family members participating in the enterprise, thereby losing the absolute and unlimited power of the *pater familias.*

Art. 230-bis of the Italian civil code, together with the recently-added art. 230-ter[13], is therefore the point of arrival of a long and tortuous historical-legal journey, whose roots are to be found in very remote times. Despite not fully meeting expectations as regards the rights of its family members, this nevertheless created a system of guarantees for them which is generally appreciable.

Art. 230 bis of the Italian Civil Code, which was inserted in art. 69 of Law n. 151 dated 19 May 1975 on the family law reform and represents one of its most significant aspects, has therefore introduced into the Italian legal system the new institution of the family enterprise, especially with the aim of protecting the work of family members, which previously received limited protection, especially in the agricultural sector.

Art. 230-bis of the Italian Civil Code has given legal importance to the work that the family members carry out, in a continuous way, in the family business, thus avoiding the determination of labor exploitation situations.

Also significant is the fact that art. 230-bis, paragraph 2 of the Italian Civil Code expressly specifies that "The work of women is considered equivalent to that of men". Such a provision, which is almost incomprehensible to a modern reader in a highly developed society, is however justified precisely by the need to ensure that women and their work in a company, which was generally conducted by men at the time of the introduction of the legislation, were not subordinated or degraded[14]. The

12. See G. GHEZZI, *La prestazione di lavoro nella comunità familiare,* Giuffrè, Milan, 1960, p. 119.

13. Law n. 76 dated 20 May 2016.

14. A recognition of the work of family members was provided in the agricultural sector, in the context of the "tacit family communion", pursuant to art. 2140 of the Italian civil code (now repealed), which thus ruled: "tacit family communions in the exercise of agriculture are regulated by custom". In this context, the family members — theoretically — had a right to enjoy the profits derived from the common *peculium*, without prejudice to the absolute administrative power of the head of the family. The tacit family communion was nothing else but a particular form of coexistence and common working of the fields under the direction of a "chief", within which the aspects of economic-business management and the regulation of the distribution of profits, besides remaining completely marginal, ended up being changed, as a result of the referral to the uses of the place where the activity took place. The institute, in any case, ended up perfectly in

norm attributes full gender equality at work, in the light, moreover, of constitutional principles and especially of art. 37 of the Constitution, according to which "Working women have the same rights and, for the same work, the same pay as male workers. Working conditions must enable them to fulfil their essential family function and provide mother and child with special adequate protection".

3. The family enterprise in the Italian Civil Code: general framework

In order to better understand the way in which the family enterprise operates and the rules governing its taxation, it would seem appropriate to set out, albeit briefly, the civil rules of the same institution[15], while at the same time outlining the significant differences that exist in tax legislation.

As mentioned above, the 1975 reform of family law introduced an express provision into the Italian Civil Code — art. 230 bis — entitled "Family enterprise" — to which has recently been added art. 230 ter, extending part of the discipline also to cohabiting partners[16].

Art. 230 bis provides an apparently broad definition, considering a family enterprise to be that in which family members collaborate and then going on to establish that «family members» are to be understood as the spouse, relatives to the third degree of consanguinity and relatives by affinity to the second degree of consanguinity[17]. This leads to a narrow notion of the family, which, as we said earlier, goes beyond the patriarchal and extended concept of the past, in line with the social changes underway at the time of the 1975 reform.

It should be noted that, according to art. 230 bis, a business is a family enterprise «unless a different relationship is configurable». Therefore, the institution has a residual character, since the collaboration of the family members to the enterprise could be configured as a relationship of employment or even as participation in a *de facto* undertaking.

What is more, the family enterprise can exist independently of the matrimonial property regime that the spouses have chosen — legal or contractual community, separation of property, property fund or other conventions.

There are two legally relevant scenarios: a) the family members carry out their activity continuously in the family business or b) the family members do not work in the business, but in the family (e.g. performing housework). Even in the latter case, they are entitled to maintenance, according to

line with the logic of a structure that was supported not by the general rules of the market, but by *affectio familiaris* and, even more so, by the principles of the peasant farming community, where only the duties of mutual assistance fulfilled the function of tempering arbitrariness in the distribution of profits.

15. See *ex multis* M. PALADINI, *L'impresa familiare,* in *Trattato di diritto di famiglia* edited by G. Bonilini, vol. II. *Il regime patrimoniale della famiglia*, UTET, Turin, 2016, p. 1737 ff.; M. DOGLIOTTI, A. FIGONE, S. GIULIANI, *Famiglia e patrimonio,* Giappichelli, Turin, 2022, p. 202 ff.

16. Art. 230-ter of the Italian civil code: "The *de facto* partner who permanently works in the enterprise of the other cohabiting partner is entitled to a share in the profits of the family business and in the purchased assets as well as company asset increases/profits, including in start-ups, commensurate with the work done". Cf. M. TOLA, *Impresa familiare e convivenze,* in *Rivista di diritto civile,* 2019, p. 705 ff.; F. ROMEO, *Impresa familiare e rapporti di convivenza: Art. 230-bis c.c. "versus" Art. 230-ter c.c.*, in *Studium Juris,* 2018, p. 289 ff.

17. Art. 230-bis of the Italian civil code, paragraph three: "For the purposes of the first subparagraph, the family member shall mean the spouse, relatives to the third degree of consanguinity and relatives by affinity to the second degree of consanguinity; for the family enterprise, it shall mean the spouse, relatives to the third degree of consanguinity, relatives by affinity to the second degree of consanguinity". The indication seems mandatory, but the rule does not clarify whether the regulation is applicable only to the cohabiting spouse or also to the separated one; by personal separation in fact, family relations are loosened. The Court of Cassation considered that there is no automatic exclusion from the family enterprise, but it is necessary to determine, case by case and in concrete terms, whether a cause of extinction has occurred.

the patrimonial condition of the family, and participate in profits in proportion to the quantity and quality of the work performed. This last provision does not however apply to the case of cohabiting partners, of which no express mention is made in art. 230-ter of the Italian civil code.

When the family members carry out their activity in the undertaking, in addition to all the rights they would have if they only worked in the family, they participate in the decisions concerning the use of profits, extraordinary management, factories, the termination of the undertaking. Decisions are taken by a majority vote of the participants.

On the one hand, therefore, the value is recognized of domestic work (which is a constant of the 1975 reform), considering that precisely because the spouse is engaged in such activity, the other is able to carry out work (in this case, entrepreneurial activity) outside[18]; on the other hand, the aim of the norm is to better guarantee the position of the family member who works within the company, vis-à-vis the owner.

The right of participation is intra-family (obviously no desire exists for outsiders to enter the enterprise and distort it), but such transfer could occur in favor of a family member, and with the consent of all the participants; the right is however liquidated at the end of the relationship, or in case of company transfer. The right of preemption in case of inheritance division or transfer of the company is also ensured.

The family enterprise ceases to exist following the death of the entrepreneur, at the will of the parties or upon the disappearance of the family; other causes of extinction are bankruptcy or the impossibility to continue business. The consequence of the extinction is that each shareholder accrues the right to the liquidation of his or her share.

Prerequisite for the application of the rule is always the existence of a company, in the technical meaning of art. 2082 of the Italian civil code. It refers to any type of enterprise, regardless of its purpose (agricultural, commercial), while, as regards size, even if in theory a medium or large enterprise could also be considered to qualify as a family enterprise, in practice, the term is generally used for small firms. Moreover, medium-sized enterprises would in themselves be incompatible with the individual business structure of the family enterprise itself[19], so that, as a market rule, any growth in size requires the replacement of an individual entrepreneur by a collective entity.

On the other hand, pursuant to art. 2083 of the Italian civil code, the case of small businesses may occur which are not also family enterprises; apart from the case in which the entrepreneur does not have family collaborators, the case could occur where some family members work only occasionally or discontinuously, or are linked to the entrepreneur by a normal employment contract.

Any type of work can be relevant: intellectual, manual, managerial or executive. What is clear, however, is that the work is carried out on a continuous basis, with regard to the duration and stability of the business activity; it follows that the person who performs occasional work may

18. The family enterprise could also be set up between spouses only, and one of them could take care of the house and the children, but could be able, albeit indirectly, to still participate in the management of the enterprise itself or otherwise directly benefit the work of the other spouse. The jurisprudence has sometimes affirmed that for the existence of the company it would be sufficient for one of the spouses to carry out, with his or her work, the duties provided for by articles 143 and 147 of the Italian civil code; however, it subsequently changed its orientation and supported the need for collaboration, albeit limited, of the spouse in the company In particular, with regard to the spouse's contribution to employment, the now consolidated guideline of the Court of Cassation states that the qualification of participant in the family enterprise must also be attributed to the housewife who provides the enterprise with benefits that contribute to its productivity (such as taking care of administrative and accounting paperwork, secretarial duties, etc.).

19. It is now established as a matter of fact that the family enterprise is an individual undertaking (see Court of Cassation, Section I, no. 6557 dated 27 June 1990). This is clearly in a protective perspective of the family member collaborator, who, adhering to the opposite option of classification in the collective enterprise, would have been recognized as an entrepreneur, with all the inherent consequences in terms of responsibility. According to the prevailing orientation, art. 230 bis does not affect the ownership of the enterprise, which remains individual, and instead has the different function of regulating the participation of family members in the enterprise, in relation to the quality and quantity of work done in the family or in the enterprise itself. In other words, the rule therefore only concerns «internal» relations between the family member and the company.

not be considered a participant in the family enterprise, i.e., not involved full time in the family business.

Important innovations were made by paragraph 46 of art. 1, Law no. 76 dated 2016, which introduced into the body of the Italian Civil Code art. 230-ter, regulating the rights of the partner in the business concern, thus overcoming doubts about the possibility of an extensive interpretation of art. 230-bis of the Italian civil code with regard to cases of mere cohabitation or *de facto* family; the new provision, in fact, acknowledges the *de facto* cohabiting partner's permanent work within the partner's business, i.e. the right to participate in profits, proportionate to the amount of work done[20]. This right — which has also been extended to civil unions[21] — is deleted if a partnership or employment relationship exists between the partners.

A substantial difference between civil and tax law lies in the fact that, from a civil point of view, a formal instrument of incorporation is not necessary. In other words, there could be a mere factual situation. In general, participants do not enter into a contract or in any case do not «constitute» the company, but, for tax purposes only, limit themselves to a declaration of its «existence» before a notary public.

4. Taxation of the family enterprise

As I have tried to emphasize in the previous pages, the rationale of art. 230-bis and art. 230-ter of the Italian Civil Code is clear, because from the point of view of private law the main intention of the legislator is to attribute a series of guarantees and safeguards not so much in favor of the entrepreneur, but rather in favor of the person or persons carrying out their activities within the undertaking. It is hardly a chance occurrence that the allocation of profits to family members takes place automatically, in a manner proportionate to the work carried out, and in the absence of prior verification.

On the other hand, the perspective changes when tax law comes into play, because the main purpose of tax legislation is above all to (try to) avoid use for elusive purposes, preventing as far as possible the phenomenon of splitting, that is, the distribution of income among the members of the enterprise in order to reduce the overall tax burden[22]. In essence, if it is true to say that the tax

20. The passing of the new legislation has, however, given rise to a number of problems. Very recently the United Sections of the Court of Cassation n. 1990 dated 18 January 2024 have raised the question of the constitutional legitimacy of the Italian Civil Code's art. 230 bis (and, in derivative way, of art. 230 ter) inasmuch as considered a violation of articles 2, 3, 4, 35 and 36 of the Italian Constitution, as well as of art. 9 of the Charter of Fundamental Rights of the E.U., and articles. 8 and 12 of the ECHR, because of the lack of extension to the cohabiting partner *more uxorio* (and to the *de facto* cohabiting partner referred to in art. 230 ter of the Italian civil code) of the tax system applicable to the spouses and to those who have undertaken a civil union. In this regard, the united sections observe that the provision in question identifies the possible persons participating in the family business exclusively within the family based on marriage (now also on civil union) and therefore the spouse (and the party to a civil union) and not the partner. Considering, moreover, that the *ratio* of art. 230 bis of the Italian civil code can be the expression of a general refusal of the gratuitousness of work in a certain social relationship, life, affection and solidarity and taking into account the considerable spread of cohabitation *more uxorio* in today's society, art. 230 bis and ter could well be taken for granted. However, according to the Court, this broad interpretation would seem to be precluded by the fact that the 2016 law has attributed to the *de facto* cohabitant, who has a stable and permanent job in the business, fewer rights and protections than those attributed to the spouse (and to the parties of a civil union). Hence the decision of the Court to raise the question of constitutional legitimacy of art. 230 bis and in a derived manner of art. 230 ter of the Italian civil code, as the only possible way to achieve the extensive interpretation now considered impossible.

21. See Risoluzione Agenzia delle Entrate n. 23170 dated 24 October 20170, commented by G. FERRANTI, *Impresa familiare, convivenze di fatto e unioni civili,* in *Corr. trib.,* 2017, p. 3575 ff. For not clearly defined aspects of this inclusion see L. GHIDONI, *Unione civile e impresa familiare: la disarmonia di una mera estensione normativa,* in *Famiglia e diritto,* 2017, p. 701 ff.

22. See M.C. FREGNI, *La dimensione dell'impresa nell'ambito familiare,* in *Riv. dir. fin. Sc. fin.,* 2013, I, p. 425 ff., as well as M. NUSSI, *L'imputazione dei redditi dell'impresa familiare*, in *Riv. dir. trib.*, 1992, I, p. 915 ff.; P. FILIPPI, *L'impresa familiare nell'imposizione diretta*, in *Riv. dir. fin. Sc. fin.*, 1976, I, p. 601 ff.; A. FANTOZZI, voce *"Impresa familiare (diritto tributario)*", in *Noviss. Dig. it.*, *App.* IV, Turin, 1983, p. 86 ff.; A.E. GRANELLI, *L'impresa familiare nella riforma tributaria*, in *Riv. dir. fin. Sc. fin.*, 1976, I, p. 621 ff. More recently see A. TURCHI, *Diritto tributario di*

legislator has not formulated its own concept of family enterprise and has limited itself to defining income splitting up criteria and taxation procedures according to the principle of transparency, it is also true that it has also requested more stringent requirements than those to be found in the provisions of civil law[23]. It should be noted however that the tax legislator has ended up distorting the inspirational principle of the institution — designed precisely to avoid exploiting the contribution made by family members to the company — and has bent it to the needs of combating possible fraud[24].

The tax rules become more stringent when it comes to the requirements for access to the resulting tax system, always in order to prevent abuse of the right. In fact, in the family enterprise, the only owner of the enterprise is the entrepreneur, who calculates and declares all the business income and then allocates part of it to the collaborating family members, for the purposes of calculating taxes.

The fact that the family enterprise is an individual enterprise also has tax effects, since only the owner of the enterprise (and not even his family collaborators) bears the tax obligations linked to the taxable subjectivity of VAT, obligations relating to the position of the tax withholding agent (certification and model 770) and also to the general income arising from the family business activity.

The above helps understand the choice of the tax legislator, to include the taxation of the family enterprise within the discipline regarding associated forms governed by art. 5 of Presidential Decree n. 917 dated 22 December 1986. So it is that the principle of transparency is applied, whereby the profits of the enterprise are attributed directly to the collaborating family members. Profit is determined in proportion to the work done by each family member. The business income is determined in a unitary way by the owner of the same and is then divided among the family collaborators, in proportion to their share in the profits, as provided by art. 5 par. 4 of the TUIR (Income Tax Consolidation Act): "the incomes of the family enterprise referred to in art. 230-bis of the Italian civil code, limited to 49% of the amount resulting from the entrepreneur's tax return, are charged to each family member who has continuously and predominantly worked in the company, in proportion to his or her share of the profits". In addition, pursuant to paragraph 5, it is clarified that: "Family members, for the purposes of income tax, are the spouse, relatives to the third degree of consanguinity and relatives by affinity to the second degree of consanguinity".

The owner of the enterprise must retain a 51% share.

The legislation is clear, in the sense that, in addition to the continuing nature of the work provided by the family member, for the purposes of the applicability of the tax regime in question, it must also prevail over other activities that may be carried out[25].

It must be pointed out that the imputation of business income for transparency on family members is only allowed by paragraph 4 of art. 5 of the TUIR subject to certain conditions[26], i.e., if: a) the

famiglia, Giappichelli, Turin, 2022, p. 97 ff.

23. See T. TASSANI, *Le vicende giuridiche dei rapporti nell'impresa familiare: profili nelle imposte sui redditi*, Studio n. 227-2015/T del Consiglio Nazionale del notariato, in *www.notariato.it*

24. In this sense see A. TURCHI, *La famiglia nell'ordinamento tributario*, Part one, Giappichelli, Turin, 2012, p. 247 f., where it is stressed that the "limited" income allocation mechanism generates the risk (if not the certainty) of new distortions and inconsistencies in the application of the tax. According to M. NUSSI, *L'imputazione dei redditi dell'impresa familiare*, cit., p. 915 ff., the tax discipline of the family enterprise has taken on a disvalued connotation, favoring the transition to the corporate model.

25. Court of Cassation, Section V, n. 40934 dated 21 December 2021; Court of Cassation, Section V, n. 34699 dated 24 November 2022 in *GT. Riv. Giur. Trib*., 2023, p. 322 et seq., with note by G. SALANITRO, *L'impresa familiare tra il diritto civile e il diritto tributario*.

26. According to the judges of the Court of Cassation, the lack of even one of the conditions expressly provided for by article 5 of the Tuir, precludes the possibility of access to this particular tax regime. It follows that there can be no family enterprise, for tax purposes, when collaborating family members have correctly filled in their tax returns, but have omitted to signed a document, before a notary public or other public official, certifying the existence of the

family members participating in the enterprise are identified by name (indicating the relationship of kinship or affinity with the entrepreneur) by public deed or notarized private agreement prior to the beginning of the tax period, signed by the entrepreneur and the family members concerned; b) the entrepreneur's tax return indicates the family members' shares in the profits and evidence that the shares are proportionate to the quality and quantity of the work actually done, continuously and predominantly, in the undertaking during the tax period; c) each member of the family certifies, in their income tax return, that they have worked in the undertaking continuously and predominantly[27].

Compared to civil law, a significant difference exists because here, in addition to continuity, prevalence is also required[28].

The recurrence of the documents listed above is essential to prove the existence of the family enterprise for tax purposes and the burden of proof is on the taxpayer entrepreneur who wants to use the special tax system referred to in art. 5, paragraphs four and five, of Presidential Decree no. 917 dated 1986[29].

In accordance with the principle of transparency, income is attributed to the collaborating family members regardless of actual receipt. On the other hand, in the event of loss, this must be recognized in full by the owner of the family business.

As to the nature of the income, the income received by the holder, which amounts, in fact, to the income earned by the enterprise net of the shares of the dependent family members, constitutes an entrepreneurial income, while the shares of the collaborators — which are not joint owners of the family business — are pure labor income[30], not comparable to that of the enterprise, and must be

requirements provided for by paragraph 4 of art. 5. See Court of Cassation, n. 2472 dated 10 February 2017; see also Court of Cassation, Section V, n. 2472 dated 31 January 2017; Court of Cassation, Section V, n. 23170 dated 17 November 2010, according to which, for the tax regime of the family business referred to in art. 5 of Presidential Decree n. 597 dated 1973 (norm applicable *ratione temporis* but replaced by art. 5 of Presidential Decree no. 917 dated 1986), the mere co-management of a company by the spouses — which could be of importance in the cases governed by art. 177 of the Italian civil code for the distribution of the profits — is not relevant for tax purposes, but it is indispensable that the conditions previewed from the same art. 5 cit. are all fulfilled, i.e., the name of the family members participating in the business activity, the shares allocated to the individual family members and the statement made in the annual tax return of each participant that they have worked for the business.

The share of the company's profits must be fixed before the beginning of the financial year by means of a private agreement authenticated by a notary or public deed. In this sense see Potenza Regional Tax Commission, Section II, n. 101 dated 7 March 2013.

27. The existence of the documentary requirements of the elements of the case pursuant to art. 5 cited does not preclude the Revenue Agency from contesting the existence in practice of effective, continuous and prevailing collaboration. In this sense see Court of Cassation, Section V, n. 34699 dated 24 November 2022. As for the requirement of continuity, common to the civil and fiscal situation, jurisprudence maintains that the continuity of the contribution required by art. 230 bis of the Italian civil code for the configurability of participation in the family business does not require the continuity of presence in the company, requiring instead only the continuity of the contribution (Court of Cassation, n. 13849 dated 23 September 2002). The configurability of a continuous contribution of the collaborator, regardless of the continuous presence of the same in the places where company business is carried out, obviously presupposes the ascertainment of the form in which the collaboration is concretely provided and of its compatibility with the nature and the organization of the enterprise's business. Both the continuity and the prevalence of the employee's contribution in the family business necessarily presupposes that this work activity is in any event actually performed.

28. See Court of Cassation, n. 40934 dated 21 December 2021. Such decision thus highlights the rationale and the specificity of this additional requirement, for tax purposes, with respect to civil and labor law stating that the norm "expressly requires the prevalence of the work of the collaborator within the family business compared to other activities possibly carried out, a requirement that is not contemplated in art. 230-bis of the Italian civil code; the specification was specially introduced, for anti-tax avoidance purposes, by art. 3, paragraph 12, Law Decree n. 853/1984".

29. See Court of Cassation, Section V, n. 34699 dated 24 November 2022.

30. Circular n. 40 dated 19 December 1976 defines the income received by the employees as income from participation. In particular, the United Sections of the Court of Cassation, with sentence n. 23676 dated 6 November 2014 affirmed that "the quotas due to the collaborators of the family business must, therefore, be classified as "pure work" income, not comparable to that of the enterprise, as these collaborators are not joint proprietors of the enterprise which is of an individual nature".

subject to taxation within the limits of the income declared by the entrepreneur. For these reasons, it has been argued in case-law that, in the event of a higher entrepreneurial income being found, the same should only be reported to the owner of the undertaking[31]; that it can be allocated pro rata to other assisting family members entitled to shares in profits must be ruled out[32].

An individual entrepreneur carrying on business in the form of a family enterprise may adopt the flat-rate scheme[33], that is to say, the optional scheme provided for natural persons who carry out business activities and have not earned income in the tax period in excess of EUR 85000 and incurred expenses for a total amount not exceeding EUR 20000 gross for ancillary work, employees and compensation to employees. The 15% substitute tax is calculated on the income, gross of the shares assigned to the spouse, and to the family collaborators. Access to and retention under this preferential scheme is dependent on compliance with all the requirements (admission, exclusion and revocation) laid down in the legislation on family enterprises. The flat tax levied on income — gross of the compensation payable by the holder to the spouse and his or her family members — is payable by the entrepreneur. Thus, family members are exempted from the obligation to file a tax return, since the 15% substitute tax includes the entire tax levy and therefore also the share of tax normally borne by the same family employees.

In the case of transfer of the family enterprise to third parties, a guideline has recently been prepared whereby the capital gain must be taxed in full on the holder of the business, as the sums received by family collaborators holding shares in the same undertaking may not be of any fiscal importance[34]. The previous approach whereby the capital gains accruing from the sale of a family-owned holding are to be attributed to the individual participants, irrespective of whether or not they have actually been received, is thus overruled. For the purposes of determining the income tax of the individual participant, who appears to have collected the proceeds of the sale, the share of such individual in the profits of the company must be determined[35].

31. Court of Cassation, Section V, n. 9198 dated 22 March 2022, in *Tax News-online,* 2023, commented by F. SCIALPI, *Imputazione del maggior reddito accertato nell'impresa familiare.* It is indeed a consolidated line of case law, most recently confirmed with sentence n. 33149/2023 according to which in the case of a family enterprise, the income received by the holder, which is equal to the income earned by the enterprise net of the contributions of the assisting family members, constitutes an entrepreneurial income, while the shares of the collaborators — which are not joint owners of the family business — constitute pure labor income, not comparable to that of an enterprise, and must be subject to taxation within the limits of the income declared by the entrepreneur; it follows that, from a taxation point of view, in the case of tax audit of a higher entrepreneurial income, the same must be reported only to the owner of the enterprise, i.e., that it can be attributed pro quota to the other contributing family members entitled to share in the profits of the enterprise is ruled out.

32. Court of Cassation, Section V, n. 33149 dated 29 November 2023; Court of Cassation, Section VI, n. 34222 dated 20 December 2019.

33. Regulation of the preferential tax regime, so-called flat-rate scheme, pursuant to art. 1, paragraphs 54 to 89 of Law n. 190 dated 23 December 2014, last amended by art. 1, paragraph 54, of Law n. 1971 dated 29 December 2022 ("Budget Law 2023").

34. See in this regard Risoluzione Agenzia delle Entrate, n. 78/e dated 31 August 2015 (commented by G. GAVELLI, G. VALCARENGHI, *Plusvalenza di cessione d'azienda in impresa familiare: fiscalmente il reddito è tutto del titolare,* in *Corr. trib.,* 2015, p. 3814 ff.) in response to a tax ruling proceeding from a taxpayer who, having received a donation from a branch of a company, had set up a family business to be carried on with the help of his children and subsequently decided to transfer the family business to third parties. As for the correct attribution of the capital gain, the Revenue Agency reiterated that the same is entirely attributable to the owner of the same, or to the entrepreneur, while the transaction is completely irrelevant to the collaborators of the entrepreneur, who are not required to contribute the sums they receive to their income. In addition, the proceeds from the transfer of a family business qualify as entrepreneurial income (articles 55 ff. of the Tuir), even if the business has been obtained by the transferor by donation, since article 67, letter h-bis of the Tuir considers as being in the category of "miscellaneous income", subject to separate taxation, only holdings donated (or inherited) which are transferred without being managed by the claimants.

35. Court of Cassation, Section V, n. 10017 dated 29 April 2009; Court of Cassation, Section V, n. 21535 dated 15 October 2007.

5. Conclusions

Almost fifty years after the family law reform which regulates the family enterprise, in the particular form I have referred to in the previous pages, and consequent taxation, an assessment can be made regarding an institution which, although recessive compared to other forms of corporate aggregation linked to a family operating in the entrepreneurial sector, has however proven to be particularly resilient. The fact remains that the family enterprise continues to represent a significant phenomenon, and one worthy of also being brought to the attention of readers who are not acquainted with the problems of the Italian legal system.

Civil and tax regulations, although appreciable as a whole, have given rise to a series of interpretative doubts and legal uncertainties, some of which over time have been gradually resolved especially at the level of jurisprudence, not counting the need — on the part of the legislator — to adapt the institution to a more modern and appropriate concept of family, more in line with the current times, which ends up including, albeit with some significant distinctions, civil unions and *de facto* partnerships.

As often happens in the relations between civil law and tax law, tax law has embedded the notion of family enterprise with a specific reference to art. 230-bis (and now also 230-ter) of the Italian Civil Code, but at the same time it has made significant changes, demanding stricter formal requirements.

From the point of view of taxation, the institute presents many critical elements, not only in terms of its systematic coherence, but also as regards its compliance with the constitutional principle of the ability to pay. Art. 5 of Presidential Decree n. 917 dated 1986, in fact, in assigning by law 51 percent of the income to the entrepreneur, deviates from the general rule of taxation of the income actually received by each family member, who from the civil point of view could receive an income exceeding the limits fixed by the tax law.

Moreover, the position of family member is unique in the tax landscape, because such a family member is not the holder of business income, as we have repeatedly said, but not even of participation income, because he or she has significant administrative rights and participates directly in the extraordinary decisions of the enterprise; at the same time he or she is not a self-employed worker, nor an employee[36].

Among the critical aspects is also the choice made by the tax legislator to apply the principle of transparency to a *sui generis* case, in which the income is not produced by a collective body and then imputed by shares to the relevant members or associates, but derives from a business activity carried out in an individual form, in which family members limit themselves to collaborate "from outside"[37].

Ultimately, tax rules seek first and foremost to avoid the phenomenon of tax avoidance which could be made easier by the way in which decisions within a household are managed.

Despite all this, also thanks to the role of jurisprudence and doctrine in solving application problems generated by the regulatory asymmetry between civil and tax legislation, family enterprise is still the object of appreciation for a relevant number of individual entrepreneurs and will continue to be a valid choice (among the many available) as the most appropriate form of carrying out business activities involving members of their families.

36. According to A. TURCHI, *La famiglia nell'ordinamento tributario, cit.,* p. 262, in essence, the entire income of the family enterprise is an entrepreneurial income, including that of the family members, even if it is intended to remunerate the benefits of those same members.

37. This critical remark is to be found in A. TURCHI, *La famiglia nell'ordinamento tributario, cit.,* p. 255.

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