EATLP CONGRESS 2009 – SANTIAGO DE COMPOSTELA
MUTUAL ASSISTANCE AND INFORMATION EXCHANGE

The enlarged duties to co-operate of taxpayers and the reversal of the burden of proof

Prof. Fabrizio Amatucci
Second University of Naples

1) *The enlarged duties to cooperate of taxpayers and economic freedoms in EU context*

The effect of limitations in the exchange of information regulations regarding proof, representing one of the main obstacles in co-operation and mutual assistance in tax affairs, is the *enlarged duty to cooperate of taxpayers* and the existence of a heavy burden of taxpayers carrying out economic activities abroad. *The enlarged duty to cooperate* gives rise to an important change: the transfer of duty to provide information from Tax authorities to taxpayers and the reversal of the burden of proof. This phenomenon may be considered a reaction of national legislation to a increasing internationalization and seems to be a sort of counterbalance to new guarantees of taxpayers offered by EU law (economic freedoms) .

Usually enlarged co-operation and the consequent reversal of the burden of proof now incumbent upon the taxpayers concerns cases in which the taxpayer asks for the recognition of a tax benefit and tax allowances or for not application of anti-avoidance rules. In such cases the principle of *free distribution of burden of proof* recognised by the ECJ is applied and the taxpayer is obliged to produce proof (see. judg. *Twoh International,* case C-184/05 of 27.9.2007 p. 26) .

This new kind of cooperation in tax affairs has been considered in an EU context by the ECJ (see judgments *Vestergaard* case C-55/98 of 28.10.1999 p. 26, *Dieter Danner* of 3.10.2002 C 136/00 p. 50, *Skandia Ramstedt,* case C-422/01 of 26.6.2003 p. 43). In these rulings the ECJ, having held that Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct payment of income tax, argued that there is nothing to prevent the tax authorities

concerned from requiring the taxpayer to provide such proof as they may consider necessary to determine whether the conditions for tax advantage have been met.

This tendency is an admission and a direct consequence of limits provided by the art 8 of EEC Directive 77/799 permitting in some cases a Member State not to give information even if it is necessary for the recognition of tax advantages.

Article 8(3) of Directive 77/799, requiring *reciprocity* of legislation in the Member States concerned and thus of relevant evidence regimes, which are often not compatible with each other, implicitly establishes in fact that a State may refuse to provide information or documents where that information either is **not admissible or is not available** in the requesting State for evidence reasons (practical or legal).

Let us think of some evidence, such as testimonies and oaths, made during criminal proceedings or oral procedures (declarations by parties or thirds), which are not allowed in some national tax systems or whose probative value is controversial; and, on the other hand, of presumptions which in some cases are widely used during domestic assessments, but not allowed or provided for by other legal systems of requesting countries.

We should consider the fact that data or information (concerning cross-boarder actitvities) regarded as *evidence* or merely as *circumstantial evidence,* if are not admissible in the requesting State, can be denied from requested State. In this case the refusal is a limitation of the Tax authorities burden of proof having restrictive effects on taxpayers' guarantees.

The limits of exchange of information and their effects on mutual assistance are elucidated in ECJ judg. *Twoh international* p. 32 and *Hein Persche* case C-318/07 of 27.1.2009 p. 64 where is argued that on the basis of Article 2(1) of Directive 77/799, Tax authorities have the possibility of requesting information from the competent authority of another Member State, and such a request does not constitute an obligation to comply.

Moreover the ECJ has ruled (see judgm. *Twoh international* p. 34) that the mutual assistance Directive 77/799 and the administrative co-operation regulation had not been adopted for the purpose of establishing a system for exchanging information between the tax authorities of the Member States allowing them to establish and to prove (for VAT exemption recognition) the intra-Community nature of supplies

made by a taxable person who is not himself able to provide the necessary evidence for that purpose.

The ECJ surprisingly has (in *Hein Persche* case, p. 69**)** recently held that, even if it proves difficult to verify the information produced by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, nothing prevents the tax authorities concerned from **refusing** tax benefits applied for if the evidence that they consider they need to make a correct assessment of the tax liability is not supplied (see also judgm. *Commission/Denmark* case C-150/04, 30-1 2007, and , *ELISA* of 11.10.2007, case C-451/05) .

Following ECJ case law it seems therefore that information provided by Member State on the basis of the mutual assistance Directive 77/799 do not necessarily constitute proof, but they require discretionary assessment activity by national tax authorities and sometimes additional documentation from taxpayers.

Moreover, if on the one hand prohibition of discrimination and restriction of fundamental freedoms in the field of taxation requires mutual assistance between Member States as a condition to avoid justification of tax control difficulties (in intra-community cases) , on the other hand, the request to taxpayers to provide proof and the enlarged duty to cooperate, could just represent - in case of difficulties or impossibilities to provide the evidence required to obtain tax advantages (*probatio diabolica*) - a restriction of fundamental freedoms by national tax system incompatible with the EC Treaty.

The limitation of exchange of information provided for by Directive 77/99 EC (art 8 in particular par. 3), inevitably creates a reversal of the burden of proof upon cross border taxpayers that weighs more heavily on them and is not comparable to the onus of proof on purely domestic taxpayers and thus constitutes a difference in treatment between them.

The reversal of the burden of proof on cross-border taxpayers is in fact often necessary in some Member States for taxpayers in the **pre-assessment** phase in order not to trigger the application of anti-avoidance rules. Art. 110 e 167 of the Italian Decree of the President of the Republic n. 917 of 1986 (TUIR) require in fact respectively the evidence from taxpayers of their principal and effective economic activities in foreign States for recognition of tax deductions and non-application of CFC rules .

In the Netherlands (art. 457 of General Tax Act) a legal obligation is imposed on companies to provide information regarding their foreign parent or sister companies. If the information cannot be obtained from other the requested Member State, the companies in question can be subject to penalties .

The German tax system (German Tax Code section 90(2)) has different rules for tax relevant operations that affect a foreign country. In this case also the taxpayers' duty to cooperate is now more onerous than is the case with purely internal tax relevant operations.

If it is true as pointed out by the ECJ (judg. *Baxter* of 19.7.1993 case C-254/97 points 19 and 20, *Centro di Musicologia Walter Stauffer* of 14.9.2006 case C-386/04, and *Hein Persche*) that a national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure carried out in other Member States (relating for instance to research or deduction for tax purposes for gifts made for the benefit of bodies) cannot be justified in the name of effectiveness of fiscal supervision; and if it is true that it cannot be excluded *a priori* that the taxpayer is able to provide relevant documentary evidence (see p. 53 *Hein Persche* case), it cannot be denied that enlarged co-operation should not be used to offset the **inefficiency or limitation** of exchange of information of the Tax authorities and should not be an obstacle to the economic freedoms in the EU context.

To overcome the limitation in tax mutual assistance and their restrictive effects on the burden of proof of taxpayers, the refusal of mutual assistance, should no longer be justified by EU Member States through the absence of **tax interest** of requested States (see art. 17 of proposal of Council Directive on Administrative cooperation in the field of taxation (COM 2009)).

In a similar context the OECD Transfer Pricing Guideline of 1995 (p. 4.16) for Multinational Enterprises and Tax Administrations, provides that particular care in the application of rules concerning the burden of proof is necessary and that the reversal of the burden of proof on taxpayers should not be used as a justification for making groundless or unverifiable assertions.

2) *Subisidiarity and Proportionality principles as conditions for the reversal of the burden of proof on taxpayers*

If mutual assistance in taxation and Exchange of information between Tax administration is lacking, inadequate or unsatisfactory , in some States (art. 457

Netherland Tax code , art. 110 and 167 TUIR in Italy) the burden of proof shifts inevitably on the taxpayer who has the duty to cooperate with the Tax administration (enlarged cooperation) and in some cases, as we've examined, this is connected to a range of tax benefits and allowances.

In the cases in which the burden of proof upon taxpayers makes it possible for a State to verify the tax residence of physical persons or of companies, difficulties can arise for the taxpayer who is required to give information considered as evidence by Tax Authorities.

The reversal of the burden of proof in the EU context , if it is not based on an absence of satisfactory exchange of information between Member States will be in conflict with **subsidiarity** and **proportionality** principles creating different treatment between taxpayers. Only if exchange of information is not adequate will it be necessary to require information from taxpayers. Inadequacy of information facilitates the activities of tax authorities and its evaluation should be objective and not be considered on the basis of inefficiency or unjustified refusal.

In this context the reliability and verifiability of information is particularly relevant. The ECJ held in *Societé Papillon* of 27.11.2008, case C-418/07 and *Skatteverket* of 18.12. 2007, case C-101/05, that difficulties, which Member States can face, cannot of themselves justify tax restrictions and recognized that tax information concerning companies is all more appropriate since Community harmonization measures apply in the fields of company account.

For the purpose of evidence , it is very important that data can be verified, so that the assessment system can be compatible in different Member States for effective tax cooperation. For there to be correct application of the enlarged duty of cooperation, **clarification from EU law** on the adequacy of the exchange of information between tax administration would be desirable. It would also be desirable to have clear criteria to establish what constitutes an adequate exchange of information, bearing in mind the limits laid down by Directive 77/99 and art. 26 of the OECD Model.

3) *Conclusions*

There is not doubt that the lack of an adequate system of exchange of information in a State automatically determines the necessary collaboration and the existence of greater demands on cross-boarder taxpayers and this cause restriction of basic economic freedoms through greater difficulties in investments.

The shift of the burden of the proof from Tax Authority to the taxpayer who requires tax benefit and escape from anti-avoidance rules in compliance to an enlarged duty to cooperate, must not constitute a loophole by national legislator to circumvent the difficulties deriving from limits to exchange of information with some Member States .

This new kind of cooperation requires a particular care from the Member States which should always preliminary ask information to Tax authorities of the other Member State. It should be necessary a larger national bind to provide information in EU context even if a national tax interest of required States is absent to avoid discrimination of taxpayers carrying out intra-community activities.

Respect is therefore necessary for the community principles of proportionality and subsidiarity on the part of national instruments which shift the burden of proof to taxpayer.

Until full harmonization of accounting system has been achieved, Member States should be worry of restricting certain economic freedoms in those cases in which a clear evidence (data) of economic activities is provided by the taxpayer and when such evidence is nevertheless considered inadmissible in tax system of the required State(*Futura* judgm. case C-250/95 of 15.5.1997) .