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XIV CYCLE

ABSTRACT

***Legitimate tax saving, tax avoidance and abuse of the right: the
Case "Dolce & Gabbana"***

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The objective of my work is basically in an attempt to describe the complex phenomenon of tax avoidance, now flanked by the principle of abuse of rights, which has always represented a road used by the taxpayer in order to obtain an undue saving tax, difficult to fight by the legal system of tax law. The aspect that most characterizes the elusive operations and makes it difficult to recognize and to be repressed is that the taxpayer obtains this objective through the use of legal transactions permitted peacefully and governed by the legal system, therefore, through a operation that is "dresses up" as legitimate tax savings. Before the last amendment legislation, the Italian legislature, unlike what has been done in other jurisdictions, has never wanted to introduce a general anti-elusive clause in the tax law, although they understand of its effectiveness in close every stretch mark in the system, because of the fear to assign of the Revenue Agency a power of investigation too broad and therefore potentially damaging to the freedom of private economic initiative which, under Article 41 of the Italian Constitution, suffering only the limit of the public utility.

In the first chapter is shown the notion of tax avoidance, which is defined through the comparison with the case of legitimate tax savings and tax evasion.

The second chapter provides an overview of the legal instruments used to counter the elusive operations, the defense weapons, prepared by the tax law system, against ambitions to circumvent its rules through the identification and exploitation of its weaknesses, of its stretch marks. Is recounted the legislative evolution that, on the basis of the discussions focused on whether to enter or not in our system of tax law a general anti-elusive clause, It led at first to the introduction to art. 10 of Law no. 408/1990, and then to art. 37-bis of Legislative Decree n. 600/1973; in particular, are detailed the difficulties of interpretation and application related to the first of those two norms, which have led to the subsequent adoption of the art. 37-bis. The latter provision, in turn, is described in its substantive and procedural elements.

The third chapter shows that was also felt in Europe the need to identify a general anti-elusive clause present in the legal systems of all the Member States, especially with regard to VAT, as confirmed by famous sentence Halifax n. C-255/02 issued by the CJEU, which it used for the first time the ancient principle of abuse of law in anti-elusive function. Comes retraced the journey of the Italian jurisprudence that, initially, applied the prohibition of abuse of rights referring to the judgment of the CJEU, and then affirm later that this principle is implicitly present in articles 3 and 53 of the Italian Constitution. Is emphasized the interpretation of that part of the Italian jurisprudence has given at the principle of abuse of rights as a legal category which includes the phenomena of tax avoidance, tax evasion, simulation and the problem of detectability of office of exceptions based on the principles of the EU Community and of Italian Constitution.

In the fourth chapter is described the case Dolce & Gabbana, that treats the profile of the criminal relevance of the conduct abusive and elusive, not conceivable in the past on the basis to the rules contained in art. 37-bis of Presidential Decree 600/73, but possible at that moment in history thanks to the introduction of the general anti-elusive clause by judicial decisions, an element that has allowed to the judges to break away from the observance of the principle of strict legality.

In the fifth chapter it is first explained the legislative process that led to the introduction of article 10-bis of the Statute of Taxpayer Rights, and then proceed to the description of the new anti-abuse discipline, which enshrined, in paragraph 13 of the same norm, the criminal irrelevance of the conduct abusive and elusive. Finally, is performed an interpretation of the new discipline contained in Art. 10-bis, focused on paragraph 12, which limits the use of the general anti-elusive clause only to cases in which the tax benefits can not be disavowed by contesting the violation of specific tax provisions in order to reach the conclusion that the legislator has decided to suppress the phenomenon of abuse and tax avoidance via a general and residual protection that allows both to

clearly distinguish the area from tax avoidance respect to the area of Tax evasion both to the Revenue Agency of compressing the area of legitimate tax savings, thereby obtaining a distinct change respect to what It had occurred in the previous jurisprudential approach.