Introduction to comparative tax law

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already mentioned above[83], the use of EC law, in my opinion, although it could not be called properly "juridical comparison", could allow the judge to use this comparison. In this occurrence, there are two different possibilities: in the first place, the judge could consider how jurisprudence of other EC members has applied the same rule of law; in the second place, when the judge had to apply a EC principle taken by the legal order of another EC member, he could refer to the foreign case law.

Really, the EC law could become the *locus minoris resistentiae* of the nationalism of legal order, EC principle could be an incentive to change the *habitus* of our jurisprudence, usually "impervious" to other juridical experiences[84].

[83] Cf. above par. 1.

[84] G. AJANI, *Navigatori e giuristi...*, *op. cit.*, pp. 3 ff.

The jurisdictional protection of the taxpayer: a comparison between Italian and French legal system.

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1. *Introduction*

The European dimension of tax-related relationships and the increasingly harmonized regulations within the European Community give rise to an extensive interest in investigating the other member Countries' juridical experiences and types of legal protection enjoyed by taxpayers within the framework of tax litigation, intended as the pathological phase of the relationship between passive subject and Tax Administration.

The pathological feature is even clearer if we consider that, in modern tax systems, the dialogue between taxpayer and Tax Administration also takes place at a stage earlier than the lawsuit, so that the jurisdictional phase is approached after an administrative procedure is accomplished and a relevant deed is drawn up, based on the alleged incorrect application of the law in the case at issue[1].

Based on the above considerations, the judicial framework is therefore the most natural place where the passive subject can apply, successfully or unsuccessfully, to a third party for an "effective"[2] protection consisting in the removal of the unlawful activity carried out

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[1] See E. GONZÀLES GARCÌA, *I ricorsi amministrativi e giudiziari*, in *Tratt.dir. trib.*, A. AMATUCCI (directed by), Padua 1994, p. 257 (265).

[2] The articles on effectiveness of jurisdictional protection are numerous. On tax

by the Inland Revenue and of the consequences thereof already suffered by the taxpayer. Generally speaking, the taxpayer's legal protection actually lies in the need to make sure that the taxpayer is being exclusively taxed within such limits and under such conditions as prescribed by law.

In this short report, we will therefore compare the choices made by Italian and French tax system. The comparison considers not only the tax litigation model and its structure, but also the foundations of tax systems and their effects on both parties' positions in the proceedings. In this connection, the taxpayer's legal protection is effective insofar as based on an actual equality before the judicial authority and on the unimportance of an interest in taxation capable of exceeding the boundaries of the ability-to-pay.

Within a jurisdictional framework, the effectiveness does not aim at identifying which of the conflicting interests deserves to prevail actually; it is rather a pursuit and enhancement of what is intended as a common interest in the dialogue between taxpayer and Inland Revenue: the collection of the "fair tax"[3], meant as a type of taxation complying with both domestic and Community tax regulations.

2. *Key matters relating to taxpayers' jurisdictional protection within the Italian legal system in consideration of its development*

The history of Italian tax litigation reveals its original administrative nature. Being contributed to by authors, case law and legislation,

law matters, the influential doctrine is taking a progressive interest in the last years. See F. TESAURO, "Giusto processo e processo tributario", in «Rass.trib.», 2006, p. 11; L. DEL FEDERICO, "Il giusto processo tributario: tra art. 6 della Convenzione europea dei diritti dell'uomo e art. 111 Cost.", in «Riv. giur. trib.», 2005, p. 154; P. RUSSO, "Il giusto processo tributario", in «Rass. trib.», 2004, p. 11; F. GALLO, "Verso un 'giusto processo' tributario", in «Rass.trib.», 2003, p. 13; E. DE MITA, *Processo tributario e carta costituzionale. Il nuovo processo tributario garantisce l'effettività della tutela*, in M. MISCALI (directed by), *Il nuovo processo tributario*, Milan 1996, p. 35.

[3] See A. MARCHESELLI, "Il giusto processo tributario in Italia: il tramonto dell'interesse fiscale?", in «Dir. prat. trib.», 2001, I, p. 799; lecture during the *3ème rencontre de Droit Fiscal Constitutionnel et Européen*, on *Le procès equitable en droit fiscal européen*, Aix en Provence, November 16-17, 2001.

the Italian tax litigation is increasingly approaching its jurisdictional independence, up to the rules of the "due process of law"[4] mentioned by the new art. 111 Cost. introduced by the Constitutional law dated 25th November 1999, no. 2.

The provisions of both Royal Decree dated 7th August 1936, no. 1639, relating to the reform of tax systems, and Royal Decree dated 8th July 1937, no. 1517, relating to the establishment and operation of administrative Committees for direct and indirect corporate taxes, had deemed those Committees to be administrative bodies and the administrative assessment and lawsuit to be as a whole. Both phases fell therefore within the framework of a broader tax relation. According to this interpretation, the only form of jurisdictional protection – obviously covering subjective rights – was offered by the ordinary judge, in spite of his limited jurisdiction, as expressly provided for by the relevant regulations[5]. He could not be acquainted with matters relating to cadastral assessment and apportionment or to direct taxes, prior to the disclosure of taxrolls; therefore, the judge could be seised only after the tax obligation was fulfilled, because the tax-collection order was supposed to be lawful and to give rise to the taxpayer's *onus probandi* (burden of proof).

In the early '40s, the first author considering the Committees as jurisdictional authorities was Allorio[6]. He argued that, prior to taxation, the taxpayer had a lawful interest, but that the subject-matter of tax litigation was not the lawful interest but a potestative right, as any tax-related lawsuit is a process of "cancellation-reform"[7]. This theoretical concept was the starting point for the enforcement – within the proceedings initiated before Tax Courts – of the Civil Procedure

[4] On the topic, see M. CECCHETTI, *Giusto Processo (dir. cost.)*, in *Enc. Dir.*, V, Milan 2001, p. 595.

[5] The rule is provided into Law March 20, 1865, no. 2248 (enclosed E).

[6] See E. ALLORIO, *Diritto processuale tributario*, Milan 1942; A. BERLIRI, *Il processo tributario amministrativo*, Reggio Emilia 1941; G.A. MICHELI, "Aspetti e problemi della prova e della decisione nel processo tributario", in «Riv. dir. fin.», 1940, p. 161.

[7] See E. ALLORIO, *Diritto processuale tributario*, quot., 108; in his opinion to whom has a legittimate interest because it is connected with annulment's jurisdictional prerogative tributed to the Commissions, «è concesso un diritto soggettivo secondario, che si qualifica come diritto d'iniziativa, un diritto di reazione contro l'atto amministrativo che leda la norma strumentale, da cui l'interesse legittimo deriva protezione indiretta».

Code's provisions and was the instrument opposing certain authors' allegations about the lawfulness of the administrative deed[8].

Step by step, the case law has then worked out the principle whereby the Inland Revenue, before issuing its tax-collection order, must provide evidence of the factual requirements underlying the order, because the *onus probandi* is up to the Inland Revenue, even though the concept of tax litigation as a mere ascertainment might lead to think of the reverse[9].

In this framework, the interest in taxation was still waiting to be adjusted, due to the assumption relating to its specific constitutional importance, as repeatedly pointed out by the Constitutional Council[10]. In many judgments', the Court has indeed justified the constitutional lawfulness of certain particular rules designed to protect the tax-related rights[11], such as the rule aiming at admitting presumptions failing to fulfill requirements in terms of seriousness, precision and consistency[12]; in other cases, the need has been felt that the citizens' interest in jurisdictional protection and the community's general interest in the collection of taxes should be "harmonically coordinated"[13].

In the opposite sense, reference must be made to the historical judgement which has cancelled the rule referred to as *solve et repete*[14]

[8] See F. TESAURO, "Giusto processo e processo tributario", in «Rass. trib.», no. 1/2006, pp. 15 ff.

[9] On the topic see G.M. CIPOLLA, *La prova tra procedimento e processo*, Padova 2005, p. 527.

[10] The Constitutional Court had statued that: «La materia tributaria, per la sua particolarità e per il rilievo che ha nella Costituzione l'interesse dello Stato alla percezione dei tributi, giustifica discipline differenziate», Corte Cost., 23 luglio 1987, no. 283, in «Giur. it.», 1988, I, 1, 906.

[11] See Corte Cost., July 7, 1962, no. 87, in «Giur. it.», 1962, I, 1, p. 1281.

[12] See Corte Cost., July 23, 1987, no. 283, in «Giur. it.», 1988, I, 1, p. 906.

[13] See Corte Cost., April 9, 1963, no. 45, in «Giur. it.», 1963, I, 1, p. 1090; ID., November 26, 1964, no. 91, in «Foro it.», 1964, I, p. 2222; ID., December 7, 1964, no. 100, in «Giur. it.», 1965, I, 1, p. 722; ID., December 22, 1969, no. 157, in «Giur. it.», 1970, I, p. 835.

[14] See Corte Cost., March 31, 1961, no. 21, in «Giur. it.», 1961, I, 1, p. 529; this pronunce was defined as exemplary because «abolendo una norma ormai divenuta anacronistica, recava un notevole contributo ai fini del progressivo adeguamento del diritto processuale tributario ai principi solennemente proclamati dalla Costituzione in tema di rapporti fra cittadino e Pubblica amministrazione», as it had been sustained by E. ALLORIO, *Diritto processuale tributario*, quot., 617.

by declaring the unconstitutionality of the provision of paragraph 2 of art. 6 of Law dated 20th March 1865, no. 2248, attachment E. After the disappearance of that principle, the rule which made the judicial action subject to the prior successful registration of the tax became ineffective, as its preliminary requirement was no longer there.

The Court has increasingly removed from the legal system the rules which made the judicial action subject to the prior fulfillment of the administrative measures, with obvious reference to the taxes pertaining to the ordinary jurisdiction[15].

The Court is reported by the most authoritative authors[16] to have acted too cautiously, thus failing to properly protect the citizens in respect of the Inland Revenue's demand by referring to an alleged higher "interest in taxation" or to a "remarkable specificity" or "peculiarity" of tax litigation, without explaining the reasons for weak forms of protection[17].

The nature of Tax Courts also inspires some comments on the effectiveness of taxpayers' protection. Let us remind that the Constitution, not expressly providing for the existence of tax Courts[18], has caused a serious gap, particularly considering the renowned union of jurisdiction.

The same Constitutional Court has changed its trend over the decades.

At the beginning, the Constitutional Council had considered jurisdiction as an indisputable fact[19], clearly acknowledged by the au-

[15] See Corte Cost., Novembre 23, 1993, no. 406, in «Fisco», no. 45/1993, p. 11389, on stamp duty; ID., July 27, 1994, no. 360, in «Giur. cost.», 1994, p. 2939, on tax on shows; ID., March 17, 1998, no. 62, in «Giur. it.», 1998, p. 1743; ID., April 1, 1998, no. 81, in «Giur. it.», 1998, p. 1743, on Iciap; Sent. April 23, 1998, no. 132, in «Foro Amm.», 1999, p. 5.

[16] See F. TESAURO, *Giusto processo e processo tributario*, quot., 23.

[17] This is the opinion of F. TESAURO, *Giusto processo e processo tributario*, quot., 22.

[18] After the second world war the literature didn't agree on the topic. As for a classical interpretation (see A. AMORTH, *La Costituzione italiana*, Milan, 1948, p. 110; G. AZZARITI *Giurisdizioni speciali e sezioni specializzate*, in *Problemi attuali di diritto costituzionale*, Milan 1951, p. 236). Commissions had exhausted their working because they were a special jurisdiction not provided by Constitution; as for a new one it should be possibile to provide specialized sections in the context of ordinary jurusdiction.

[19] See Corte cost., January 26, 1957, no. 12, in «Giur. Cost.», 1957, p. 287; ID., March 11, 1957, no. 41, in «Dir. prat. trib.», 1957, II, p. 235; ID., March 11, 1957, no. 42, in «Giur. cost.», 1957, no. 516; ID., December 30, 1958, no. 81; ID., July 13, 1963, no. 132, in «Dir. prat. trib.», 1963, II, p. 447.

thors too[20]. Later on, however, it finally concluded that tax courts are highly administrative[21], due to their composition, applicable procedures, functions and orders issued by them, thus being disagreed with by the most authoritative authors[22]. After the tax reform arising from Presidential Decree no. 636 of 1972[23], this marginal trend has been definitively vanished, not as a result of an explicit regulatory provision or of an irreversible trend in case law, but rather with reference to art. 29, third paragraph of the reformed *corpus* of regulations which indirectly allowed the appeal to the Supreme Court against the central Tax Court's judgements[24]. Particularly, following the tax reform of the '70s, the Court, diverting from its own case law[25], had retroactively deemed the tax Courts to be jurisdictional – which therefore could not be considered as a new judge, but just as a reformed pre-existing judge – so as to comply with the prohibition from establishing new jurisdictions[26].

[20] See M.S. GIANNINI, *La giustizia amministrativa*, Rome 1963.

[21] See Corte costituzionale, January 29, 1969, no. 6, in «Dir. prat. trib.», 1969, II, 90, with a comment of C. MAGNANI, "Brevi osservazioni sulla dichiarata natura amministrativa delle commissioni tributarie". It had been underlined by the Court that qualifying Commissions as municipality's organs should not influenced their functions. It had been already revealed by the Court (see Corte Cost., 11 luglio 1961, no. 42) that a qualification as municipality's organs was not coherent with their jurisdictional nature.

[22] The most important authors were convinced of the jurisdictional nature of Commissions. From this point of view we have to look to the title of their comments. See, for istance, E. ALLORIO, "Sulla rappresentanza e sulla difesa del contribuente avanti le commissioni giurisdizionali tributarie", in «Dir. prat. trib.», 1969, II, p. 102.

[23] See F. TESAURO, "La natura del giudizio dinanzi alle commissioni tributarie alla luce delle nuove norme sul contenzioso", in «Boll. trib.», 1982, p. 5; G. MARONGIU, "Sulla natura giurisdizionale delle vecchie e nuove commissioni tributarie", in «Giur. comm.», 1975, p. 422; V. ROSAPANE, "La natura giurisdizionale delle nuove commissioni tributarie", in «Comm. trib. centr.», 1974, p. 974.

[24] See C. MAGNANI, *Le Commissioni tributarie*, in A. AMATUCCI, *Tratt. dir. trib.*, Padova, 1994, III, p. 319; C. CONSOLO, "Ancora sugli effetti nel tempo delle sentenze costituzionali: il caso della sentenza no. 50 del 1989. Una incoerenza della corte nella vicenda perenne della natura giurisdizionale delle commissioni tributarie ed un'"occasione sbagliata per sperimentazioni sull'art. 136 cost.", in «Giur. it.», 1989, p. 353.

[25] See Corte Cost., December 27, 1974, no. 287, in «Dir. prat. trib.», 1975, II, p. 34; ID., August 3, 1976, no. 215, *ivi*, 1976, II, 589; ID., November 24, 1982, no. 196, in «Giur. it.», 1983, I, 1, p. 850; ID., December 16, 1982, no. 217, *ivi*, 1983, I, 1, p. 848.

[26] See C. MAGNANI, "Le Commissioni tributarie", cit, p. 319.

The Legislator of the reform based on Legislative Decrees dated 31st December 1992, no. 545-546, entitled "The system of special tax authorities" (*Ordinamento degli organi speciali di giurisdizione tributaria*) also confirms the above feature on a regulatory level, although with some marginal reservations relating to the professional qualification of judges[27].

This progressive development has raised the level of protection for taxpayers, by introducing into tax litigation the guarantees typical of actually jurisdictional proceedings, including the time-based guarantee regarding the due process of law[28] and remarkably downsizing the interest in taxation, also thanks to the protection based on interim precautionary measures.

In the late '90s, the Constitutional Court has finally declared the constitutional lawfulness of Tax Courts[29], by emphasizing that they are not a new judge, whereas the legislator has consequently extended the tax Courts' jurisdiction to any form of tax.

However, according to the authors[30], critical matters are still there and do not enable to deem the taxpayers to be actually and effectively jurisdictionally protected.

The above matters relate to the tax Courts' independent, impartial and third-party position and to the failure to set up the list of tax judges. Even before the reform of art. 111, which, in its current wording, has greatly boosted the problem, the Constitution has provided that the judges be subject to the law only (art. 101) and that the law must guarantee their independence (art. 108), but such rules seemed not to be fully complied with by the provisions of Presidential Decree

[27] See G. GAFFURI, *Diritto tributario*, Padova 2006, p. 202.

[28] See A. GARCEA, "La giurisdizione delle Commissioni tributarie ed i principi del 'giusto processo'", in «Dir. prat. trib.», 2001, I, p. 474; E. MANZON, "Processo tributario e Costituzione. Riflessioni circa l'incidenza della novella dell'art. 111 Costituzione sul diritto processuale tributario", in «Riv. dir. trib.», 2001, I, p. 1095; F. GALLO, "Verso un 'giusto processo' tributario", in «Rass. trib.», 2003.

[29] See Corte Cost., ord. April 23, 1998, no. 144, in «Giur. it.», 1998, p. 2508, with a comment of A. MARELLO, "Riforme del processo tributario: il superamento del concetto di 'revisione'"; M. CANTILLO, "Il nuovo processo tributario all'esame della Corte Costituzionale: osservazioni minime su tre importanti decisioni", in «Rass. Trib.», no. 3/1998, p. 646.

[30] See F. TESAURO, *Giusto processo e processo tributario*, quot., p. 34.

dated 26th October 1972, no. 636, actually regulating the composition of tax Courts[31].

Nonetheless, all the Constitutional Court's interventions in this respect have always declared groundless the pleas of unconstitutionality[32] raised on the specific matter, although with some reservations based on observations *de jure condendo*[33].

The latest legislative intervention, pursuant to Legislative Decree dated 31st December 1992, no. 545, has failed to fill in all the gaps, because the tax Courts still closely depend on the Ministry of Economy and Finance.

3. *Jurisdictional protection: a comparison between Italian and French legal systems*

Within the French legal system, the jurisdictional protection is regarded as an exceptional remedy for protecting the taxpayer against unlawful taxation. He is indeed allowed by the law to undertake an administrative action, the so-called "amicable petition" (art. 247 LPF), aimed at obtaining a total or partial tax amnesty or an amicable settlement[34].

The taxpayer, when applying to the relevant Tax Office, starts an action leading to an administrative debate ending with a decision communicated to the general manager or Minister of Finance. This instrument is indeed comparable to the self-protection[35] allowed by the Italian tax system, whereby the taxpayer objects to the tax being claimed by directly applying to the claiming Tax Office. The French Inland Revenue's decision[36] to reject the application for "tax amnesty" can be appealed against before the administrative judge by virtue of a complaint about abuse of power.

The following jurisdictional phase, if any, is aimed at a double control, both inside and outside: the external control makes sure whether the decision-maker was actually holding jurisdiction and whether the decision was taken properly; the internal control relates to any mistake in fact or in law, any abuse of power or very clear mistake in evaluation. This is usually referred to as litigation arising from an action for invalidation, whereafter the judge, without superseding the Inland Revenue, can decide to cancel the deed rejecting the application for tax amnesty.

Something like this also applies in the Italian tax system, where nobody questions the right to appeal against a rejection of self-protection; nowadays, an extensive debate is going on in our tax system about the issue of jurisdiction, finally sorted out by the Supreme Court in favour of the tax courts[37]. This choice has been however criticized by most authoritative authors, pointing out the need to submit the issue of jurisdiction to the administrative judge, due to abuse of power, exactly as in the French system[38]. In this last system, the jurisdictional protection of the passive subject is not entrusted to any special proceedings. The French tax litigation, requiring a preliminary compulsory administrative complaint, is a classical lawsuit, with full cognizance, where the taxpayer's application – for an ascertainment of his own rights in relation to the taxes being claimed – is processed by administrative or ordinary courts. The administrative judge holds jurisdiction over direct taxes and turnover, whereas the ordinary judge is

[31] See A. MARCHESELLI, "Il giusto processo tributario in Italia", quot., p. 811.

[32] See Corte Cost., December 7, 1964, no. 103, in «Giur. it.», 1965, I, 1, p. 716; 24 novembre 1982, no. 196, in «Giur. it.», 1983, I, 1, p. 850; ID., December 16, 1982, no. 217, *ivi*, 1983, I, 1, p. 848.

[33] See Corte Cost., June 5, 1984, no. 154 in «Dir. prat. trib.», 1984, II, p. 1235.

[34] On the topic see J. GROSCLAUDE, P. MARCHESSOU, *Diritto tributario francese*, (translated by DE MITA E.), Milan 2006, pp. 578-79.

[35] See V. FICARI, *Autotutela e riesame nell'accertamento del tributo*, Milan 1999.

[36] See E. GONZÀLES GARCÌA, "I ricorsi amministrativi e giudiziari", quot., p. 263; J. CHEVALIER, *L'elabotarion historique du principe de separation de la juridction administrative et de l'administration active*, Paris 1970. The need of a previous administrative action is also provided under German tax law system: see D. BIRK, *Diritto tributario tedesco*, (translated by E. DE MITA), Milan 2006, p. 150.

[37] The United Sections of Italian Supreme Court definitively declared Tax Commissions are the competent authority on the topic (see Cass., Sez. Unite, August 10th, 2005, no. 16776; see also Cass., sez. Unite, March 26th, 1999, no. 185). Administrative justice acknowledge this principle (see Tar Emilia Romagna, ord. January 28th, 2005, no. 114; Tar Campania, April 8th, 2005, no. 519; Tar Trentino Alto Adige, July 14, 2003, no. 273; Tar Emilia Romagna, February 18th, 2003, no. 119; Tar Veneto, May 27th, 2002, no. 2401). See L. PIRRELLO, D. STEVANATO, R. LUPI, "Il diniego di autotutela e la giurisdizione tributaria", in «Dialoghi dir. trib.», 2006, p. 161.

[38] This is the opinion explained by E. DE MITA, in «Ilsole24ore», November 1st, 2005, p. 23.

empowered to settle the disputes relating to registration fees and the like[39]. However, the higher or lower protection offered to the taxpayer must not be found in the enforceability of a uniform jurisdiction, incidentally alleged by the authors[40], but rather in the "features of his application", i.e. in its scope and in the powers exercisable by the tax judge when issuing a judgement in that respect.

The Italian system did not provide for a preventive administrative claim as it provided, pursuant to both the D.R. dated August 7, 1936, no. 1639, concerning the tax system reform, and the R.D. dated July 8, 1937, no. 1517, that a legal action could be filed only after the fulfilment of the tax debt. This because the legitimacy of the imperative measure was supposed, with a consequent burden of proof on the taxpayer.

Most important authors[41], basing their opinion on the jurisdictional nature of the Commissions, affirmed that the taxpayer's position before the taxation was to be considered as a legitimate interest, while the subject matter of the tax proceedings was not the legitimate interest but, on the contrary, a potestative right, as the tax proceedings are a proceedings for "the annulment of the reform"[42]. On this assumption, the provisions of the Italian Civil procedure Code[43] were applied.

Gradually, the case law developed the principle according to which the Administration, before adopting the imperative measure, should give the evidence of the factual background of the measure, being on same Administration the burden of proof, notwithstanding

[39] The provision refers to in direct taxation and taxes on corporate's and tourism cars.

[40] See J. GROSCLAUDE, P. MARCHESSOU, *Diritto tributario francese*, quot., 588; M.C. Bergeres, "La contingence et la contentieux fiscal", «Revue de droit fiscal», no. 10, 1999.

[41] See ALLORIO E., *Diritto processuale tributario*, Milano, 1942; A. BERLIRI, *Il processo tributario amministrativo*, Reggio Emilia, 1941; G.A. MICHELI, "Aspetti e problemi della prova e della decisione nel processo tributario", in «Riv. dir. fin.», 1940.

[42] ALLORIO E., *Diritto processuale tributario*, quot., 108 writes that «ai titolari dell'interesse legittimo, in quanto correlato alla giurisdizione di annullamento delle Commissioni, è concesso un diritto soggettivo secondario, che si qualifica come diritto d'iniziativa, un diritto di reazione contro l'atto amministrativo che leda la norma strumentale, da cui l'interesse legittimo deriva protezione indiretta».

[43] See F. TESAURO, "Giusto processo e processo tributario", in «Rass. trib.», no. 1/2006, pp. 15 ff.

the concept of the tax proceedings as a mere declaratory proceedings could bring to believe the contrary[44].

In this frame, the tax interest delayed to be mitigated, on the assumption, several times highlighted by the Court, of its specific constitutional relief[45]. In several judgements, the Court believed to justify the constitutional legitimacy of specific provisions for the safeguard of tax system[46], as the one addressed to allow the assumptions not equipped with the requirements of gravity, precision and concordance[47]; in other cases, on the contrary, it has been believed that the citizen's interest to the constitutional safeguard and the general interest to the tax raising had to be *harmoniously coordinated*[48].

The Court has gradually eliminated from the system those laws that required the exercise of judicial action only in the case of previous recourse to administrative remedies, obviously for the taxes that belonged to the ordinary jurisdiction[49].

[44] On the topic see G.M. CIPOLLA, *La prova tra procedimento e processo*, Padua, 2005, p. 527.

[45] Corte Cost., July 23th, 1987, no. 283, in «Giur. it.», 1988, I, 1, p. 906 affirmed that «La materia tributaria, per la sua particolarità e per il rilievo che ha nella Costituzione l'interesse dello Stato alla percezione dei tributi, giustifica discipline differenziate».

[46] See Corte Cost., July 7th, 1962, no. 87, in «Giur. it.», 1962, I, 1, p. 1281, in which the specification of the executive procedure have been justified for the credits regarding taxes.

[47] See Corte Cost., July 23th, 1987, no. 283, quot.

[48] Corte Cost., April 9th, 1963, no. 45, in «Giur. it.», 1963, I, 1, 1090; ID., November 26, 1964, no. 91, in «Foro it.», 1964, I, 2222; ID., December 7th, 1964, no. 100, in «Giur. it.», 1965, I, 1, 722; ID., December 22, 1969, no. 157, in «Giur. it.», 1970, I, p. 835. For a different opinion it is necessary to underline the important sentence by which the rule of *solve et repete* was censured (see Corte Cost., March 31th, 1961, no. 21, in «Giur. it.», 1961, I, 1, p. 529) and by which it was declared as uncostitutional the provision of art. 6, par. 2, L. 20 marzo 1865, no. 2248, all. E. The sentence was important because «abolendo una norma ormai divenuta anacronistica, recava un notevole contributo ai fini del progressivo adeguamento del diritto processuale tributario ai principi solennemente proclamati dalla Costituzione in tema di rapporti fra cittadino e Pubblica amministrazione», as for the opinion of E. ALLORIO, *Diritto processuale tributario*, quot., p. 617. After the declaration of this principle, the rule by which the jurisdictional action was subject to the previous entry for trial left its meaning.

[49] See Corte Cost., Novembre 23th, 1993, no. 406, in «Fisco», no. 45/1993, p. 11389, on tax duty; ID., July 27th, 1994, no. 360, in «Giur. cost.», 1994, p. 2939, regarding taxes on the shows; ID., March 17th, 1998, no. 62, in «Giur. it.», 1998, p. 1743, regarding the opposition against the entry for trial provided for taxes for which law doesn't provide the

In the opinion of some of the most important authors[50] the Court has acted with too much caution demonstrating an inferior level of protection of the citizen when compared to the Fiscal Administration demands, causing reference to a superior "tax interest" or a high specificity, or peculiarity of the tax process, without clarifying the reasons for such a low level of protection[51].

In the French system the judge does not limit his action to receive or to reject the claim, because he has the prerogative to require a new calculation of the exact tax due. This kind of model is considered particularly appropriate to the aim, if we assume that the intent of the tax judgement is to apply the "right tax", understood as an amount which corresponds to the confirmed reality of the situation.

On examination, the judgement on the act and the judgement on the report do not seem directly comparable in the matter of protection of the tax payer in disputed cases; the tax payer cannot be considered as more protected because the unlawfulness of the act for breach of procedure is able to overturn a tax claim substantially justified; in such a case the tax saving is a mere contingency. The protection of the tax payer[52], in the jurisdictional phase means equality of the parties, impartiality of the judge, called to decide the dispute, without prejudicing the interest for the guarantee given by respect for the procedure, where stipulated.

It concerns profiles on which the French system places specific attention, emphasizing on one hand the official powers of the judge, but on the other hand taking into account the guarantees of the legal disputes providing a general rule (art. 16 c.p.c.)[53]. Therefore, he will

action before the tax commissions; ID., April 1st, 1998, no. 81, in «Giur. it.», 1998, p. 1743, on Iciap; ID., April 23th, 1998, no. 132, in «Foro Amm.», 1999, p. 5, on garbage tax.

[50] See F. TESAURO, *Giusto processo e processo tributario*, quot., p. 23.

[51] *Ivi*, p. 22.

[52] P. PHILIP, "La frontiere entre la verification personnelle et la verification de comptabilité – le controre du juge, l'intervention du legislateur et le respect des droits de la defense", in «Revue de droit fiscal», no. 16, 1998.

[53] Art. 16 provides: «Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction. Il ne peut retenir, dans sa decision, les moyens, les explications et les documents invoquès ou produits par les partiesque si celles-ci ont été à méme d'en débattre contradictoirement. Il ne peut fonder sa decision sur les moyens de droit qu'il a relevés d'office sans avoir au prèalable invitè les parties a presenter leurs observations».

be obliged to raise all the formal and substantial exceptions for the solution of the dispute, after having informed the parties and asking them to present their observations first[54]. The judge proceeds in this way if the presentation of the claim is affected by a procedure flaw and this methods can regard also the merits of the dispute allowing the judge to consider inapplicable to the case in point the law invoked by the fiscal administration, even when the taxpayer has not specifically argued against the inapplicability.

Taking place before an administrative judge, the claimant benefits from the tendency to avoid formalisms[55], fruit of the liberal tradition which excludes, at least in principle, the intervention of a lawyer. In the Court house, the protection of the taxpayer is placed on his diligence in the administrative phase which took place before; he must in fact have an agreement between the claims, in addition to the liberty to provide evidence different to and further to those already supplied. Establishing the principle abovementioned, the French law intends to ensure an effective protection of the taxpayer compared to the power, attributed to the Administration, to modify in the Court house the reasons in law on which is founded the amendment[56].

The examination of the dispute takes place through a method of inquiry[57] in which the judge, respecting the guarantee of the rules of the dispute, normally requests the presentation of documents and information which he considers necessary, he can appoint a technical consultant for the determination of the amount of tax, he can request the opinion of the State Council if it raises a question of a new law. Further more, if in the Court house the judge considers that the process is incomplete, he can request a reopening[58].

If instead a question of an incompatibility of national law with European law arises, there are doubts that the judge can sponta-

[54] J. GROSCLAUDE, P. MARCHESSOU, *Diritto tributario francese*, quot., p. 589.

[55] See A. ZOPOLO, "Il contenzioso tributario in Italia, Francia e Germania", in «Rass. mens. imp.», 1985, p. 11.

[56] See J. GROSCLAUDE, P. MARCHESSOU, *Diritto tributario francese*, quot., p. 595.

[57] See G. MARTICICH, "Brevi cenni sul contenzioso tributario in Italia ed in altri paesi Cee", in «Dir. prat. trib.», 1992, I, p. 173.

[58] P. AMSELEK, "L'opposition à l'Administration de sa propre doctrine: les innovations apportèes par le decret du 28 novembre 1983", «Dir. fisc.», 1984, no. 4; B. PLAGNET, "L'opposabilité de la doctrine administrative", «BF Lefebvre», no. 8-9/94.

neously request the preliminary deferment to the Court of Justice[59], according to article 234 of the European Community Treaty.

In the arena of the Italian system, as described by the jurisdiction of Supreme Court[60], it is not sufficient that only one party asserts the existence of a question of interpretation of European law; the judge has the power to ascertain before referring to the European Court, if such a question in reality exists, if the solution of the dispute depends on this and if there are margins of doubts.

However, it could be that the judge while pointing out the necessity for a postponement, avoids the deferment for the single fact that it is optional. A correct exercise of the jurisdictional function requires that in every case where a solution of a dispute is necessary, the fiscal judge, having evaluated the recurrence of the requirements, should consider the deferment as a duty, if not automatic[61], without delaying unnecessarily, entrusting the burden of proof to the judge of the next degree, creating a domino effect.

The deferment of the case, is in fact only necessary[62] if the case takes place before a judge of the highest degree, that is the Court of Cassation[63], so that the provision, also in this case, of the option of deferment, rather than being an obligation, would have a lesser effect on the jurisdictional protection which would not reach a higher limit in successive steps.

Moreover, important writers and commentators[64] have not failed to indicate that in Italy, differently from other countries like Austria or Germany[65], there does not exist any remedy against the refusal of

[59] See M. DE WILMARS et STEENBERGEN, *La notion de securité juridique dans la jurisprudence de la Cour de justice des Communautes europeennes: Melanges Robert Legros*, ed. de l'Université de Bruxelles, Faculté de Droit, 1985; J. GROSCLAUDE, P. MARCHESSOU *Diritto tributario francese*, quot., p. 589.

[60] See Cass., 9 giugno 1998, no. 5673, in «Giust.civ.», 1999, I, p. 3426.

[61] See P. ADONNINO, "Rinvio pregiudiziale alla Corte di Giustizia CE", in «Rass. trib.», 2005, p. 1475.

[62] See P. ADONNINO, "Il rinvio pregiudiziale", quot., p. 1484 on the violation of the due to ask for the ECJ procedure.

[63] ECJ, July 15th, 1964, C-6/64 (Costa/Enel) refers to that judge whom sentences cannot be subject to refutation.

[64] See G. TESAURO, *Diritto comunitario*, Padua, 2004, p. 280.

[65] Constitutional Court of Austria affirmed that if the judge doesn't claim for an ECJ procedure, it derives a violation to the right to natural judge or to the legal judge;

the fiscal judge in the last instance to adopt the preliminary deferment, depriving the citizen of an instrument of jurisdictional control which operates in his favour. However, the jurisprudence of European Court of Justice asserts the right of individuals to the damages deriving from the transgression of European law by the higher rank of jurisdictional Authority of the member State[66].

In the complex and protracted passage of a French administrative case, one aspect in particular is considered as a source of doubts where the protection of the taxpayer is concerned. It deals with the role assigned to the government commissioner, a magistrate called to give, in the course of a brief hearing, his judgement on the case and to propose a solution. Commentators[67] have criticised the intervention of this figure because he is the last called on to express his convictions, without the parties having the possibility to reply during the hearing to his observations. The inadequate level of protection given to the taxpayer is underlined in particular, considering that the commissioner is a representative of the public interest in the dispute and as such, however indirectly, of the interests of the administration, however much the judges are not bound by the commissioner's conclusions and notwithstanding that the parties, in the course of the deliberation can deposit a brief comment on their position on the reconstruction of the facts adopted by him.

The figure of the government commissioner is not present in fiscal judgements heard before an ordinary judge, in which a panel of three members have powers analogous to those of the administrative judge. This procedure ensures a greater protection of the taxpayer re-

in Germany it is possibile to ask in this case a control in term of constitutional lawfulness (see P. ADONNINO, *Il rinvio pregiudiziale*, quot., p. 1478).

[66] See ECJ, September 30th, 2003, C-224/01 Kobler (points 36-53); ECJ, June 13th, 2006, C-173/03, Traghetti Mediterraneo (points 45-46). See also the comment to the sentence by R. BIFULCO, in *Giustizia amministrativa*, 2006, no. 3, p. 521.

[67] J. GROSCLAUDE, P. MARCHESSOU, *Diritto tributario francese*, quot., p. 597. European Court of human rights, (June 7th, 2001, Kress c/Francia, no. 39594/98) censored the participation of the Government's Commissary to the decision; in this case we have a transgression of art. 6, § 1, European Convention for human rights; B. BOUTEMY, E. MEIER, "Renseignements recueillis aupres de tiers et opposes au contribuable redressé: l'Administration doit jouer cartes sur table. Etude d'ensemble", in «Revue de droit fiscal», no. 40, 2001.

garding the time taken to reach a decision[68], due to its structure and methods, but its residual character in the framework of French fiscal justice does not allow a compensatory function to be assigned to it compared with the lacks of administrative proceedings.

The Italian fiscal process does not provide for the intervention of a figure of this type which emphasizes the administrative character of the dispute.

4. *Conclusions*

The considerations examined so far are only some of the most interesting profiles of the discipline of the fiscal process in Italy and France. From both systems it seems some common elements emerge.

They regard the dispute as having pathological origins in the relationship between the fiscal administration and the taxpayer, which on the basis of good faith, pursuant to the Italian law (article 10 L. 27 July 2000 no. 212) must find its resolution in other areas. Under this profile, the preventive complaint to the French administration by its obligatory character, finds a valid instrument for a ready definition of the dispute and for the deflation of the process.

In the Italian system, this intention is not necessarily entrusted to the complaint, but finds a check in the possibility of the taxpayer to participate, even if in a limited way, in the examination phase (one thinks of the invitation to the taxpayer to supply documents or information, of the confirmation with the agreement of D. Lgs. 19 June 1997 n. 218, or of the possibility to submit observations following the written report of the hearing according to Article 12, 7 n. 212/2000). Leaving out of consideration the expression of a judgement on the greater or lesser effectiveness of a preventative administrative recourse as compared to the mechanisms of collaboration with preliminary inquiry, there emerges, however, that the French approach to the actual jurisdictional phase, brings the new proposition by the taxpayer of the reasons already given in the claim, with the exception of new evidence, while not excluding that the administration can modify the principle of assessment.

In an analogous way, in the Italian system, the instrument of self-protection, as in the observations on the written report of the case is rarely used for the reason that it avoids an opportunity to let the administration knows the arguments which will be later used before the judge.

Both systems set out in every case a real and true fiscal justice even though it is articulated on the other side of the Alps in an ordinary and administrative justice, while in Italy it is partly by ungowned judges. It ensures, however an adequate level of judicial protection. This consists, in particular, of the respect for the principle of the claimant, a specific object of law in France, as well as the enforcement of the "right process", in Italy in accordance with constitutional law article 111.

[68] On the matter of slowness of both administrative and jurisdictional procedures in France see J. MORAND-DEVILLER, *La célérité de l'action administrative entre la procédure et le procès en Europe: L'aménagement du territoire en France*, Brescia, March 15th, 2007.