

Fundamental rights and tax inspections¹

Federico Aquilanti²

1. Introduction: the relevance of fundamental rights in tax inspections

The question of the relationship between taxation and human rights offers the opportunity to reflect on the more specific question of the relevance of fundamental rights in connection with tax inspections. This is an issue that involves several aspects of the tax system. On the one hand, with regard to safeguards for the taxpayer, and on the other hand, with regard to their effectiveness in relation to tax inspections carried out in violation of these safeguards. Moreover, the Italian law on "access, inspections and assessments", pursuant to Art. 33, D.P.R. n. 600/1973, does not provide protection for the taxpayer subject to inspections. For these reasons, it is necessary to identify the norms providing protection for the taxpayer, and to ascertain the degree of protection from the power to carry out tax inspections.

The legal framework seems to lack proper regulation of the protection of the taxpayer during inspections. It should be noted, however, that there are certain rules which, in a broad perspective, provide for "protection" of the taxpayer in relation to certain inspection procedures. At the constitutional level, mention should be made of Art. 14, that lays down the inviolability of the domicile³. In this connection, it is permitted to carry out inspections as laid down by law in accordance with the guarantees safeguarding personal freedom. However, investigations and inspections for tax purposes are regulated by specific laws. Tax law is characterized by the absence of specific guidelines concerning the cases in which an inspection can be

¹ How to quote this article: F. Aquilanti, Fundamental rights and tax inspections, in *European Tax Studies*, 2014, No. 2, (www.seast.it/magazine), pp. 46-49.

² Federico Aquilanti, PhD candidate in European Tax Law at European School of Advanced Tax Studies – Alma Mater Studiorum, University of Bologna, Italy.

³ Article 14 of the Italian Constitution.

carried out⁴. However, these matters are governed by the judicial authorities as well as the general regime of personal freedom⁵. At the legislative level, mention should be made of Art. 12 of the "Taxpayers' Statute" laying down a clear set of rights and guarantees for the taxpayer. Moreover, when the inspection is initiated, the taxpayer should be informed of the reasons for it, and have the chance to make observations during the inspection, to be carried out within 30 days without prejudice to the powers of extension in "particular" cases⁶. As a result, the lack of comprehensive regulations concerning the protection of taxpayers during tax inspections does not preclude the recognition of rights and safeguards. In fact, the constitutional rules and the norms of the Statute, reflecting general principles of tax law, offer a legal basis for judicial solutions to protect the taxpayer subject to tax inspections. Mention should be made of the principle, derived from case law, of the inadmissibility of unlawfully acquired information.

2. The position of the Italian Supreme Court on the protection of taxpayers in relation to tax inspections

On a number of occasions the Italian Supreme Court has considered the issue of the protection of the freedom of domicile of the taxpayer. In particular, considering that the authorization of the judicial authority provides a safeguard for the taxpayer, this is seen as a form of procedural protection⁷. The Supreme Court, enhancing the protection of fundamental freedoms, in particular the inviolability of the domicile, considered the authorization of the judicial authority to be a necessary condition for the proper exercise of the power to carry out tax inspections. This is significant for inspections taking place at the private residence of a taxpayer without

⁴ A. Fedele, *Concorso alle pubbliche spese e diritti individuali*, in Riv. dir. trib., n. 1, 2002, pag. 31.

⁵ A. Fedele, *op. ult. cit.*

⁶ Article 12, l. n. 212 del 2012.

⁷ N. Monfreda – F. Stella, *L'invalidità dell'accesso domiciliare ai fini fiscali fondato su segnalazioni anonime*, in Il fisco, n. 1, 2013, pag. 2-117, F. Marucci, *È legittima la verifica fiscale presso l'abitazione dell'amministratore della società, a condizione che vi siano gravi indizi di evasione*, in Il fisco n. 8, 2012, fasc. n. 2, pag. 1203, Cass. n. 631 del 18 January 2012, Cass. n. 17957 del 19 October 2012, both in the online database "fisconline".

judicial authorization or at the domicile of a taxpayer other than the one specified in the authorization. In one specific case, the Supreme Court considered judicial authorization to be essential for the proper exercise of the power to carry out tax inspections, in other words a procedural safeguard for taxpayer. This case concerned a tax inspection carried out in an Italian company, and the access to the company concerned both the company and the partners. This access is considered illegitimate when performed in places other than those specified by the judicial authorization, particularly at the domicile of persons not connected to the company. As a result, the acquisition of documents at the domicile of a person not connected to company was found to be illegitimate. Consequently, the Judge declared the tax inspection to be illegitimate due to the absence of an authorization by the judicial authority.

In this connection, the Court ruled that a judicial authorization (or warrant) is required to protect the freedom of domicile, and hence, indirectly, the freedom of the taxpayer. It is essential for the legitimacy of the tax inspection and of any documentation acquired. In addition, the Court held that the principle of the inadmissibility of evidence acquired in an illegitimate manner is applicable in tax matters, in accordance with the defence rights laid down in Art. 24 of the Constitution⁸.

3. The effect of ECHR fundamental rights on tax inspections

First, it should be noted that the applicability of the European Convention on Human Rights (ECHR) to tax inspections is the result of case law rulings concerning administrative sanctions, tax incentives, the rights of pre-emption of the tax authorities, and repayments⁹. In this connection, the *Ravon* ruling recognized, for the first time, the effectiveness of conventional safeguards in relation to tax inspections¹⁰. As a result, the taxpayer can enforce the safeguards of the ECHR in relation to any irregularity taking

⁸ Cass, n. 17957, 19 October 2012, Cass. n. 16570/2011; n. 2444/2007; n. 10664/1998, in the online database "fisconline".

⁹ In this connection, L. Del Federico, *La rilevanza dei principi della CEDU in materia tributaria: ricadute applicative e percorsi interpretativi*, in *Dialoghi tributari*, n. 4, 2009, p. 381.

¹⁰ CEDU, 21 febbraio 2008, *Ravon e altri c. Francia*, about L. Del Federico, *op. ult. cit.*

place in tax inspections. Moreover, the concept of domicile pursuant to Art. 8 of the ECHR and Art. 7 of the Charter of Fundamental Rights of the European Union, concerns not only the private home, but also the registered office of a company or the offices of a professional firm¹¹. As a result, the tax inspection is legitimate if it is carried out in accordance with the law and the principle of proportionality. In the case of tax inspections in a private home, the taxpayer has a fundamental right to refer the matter to the courts¹². Finally, if the inspection has already taken place, the court can rule on whether the procedure was carried out in a proper manner, and can prevent or suspend its execution¹³.

4. Conclusion

As argued above, the relationship between taxation and fundamental rights is particularly relevant to tax inspections. Inspections carried out by the tax authorities are intended to implement the tax regulations and therefore to ensure the collection of tax revenues. However, this power must be exercised in accordance with specific procedures: compliance with such procedures ensures respect for the taxpayer's rights and safeguards. It should be noted that the exercise of the powers of tax inspection must not only comply with the rules laid down by the national law, but also with the principles and freedoms upheld by the Constitution and the ECHR. At the same time there is a recognition of the prohibition on the use of evidence acquired unlawfully. Despite the lack of an express provision laying down this prohibition, the infringement of a fundamental right results in the inadmissibility of any evidence produced¹⁴. On the other hand, the provision of remedies relating to tax inspections carried out in an illegitimate manner is intended to prevent inspections that are in breach of fundamental rights from continuing.

¹¹ S. Marchese, *Attività istruttorie dell'amministrazione finanziaria e diritti fondamentali europei dei contribuenti*, in *Diritto e Pratica Tributaria*, n. 3, 2013, p. 493

¹² S. Marchese, *op. ult. cit.*

¹³ S. Marchese, *op. ult. cit.*

¹⁴ P. Russo, *Manuale di Diritto tributario – Il processo tributario*, Milano, 2013, pag. 210 ss.