

New forms of fiscal control in Italy*

Andrea Mondini¹

1. "New" and "modern" between continuity and reforms of the tax system

Is there really something "new" in Italy nowadays as far as fiscal controls are concerned?

To answer this question, winllyngly posed in a provocative manner, one should first of all analyse the decrees implementing the tax reform designed by law n. 23/2014, since the Government, through them, chose to act more on formal and procedural law than on substantial law (with and exception being made for international tax law).

From the implementation of the reform no significant innovations with concern to models, techniques and the instruments of tax controls and assessment seem to emerge, specifically as far as investigative powers and procedural rules are concerned².

The Italian system of tax controls is a conservative one, still linked to a historical model dating back to the tax reform of the 1970s, which strengthened a model of tax enforcement typical of a "mass taxation".

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¹ Andrea Mondini, Associate Professor in Tax law at the University of Bologna. Revised text of the report given to the international convention "Moderniser l'impôt", University of Bologna, 13th november 2015. Translation by Andrea Amidei, PhD in European Tax Law at European School of Advanced Tax Studies – Alma Mater Studiorum, University of Bologna, Italy.

² The introduction of a general anti-abuse clause (article. 10 bis of the "Statuto dei diritti del contribuente") indirectly exercises its influence on controls, but this element is actually not so "new": fighting abuse of law from a procedural point of view reiterates models already experimented; therefore, preventive debate between taxpayer and authorities as a necessary procedural phase, with a function that is not only "defensive", but of investigative integration.

In such a model, the structure of the relationships between tax administration and taxpayer is based on the latter's subjection to the administration's authoritative public powers and on the conception of "cooperation" as performance of strict legal duties³.

On one hand, we have the fundamental taxpayer's duty to declare and quantify fiscally relevant facts and the consequent tax due (even in the field of local taxes, such as "imposta municipale unica IMU", "tassa sui servizi indivisibili TASI", "tassa sui rifiuti TARI", the most recent reforms generally apply the self-assessment model); on the other hand, we have the administration's authoritative intervention, which has a control function ex post and generally selective, concerns an ex post verification of the correct performance of assessment and payment duties and works as a substitute or repressive form of taxpayer's behaviour. Therefore, a significant responsibility is imposed on the taxpayer in the form of sanctions in case of lack of or false declaration.

To corroborate the existence of this general structure one can observe that the recent reform of criminal and administrative sanctions enacted by d.lgs. n. 158/2015, even though inspired by the proportionality principle, has confirmed, for administrative sanctions of breach of law in the fields of tax returns, high minimum sanctions, which are essentially equal to or higher than tax evaded⁴. Failure to submit returns remains punished with a sanction going from 120 to 240% of the tax (reduced to 60%-120% in case of late tax return submitted within the term for the submission of the return concerning the following year if controls have not been initiated). For false returns minimum sanctions are slightly lower than before, i.e. 90%-180% of taxes (previously 100%-200%). It is also true that reductions of sanctions have been introduced for the case of a reduced prejudice to the public coffers (reduction of 1/3 in case the difference between tax assessed

³ If is, of course, a simplifying generalisation, however necessary in the context of a limited report such as the present one.

⁴ One should always remember that this is the "on paper" sanctioning system, since the general implementation of incentives or alternative instruments contributes to significantly reduce the amount of sanctions actually imposed on or paid by taxpayers.

and tax declared is lower than 3% and in any case the evasion is not higher than 30.000 euros), but an increase by half is provided for in case the breach is enacted through fraudulent conducts (resorting to false documents or documents concerning non-existing operations, è previsto anche un aumento della metà quando la violazione è realizzata mediante condotte fraudolente (utilizzo di documentazione falsa o per operazioni inesistenti, ruses or deceptions, simulation, etc.)⁵.

In such a context, rather than merely listing "innovations" in the field of fiscal controls, though existing, but mostly constituted by "maintenance" or "restyling" interventions (sometimes by the hand of the lawmaker, some other times by the hand of judges), I deem it more useful to try and develop a suggestion coming from the title of the convention (*moderniser l'impôt*), which has to do with modernisation, i.e. to the idea of "innovation" linked to the conceptual category of "modern".

Modern - I quote from Walter Benjamin - is "novelty in the context of what has always existed". In the field of law we could then interpret it as discontinuity of the juridical system in a dialectic dialogue with the "*ancien*" elements of the system itself (the past), with the purpose of transforming it (looking to the future) and of integrating and being absorbed in the system itself (in the present).

Therefore, if one adopts such a perspective, one should ask himself what is "modern" in the Italian system of fiscal controls.

I believe that amongst the innovations in the field of law introduced around the last decade - or even those they attempted to introduce, though at times not as successfully as hoped - only some of them in particular may be seen in a unitary way as an expression of a certain tendency and development of the system through the lens of a conscious and sought

⁵ The entering into force of the reform of administrative sanctions has been however postponed to 2017 for reasons linked to financial coverage of the effects of the envisaged "reductions" of sanctions (no retroactive effect of more favourable sanctionary rules is now being produced). One could say that this is typical of the "modern" of the Italian tax system as well: in more recent years all reforms structurally depended on the financial emergency and on contingent financial availability.

"modernisation", i.e. of a different, more "modern" way to structure the relationship between taxpayer and administration, beyond traditional models.

Which are such innovations? None of them are "new" in absolute terms, since they all represent the evolution of previous experiences and categories; and some Italian trends are common to most European fiscal systems. "Modernisation" of controls in our system also means to try to conform to international standards and to introduce categories or regimes which have already been experimented in other economically advanced countries.

The main tendencies and innovations may be listed as follows:

A) implementation of regimes of cooperation by and with the taxpayer di: in particular, strengthening methods and instruments to favour tax compliance and the spontaneous regularisation on the part of the taxpayer (in the perspective of better implementing juridical safety and certainty of law principles);

B) implementation of methods for the analysis of tax risks and of the elaboration of more selective criteria to optimise organisation and action of the administration, thus making it more efficient and "performing" (one of the typical traits of what wants to be "modern" *à la* Weber: efficiency and efficacy as expressions of a superior instrumental rationality);

C) informatisation and digitalisation of IT systems for the communication, collection and elaboration of fiscal data for the purposes of controls (massive employment of IT technologies to enhance the administration's "knowledge", as a tool to exercise a power which is not alternative to the control power, but able to improve controls and even to anticipate or prevent controls);

D) adjustment of such systems and of control procedures to the European and international dimension of taxation and evasion⁶.

⁶ One should think of fiscal monitoring, of the European exchange of information and sharing of best practices at Eurofisc level, of the implementation of European databases, of the old

I believe it is fair to state that in the Italian legal order such tendencies, at least in more recent years, intertwine and integrate with each other, stressing the value of preventive participation of the taxpayer: in this one can see the main aspects of more evident "modernisation" of our control system.

This modernisation actually has as its purpose the prevention of the very need of controls or at least its anticipation before the moment in which it will be evaluated whether it is necessary to proceed to issue a measure. This might be in the sense of previously identifying the risks of evasion and to almost identify the "morphological phenotype" or the "identikit" of the average "honest" taxpayer or tax cheater: to the aim of orienting controls or collection or exchange of information not only towards an *a posteriori* action, but also towards suasion, deterrence and induction of spontaneous compliance of such taxpayers who know they may be the object of true "fiscal radiographies". It should be noted that prevention or anticipation of controls does not mean merely prevention of litigation. The Italian system has been resorting for a long time to forms of taxpayer participation to assessment or "agreements", but here we are talking about something different, since the purpose is control aimed at preventing the very exercise of the power of tax assessment.

This will be further explained, in the following paragraphs, by some examples drawn from the most recent reforms.

2. Strengthening cooperation and tax compliance

The so-called "*adempimento collaborativo*" regime for large taxpayers (with a turnover higher than 100 million euros, and 10 billion euros for its first implementation) is an innovation introduced by d.lgs 128/2015 (articles 3-7), but already enacted in an experimental way since 2013. It represents the development of the experience of the "tutorage" for large taxpayers

VIES to the new database which will be managed by the European Commission on fiscal rulings and APAs, provided for by EU Directive 2015/2376.

provided by article 27 of d.l. 185/2008. However, if the tutorage aimed at focusing controls based on detailed risk analysis, this new regime involves taxpayers in the implementation of systems within enterprises to assess, measure, prevent and manage the risk of tax evasion/avoidance, attributing tasks and responsibility to structures internal to the enterprise.

The controlled subject, in other terms, is given the task to "self-control". It cooperates with the Central Direction for Assessment of the Agenzia delle Entrate, communicating with it in a transparent way, specifically with concern to tax risks connected to business models that the Agenzia itself, on its website, presents as aggressive tax planning, thus contributing to the promotion of an *"enterprise culture based on principles of honesty, correctness and compliance with tax law, ensuring completeness and reliability and the sharing of knowledge at all enterprise levels"*.

Which are the practical advantages for the taxpayer? First of all, being able to *"to come up, together with the Tax Administration, with a common assessment of the circumstances that may lead to tax risks before submitting their returns, through forms of constant pre-emptive dialogue on factual elements, including the possibility to move up controls"* – this is the element of major interest here. It is in fact provided that the Agenzia delle Entrate may put in place *"inspections, by deciding their dates with the taxpayers, in order to collect elements that are relevant for the answer"*. Moreover, the taxpayer has access to a *"shorter procedure of prior tax ruling concerning the implementation of tax provisions in practical cases, in relation to which the taxpayer sees possible tax risks"* (in any case the terms are reduced by half, from 90 to 45 days). Even if the Agenzia does not share the enterprise's position, if tax risks have been communicated in a timely and complete manner, the rule provides for a peculiar "advantage regime", reducing administrative sanctions by half and in any case to an amount not higher than the minimum. For criminal law purposes, the cooperating behaviour is reported by the Agenzia delle Entrate. On this point, in particular, it should be highlighted that the sanctioning treatment should have been better coordinated with the general proportionality

principle presiding over the concurrent general reform of sanctions. Finally, another advantage not to be overlooked is that the taxpayers does not have to provide collaterals in case of reimbursement requests.

Another instrument introduced by the reform is constituted by the preventive agreements for enterprises with international activity (new article 31-ter d.p.r. 600/1973). They are the Italian version of the Advanced Price Agreements (APAs). Also in this case the innovation is the evolution of the previous "international ruling" enforced since 2004. The new regime has a longer duration (the agreement is binding for five years instead of the previous three years) and a considerably wider range. It concerns, in fact, the agreed pre-emptive definition of the effects of the implementation of domestic or conventional rules not only to intra-group operations (dividends, royalties, transfer pricing, etc.) but also to matters such as the definition, through a dialogue with the Administration, of the normal value for exit tax purposes or the discipline on transactions with enterprises located in black list countries (for large "cooperating" taxpayers), or the existence of a permanent establishment in Italy or abroad and the attribution to such p.e. of revenue and losses, and more in general income flows from and to non-resident subjects. As it already happened in the past, taxpayers are granted *immunity from controls* for matters defined through the agreement with the Administration (without prejudice to the control of the continued existence in time of the requirements to be able to have access to the agreement). However, the agreement has retroactive effects as well (starting from the tax period in which the request is submitted), to coordinate agreements executed with the Italian administration with those executed with foreign administrations, so as to allow taxpayers to make amends ("ravvedimento operoso") without sanctions.

It should be noted that taxpayer cooperation had already been valued in an original manner with regards to fiscal sanctions connected to the higher tax assessed following the implementation of transfer pricing rules. The regime of non-application of sanctions had, in fact, already been introduced (the case of special exemption for *a posteriori* "cooperation") where the

enterprise, during tax controls, hands over to the Administration all required documents able to demonstrate that prices applied in infra-group operations are conforming with the normal value (so-called *masterfile* and *country file*), even though later on the Administration were to decide to determine normal value based on different criteria than those applied by the enterprise and to proceed to recuperate higher taxes due through assessment (current article 1, par. 6, d.lgs. n. 471/1997).

D.lgs. n. 147/2015, so-called "decreto internazionalizzazione", which has reformed the preventive agreements regime, has also introduced (article 2) a particular form of pre-emptive cooperation in the form of a special tax ruling request on new investments in Italy (if amounting to no less than 30 million euros and with significant consequences on labour). It looks like a sort of "super-ruling", which may cumulatively concern the fiscal regime of the investment and extraordinary operations, the application of the prohibition of abuse of law and the disapplication of special anti-abuse rules, access to possible regimes provided by tax law, and refers to all taxes and all levels of tax government (including minor local entities, Regions and local entities). The answer is binding on the administrations competent for the different taxes until the factual and juridical elements that constituted the object of the evaluation remain unaltered, following the exercise of the powers of pre-emptive control. The law focuses not only on the information elements submitted by the investor when "dialoguing" with the Administration, but also grants the latter the power to "have access, with the taxpayer's agreement, in order to directly collect elements which are useful to the inquiry." Also in this case the taxpayer is made immune to the Administration's powers of control with regards to the matters that are object of the ruling (as opposed to ordinary tax ruling, which is why the regime is more similar to a real pre-emptive agreement, even though through the form of a tax ruling).

One can observe, *en passant* and in general terms, that through the reform the tax ruling has "shed its skin": it appears to be less linked to the interpretation of the rule and more and more linked to its implementation,

or, better said, the definition of its result, since it concerns the definition to the effects and the "correct" tax regime of a specific and practical case in a pre-emptive manner. In a certain sense, some of the (new) rulings actually concern the possibility of an implementation of the law by both the administration and the taxpayer, given that its functioning is based on a proposal (of a result) from the taxpayer which is wholly or partially agreed upon by the administration. The taxpayer is protected by the certainty ensured by the individual bond that the answer creates for the administration, even with concern to following behaviours that can be linked to the object of the ruling, and even though the administration may change its view on the point such a *revirement* cannot have retroactive effects (this is provided by the new article 11 of the Statuto dei diritti del contribuente, l. 212/2000).

Finally, another "revolutionary" innovation should be highlighted, dealing with the relationship between taxpayer cooperation and fiscal controls, i.e. the extension of the period for amending previous fiscally relevant behaviours ("ravvedimento"), which does not need to be spontaneous ("operoso") any longer. In fact, since 2015 the taxpayer may make amends (article 13 d.lgs. 472/1997) by self-correcting returns and omissions, thus having the administrative sanction reduced (up to 1/5 of the minimum sanction) and obtaining criminal non-punibility for the crime of failure to pay VAT or withholding taxes and for the crime of undue set-off, even after control activities, access and inspections formally communicated to the taxpayer have been initiated, and even after the notification of the "processo verbale di constatazione" (even though only for levies "managed" by the Agenzia delle Entrate and by the Agenzia delle Dogane). This does not avoid the assessment of the possible higher tax due for which the taxpayer has later on made amends, but surely represents a sort of extreme "exit door", postponing to the moment of the notification of the measure the line beyond which the untimely "cooperation", which jeopardises the efficiency and economic character of the administration's entire action, cannot be protected any more. Moreover, for the

“ravvedimento” which is really “operoso”, i.e. happening before the initiation of controls, contrarily to the past, non-punibility for crimes of failure to submit returns and false declarations in the returns is granted.

As counterpart of such innovations, since 2016 all forms of “swift” cooperation with the taxpayer’s acquiescence with the report of findings and with subpoenas submitted during controls to define assessment (d.lgs. 218/1997) have been repealed. Which demonstrates the existence of an overall design on the part of the lawmaker, though not always homogeneous, aimed at strengthening the non-proceduralised forms of pre-emptive and, we could say, “free” taxpayer cooperation, i.e. forms that do not depend on their formally following procedural models of administrative action.

3. “Knowing” and “letting know” before enacting controls in order to better “orient” small/medium taxpayers as well

Advanced IT acquisition of information concerning the taxpayer, before him/her being object of specific controls, such as sharing such data not only amongst the various levels of (national and European) fiscal government, but also with the taxpayer himself/herself, represents the first stepping stone for the implementation of taxpayers.

Data flows towards the Fiscal Registry Office (“Anagrafe tributaria”) and the databases managed by the latter have esponentially grown in recent years, through the introduction of automatic information duties on enterprises, intermediaries and professionals. Suffice it to remind the strengthening of the section of financial reports of the Anagrafe tributaria with the duty on financial intermediaries and insurance companies to periodically communicate data concerning all flows and initial and final deposits of their accounts, which the Administration must use to enact its analysis on risks of evasion; or the so-called “spesometro”, i.e. telematic communication to the Agenzia delle Entrate of all operations that are object of invoices for VAT purposes and of those for which there are not invoking duties (that is to say,

relationships with final consumers) if concerning an amount higher than 3.600 euros.

One should also add the duties of telematic communication imposed on economic and commercial operators and to tax substitutes with regards to purchases of goods and services performed by natural persons and deductible in their tax returns (such as sanitary expenses). Or, again, the digitalisation of the land registry and data flows concerning real estate or the forms of vertical informative cooperation between local bodies and the administration, which allow to enhance the value of information also for the purposes of the controls on the part of local entities, even though an efficient system of horizontal sharing of information between different entities is still lacking.

Issues and need for rationalisation of databases still frequently emerge, as one can draw from the activity of the Parliamentary Commission on the "anagrafe tributaria", even as far as data protection and privacy are concerned, given the sensitive nature of many information and the need to adopt adequate technical safety measures.

If such information are useful to the selection of controls through presumptive assessment tools, such as "studi di settore" and "redditometro", they also constitute the stepping stone, once again, to enhance pre-emptive mechanisms to induce spontaneous compliance on the part of the taxpayer, in the overall logic to favour the spontaneous or guided emersion of tax bases. Which highlights forms of cooperation based on an original binomial of consensual models and authoritative mechanisms based on highlighting and making known to the taxpayer the quantity and quality of information available on the part of the tax authorities.

This has recently been done through two techniques.

First of all, one should remember the introduction (in the financial act for year 2015) of a quite particular system of pre-emptive warning for the taxpayer, especially if entrepreneur or professional (article 1, par. 634-636, l. 190/2014). With the purpose of enacting "*new and more advanced forms of communication between the taxpayer and the tax administration, also in*

pre-emptive terms with regard to fiscal deadlines, in order to simplify compliance, stimulate the compliance with tax duties and to favour the spontaneous emerging of tax bases", it has been required that the Agenzia delle Entrate will provide the taxpayer, through telematic systems and new technologies, the elements and the information in its possession concerning said taxpayer, acquired directly or from third parties, with regards to revenue, compensations, income, turnover, value of production, advantages, deductions, tax credit, even if not due, and information useful to evaluate and analyse such elements and income elements. On his/her part, the taxpayer may point out to the Agenzia facts and circumstances that the Agenzia know nothing about. It is a peculiar model which (already at the normative level) wants to take advantage of a "psychological" mechanism for addressing taxpayer behaviour based on the potential effect played by letting him/her know not so much what the Administration knows, but rather the fact that the Administration "knows". From such a perspective, the "exchange", or rather the measuring of reciprocal knowledges, appears to be entirely de-proceduralised and ultimately aimed at favouring amendments and future spontaneous compliance in submitting returns.

The other "technical tool" which should be mentioned is the electronic pre-filled tax returns. Even though for now, in its first experimental phase, it has been limited to the 730 model, used only by employees, it nonetheless constitutes a change in perspective in the "mass relationships" between administration and taxpayers. The tax return is filled up by the administration based on the information in its possession, mainly deriving from third parties which have a duty, under pain of being sanctioned, to submit data. The responsibility for controls is shared between intermediaries and professional attesting the conformity of the return to the relevant documents for proof. Possible formal controls are aimed at them (substantial controls remain aimed at the taxpayer) and, in case of irregularities, they are imposed a sanction equal to the tax plus sanctions and interest which would have been paid by the taxpayer (which will not be

asked to the taxpayer, at least on the part of the administration: the economic fallback on the taxpayer is tacitly left up to the possibility of recovery on the part of the professionals: article 39 d.lgs. 241/1997). This, unless the intermediary demonstrates that the fault of the irregularity of the tax return (consisting in an otherwise detectable falsification of the supporting documents) falls entirely on the taxpayer or leads the taxpayer to submit an amending return.

This regime, undoubtedly significant for the number of taxpayers involved, though limited as far as categories of income are concerned, surely constitutes a profound innovation of the role of the tax return and of the control mechanisms (essentially of a formal nature) of the tax returns of persons which are not economic operators.

But the lawmaker, maybe with an excess of foresight, had already thought of small entrepreneurs and professionals, which are not subject to "studi di settore", with the simplifying reward system provided for by article 10 of the so-called d.l. "Salva Italia", n. 201/2011, which has not then been implemented, evidently because of the technical difficulties it entailed. For those subjects the law provided that for the administration to automatically prepare all the returns (IRPEF; VAT; IRAP; of the tax substitute) and manage all assessment activities, upon condition that the taxpayer would telematically submit to the Agenzia all of his/her invoices and communicate all compensations received or paid and have a bank account dedicated to his/her economic activity. It was a sort of "tutoring" for small and "truly transparent" enterprises, as far as information cooperation was concerned, with the addition of immunity from presumptive assessments and from the duty of minimal book-keeping.

Even though it has not been implemented, said regime demonstrates the tendency to using the possibilities given by technology to completely overcome the separation between taxpayer and administration (which normally controls and does not assist); a separation upon which the return system and the following consequences currently rely.

This purpose has been only partially reached with the current pre-filled return, which is based on the same *ratio* (though imposing a heavy responsibility on intermediaries). It has not been implemented further, even though a series of subsequent more recent modifications could have created the conditions to follow up on that idea. Currently, however, the model of the interaction between the taxpayer and the administration seems to be based, as far as powers and responsibilities go, on the coexistence of a dishomogeneous number of dynamics where the acknowledgement of the essential character of responsibility (and sanctionability) of taxpayers' conducts, as much as subject to control, is pivotal. If anything, the combination of articulate and wide-ranging forms of pre-emptive collection of information by the administration seems to be built on this model, with rewards systems (based not only on the *ex post* curtailing of sanctions, but also on the foreseeability of controls or on the *ex ante* immunity from them), aimed at making self-assessment, compliance and pre-emptive cooperation more convenient (in terms of certainty of the relationships between taxpayers and administration as well) and at making their refusal significantly more burdensome⁷.

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⁷ In this context, one should mention the increase of sanctioning measures in case of an assessment on the disapplication of special anti-avoidance rules that has not been preceded by a tax ruling request pursuant to article 11, par. 2, l. 212/2000; or, again, the introduction of a general duty to telematically submit to the Agenzia delle Entrate data concerning invoices and periodical assessment, with very few subjective exemptions, pursuant to d.l. n. 163/2016, which modified article 21 d.l. n. 78/2010; and finally the creation of summary indexes of fiscal reliability (ISA), with d.l. n. 50/2017, article 9-bis, aimed at progressively "substituting" "studi di settore", enhancing the nature of pre-emptive self-control instrument for the taxpayer (which actually was already provided in the logic of the "old" "studi di settore") rather than as an instrument to direct *ex post* assessment and sanctioning activities.

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