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PhD Thesis

"The Use of Taxes for Regulatory Purposes and the Protection of the Cultural Heritage"

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Introduction

1. Why this research? (academic and social relevance of the reaserch)

This paragraph is aimed at outlining the reasons behind this doctoral research.[1] In particular, the author will try to better illustrate the relevance of the investigation both from a social and academic point of view.

The author feels the need to draw the reader's attention to the noteworthy echo of the fire in the National Museum of Rio de Janeiro,to the various collapses that have affected the UNESCO heritage site of Pompeii and to the fire of the Notre-Dame Cathedral in Paris.

Such sad events, even if characterized by individual specificities, can be assumed as spies of the problem represented by the protection of the historical and artistic heritage. It is interesting to note how, in both

[1] The text up to page 77 elaborates in several places and with some modifications a contribution of this author entitled "*Art bonus* e *crowdfunding* "published in R. CORDEIRO GUERRA, A. PACE, C. VERRIGNI, A. VIOTTO, *Finanza pubblica e misure tributarie per il patrimonio culturale. Prime riflessioni*, Giappichelli, Turin, 2019.

events, media reflection focuses on the analysis of the themes of the loss of fundamental parts of the historical memory of the whole of humanity and on the scarcity of funds destined for historical and artisticheritage. More specifically, citizens often end up by identifying an intimate connection between the aforementioned problems, when not directly a cause-effect relationship of the second with respect to the first.

The need to conduct a specific study on cultural heritage moves therefore from the consideration of the risks due to the limited resources that the public can make available to the various types of intervention aimed at preserving it.

Taxes are normally levied and collected in order to make financial resources available for the functioning of a given community. However, starting from the Second World War with the appearance of the welfare state[2], scholars have for long also supported the use of taxes for non-

[2] R. BALLADARES SABALLOS, *Le imposte con fini extrafiscali. Profili costituzionali e di teoria generale*, in Imposte di scopo e federalismo fiscale/ [ed] A. F. URICCHIO, Maggioli Editore, Santarcangelo di Romagna, 2013, 30 p. A definition of welfare state could be"concept of government in which the state or a well-established network of social institutions plays a key role in the protection and promotion of the economic

fiscal purposes[3], i.e. in order to pursue regulatory goals that are important for the community.[4]

This alternative use of taxes is subject to specific legal constraints, which respond to a function of guiding a society's behaviours. Accordingly, they aim at influencing taxpayers' choices by modulating the tax bruden.

and social well-being of citizens", Welfare State in Encyclopaedia Britannica, available at https://www.britannica.com/topic/welfare-state. The different regulatory goals of taxes are justified in the light of theories that go beyond the neutral role of public finance and promote an intervention of the State, as indicated by R. ALFANO, *Tributi ambientali. Profili interni ed europei*, Giappichelli, Turin, 2012, p. 34.

[3] Å. Gunnarsson reports how "the discursive terminology of using the taxing powerfor non-fiscal purposes has been one perspective on tax policies for a long time", referring to the famous definition proposed by Harvey Peck in the thirties of the twentieth century. See Å. GUNNARSSON, *Swedish legal national report: the use of taxation for non-fiscal purposes*, in *Yearbook for Nordic Tax Research 2009: the non-fiscal purposes of taxation* / [ed] J. BOLANDER, DJÖF Publishing, Copenhagen 2009, p. 109.

[4] E. Chemerinsky indicates how the difference between revenue raising and regulatory taxes is nowadays devoid of any meaning and brings its origin back to the contribution of the jurisprudence, see on the point E. CHEMERINSKY, *Constitutional law: principles and policies*, Wolters Kluwer, New York, 2019, p. 292. K. Määttä indicates how the boundary between fiscal and regulatory taxes is blurred and how the purity of the objectives, totally regulatory or totally destined to find resources, is not a common characteristic of taxes, see K. MÄÄTTÄ, *EnvironmentalTaxes: An Introductory Analysis*, Edward Elgar, Cheltenham, UK-Northampton, MA,USA, 2006, p. 38.

This classical topic of tax and public finance requires a different approach that goes beyond the specific analysis of issues connected with environmental protection and the promotion of economic development (which represent traditional regulatory goals for the use of taxes for regulatory purposes), while preserving the methodologicalanalysis of taxes in connection with public expenditure.[5]

There could be more discussion in scientific literature on the role of taxes in connection with the protection of cultural heritage, which in some countries, such as Italy and Belgium, can reach a significant level, taking into account the size of the heritage and the financial resources needed to preserve and promote it.[6]

[5] To deepen the role of tax expenditures as a means of realizing the political choices made by the Government, see P. R. McDANIEL, *Tax expenditures as Tools of Government Action*, in *Beyond Privatization: The Tools of Government Action*, / [ed] L. M. SALAMON, The Urban Institute Press, Washington, 1989, p. 167 and following. For a framing of the role of S. Surrey in the birth of the concept of tax expendituresand for their global relevance, see L. PHILIPPS, *The globalization of tax expenditure reporting: transplanting transparency in India and the Global South*, in *Tax, Law and Development*, / [ed] Y. BRAUNER and M. STEWART, Edward Elgar, Cheltenham,UK-Northampton, MA, USA, 2013, p. 184 and following.

[6] For a discussion on the role of taxation linked to the promotion of human rights, to which this author also leads that of culture, see O. DE SCHUTTER*, La fiscalité au service de la réalisation des droits économiques, sociaux et culturels*, in Revue trimestrielle des droits de l'homme, n. 115, 2018.

Through a a reflection on the law of culture in general and on the international law of culture, in line with doctrinal studies[7] and the legal constraints established within the constitutional and European legal framework (take into account for the latter in the first place the importance of freedom of movement and the prohibition of State aid), this research aims at enquiring how the theories of the use of taxes for regulatory purposes can operate in connection with the goals of preserving and promoting the cultural heritage.

The theme of this research is extremely topical on the basis of a series of considerations that justify its adoption both in Italy and in Belgium.

Speaking of risks related to cultural heritage protection means first of all concentrating, as the author has already tried to point out, on the danger of not being able to transmit the cultural heritage in its entirety to future generations, ie that essential components of the same can be

[7] See F. FICHERA, *Imposizione ed extrafiscalità nel sistema costituzionale*, ESI, Naples, 1973.

irreparably lost and this occurs more frequently in medium-long-term processes rather than individual catastrophic moments.

The issue of the scarcity of funds that the individual states can devote to the maintenance of the existing artistic historical patrimony does not exhaust the relevance of the question object of the research. In fact, it is important to bear in mind that the challenge is, and it is undoubtedly part of the questions that this study strives to offer an answer, also to improve the historical and artistic heritage.

Acquire new finds both in the antiques market and through excavation campaigns, set up new itineraries to visit a museum or expand opening hours, increase exhibition spaces to allow the public to appreciate more works by drawing on those generally relegated to warehouses are examples of different actions that could easily be identified as attempts to contribute to the improvement of cultural heritage.

Clearly all the various initiatives just mentioned represent significant cost increases, especially in the consideration of how often usable public

resources are not sufficient to cover ordinary maintenance costs or are even barely sufficient to pay the salaries of the operators involved.

There is also a need to involve private individuals in a speech aimed at enhancing cultural heritage in an effort to attract more resources and to encourage, by increasing the actors involved, a common reflection on the importance of the cultural factor in the overall growth of community.

The complexity of the problems concerning cultural heritage is also grasped in the attention that the European Union poses to the topic, already before 2018 that was in the European year dedicated to cultural heritage.

The research of tax law scholars seems to have focused on the analysis of a series of specific themes concerning cultural heritage (taxation of historic buildings, VAT on cultural heritage, payment of taxes through works of art, etc.), not being frequent broader analysis dedicated to the cultural heritage from a tax point of view.

At the same time, even the research of tax law scholars in the field of tax law used for regulatory purposes seems to be characterized by the smallness of monographic contributions on the subject (reference is made here mainly to the studies of F. Fichera and J. E. Varona Alabern).

The theme of the use of tax law for regulatory purposes acquires renewed relevance because of the temporal distance that separates the present study from such monographic contributions in the context of significant changes that have occurred. The author is now referring to the effects of economic crises, which have led to greater intervention by nation states in the economy, and to the different needs for international fiscal coordination.

The aim of the thesis is to offer an answer to the question of how it is possible to protect cultural heritage through tax instruments, or to define tax instruments that are more suitable for achieving this protection objective. Also, more generally, the thesis aims to explain what are the merits and limitations of the used taxes for regulatory purposes.

The author believes that the thesis will offer answers to a series of implicit questions that pose considerable doubts to scholars and cultural heritage

operators such as whether it is necessary to favor private ownership of cultural or public assets, to what extent it can be privatized the management of the public patrimony of a nation, what are the limits to the management of the same aimed at obtaining an economic advantage.

Another issue that will be addressed concerns in particular the tax measures to encourage cultural heritage, how these should be controlled and whether it is possible for individual states to adopt tax incentives for international interventions aimed at protecting historical and artistic assets (excavation campaigns, restorations and interventions following natural or military campaigns).

The reflections of this thesis are first of all addressed to Italy, but are enriched by trying to take into consideration the Belgian system as well as other national experiences due to the specific relevance on the single aspects dealt with in the thesis work. The author's ambition is therefore to provide some recommendations that can also go beyond the specific national contexts and be taken into consideration for application in other European countries.

The author aims to contribute to the creation of a global network of scholars interested in collaboration and comparison on the topics covered by this thesis to also offer a contribution to the various international and national bodies that concretely operate in the sector.

2. Research questions

1.1. Main research question

This paragraph is dedicated to the main research question to which the thesis work tries to offer an answer.

The main research question is: what kind of tax mechanisms for regulatory purposes can be used to protect cultural heritage in compliance with EU law limits?

2.2 Sub-research questions

To answer the main research question of this thesis, that is which tax mechanisms for regulatory purposes can be used to protect cultural heritage within the limits set by EU law, it is considered necessary to break down the question into a series of sub-questions.

The sub-questions that will be addressed during the course of the work

are the following:

a) What is meant by cultural heritage?

b) What is meant by the protection of the cultural heritage?

c) What does the use of taxes for regulatory purposes mean?

d) What are the tax instruments for regulatory purposes to protect cultural heritage?

e) What are the legal limits established by European Union law whose respect allows to formulate some recommendations aimed at protecting the cultural heritage in a way compatible with the national and supranational legal framework?

2. Delimitation of the research object

2.1. Working definition of cultural heritage

In this paragraph the author will clarify the concept of "cultural heritage" in which are usually included, referring to the definition adopted by

UNESCO[8], tangible cultural heritage with movable cultural heritage and immovable cultural heritage, but also intangible cultural heritage. In the concept of cultural heritage it would be possible to include also natural heritage. In this work the concept of "cultural heritage" has to be understood as as referring above all to tangible goods whether they are movable or immovable.

2.2. What types of cultural heritage?

This research chooses to focus in particular on cultural heritage, giving priority to tangible assets, in order to better delimit the field of investigation. The main problem in this author's opinion is in fact the extreme diversity of types that can be included in the category of cultural goods.

[8] See UNESCO, What is meant by cultural heritage ?, available at http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco- database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural- heritage/ .

Therefore, it seems essential to make a choice by focusing on tangible assets, investigating a selection of topics, without any claim to being exhaustive, that stand out because of their importance and the frequency with which they are encountered by operators, not only legal ones, in practice.

2.3. What types of protection of cultural heritage are envisaged?

The work refers both to conservation and to the enhancement of cultural heritage through the use of tax law instruments for regulatory purposes.

3. Methodology

For the purposes of the survey, it is important to understand what constitutes a cultural asset, this because it can determine the application context of tax measures intended to promote the protection of cultural

heritage. It is therefore considered necessary to make preliminary clarity on how the identification of what is the definition of cultural asset relevant to tax law is a question far from easy. Like any other choice of a definitional nature, also this one is presented as in nothing neutral presupposing, in fact, the adoption of a very precise methodological option among the different ones that present themselves to the scholar as relevant to a first judgment.

Later the author will try to offer the reader, without pretension of exhaustiveness, a succinct overview of the above methodological approaches to the present study object in an attempt to testify the complexity of the issues underlying the different interpretative paths.

First of all, it seems opportune to direct the reflection on how the primitive choice on what should be understood as a cultural asset falls within the competence of the Legislator. The next question can not but refer to which Legislator this author is referring to, not being able to ignore how distant the administrative and tax ones appear, and pay attention to how not in a casual way it is here preferred to refer to two related scientific fields.

A first solution could be constituted by carrying out a doctrinal survey of the definitions used in different sectors with respect to tax law. The author needs both to point out firstly how administrative, European, international, constitutional and penal law know different elaborations of a concept of cultural asset, thus placing the complexity of evaluating in what the above definitions differ and selecting which of them would be more appropriate to import in the tax sector. To be silent about the frequent existence of majority and minority theses, and therefore of the non-univocality of the definition adopted in each of the other branches of law, it is impossible not to remember at the same time the high risks that legal transplants pose, starting from those well known of a rejection.

A second methodological option would instead be to investigate which tax laws refer to cultural assets, i.e. which laws deal with taxing wealth that comes from the cultural heritage sector. The main problem that this approach presents is represented by the risk of excessive generality of the definition of cultural heritage, precisely because of how many and considerably different are the objects of protection having constitutional status to necessarily have to consider unitarily.

The last methodological approach could be that of a conditional

reference to positive non-tax norms, a reference as it is peaceful without prejudice to the intrinsic peculiarities of the subject in which it would be such a definition called to operate, that is tax. Even if the author wants to follow this path, there would be the problem already mentioned above of having to ascertain to which sector of law it is considered necessary to refer to. The danger could be constituted by the wavering of the principle of legal certainty, which is a cornerstone of this technique and which here would be weakened by the ambiguity of the reference, in no way facilitating the task of the interpreter.

The methodology with which the author proposes to try to solve the defining problem consists also thinking about the idea that cultural heritage is a common asset, on the basis of how this theory is particularly popular among private law scholars and constitutionalists. Furthermore, in the idea that cultural heritage is not a traditional object of study by tax law scholars, the author intends to use in an auxiliary way also the manifestos internationally adopted by the communities of scholars who concretely operate in the activity of restoration and conservation of cultural heritage.

The thesis will in any case take into consideration the reflections of the

economists regarding the definition of cultural asset, also with the aim of identifying further reasons that justify the protection of the same.

The methodology also takes into account the experiences of countries that are not necessarily members of the European Union, but which can make a contribution to the scientific debate on cultural heritage from a tax point of view.

It is also envisaged to use the comparative method, in particular the author wants to analyze the Belgian tax legislation regarding cultural heritage to identify specificities that characterize the system.

4. The assumption of market failure and the development of liberal thought as a premise to the investigation

Currently, the tax system requires a variety of tasks in addition to the historically original task of providing financial resources to enable the State to fulfill its functions. Initially taxes were required to taxpayers for

the needs of defense of the state and public order and the maintenance of the Court.

With the economic evolution and the birth of the liberal economy the tax system has been set with different aims. The first purpose was to finance the increase in the functions of the State and to ensure and stabilize a greater revenue. At the same time, another aim was to influence as little as possible the course of the nation's economic and social life, in accordance with the principle of *laissez faire* and with blind faith in the market's capacity for self-regulation, which tends to optimize the behaviour of the parties and allow the best possible development.

The role assigned to the tax system is well summarized in the term "neutral finance" in which the taxes had only the purpose of procuring the resources to face the public expenses that had to be reduced to the payment of those public services that was not possible or opportune to charge users as customers of a service. The concern of the State was to demand as little as possible to the taxpayers by limiting as much as possible the interventions in the social fabric.

This rigid approach has gradually evolved by attributing to the tax system

tasks of social protection, redistribution of wealth and even up to those aimed at directing the nation's economy. The modern "functional finance" is an instrument that is used in budget policies and public spending both in cyclical terms and to favor and guide the development of the economy of a State.

The first forms of welfare provided welfare measures for the poor and were introduced in England since the seventeenth century, not without contrasts with a part of public opinion opposed to helping those who were considered undeserving lazy. Only with the introduction of compulsory insurance was a qualitative leap, passing to a generalized and codified system instead of the previous discretionary and charitable interventions.

The moment when the liberal economic ideologies begin to suffer a crisis can be identified in the inability to face the so-called crisis of 1929, whose consequences were exacerbated and prolonged over time by the classical economic policies implemented by the various states: budget balance, reduction of public spending, tax increases and trade protectionism. The failure of these responses has given rise to a series of alternative attempts ranging from the innovative policies implemented by Franklin Delano

Roosevelt known as the New Deal in search of maximum employment with rearmament and massive public works with military purposes (motorways, airports, railways) in Germany. Both have demonstrated practically the positive effects of greater state involvement in the economy by shifting part of the economic doctrine to interventionist thought forms.

The role played by J.M. Keynes in the evolution of the concept of functional finance and the use of public spending as a driving force of economic development and reduction of social inequalities, through are distribution of income, is fundamental. Furthermore he has also played operational roles guiding the English delegation in the negotiations for the Bretton Woods treaty and the establishment of the World Bank.

Following the crisis of 1929, the state intervention has greatly expanded and the classic liberalist thought has entered a crisis, allowing a flourishing development in the West of a complex system of social protection after the Second World War.

The evolution of the industrial economic system and social changes since the second half of the seventies have undermined the welfare model.

The main problems were related to a reduction in resources and to an increase in the needs induced by the growth of the seniority of the population and high level of expectations generated in the period of strong growth in well- being.

The demographic changes with the increase of the percentage of elderly people and the increase of life expectancy determine the increase of the cost of health services and expenses connected to the provision of pensions. Also in terms of political consensus it was difficult to compress the expectations of people who retire after years of "generosity" by the State in guaranteeing pensions with very advantageous calculation mechanisms. In many western countries there were demonstrations and street fights against attempts to reduce social spending. The other social aspect was that the population perceived the level of taxation as exaggerated and strongly urged its political exponents to reduce the incidence of taxes, by bartering immediate savings with a future and "possible" reduction in the services offered by the State.

Under the influence of the social changes previously mentioned in most Western countries, a profound revision of the welfare concept is underway with clear reductions and rationalization of the same, with the

consequent re-evaluation of the contemporary liberal economists (Buchanan, Von Hayek, Friedman).

The fundamental concept is that the reduction of the tasks of the State leads to a decrease in the tax burden by freeing resources that allow economic development without intervention by the State authorities.

Chapter I The use of taxes for regulatory purposes

1.1 Rewarding, promotionality and the use of taxes for regulatory purposes.

This part concerns the analysis of the philosophical substratum to the idea of the use of taxes for regulatory purposes. The thesis that is to be demonstrated here is how contemporary readings of the use of taxes for regulatory purposes as a tax dogmatic category based on the ideas of rewarding and promotionality are to be accepted with many reservations.

It would seem that the idea that the phenomenon of the use of taxes for regulatory purposes could not be analysed without reference to the theories of the promotional use of law developed by N. BOBBIO has recently become widespread in tax doctrine.

There is a need to premise how what has just been said is difficult to demonstrate. The reason is soon said: there is not an abundance of studies on the phenomenon of the use of taxes for regulatory purposes, as will be stated several times in this study. What is more, there is a shortage of monographic studies on the subject. To this author, the use of taxes for regulatory purposes seems to have been reduced today to an easy juxtaposition. The use of the expression "the use of taxes for regulatory purposes" is used by tax law experts to indicate how they are dealing with specific tax policies that seem to be related to the traditional category of the use of taxes for regulatory purposes. It is inevitable that the reference to N. BOBBIO's theories is not present in the latter authors, because they do not investigate the category of the use of taxes for regulatory purposes, as this author tries to do in this work. The reference to N. BOBBIO's theories is instead present in the work "*Funzione promozionale del diritto e sistemi di tutela multilivello livello*", edited by

F.J. LACAVA, P. OTRANTO, A.F. URICCHIO[9] who not casually choose to title their work, omitting a clear reference to the use of taxes for regulatory purposes and in the work by J.E. VARONA ALABERN , "*Extrafiscalidad y dogmática tributaria*"[10].

These are two of the few recent works dedicated to the use of taxes for regulatory purposes that are present in international tax doctrine and both are significantly influenced by N. BOBBIO's theses. Here below this author will present its own idea: N. BOBBIO's theses are undoubtedly endowed with charm, but they do not enrich much the analysis of the use of taxes for regulatory purposes.

9 *Funzione promozionale del diritto e sistemi di tutela multilivello*, F.J. LACAVA, P. OTRANTO, A.F. URICCHIO [ed], Cacucci, Bari, 2015, see in particular for the relationship between economic freedoms and the use of taxes for regulatory purposes A. F. URICCHIO, *Fisco promocional y libertades económicas*, in Funzione promozionale del diritto e sistemi di tutela multilivello, F.J. LACAVA, P. OTRANTO, A.F. URICCHIO [ed], Cacucci editore, Bari, 2015, pp. 361-370.

10 J.E. VARONA ALABERN, *Extrafiscalidad y dogmática tributaria*, Marcial Pons, Madrid, 2009.

The reason is easy: they are theses subsequent to the birth of phenomenon of the use of taxes for regulatory purposes and, because of the distance between the elaboration moments of these theories, they could little contribute to explain the tax ones.

The use of taxes for regulatory purposes is a very ancient phenomenon and it is completely useless to try to identify the year 0 of it. The risk is simply to list with a non-historical method a series of experiences, sometimes even extemporaneous, that saw the invention and/or the use of the use of taxes for regulatory purposes. This memory of experiences that are very distant to us appears almost traditional in tax law doctrine and it is the opinion of this author that, apart from giving prominence to the cultured knowledge of those who write about it, it is of little use. What is the relationship between the experiences that are used to be recalled? What links Roman taxation aimed at avoiding the liberation of slaves to the medieval experiences of the use of taxes for regulatory purposes? This author therefore choose to omit any reference to past experiences of the use of taxes for regulatory purposes, in the idea of a correct use of the historical method aimed precisely at enriching the discourse and not used as useless tinsel.

1.2 Fiscal and non fiscal purposes of taxation.

The current tax system has a multiplicity of both classically fiscal and regulatory functions. At this point the author needs to investigate the evolution of taxes and the concept of the use of taxes for regulatory purposes. In a modern tax system, the use of taxes for regulatory purposes is a widely recognized feature, even if difficult to identify. It is considered useful to reason from the opinion of G. CASADO OLLERO who maintains that cannot be attributed much meaning to the term the use of taxes for regulatory purposes.[11] What the illustrious Iberian jurist wants to say, is how to be in agreement on what meaning to attribute to the term the use of taxes for regulatory purposes is very complex.

[11] In the words of the Spanish author: "the use of taxes for regulatory purposes is a vague epression that in itself means almost nothing" (translation proposed by the writer of the original in Spanish "*la extrafiscalidad es una expresión vaga que apenas significa algo en sí misma*"), *Los fines no fiscales de los tributos* in AA.VV., Libro homenaje al Prof. Fernando Sainz de Bujanda, Comentarios a la Ley General Tributaria y Líneas para su reforma, I.E.F., Madrid, 1991, p. 103.

The problem arises of establishing to what extent the tax has fiscal purposes and to what extent it has non fiscal purposes.

A starting point of the analysis can be constituted by considering how both fiscal and non fiscal purposes represent intrinsic characteristics typical of any tax system, that is, they are natural elements of this and are essential.

It could be said that the use of taxes for regulatory purposes indicates an alterity with respect to taxation. Following this idea, it is therefore possible to identify taxation with collection targets and what does not pursue objectives linked to the increase of financial resources, ie obeying different criteria, would end up being defined as the use of taxes for regulatory purposes.

Taking for granted that the categories of the use of taxes for regulatory purposes and taxation are blurred and the boundaries to be identified are not so clear, the analysis should accept that taxes can simultaneously pursue multiple purposes, i.e. obeying both tax and regulatory purposes.

Very often the achievement of regulatory purposes is presented as not sought in a desired manner by the tax Lawmaker, and as often there are taxes that are considered to have a purely fiscal nature and as in reality achieve at the same time regulatory purposes.

An Italian example able to clarify the concept previously described is offered by the introduction of the deductions on the building renovation works in 2012. A reduction in the tax burden for the individual taxpayer corresponds to a tendential increase in the tax base for other subjects in a stimulus to the construction sector and to the improvement of the building heritage, which in Italy is particularly old and degraded. Over the years, this measure has been constantly adapted making it more convenient both as a percentage of deduction and as the amount and type of works eligible for the benefit (interventions for energy saving, safety and finally sismic adjustment). The initial aim that led to the adoption of the measure was subsequently expanded to include further objectives, which are of a distinctly regulatory nature.

The granting of tax benefits is a way in which regulatory policies can be effectively implemented, according to F.Fichera:

"*the tax benefits can not find a direct benchmark in the ability to contribute because it is not a lack of ability to pay, but a different assessment of a contributory capacity that in any case exists [...] the main type of control in terms of delimiting the tax benefits refers to their legitimacy in the search for the general principle of equality. In this case it is the inconsistencies and unreasonableness that spoils the legislative choice of differences compared, for example, with other delimitations posed by the same ordinary law*"[12].

The tax having mainly regulatory purposes is that which is used to achieve different objectives with respect to the collection of tax revenue and which aims to guide the behavior of the affiliates.

[12] See F. FICHERA, *Imposizione ed extrafiscalità nel sistema costituzionale*, ESI, Naples, 1978 (the quotation is a free translation conducted by this writer).

1.3 Legal costraints on the use of taxes for regulatory purposes: internal limits of constitutional level.

In the use of tax law for regulatory purposes, the tax burden is often increased on some actors when they implement a behavior to which the constitutional order gives a negative connotation. The legal system therefore intends to discourage certain types of behaviour, favoring the adoption of choices of different sign that meet instead the favor of the constitutional order,

If the tax purposes are built with particular attention to the principle of ability to pay, regulatory ones seem to allow a departure from this principle, or a relaxation of the respect, justified by the prevalence of needs related to promotional tasks linked to that of equality in substantial sense.

The use of taxes for regulatory purposes is intimately related to the purposes that justify the function of the tax from the constitutional point of view. The purposes other than tax that concern the financing of the state apparatus require a constitutional coverage or must direct the

society towards the realization of aspirations that embody constitutionally protected principles.

Regulatory purposes can have very different nature and their spectrum is infinitely wide. It can even be argued that this is not even necessary to enjoy citizenship in order to be recipients of laws that reflects the use of taxes for regulatory purposes : please think, for example, of the fat taxes aimed at discouraging the consumption of food that is harmful to health, which affect all consumers of the same, regardless of their nationality and for the sole fact of having purchased such products in the State that has decided to make use of such laws according to an agreed perspective to the use of taxes for regulatory purposes.[13]

[13] The issue of how taxation can be used to promote healthier lifestyles is an extremely complex one because it brings together a number of different issues that are briefly recalled here and do not form the focus of this work. However, it seems interesting to stop and reflect on fat taxes because from the current debate on them, it is believed that it could be possible to extrapolate some characteristic elements useful in the study of the more general category of the use of taxes for regulatory purposes to which they appear to be ascribable. A first reflection, which precedes and at the same time extends beyond the perimeters of fat taxes, concerns the evident interconnection profiles with the excise duties sector which "enable us to reduce

activities considered socially undesirable, such as environmental pollution, tobacco, alcohol, and drug consumption, gambling and road congestion", see B.S. FREY, *Excise Taxes: Economics, Politics, and Psycology*, in Theory and Practice of Excise Taxation. Smoking, Drinking, Gambling, Polluting and Driving, Cnossen S. [ed], Oxford University Press, Oxford, 2005, p. 230. For studies on excise duties in general see *ex multis* S. CNOSSEN, *Excise systems: a global study of the selective taxation of goods and services*, The John Hopkins University Press, London, 1977 and *Excise tax policy and administration*, S. CNOSSEN, [et al.] [ed], Erasmus University, Rotterdam, 2002. For a reference to the topic in the German legal system see M. BONGARTZ, S. SCHRÖER-SCHALLENBERG, *Verbrauchsteuerrecht*, Beck, Munich, 3 rd ed., 2018. Consider the prospects for harmonisation in consumer taxation V. EDO HERNÁNDEZ, *Los obstáculos fiscales en el proceso de creación del Mercado Común Europeo: el proceso armonizador del impuesto sobre el valor añadido y de los impuestos sobre consumos específicos*, Facultad de Ciencias Económicas y Empresariales, Universidad Complutense de Madrid, Madrid, 1989. See, more in general, on the subject of manufacturing taxes, with particular reference to the Spanish legislation, J.A. ROZAS VALDÉS, *Impuestos especiales de fabricación*, in Medidas fiscales para 1998, R. FALCÓN Y TELLA, R. NATERA HIDALGO, J.A. ROZAS VALDÉS, F. SERRANO ANTÓN [ed], Marcial Pons, Madrid, 1998. On the possibility of using excise duties as a use of taxes for regulatory purposes, see C. VERRIGNI, *Le accise nel sistema della tassazione sui consumi,* Giappichelli, Turin, 2017, p. 54 and for an explanation of the relationship between consumption taxes and the principle of the ability to pay, see the same text p. 233-241. A historical picture of excise duties in the Italian public

finance is offered by the Author herself, *Contributo allo studio delle accise*, Amon, Padua, 2012, pp. 15-30. For a study of excise duties in the EU dimension, please refer to the last text, pp. 45-68, and for further details on specific issues see the Author herself, *Le Accise*, in AA.VV. [ed], Lo stato della fiscalità nell'Unione europea. L'esperienza e l'efficacia dell'armonizzazione, Ministero dell'Economia e delle Finanze, Rome, 2003, *Le accise come tributo a fattispecie progressiva ed il divieto di retroattività posto dallo Statuto del contribuente. Nota a Cass. sez. tribut. 14 aprile 2004, n. 7080*, in Riv. dir. fin., 2005, *Le accise nel mercato unico europeo*, in Riv. dir. fin., 2007, *Accise non armonizzate sul consumo di sigarette elettroniche*, in Corr. trib., 2014, *La capacità contributiva nelle accise*, in L' evoluzione del sistema fiscale e il principio di capacità contributiva, in SALVINI, L., MELIS, G. (), Cedam, Padua, 2014. It is interesting to note how the issue of safeguarding public health through tax choices ends up presenting the risk of a moralizing use of Tax Law, please refer to S. VASQUES, *Os Impostos do Pecado:o Álcool, o Tabaco, o Jogo e o Fisco,* Livraria Almedina, Coimbra, 1999. Tax doctrine has also used the term "paternalism" defined as: " generic propensity of public sector to govern the conduct of the individual to promote better choices than the same would operate independently, or to promote virtuous behaviour, faces to preserve the integrity and human health or inhibit harmful conduct ", see S. A. PARENTE, *Fat taxes and promotional tax dimension,* in Journal of Modern Science, 2019, p. 242-243. In general, it seems useful to recall that the origin of the term paternalism does not belong to tax science, see, for the purposes of understanding this concept loaded with imported philosophical afflatus, at least the fundamental defining contribution of G. DWORKIN, *Paternalism*, in Paternalism, R. Sartorius, [ed], University of Minnesota

Press, Minneapolis, 1983, p. 20. A definition of paternalism is delivered to us, as part of a passionate defence of anti-paternalism, by the philosopher of law G. MANIACI, who expresses himself in this way: "In extreme synthesis, legal paternalism holds that the State has the right to limit the freedom of the individual, through coercion - for example, criminal sanctions - to protect (that which is intended to constitute) the good of the individual himself, in order to prevent harm from being caused, even if it does not cause harm to others", [translation proposed by this author from Spanish language "*En extrema síntesis, el paternalismo jurídico sostiene que el Estado tiene derecho a limitar la libertad del individuo, a través de la coacción—por ejemplo, las sanciones penales—, para tutelar (aquello que se pretende que constituye) el bien del individuo mismo, con el fin de impedir que se cause un daño, incluso si no causa un daño a terceros*"] in G. MANIACI, *Contra el Paternalismo jurídico*, Marcial Pons, Madrid, 2020, p. 9. The reflection in terms of the use of taxes for regulatory purposes is, on the basis of the last quotation, thorny: in fact, the philosopher recalls the use of sanctions, which it will be useful to anticipate represent one of the two traditional instruments of extrinsic tax interventions in the sense of the use of taxes for regulatory purposes as known together with those of a rewarding nature (on both will be said in more detail during the analysis not in note). What seems problematic is the possibility that the State may impose how the affiliates should behave. The objection is easy: the operation previously mentioned seems not to distinguish from normal state choices. In this sense, it could be possible to take as an example the choices of criminalisation made in a given legal system and for this reason, it would be possible to refer, also to give an account of the fascination that the theories of paternalism have in the reconstruction of criminal law, to *Paternalismus*

im Strafrecht. Die Kriminalisierung von selbstschädigendem Verhalten, A. VON HIRSCH, U. NEUMANN and K. SEELMANN. [ed], Nomos, Baden Baden Baden, 2010. The question, however, concerns completely irrelevant choices from the State's perspective made by individuals, such as, for example, the disposition of one's body by choosing one's own diet. One objection could be the extra expense that the national health services would have to bear in the event of obesity, which is reflected in the tax burden on all individual taxpayers. It is not by chance that here this author has chosen to give an example related to the issue of food taxation, on which in general see A.F. URICCHIO, *La tassazione degli stili di alimenti e la capacità contributiva*, in L'evoluzione del sistema fiscale e il principio di capacità contributiva, L. SALVINI, G. MELIS [ed], Cedam, Padua, 2014 and A.F. URICCHIO, *La tassazione sugli alimenti tra capacità contributiva e fini extrafiscali*, in La dimensione promozionale del Fisco (A. F. URICCHIO, G. SELICATO, M. AULENTA), Cacucci, Bari, 2015. One wonders, however, whether the increase in costs for Healthcare and the subsequent, not discounted and not immediately perceptible, increase in tax burden could justify the public interest for such an invasive intervention in the freedom of self-determination of private individuals. It is perhaps superfluous to remind readers that these issues are much broader in scope than the sectoral regulation of tax interventions linked to the taxation of food, i.e. here it is possible to deal with - as it has already be said- high issues that embrace the doctrinal category of the use of taxes for regulatory purposes as a whole. What justifies interventions in the sense of the use of taxes for regulatory purposes? What is the limit to the same intervention? Some prima facie answers, which are intended to be examined in more detail later in the analysis and not here in

the notes, come from the consideration of how attention to the weight of the affiliates falls within the constitutional mandate of the protection of the right to health. In general, for a reconstruction of the scientific debate, also outside the legal field, with specific reference to taxation aimed at reducing the consumption of sugary drinks, see J. ADEKOLA, *Power and Risk in Policymaking. Understanding Public Health Debates,* Palgrave Pivot, London, 2019, pp. 73-85. There is increasing doctrinal interest in food taxation - of which the focus on the sugar content of beverages is a single species within a larger genus - and there are many reasons why this is the case. First of all, the same reasons appear to be linked to the multiplication of concrete experiences of national legislations adopting such extra-fiscal forms of taxation, see M. HAMMER , *Taxing Sugar-Sweetned Beverages: A Bittersweet Solution*, in Bulletin for International Taxation, 2018, Vol.72, No. 3 and Y. LE BODO et al., *Introduction* in Y. LE BODO, M.C. PAQUETTE, P. DE WALS [ed], Taxing Soda for Public Health. A Canadian Perspective, Springer, N.Y., p. 16. The aspect that this author considers most important is how the need to find resources has often been invoked when considering the introduction of taxes linked to the harmfulness of certain foods. On this point, it is worth remembering the recent discussion in the Italian legal system, which is reflected in the tax doctrine: "This is confirmed by the clamour of the controversies that followed - with many harmful trivialisations - the hypothesis of the introduction of plastic tax, or sugar tax, in the budget manoeuvre for 2020"(translation from Italian proposed by this author), see M. BASILAVECCHIA, *La tutela ambientale: profili tributari*, RTDT, n. 4, 2019, paragraph 3. The theme is therefore that of the link between the objectives of finding resources and the use of taxes for regulatory

purposes. *Rectius* the theme concerns the relationship between the justification of the use of taxes for regulatory purposes and the retrieval of resources and use of taxes for regulatory purposes itself. The question is the following: how are the resources that the Governors of the various States ask taxpayers to pay through the payment of taxes introduced to finance the protection of health or the environment concretely.

Tributary systems like anything else are not immutable and constant is their modification, which also reflects the evolution of values and social reality. Like law, tax systems are not only a mirror of the existing, but through the attempt to achieve regulatory purposes pursue the ambition to build a better society. The regulatory impact is often discovered and measured only after the tax law has deployed the tax effects of collection of revenues for a very variable time frame.

used? The discussion on how "green" taxes are often very little oriented to the effective protection of the environment is known to most people, for an in-depth examination of the lack of a real link with the environmental protection of such taxes and for a reflection on the improper use of the term "environmental taxes", let please this author refers *ex multis* to F. PITRONE, *Would Environmental Taxes by Any Other Name Smell Sweet?* in WU International Taxation Research Paper Series, No. 3, 2015. These considerations, which the international tax doctrine has long formulated for the traditional example of use of taxes for regulatory purposes, i.e. environmental taxation, can be extended in this author's opinion to any policy that reflects the use

of taxes for regulatory purposes, of which those relating to cultural goods are an example. In short, to conclude, there is often a hiatus between *sein* and *sollen* of tax interventions in the sense of use of taxes for regulatory purposes which cannot be ignored in the objective of offering a corrective to the reduction of the same.

In fact, the economic effects are quickly perceived by taxpayers who also modify their choices to minimize the tax burden, but in the other areas the time necessary to detect a change is in fact very variable. It is possible to state that the use of tax law for the achievement of promotional purposes finds the right to citizenship within any legal system when it does not conflict with its constitutional principles. To be more precise, it is a matter of respecting a teleological perspective. According to that perspective, those aims that must be reached through the use of taxes for regulatory purposes must also be the same aims that the system has chosen as fundamental and in which it recognises itsef, i.e. those that have been raised to the level of constitutional norms.

In the panorama of Italian doctrine, monographic contributions on the topic are not very frequent, however, the works of M. Pugliese[14], F. Fichera[15] and S. La Rosa[16] must certainly be reported. The writer recognizes at the same time the frequent appeal by the majority of authors

to the same legal category; the latter, however, is often not studied in light of the characteristics that define it, but simply used as a connotation of policies and tax laws aimed at addressing the behavior of the citizens.

Among the most recent contributions on the subject of the use of tax law for regulatory purposes, it is appropriate to point out those of A. Uricchio[17], which is characterized by taking into consideration the law in its promotional function and that of L. Iacobellis who offers a clear connection of the theme with that of the protection of the historical and artistic heritage[14].

[14]M. PUGLIESE, *La finanza ed i suoi compiti extrafiscali negli stati moderni,* Cedam, Padua, 1932.

[15]F. FICHERA, 1973 (as n. 3 above).

[16]S. LA ROSA, *Eguaglianza tributaria ed esenzioni tributarie*, Giuffrè Editore, Naples, 1968.

[17] A. F. URICCHIO, *Introduzion*e, in La dimensione promozionale del fisco/ [ed] A. F. URICCHIO, M. AULENTA, G. SELICATO, Cacucci, Bari, 2015.

[18] L. IACOBELLIS*, La fiscalità per la promozione del patrimonio storico-artistico*, in A. F. URICCHIO, M. AULENTA, G. SELICATO, 2015 (as n. 17 above).

1.4 The protection of cultural heritage in the Italian and Belgian constitutions

This paragraph analyses how the Italian and Belgian constitutions protect cultural heritage and how it is therefore possible to use tax law for regulatory purposes to protect cultural heritage while respecting the internal limits analysed in the previous paragraph (1.3).

The historical and artistic heritage is the recipient of protection and enhancement actions and the same actions are not mutually interchangeable. In fact, the former presents itself as a concrete conservation action and its primary objective is to make cultural goods available, even if they are owned by private individuals.[19] Citizens must be able to admire them and it seems necessary that the community is in a position to enjoy it.

[19] For an in-depth analysis of the tensions between the right to property and that of the community towards artistic heritage, please refer to M. de CLIPPELE, Quand l'équilibre devient art – Le Conseil de l'Europe et la balance des intérêts des propriétaires et de la collectivité en matière de patrimoine culturel, Revue trimestrielle des droits de l'homme, n.100, 2014.

Otherwise, valorisation is a concept of a more recent formulation with respect to protection, most recently it was introduced in the Italian Constitution in 2011: it concerns in particular the increase in the conditions of usability and the same economic quality of the asset.

The valorization allows the production of greater financial revenues and allows to reason about the concept of self-finanzing of the management of cultural heritage.

Article. 9 of the Italian Constitution is dedicated in its entirety to the protection of culture. In particular, the first paragraph of this article guarantees in particular how it is up to the Italian Republic to support the concrete advancement of scientific and technical knowledge and to favor the progressive growth of culture.

The protection of the value of culture that is found consecrated in the constitutional text must be coordinated with positive legislation, also because it alone can not solve the problem of the difficult definition of what cultural assets should be considered. There is a need to remember how this question invests only in a reflexive manner the tax law, called upon the adoption of a definition relevant to the application of tax laws.

This definitional task is therefore assumed by other sectors of the legal system with respect to the tax one and above all the administrative sector.

In Italy the "*Codice dei beni culturali e del paesaggio*" (Code of cultural heritage and landscape) was introduced by the legislative decree 22 January 2004 n. 42 and it will be useful to recall how the juridical concept of cultural good has found a first elaboration in the field of international law: its first appearance was in fact in the Convention for the protection of cultural heritage in 1951 signed in The Hague.

Subsequently, the introduction in Italy of this concept took place in 1964 by the Franceschini Commission and it was also decided to extend the concept that was at the beginning identified as cultural asset. The author has witnessed the passage from the relevance of an aesthetic criterion to a historical one; to exemplify it would be possible to think of the nineteenth-century restorations of Viollet-le-Duc that isolated the single monument by eliminating the adjacent buildings without a specific artistic value, while it is now preferred to highlight the complexity of the urban fabric preserving the stratifications accumulated over time.

The Italian "*Codice dei beni culturali e del paesaggio*" outlines a definition of

cultural heritage that could be described as "mixed and open"[20]: mixed because it incorporates a diverse spectrum of different types of cultural goods and open as it marries a conception of culture that tries to hold together meanings that are between them very different one to the other (material, intellectual, emotional, etc.).

The polyvalent concept of cultural good that emerges from such a codicistic system strives to contribute to the identification of a specific society or specific social groups and it does so first of all as multifaceted: in fact there are also not expressions of common inclusion such as literary ones, value systems, as well as beliefs and traditions in terms of how they contribute to structuring the identity of a given community.

It is necessary to highlight how the Belgian Constitution contains a clear reference to the protection of culture within Article 23.

20 C. BUCCICO, *Il volano fiscale dell'Art Bonus*, in Innovazione e Diritto, www.innovazionediritto.it .

This article represents a remarkable evolution of Belgian constitutional law, which in fact until 1994 had no explicit reference to the right to culture which could be said to be protected only implicitly.[21] It is interesting to note how the article opens with a connection to human dignity and therefore how the right to culture appears to be guaranteed due to its importance compared to the latter. In particular, Article 23 of the Belgian Constitution refers to a concept that is difficult to define especially in the legal sphere such as "*l'épanouissement culturel*" (cultural fulfillment), which ultimately appears to this author due to the ability of the individual to improve through culture.

[21]See C. ROMAINVILLE, *Les droits culturels : un nouveau référentiel pour les Centres culturels ? Précisions àpartir du droit à la culture*, in Observatoire des politiques culturelles, accessibile online at http://www.opc.cfwb.be/index.php?eID=tx_nawsecuredl&u=0&file=fileadmin/sites/opc/upload/opc_super_editor/opc_editor/documents/pdf/droits_culturels.pdf&hash=469ff796b72b8061ed62bdcaffe76cb2238a6efd .

[22]See C. ROMAINVILLE, *Contenu et effectivité du droit à l'épanouissement culturel*, in M.VERDUSSEN [ed], Les droits culturels et sociaux des plus défavorisés, , Bruylant, Bruxelles, 2009.

1.5 Legal costraints on the use for regulatory purposes: external limits of European level. The State Aid discipline and consequences for cultural heritage of the freedom of movement

The law of the European Union contains a clear prohibition because the member states intervene by adopting selective measures aimed at favoring certain enterprises or certain productions.[23] The rationale of this prohibition is to protect the common market and free competition between States and operators who conduct their business in the previously mentioned market. This paragraph intends in particular to investigate cases in which the European Commission has a discretionary assessment of whether the aid granted by a state can still be assessed as compatible with the internal market, and more specifically on that relating

[23] The next three pages take up, with a series of modifications, a communication not yet published with the title "The impact of the General block exemption Regulation on the exception to the prohibition of State Aid for the protection of cultural heritage: tax relevance profiles" selected and presented to the Meeting of study for PhD programs and young scholars "*Finanza Pubblica e fiscalità per il patrimonio culturale*", held in Pescara on 13 June 2019 at the "G. d'Annunzio" University.

to the cultural heritage contained in art. 107 TFEU, paragraph 3, point d).

It is here important to underline the reasons that led the author to deepen this profile: specifically, it was not possible to find much literature in doctrine dedicated to the analysis of the derogation from the prohibition of State aid for the protection of cultural heritage. Therefore the latter appears to be a topic that has been undervalued in the most discussed topic of State tax aid and therefore a subject of study worthy of attention, also in the hope of being able to contribute in a personal way to a debate that will hopefully involve a larger number of scholars.

The requirements of the derogation contained in art. 107 TFEU, paragraph 3, point d) are based on an assessment of the impact that the aid to the culture has on the market and a balance is envisaged with respect to the achievement of a common interest. In the opinion of this author is the element of the common interest the most important one on which to reflect. If in fact the protection of culture can be seen as one of the purposes that can be included in the use of tax law for regulatory purposes, the realization of this could also pass through the acceptance of a very strong form of intervention such as State Aid. Here it is

fundamental to acknowledge the reading of the matter of the ban on State Aid given by R. Mason who, while stressing the need to protect the market and competition in the European Union, at the same time underlines its possible overcoming for the need to achieve different objectives from those of a fiscal nature.[24] The common interest could therefore be to offer protection to the cultural heritage, even if this means having to endure a loosening of the rigidity of the protection of competition and the market.

The General block exemption Regulation includes an indication of cases for which the prohibition of State aid does not apply, such as museums, archives, libraries, cultural and artistic centers, theaters and opera houses, concert halls, the movable and immovable cultural heritage, natural and intangible cultural heritage, as well as artistic or cultural events and cultural and artistic education activities. The author considers also interesting to reflect on the analysis that has R. Luja addressed to this derogation connected with the cultural heritage.

[24] R. MASON, *A US View of State Aid and Transfer Pricing*, Amsterdam Distinguished Lecture in International Tax Law, Amsterdam University, 8 October 2018.

The author considers also interesting to reflect on the analysis that has R. Luja addressed to this derogation connected with the cultural heritage. This author considers the reflections that R. Luja leads on the situation of a historical-artistic site that fails to deal with the restoration works necessary for its mainteinance, if not resorting to public intervention, to be particularly convincing. R. Luja focuses on the situations in which once the State Aid has been implemented for the benefit of these artistic sites, the same restored goods are left in the availability of the museum. In that case R. Luja belives that "it may be necessary to put a system in place to avoid compensating for such costs to the extent that museums can be expected to cover them by drawing on additional resources".[25] A problem in the opinion of this author is set by the regulation following the modernization of State aid. If the regulation is a limitation of the discretion of judgment and therefore of possible arbitrariness on the part of the judging body, it could end up perhaps to be seen its own value reduced by the fact that it is produced by the same Commission.

[25]R. LUJA, *Tax Incentives, Harmful Tax Competition and State Aid Considerations in the EU* in S. Hemels and K. Goto [ed], Tax Incentives for the Creative Industries, Springer, Singapore, 2017.

Chapter II The Italian system of tax protection for cultural heritage

2.1 The "art bonus".

In 2014 Italy introduced a tax credit (Law 29 July 2014 n. 106) called "art bonus" that, designed to be initially a temporary measure, has assumed a permanent nature in 2016 through the Stability law.[26] This tax credit allows taxpayers to obtain tax savings if they make a spontaneous contribution intended to favor the maintenance and restoration of cultural assets, or the restoration and support of cultural and entertainment institutions such as lyrical foundations, traditional theaters, libraries and museums.

The measure of the tax credit amounts to 65% of the sum invested to support the culture and a differentiation is made between the various categories of tax payers, both for the maximum limits for the use of the same deduction and for the methods for using the same credit.

[26]Please refer to R. ALFANO, *Il credito d'imposta per il mecenatismo culturale: luci ed ombre dell'Art bonus. Bilancio del primo lustro di applicazione*, in DPT 1/2019.

The element of the carrying out of a commercial activity is essential for making a distinction within the potential users of the measure. All the subjects holding business income, whether they are companies or organizations or even individual companies, enjoy the tax credit for the payment fee that does not exceed 5 per thousand of revenues for the year and take advantage of the credit, through the mechanism of compensation, in three tax periods. Individuals, professionals and non-commercial entities have a recognized credit on the payment up to the maximum amount of 15 percent of their taxable income and benefit from it in three installments within the tax return (they can not compensate within the payment model called "F24").

The "art bonus" represents in particular a form of sponsorship of cultural heritage, its origin is justified in order to entice individuals to intervene through their own resources in the preservation of historical and artistic heritage. This measure is easily understandable on the basis of the attention that a state places on the need to transmit as far as possible to

future generations memories of the experiences of identity that that have characterized its history.

The “art bonus” operates as a "self-liquidated subsidy" by taxpayers and allows the inclusion of the latter in the concrete management of the collective artistic heritage, in line therefore with the law 156 of 2006 that, in assigning to the public subjects the programmatic elaboration of strategies and the preventive fixation of common objectives, sought the effective participation of private individuals operating non-profit.

The administrative experience has left clear how the practices relating to the sponsorship of cultural heritage are often extremely complex, as well as characterized by a high temporal duration. From the point of view of taxation, among the various difficulties, the one relating to VAT can not be subdued or that the sponsor is subject to a limit to the deductibility of the VAT paid.

Of fundamental importance is how with regard to the “art bonus” payments must be made indicating in an extremely clear manner within the convention the allocation of costs or directly to the institution using instruments traced. The cardinal principle that directs the matter is made

up of the full traceability of the financial flows previously identified, as part of the operation of a mechanism that sees a subsequent control intervention replacing the preliminary investigation for the granting of the contribution.

The disbursements of the tax credit called "art bonus" are then non-deductible for the purposes of determining income. If compared with the classic sponsorships, which provide for the deduction of the sums from the income before determining the taxes due, ie being an operating cost, they appear advantageous. In addition to being higher in percentage terms, it is also permissible for loss-making companies to use them to offset VAT payments, contributions, withholding taxes and all the different forms of taxation on buildings. In light of what has already emerged, the author believes that art bonus therefore constitutes a valuable tax planning tool as it allows you to operate in a flexible manner with respect to different business scenarios.

The quantitative limits envisaged, respectively, of 15% of income or 5 per thousand of revenues, must finally be read in the opinion of R. Lupi[27], as specific attention to large companies, such as Eni, cooperatives, Enel or all large distribution companies. The setting of these limits should not be

interpreted as an unwarranted attention to companies that have grown significantly in size, as would be understandable on the basis of the consideration of how small companies have less investment opportunities and probably less managerial skills in dealing with the related problems. The "art bonus" was said to be a tax credit and in particular could be traced back to those tax credits that arise for regulatory purposes, i.e. cases in which there is evidence of the presence of financial resources not confiscated by the State.

One of the possible motivations that push the State to the aforesaid renunciation is that of giving full realization to the constitutional mandate of protection of the historical and artistic heritage expressed by the art. 9 of the Italian constitution. In fact, the tax credit called "art bonus" favors, and especially for companies, the "adoption" of a monument to obtain commercial and image advantages.

[27] R. LUPI, *L'Art Bonus come sovvenzione pubblica in forma di "credito d'imposta*", in Aedon, n. 3/2014 (http://www.aedon.mulino.it/archivio/2014/3/lupi.htm).

The type of advantages achievable through this mechanism is comparable to those guaranteed by a sponsorship, thus allowing to link the "art bonus" according to the points of contact to the type of sponsorship.

The problematic use of sponsorship by Italian companies derives from two types of problems: one of a fiscal nature and another of a managerial nature.

The sponsorship is regulated by an atypical contract in which the company (sponsor) provides financial means and / or goods and services to a subject (sponsee) obtaining in exchange the possibility of using the activities of this as an advertising vehicle. In practice there are many forms of sponsorship, from a single sporting or artistic event, to teams, stables of cars and horses, clubs and associations, to individual athletes who take the form of exposing the corporate brand of the sponsor and the possibility of publicizing the link or the exclusive use of certain assets. Sponsorships of cultural assets are particularly thorny because they often lack specific obligations on the beneficiary and the inherence with company products is almost always non-existent.

The management aspect also concerns the low diffusion of the cost-

benefit analysis tool and the difficulty in assessing the economic advantage deriving from the improvement of image induced by the sponsorship of cultural heritage.

The combination of the goods produced by the company and the notoriety of the cultural asset object of the intervention are two relevant parameters to consider; which produces a distortion effect in the sense of limiting the attractiveness of sponsorship only to some areas of great visibility (think of the restoration of the Colosseum by the Tod's company), slowing the spread of the phenomenon to the enormous fabric of artistic assets present in Italy.

The art bonus instrument, by reason of its certain and measurable configuration, makes it easier for this type of investment to be concretely carried out following a cost-benefit analysis. This happens because the certain costs are offset by the benefits certainly represented by the tax savings, exactly calculable, to which other more random elements must be added.

2.2 Crowdfunding for the artistic heritage and its justifications

Crowdfunding presents itself as a means of raising capital released from classical financial institutions, thanks to the use of a multitude of web users. Its regulation in Italy is slightly older than the tax credit called "art bonus" and was designed especially with regard to the so-called innovative start-ups.

The regulation concerning the purchase, in particular, of shareholdings in the capital of companies has been the object of legislative interventions aimed at guaranteeing a minimum level of protection as it involves solicitations to invest that present high risk profiles for the subjects who adhere to it. The latter must in fact be placed at least in conditions to enjoy an essential level of information.

In particular, crowdfunding is a possible answer to the problems that companies, especially those that are not traditional, face when they need

to receive both capital and financial funding.

The fiscal discipline of the investments made through crowdfunding is a discipline that on the one hand regulates the taxation of the start-up proceeds and on the other provides for the granting of a particularly significant tax deduction from income for the subjects subjected to corporate income tax (IRES).

Premising the existence of different types of crowdfunding that can be differentiated on the basis of the position that the subjects who bring the capital at the end of the operation assume, the latter becoming for example in the equity crowdfunding partners of the nascent enterprise or financiers in the lending crowdfunding or even beneficiaries of a predefined share of products and / or services of the same company in the reward crowdfunding or, lastly, mere donors in the donation crowdfunding, these are not equally relevant according to the discourse the author is trying to do here.

The protection of cultural heritage appears first of all to privilege, due to the main characteristics of the sector, the two last types mentioned above.

As for the reward crowdfunding, it would be possible to assume for example the granting of museums or theaters of free tickets or access to reserved benefits, while the donation crowdfunding presents the greatest affinities based on a long dominant philanthropic concept of art.

Crowdfunding can be read as a neutral technique in the sense that it can legitimately be used to support any activity, obviously where it is legal. The possibilities of development of the cultural sector are linked to a joint use of the crowdfunding mechanism and the tax credit called "art bonus" in the sense of creating synergies aimed at multiplying the subjects that bring capital by adding to the saving of tax the use of the computerized medium.

The use of internet for crowdfunding campaigns is aimed, ultimately, to a broader and sociologically different type of recipient compared to that reached by the government site used to promote the "art bonus" or the institutional ones of the single bodies responsible for the goods.

Italy is not the only country to have introduced the "art bonus "which, in different ways, is also present in the United Kingdom, France and

the United States; however, the experiences of these countries do not seem to limit the tax credit only to interventions aimed at supporting public cultural institutions, in a broader concept of the value of culture to be concretely supported.

In France, for example, there is the possibility offered to professionals and companies to provide services and to calculate the amount of the deduction on the fee. In the author's opinion, what is mentioned above is a particularly relevant experience to which it would be important to look with great care and attention as it provides a more incisive incentive than simply tax deduction on a purely financial outlay and this allows companies to qualify commercially and make the most of their entrepreneurial skills.

In order to reflect on the compatibility within the system of the crowdfunding mechanism, it is considered necessary to point out the need to focus on those legal hypotheses that appear to present similar characteristics within the Italian legal system.

The objective of this reconstruction is to offer a justification of the aforementioned phenomenon by analogy and which is based on the

recognition of how the author faces different methods of renouncing tax revenue justified by different purposes but, finally, they are all covered by the umbrella of the use for regulatory purposes of tax law.

At the same time, efforts will be made to help isolate a series of limits that the Legislator should always have in mind when preparing to consent to the state's refusal to absorb financial resources.

The situations that appear to us to be comparable to the different techniques on which crowdfunding is based are constituted by the mechanism provided for by tax legislation that allows taxpayers to allocate a portion of the tax on personal income from them already paid to third parties. This possibility is granted only in respect of individuals who can claim certain requirements: having previously stipulated an agreement with the State (as envisaged for the 8 per thousand) and having been included in a list following the positive passing of a series of checks carried out by the Financial Administration (as in 5 per thousand).

The control activity to which the latter is called is carried out in consultation with the Ministries interested in the specific activities of

the beneficiaries of the resources. In particular, the bodies that carry out research in the health sector are subject to control by the Ministry of Health, while entities that deal more generally with scientific research are subject to supervision by the Ministry of Education, University and Research. The exceptions to the ministerial competences are the bodies that carry out voluntary activities and the amateur sports associations, the first subject to the supervision of the Revenue Agency and the latter to that of the Italian National Olympic Committee (CONI) in the respective territorially competent branches.

It is imperative to underline that the devolution of the per 1000 does not entail an advantage for the individual taxpayers, thus being able to differentiate in this respect from the donations and the mechanism of donation based crowdfunding. In fact, in the per 1000 mechanism it is not possible to recognize a reduction in the tax measure, which instead is a feature of the tax treatment of crowdfunding where there is a tax saving in favor of those who make available the financial resources for the benefit of the projects that need financial support.

When a State's renunciation of financial resources is allowed, it is justified that these resources do not go to enrich the revenue, but are directed towards other subjects. This change of destination inevitably results in a reduction in the total amount of financial resources on which the State can rely, which can be tolerated only when it is harmonious with respect to the values protected by the Constitution.

In particular, the agreements at the base of 8 per thousand or the procedure that allows the inclusion of individual subjects in the list of potential beneficiaries of 5 per thousand, to which reference has been made above, must be submitted to the possibility of control over how the financial resources forfeited are used.

The author will now analyze how checks are currently structured in 5 and 8 per thousand, in order to examine whether they can be considered sufficient to ensure the correspondence of the sacrifice of resources belonging to the community to the pursuit of values that it considers fundamental.

The Prime Ministerial Decree of 7 July 2016 entitled "Provisions on

transparency and effectiveness of the use of the 5 per thousand share, in implementation of Article 1, paragraph 154, of the Law of 23 December 2014, n. 190 " provides, also on the basis of clarifications to the same provided by the circular of the Revenue Agency n. 5 of March 31, 2017, the revocation of the registration in the list of beneficiary bodies in addition to the repayment of sums unduly collected.

With regard to 8 per thousand, there are also joint control committees that require the participation of members nominated by the government authority and representatives of the individual religious confessions called to carry out an evaluation of the reports which, on an annual basis, are prepared by the Confessions.

The criticality that emerges from a first analysis in the control activities of 5 per thousand concerns how the accounting documentation, which is sent by the beneficiaries on the list, is subject only to random checks carried out at the headquarters of the same institution. With regard to the same theme of control in 8 per thousand, it should be noted that the weakness is for us constituted by the absolute non-forecasting of accounting checks.

In addition to the possibility of finding hypotheses for penal sanctions, for example in the case of distraction of financial resources, it is particularly appropriate to address this reflection to the need to include in the control activities an assessment of compliance with the criteria of economy and efficiency.

If the State diverts certain financial resources from the common fund, allowing another party to charge them for the purpose of investing them, the latter's activity must lead to greater utility than the direct use of the same resources by the State. The principle that should orient the subject, in the final analysis, is that for which the institutions guarantee to be able to make investments in the social that make at the same time a general saving of resources used to solve the problems that constitute the object of their activities, even in a virtuous perspective of spending review.

2.3 Evaluation of non fiscal policies.

Through the use of tax credit, resources are provided to a subject by drawing on the finances of the State.

It is possible to find a multiplicity of motivations that give rise to the use of this instrument of the German tax law (*Steuerförderung*)[28], which range from the attempt to avert the danger of double taxation to those concerning an active intervention of the state in the governance of the economy.

As an instrument that may as mentioned in some cases provide for purposes other than fiscal ones, the tax credit must be interpreted and applied in line with the limits set by the Constitutional framework, so that the pursuit of any purpose must be harmonious to those values that have been isolated from from those who wrote the constitution as in need of protection.

[28] A. FIORINI, *Imposta, credito di*, (ad vocem) in Dizionario di Economia e Finanza, Treccani, 2012, available at http://www.treccani.it/enciclopedia/credito- di-imposta_%28Dizionario-di-Economia-e-Finanza%29/.

A reading of the tax credit that enhances the promotional function of certain sectors and activities within a constitutionally oriented perspective can be considered a patrimony of the doctrine of Italian tax law for some time now. Notwithstanding the aforementioned problematic framework that unites several generations of authoritative scholars, the teleologically oriented reflections entrusted to us by M. Ingrosso in the mid-eighties still seem to us today under many current profiles and it is to that lucid analysis that the author allows himself to look in the conviction of how it constitutes an obligatory starting point for orienting the present survey.[29]

The tax credit represents one of the possible instruments to which the Legislator can make recourse if it feels the need to realize the programmatic content of the constitutional rules aimed at a global improvement of present and future conditions of life of the community.

The function of addressing the economy of which the above- mentioned author discusses must be the only one that it is possible to take into consideration. It is no longer possible to refer to a function

[29]M. INGROSSO, *Il credito d'imposta*, Giuffrè editore, Milan, 1984.

characterized in a dirigiste way, for the intrinsic problems related to an excess of interference in the private affairs. It is therefore undeniable that this intervention activity is justified in the light of a duty to contribute expressed by art. 53 of the Italian Constitution now having an innovative meaning.

It is the abandonment, in fact, of a perspective that traces in the sense of the contribution only the resolution of the age-old problem of finding the tax resources necessary to allow the functioning of the public machine that one must make one's own. This choice is ultimately obligatory to enhance a wide range of instances of which the human person is the bearer and to whom the constitutional text has now guaranteed the dignity of citizenship within the legal system.

At the same time, the Constitution also places a series of restrictions on the intervention of the State in the economy for M. Ingrosso. These concern the impossibility of not safeguarding a space of autonomy of individuals in the identification of their field of activity on the basis of a personal interest and of individuated economic advantages, thus protecting private property at the same time.

While fully agreeing to easily recognize the presence of the aforementioned constraints to a public action oriented in a different sense from the fiscal one, the author can not at the same time evade the question whether, like the duty to contribute mentioned above, it is not to be registered a substantial extension of these limits too.

The answer must be affirmative because a discourse about the use of tax for regulatory purposes can not ignore how much an assessment of constitutional compatibility of the measure of favor is not irrespective of sufficient. The danger, also felt in Mexican doctrine[30], is constituted by an indiscriminate recourse to constitutional principles to offer a justification for the proliferation of interventions inspired by logic other than fiscal ones.

[30] C. A. DOMÍNGUEZ CRESPO, *Los fines extrafiscales de los tributos*, Editorial Porrúa, México D.F., 2014, pag. 65.

It is not on the risk of forms of assistentialism pushed that the author is now lingering, while not failing to emphasize that from a theoretical point of view this possibility can not be excluded, but rather on the opportunity to put in debt the theme of the use of tax law for regulatory purposes should be compared to the inescapable relationship linking public revenues to expenses.

Here is therefore the emergence of an additional limit: if any legislative intervention has a cost in terms of the financial effects that each member of the community endures, the initiative of the Legislator in a regulatory key has one greater. Taking account of a driving activity to the assumption of a determined positive behavior by the affiliates presupposes the willingness to renounce a part of the tax revenue. This occurs when one intends to choose the path of rewarding, that is when a reduction in the tax burden for taxpayers is determined, thus avoiding a weighting of the same by means of sanctions linked to poorly virtuous behavior.

Lower income must mean lower expenses and this is due to interventions that ultimately reduce the incidence of the expenses of the welfare state. The author believes, in particular, that the use of regulatory tax policies

allows for the adaptation and modernization of the traditional areas where welfare interventions are concentrated, with a view to enhancing cost reduction and raising efficiency parameters.

The relationship between the two items of the public budget - that is, revenue and expenditure - which is already clear in the comments of A. Amatucci and M. A. Plazas Vega, today finds an anchor to the positive data thanks to the constitutionalization in Italy of the principle of budget balance.

The effects of Italian constitutional law n. 1 of 2012, in excluding indiscriminate indebtedness, extends their scope also in terms of the use of tax law for regulatory purposes. Despite the prediction of the possible occurrence of adverse phases and favorable phases of the economic cycle, which mitigates the absoluteness of the need to achieve a balanced budget in the light of economic planning, there is a strong obligation to link what is collected to the amount spent.

If in the most common reading no excessive expenses are to be made with respect to revenue, the order of factors if inverted does not change in terms of the value of the mathematical operation, however, takes on

greater significance in terms of the use of tax law for regulatory purposes. The income never enough can allow a limited number of expenses, but this also means that even if you think to reduce the former to allow non-fiscal measures, these must explain their effects in a long-term perspective with advantages well perceptible on the overall health of the system. In short, expenditure must finally be reduced because it has been decided to make an investment that looks to the future of the community of affiliates; the reduction in expenses must be at the end of operations more than proportional to the amount initially invested.

It is fundamental to recover those criteria that M. Ingrosso considered to be the basis for the construction of the legal concepts of exemption and facilitation: purpose and outcome. In the happy expression "programmatic and current moment"[31] the difference between both is summarized and the method of elaboration of any correct non-fiscal policy is mentioned.

[31]M. INGROSSO, *Il credito d'imposta*, p. 83, (above n. 29).

Analysis of the usefulness that the intervention proposes to achieve, proportionality of the resources sacrificed (or rather not confiscated) with respect to the objective to be achieved, compatibility of the benefit invoked for the community with the ideological fabric transposed into the constitutional norm, resolution of any conflicts of values with respect to principles of equal rank on the basis of the result that appears more easily achievable with equal resources: here is presented, developing in a personal sense the lesson of M. Ingrosso, an evaluation grid to optimize the regulatory intervention choices.

2.4. Favourable tax treatment of historical buildings.

One of the most important elements that is part of the cultural heritage is that of historical buildings. The buildings of historical value are in fact particularly evident as they represent the effect of human action on the territory and on the landscape. Another reason that makes historic buildings relevant in the context of cultural heritage is connected to their property, which is often in the hands of various private subjects. These private subjects have obligations to preserve the historic buildings they possess because of their value for the community and this involves noteworthy costs, limitations to the free use of historical buildings and guarantees of access for the public.

The author considers it necessary to summarize briefly what are the reductions in property rights when this concerns a historic building. In Italy, the law of 1 June 1939, n. 1089 and subsequent amendments and the legislative decree 22 January 2004, n. 42, known as the Code of cultural heritage and the landscape ("*Codice dei beni culturali e del paesaggio* "), provide for the possibility of subjecting cultural heritage to a legal constraint. It is possible to distinguish between two different types of legal constraint: direct and indirect. The first applies to historical

buildings that are characterized by particular historical and artistic value. The second concerns those buildings that do not have in themselves a particular historical value worthy of protection, but which assume it because they are around or on the perspective lines that allow to admire historical buildings subjected to direct constraint. As far as indirect constraints are concerned, there are wide margins of discretion for the administration in the application of the constraint since "the continuity of the area must not be understood only in a physical sense, nor necessarily require stylistic or aesthetic continuity between the areas". [32]

According to Italian legislation, when a historic building is subject to direct restrictions it is not possible to transfer the ownership and possession of the same property without having previously informed the competent Superintendence of Archeology, Fine Arts and Landscape for that specific territory. The communication made to the administration serves to allow the latter to exercise a priority claim in cases where it is provided for.

[32] Judgment of the Italian Council of State, Section VI, n. 3354 of June 6, 2011. The translation is by the author.

Furthermore, this communication also serves to identify the new owners of the historic building and to encourage controls. It is appropriate to point out that for transfers made free of charge the administration does not have a priority claim. With regard to historical buildings subject to indirect constraint, the communication must in any case be made to allow a control activity, but there is no a priority claim in favor of the Administration.

The reasons for which preferential treatment is generally provided for historical buildings from a tax point of view is connected to a lesser possibility of exploiting them from an economic point of view and a desire to lighten the burdens that their owners must face. [33]

With regard to historic buildings, a first favorable tax treatment is represented by a different calculation of the cadastral income to be used for tax calculation purposes.

33 See S. Giorgi, *La fiscalità della cultura: il paesaggio dimenticato ed il ruolo della sussidiarietà. Spunti per un cambio di prospettiva*, Rivista Trimestrale di Diritto Tributario, Issue n. 4, 2016.

To make clear how the calculation method of the cadastral income works, reference is made to the cadastral value of the minor cadastral category present in the census zone in which the property is located. In practice, a property that is classified as high quality according to the Land Registry (A1 is the type according to the cadastral category table in force in Italy) assumed for tax purposes the value of the properties of ultra popular type (A5 which has the lowest value).[34]The historical buildings enjoyed the aforementioned facilitation in the event that they were used by the owner, in case they were vacant and also in that in which they were rented. This so-called figurative rent ended up resulting in the substantial non-taxation of the relative rental income. The law of 26 April 2012, n. 44 eliminated this facilitation and, modifying the art. 37 of the Consolidated Law on Income Taxes (T.u.i.r), granted a fixed reduction of 35% on the portion of the rent to be considered for the calculation of taxes.

[34] For further details and examples, consider I*mmobili storici. Approfondimenti ed excursus normativo sugli immobili storici ai fini ICI*, a guide published by the Municipality of Venice dedicated to historic buildings and avalaible online at https://www.comune.venezia.it/sites/comune.venezia.it/files/documenti/Tributi/ici/STORICI.pdf.

This favorable regime described above concerns only historic buildings subject to direct legal constraint, no facilitation is therefore provided for buildings subject to indirect constraints.

With regard to indirect taxes, the same decree law 2 March 2012, n. 16 increased the registration taxes thus canceling the previous facilities that provided discounted rates for historic buildings subject to legal constraints. It can be considered that the Italian tax system, starting from the decree law 2 March 2012, n. 16, has made a decisive turnaround with regard to the taxation of historic buildings subject to legal constraints. This trend reversal can be explained due to the pressure of budgetary requirements and linked to the particular historical moment that saw Italy in great economic difficulties and in the need to try to reduce the deficit.

In Italy in the field of property taxes it was introduced by the law of 30 December 1992, n. 504 the municipal property tax (I.C.I.). Property taxes on real estate in Italy have had a very troubled history and have been the subject of many interventions by various governments. In 1992 the Amato government introduced the extraordinary property tax with the

decree law 11 July 1992, n. 333 converted with subsequent amendments by the law of 8 August 1992, n. 359. This temporary tax was then made permanent by turning it into a tax called I.C.I. with the decree law of 30 December 1992 n. 504. In the application mechanism of the I.C.I. for historical buildings subject to legal constraints, the so- called figurative income was applied, which has already been described.

The tax called I.C.I. was abolished on the main house by the law decree 27 May 2008 n. 93 converted into the law of 24 July 2008 n. 126. It should be noted that in the case of luxury homes (cadastral categories A1 luxury houses, A8 villas, A9 castles) the tax called I.C.I remained in force even in the case of a principal residence. With the legislative decree of March 14, 2011, n. 23, the single municipal tax was introduced for properties other than the main house (I.M.U.) starting from the 2014 tax year. The Monti government, given the gravity of the Italian economic situation, anticipated its application to 2012, subjecting the main houses to this tax burden also through the decree law of 6 December 2011 n. 201 converted with law of 22 December 2011 n. 2014.

The T.A.S.I. is introduced by the law of 23 December 2013 n. 147 and relates to the buildings and is intended for the financing of services considered indivisible such as for example street maintenance and municipal lighting and gardening and has the same calculation mechanism linked to the cadastral value of the building of the previous taxes already described. For historic buildings subjected to legal constraints with regard to the application of the I.C.I. the figurative rent was expected to be taken into consideration. For the calculation of theI.M.U. instead, a 50% reduction in the actual cadastral income is granted, significantly increasing the tax burden on the owners of historic buildings. As regards the tax called T.A.S.I., although there is no explicit rule in favor of historic properties subject to constraints, the Ministry of Economy and Finance has clarified in the answer[35] to a question proposed by the professional accounting association of Certified Public Accountants, Auditors and Advisors (ODCEC) that the aforementioned 50% reduction is also applicable in the case of this tax.

[35] Protocol note of the Ministry of Economy and Finance n. 16252 of 22 May 2015.

In the context of the problems posed by historic buildings, it is considered interesting to recall that some historic buildings are protected by "the special law for Venice" or the law of 16 April 1973, n. 171.[36]

According to this law, through a decree of the Superintendent of Venice it was possible to subject a list of historic buildings located in the territory of the municipality of Venice to a legal constraint. For these historical properties and then for the buildings subjected to an indirect legal constraint, no specific tax facilitation is provided, despite an appeal to the Italian Constitutional Court which concluded with sentence n.111 of May 20, 2016. This sentence states that it is not unconstitutional that the properties subject to indirect constraint do not enjoy favorable tax treatment as the Legislator grants the facilitation rules in a discretionary manner and as the direct contstraint entails a lower ability to pay.

[36] See E.M. BAGAROTTO, *Considerazioni sull'interpretazione estensiva ed analogica delle disposizioni che riconoscono benefici fiscali: lo strano caso degli immobili vincolati in base alla legge speciale per Venezia*, Rivista Trimestrale di Diritto Tributario, Issue n. 2, 2018.

Otherwise the burdens imposed by the indirect constraint do not take on a relevance such as to lead to an appreciable reduction in the ability to pay.

Some specific considerations must be made regarding the application of VAT to the renovation of buildings. As regards ordinary and extraordinary maintenance, restoration and conservative restoration work, different VAT rates are applied in Italy. The motivation for which a differentiation in the VAT rate is envisaged is that of favoring the maintenance of buildings of any kind for a series of purposes ranging from static safety of buildings to technological adaptation and maintenance of the architectural decorum of the facades of buildings.

The ordinary VAT rate is currently set at 22% in Italy and is valid for ordinary and extraordinary maintenance with the only exception of residential buildings as far as services are concerned. The term "services" means those carried out by construction companies both in contract and in subcontract and also includes the supply of goods carried out by the construction companies themselves. The condition to benefit from this facilitation is that the building is mainly intended for residential use. For restoration and conservative renewal as well as those of urban

renovation, the 10% tax is always valid and this last type concerns all historical buildings with a constraint because it grants the benefit only on condition that the interventions concern collapsed or demolished buildings that are restructured respecting the same shape of the previous building and every other prescription and authorization of the Superintendency.

It is possible to note that there are no particular tax advantages for historic buildings subject to legal costraints as the choice of rates is linked to the type of works and the destination of the buildings rather than to the presence of the constraint. In other words, ordinary or extraordinary maintenance carried out on a historical building subjected to a constraint and not for residential use is subject to the 22% VAT rate.

It is also important to consider how in Italy many religious and non-religious institutions use historic buildings to carry out both non-commercial activities and commercial activities and for this reason it would be desirable to have a formulation that grants the benefit of reduced VAT to historical assets regardless of the type of work carried out on the latter. This wish of the author must be understood in the perspective of favoring as much as possible the maintenance and

preservation interventions of the historical real estate that already requires high costs due to the complexity of the work and the constraints as well as the requirements imposed by the Superintendencies.[37]

[37] On the issues addressed in this paragraph, please refer to M. P. NASTRI, *Il ruolo delle agevolazioni fiscali nella promozione del patrimonio immobiliare culturale dei private*, in DPT 1-2019 and G. GIUSTI, *La fiscalità delle dimore storiche private: proposte di riforma per far fronte alla crisi post COVID-19*, Rivista di Diritto Tributario, 1-2021.

2.5. The transfer of cultural assets as a form of payment of tax obligations.

In Italy, the law of 2 August 1982, n. 512 provided for the possibility for taxpayers to pay direct taxes on income and inheritance taxes through the cessation of cultural assets. These cultural assets are identified on the basis of the legislative decree 22 January 2004, n. 42. Subsequently the art. 20 of legislative decree 46/1999 has made it possible to pay all kinds of taxes through the transfer of cultural goods. [38]

The procedure starts from a proposal of the single tax payer to the Administration. The proposal must indicate all the historical assets, subject or not to a costraint, which are offered for payment of tax obligations. The proposal must be presented to the Ministry of Cultural Heritage.

[38] See A. GUIDARA, *Indisponibilità del tributo e accordi in fase di riscossione*, Giuffre, Milan, 2011, pag. 199 and A.E. GRANELLI, *Il pagamento delle imposte dirette e indirette mediante cessione dei beni culturali* in AA.VV. Il regime culturale ed amministrativo dei beni culturali, Atti del convegno svoltosi a Saint Vincent, G. FALSITTA [ed], Il Fisco, Rome-Milan, 1986, pag. 111.

In the case of the payment of inheritance taxes, the proposal signed by all the heirs or by the legatee must be presented both to the Ministry of Cultural Heritage and to the Register of the competent office within the term established for payment of the tax, thus interrupting the deadline for making the payment. A commission composed of representatives of the administrations of the Ministry of Cultural Heritage and the Ministry of the Economy and Finance is in charge of assessments concerning two different aspects: the will of the State to proceed with the acquisition of the historical good and the relationship between the value of the cultural asset and the amount of the tax debt. A specific motivated decree will conclude the procedure with the acceptance or rejection of the proposal made by the tax payer.

Once the Administration has accepted the proposal, the tax payer must also accept the same respecting a peremptory deadline for the procedure to be concluded.

Wide margins of discretion are left regarding the time needed for the assessment to the public administration. In fact the six months from the

tax payer's proposal must not be understood as a binding term.

Evaluation activities must necessarily take into account, according to the different types of cultural assets proposed, also the expenses that the State bears for the conservation and management of the cultural good.

Law 512/82 has found little application in practice for a number of reasons such as the lack of knowledge by potential users, the malfunctioning of the commission between the ministries, the opposition of interests between the two different ministries that sees the Ministry of Economy and Finance prefer the collection of taxes in the usual ways. [39]

[39] See A. PIRRI VALENTINI, *Pagamento di imposte mediante la cessione di beni culturali: una normativa discontinua?,* Aedon. Rivista di arti e diritto on-line, n. 1, 2019, available online at http://www.aedon.mulino.it/archivio/2019/1/pirri.htm and G. BALOCCHINI, *Pagare le tasse in opere d'arte (in Italia) si può, ma non si può dire*, Artribune, 2011, available online at https://www.artribune.com/professioni-e-professionisti/diritto/2011/12/pagare-le-tasse-in-opere-d%E2%80%99arte-in-italia-si-puo-ma-non-si-puo-dire/.

Chapter III Comparative perspectives on the tax aspects of cultural heritage

3.1 European experiences of protecting cultural heritage through taxation.

The attention to cultural heritage and the possibility of its protection through the tax instruments characterize the legislation of different countries. The purpose of this paragraph is to offer a first picture of tax interventions related to cultural heritage in some countries such as the United Kingdom, France, Germany, Spain and Portugal.

The United Kingdom has a long tradition in preparing responses to the problem of protecting cultural heritage with the specificity of wanting in particular to promote the use of the same historical artistic heritage to the widest possible audience. A first area of intervention concerns the problems of the transmission of the great heritages of noble families to successive generations. The exemption from inheritance tax is provided on condition that the public is guaranteed access to historical buildings, gardens and collections of movable property. It is also provided that when parts of the artistic heritage in private hands are sold in order not

to incur the taxation of capital gains, there must be a specific agreement with the new owner in which he undertakes not to export the object from the country, to keep the asset and to continue to guarantee the possibility for the public to enjoy it. A detailed series of provisions concern more precisely the regulation of access to the asset and range from predicting the hypotheses in which the good can be viewed in places other than those in which it is stored, at the hypothesis (indeed more and more residual with respect to past) that access should take place by appointment and not necessarily in the presence of the owner. There are also provisions in the legislation of the United Kingdom concerning donations, the use of crowdfunding for the collection of sums for the maintenance and enhancement of cultural heritage as well as special tax relief compared to corporation tax for the creative industry.

In France in 2007 a law was introduced granting a tax reduction to companies making donations to restore privately owned cultural property, ensuring public access to these assets for a minimum of ten years. The innovative aspect is constituted by the possibility that the company does not give money as much as it makes available for the execution of the specific goods works or even its own competence in the

planning and/or execution of the works. This legislative provision undoubtedly favors the increase in the number of subjects who can find managerial advantages in carrying out this form of donation. Donations made to museums, cultural associations and scientific research organizations, even if by private individuals, enjoy a mechanism of deductibility on the amount of the sums paid in variable measure on the basis of the nature of the beneficiary body. It is interesting to note that the possibility of making donations using the same mechanism is also possible with respect to organizations having their headquarters outside the French territory when an agreement is in force with the state belonging to the European Union or the European Economic Area providing for specifically mutual administrative assistance to counter tax evasion and fraud.[40]

[40]For more details see the contribution L. AYRAULT, *Le régime fiscal du patrimoine culturel en France*, in DPT 1/2019.

In Germany, legislative attention has focused on the involvement of private individuals and businesses through donations facilitated according to the usual mechanism of tax deductions that differ according to the nature of the subject who dispenses the sum of money.

Also in Spain there are deductions for donations by the various types of taxpayers with differentiation depending on the legal nature of the subject offering, they are identified in a timely manner the persons against whom donations can be made.

The particularly interesting aspect of the Spanish legislation on the subject linked to the annual budget laws is the possibility of being able to make changes on the tax rates deductible from year to year in some particular sectors that are established from time to time.

There is therefore the introduction of a mechanism that allows to efficiently and effectively address the resources of private individuals in those particular sectors of cultural heritage that are found to be in need of greater resources or which are innovative projects that can also drive economic sectors such as the use of telematic networks and new technologies for the dissemination of Spanish culture and language

abroad.[41]

Portuguese legislation reduces by one third the cadastral value of historic buildings for the purpose of determining inheritance taxes and provides that interventions aimed at restoration or ordinary maintenance benefit from a maximum deduction of twenty percent.

[41]For further details on payment by donation of works of art in the Spanish legal system, please refer to P. V. ARCHE COLOMA, *Pago en especie o datio in solutum en el ordenamiento tributario español*, in DPT 1/2019.

3.2 Taxation and cultural heritage in Belgium.

This paragraph aims to analyze how the cultural heritage in Belgium is regulated. In particular, the author intends to dwell on the guarantees that are offered by this legal system in order to allow an effective protection of historical assets. The starting point of this discourse is constituted by the constitutional protection of culture and an analysis of the link between federalism, above all fiscal, and the protection of cultural heritage.

As previously analyzed, in the Belgian Constitution there is a clear reference to the protection of culture within Article 23.

To understand how Article 23 finds concrete application it is useful to address the issue of the division of competences in Belgium within the framework of federalism. The federal turning point of the Belgian Constitution can be said to have been initiated in 1990 and in 1993 it found its maximum reference in the Article 1 of the same constitutional

text that states the nature of the federal state of Belgium, highlighting how this is done in communities and regions.[42]The peculiarity of the Belgian system is given by the provision of a specific level concerning the communities that originates on the basis of the different languages that are currently spoken in the state or the Dutch, French and German languages.[43] Immediately below the level of which the communities are expression, there are the regions or Brussels Capital, the Wallonia region and the Flemish region.[44]

[42] L. R. SCIUMBATA, *Un modello di stato federale : il Belgio*, I.S.S.I.R.F.A., available online online at http://www.issirfa.cnr.it/letizia-rita-sciumbata-un-modello-di- stato-federale-il-belgio.html .

[43] The presence of two major linguistic communities allows F. CIRINCIONE to define Belgian federalism as a dualistic type of federalism, F. CIRINCIONE, *Il federalismo belga: l'equilibrio istituzionale federale del Regno del Belgio*, Tangram Edizioni Scientifiche, Trento, 2009, p. 32.

[44] L. R. SCIUMBATA, *Un modello di stato federale : il Belgio,* see above 42.

The administrative organization of the Belgian Kingdom consists of two other levels, namely the regions and municipalities.[45]

Another important element that characterizes Belgian federalism is how the linguistic communities do not coincide perfectly with the regions, going beyond administrative boundaries.

In the cultural field there are many cases in Belgium of competences between communities and regions that overlap and there is a large margin of autonomy which regards how the political choices are concretely implemented by the administration and how they are expressed by fiscal policies.[46]

[45] L. R. SCIUMBATA, *Un modello di stato federale : il Belgio*, see above 42.

[39] F. FATICATI, *I beni culturali e il ruolo del privato : valorizzazione e gestione in prospettiva comparativa*, thesis developed under the supervision of Prof. A. Botto, Luiss University, academic year 2015-2016, pag. 156 et seq.

The task of linking the various needs of both central and peripheral realities is entrusted to a Concertation Committee in which representatives of the central, regional and community governments are present. The task of the Committee is therefore to mediate and coordinate a series of different and very often divergent needs. The communities have competences in the cultural field and for this reason they take on relevance in the field of the protection of the historical and artistic heritage of Belgium. Each community operates in full autonomy and it is worth remembering that it has its own legal personality. It is precisely because of the particularity of the situation that it includes linguistic communities so different from each other that the cultural factor takes on great importance because it is a source of individual recognition and a reason for aggregating a community, reflecting itself in the very well thought out policies of investment in the sector.

Belgium appears to this author to have made particularly far-sighted and absolutely acceptable choices regarding the protection of cultural heritage. In particular, this status is noteworthy for choices aimed at implementing a preventive policy with regard to cultural heritage, taking advantage of widely consolidated methodologies in the maintenance of

industrial plants and air and naval vehicles. These choices lead to a continuous series over the years of small conservative interventions that involve a much lower cost than interventions carried out in emergency situations and significantly affect the quality of the conservation of the work of art. An example will clarify what has been said previously. Inspecting the gutters of a frescoed church and performing repairs of individual sections of the rainwater installation is much cheaper and more effective than interventions performed a posteriori when the humidity has penetrated and has reached the frescoes.

The birth of an organization specifically dedicated to the care of cultural heritage and in particular to historic buildings dates back to 1991.The *Monumentenwacht* was born which is a private non-profit association divided into five associations present in each of the Flemish provinces as well as a sixth covering the entirety of the Flemish territory and which carries out coordination and training courses in the comparisons with other territorial articulations. The members of these associations are represented by the owners of historic buildings subjected or not to legal alley. Those who join the association do so on a voluntary basis. The purpose of the associations is to provide their members with an

inspection service of the buildings that involves the compilation of a technical sheet that photographs the situation of the building. At each inspection visit will be highlighted the operations deemed necessary in the context of maintenance, this is not a mandatory requirement and each member is free in any case to carry out the intervention or not. In the event that the maintenance operation is carried out, it is the duty of the member to contract and carry out the work with trusted companies, as the association does not carry out building work except for very small interventions made necessary by inspection requirements. The association does not provide any financial support to the associates for the execution of the works, limiting itself to a mere consulting activity.

Second line of intervention of the associations is that of organizing training also in collaboration with the universities and in particular the specific training of professionals wishing to specialize in the sector of maintenance and restoration of cultural assets, in addition to the workers of the companies interested in similar works.

The last sector of intervention concerns campaigns to raise public awareness and to attract the owners of historic buildings that are not yet associated.

These associations are largely financed by provincial and regional governments and by a share of the national lottery and to a minimum part by donations from their own members.

The government for the cultural heritage subject to constraints offers the Maintenance grant which provides, upon the request of the person performing the intervention, the granting of a non-repayable contribution in the amount of 40% of the investment made for a range that goes from a minimum of € 400 to a maximum of € 12000 for each year. To this measure is also added that provided by the Flemish community and the Restoration Grant provinces which varies according to the type of buildings, going from a minimum of 40% for private buildings to a maximum of 90% for public buildings

It is important to reiterate that what is prescribed in the inspection sheet has no binding value for the associates, but represents a tool to be able to gain access to a series of facilities provided by the various levels of the federal organization of Belgium in the event of work being carried out.

3.3 Tax choices on cultural property in Italy and Belgium.

A topic of particular relevance for the protection of historical and artistic heritage is that of the deductions envisaged in Italy for the renovation of buildings in general because historic buildings subjected or not to legal constraint can also take advantage of such favorable legislation. This legislation has been introduced for a series of purposes different from those attributable to the safeguarding of cultural heritage and this approach contains ample traces in the various changes that have affected the specific legislation and above all in the constraints and in the ways in which it is applied. The construction works sector, especially the one addressed to private clients, was characterized in Italy by very high levels of tax and contribution evasion and by a poor application of the regulations in the field of occupational safety.

The term contribution evasion refers in this work to the non-payment of contributions to workers to the various social security institutions that in Italy are the National Institute of Social Security (INPS), the National Institute for Accident Insurance on the Work (INAIL) and also for the construction sector Building Casses present in each province.

The last body deserves to be studied in depth because it is formed in equal measure both by workers' trade unions and by employers and guarantees a series of protections against workers who also extend to their families. Building Funds originate from the collective bargaining process that sets wage standards and are intended to provide workers with a series of services that protect the workers themselves from certain peculiarities found in the construction sector such as frequent periods of interruption of the employment relationship, dismissal upon completion of work and short duration of working periods.

To counter the various types of evasion, it was thought that the mechanism of tax deductions granted to clients could be exploited to bring out taxable material, combat undeclared work and increase safety on construction sites. This strategy was also functional for the rationalization of the restructuring interventions on more advanced technical bases by providing conformity certifications for the technical installations.

To understand the reasons that led the Legislator to provide for a treatment to encourage citizens to carry out renovation of buildings, it is necessary to keep in mind how the need to stimulate the construction

sector at a historical moment such as the end of the 90s has been presented of particular difficulty for the sector. The laws that have occurred over time have always been characterized by the lack according to this author of a long-term vision and this appears to be confirmed by the fact that the tax treatments in favor of restructuring have always been extended from time to time. In particular, there has been a continuous modification of the rates of facilitation and changes to the application perimeters that must be connected to an extemporaneous assessment, and therefore not long-term, also linked to revenue requirements.

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Within the tax deductions for works carried out on the building heritage there is also a specific regulation dedicated to energy saving which was introduced by the Law of 27 December 2006, n. 296 and by measures for interventions aimed at preventing the damage caused by the seismic phenomena introduced by Law 11 December 2016, n. 232. In particular, this last intervention was implemented following the seismic events of considerable gravity that hit central Italy and in particular the Marche, Abbruzzo and Umbria regions in 2016 and previously those that occurred in the Emila-Romagna region in 2012.

Although not designed for the protection of the historical and artistic heritage, these legislative interventions have effectively contributed to the increase in investments made by the owners and also to a better use of the same buildings, allowing a better habitability and a greater economic use both as real estate data leased both as receptive type structures (this last aspect is particularly relevant in large and medium-sized art cities).

Due to the specific relevance of this work, the author considers it useful to analyze in more detail the rules governing the possibility of benefiting from this type of tax deduction. The regulations on the facilities provided for building renovations make a first fundamental distinction between those destined for individual buildings and those for condominiums. For the individual real estate units it is possible that the owners resort to the facilitation in the case of extraordinary maintenance, restoration and restoration, building renovation, restoration of buildings that have suffered subsequent damage damage, elimination of architectural barriers and finally the realization of measures aimed at reducing the risk of unlawful acts by third parties. The author feels the need to clarify how unlawful acts (including thefts, assaults and in general all types of crimes that involve a violation of the domicile of the subject. The prevention of these hypotheses of crime can be realized both by improving the structural safety of buildings (armored doors, shatterproof glass, wall safes), and through detection systems (anti-theft systems and cameras, cameras in connection with private security centers, etc.).

According to the legislation that is being analyzed here on the common parts of the condominiums identified by article 1117 paragraph 1, 2 and

3 of the Italian Civil Code, ordinary maintenance and cabling of the buildings, the reclamation of the asbestos and measures for containing the sound system. The different types of building works are identified on the basis of the single text of the legislative and regulatory provisions on the subject of construction to give a binding framework.

The amount of the financeable works is 96,000 euros for each housing unit to the extent of 50%, however starting from 1 January 2020 the maximum spending limit falls to 48,000 euros and the relative rate to 36% for cash needs linked to the complex Italian economic situation. To take advantage of the deduction, a series of regulatory provisions must be complied with:

1) The company has to send a preventive communication to the Local Health Authority which allows to localize the works and allow to carry out checks on safety at work;

2) The company that carries out the work must guarantee compliance with the safety regulations provided and the regular payment of the contributions relative to the workers with a specific declaration;

3) The client must make the payments of the invoices relating to the

works with a special form of bank transfer specifically created for this case which allows the traceability of payments, the bank's performance of a withholding tax on the company and provides all the elements of control both for the deduction and for the correct tax declaration of the companies;

4) The client must communicate the technical data to the National Agency for Energy Efficiency even for renovation only.

In Belgium the art. 145/36 of CIR/92 and subsequent amendments provides for the granting of a tax benefit on the expenses incurred by property owners subjected to a legal restriction due to their cultural value. In particular, facilitations are envisaged for the part of the expense actually paid by the owner as part of the expenditure can be financed by subsidies provided by various public institutions. On 50% of the costs incurred by the owner for the restoration of the building with a 25,000 euro limit applies a benefit equal to 30% and expertise is of the Regions.

The Belgian law provides these tax benefits exclusively for historic buildings provided that the works are carried out in compliance with the technical provisions prescribed by the Supervisory Authorities and that

they are accessible to the public.[47] According to this author, these last two conditions have a more incisive effect on the preservation and usability of the cultural heritage assets than is generally provided for by Italian laws.

[47]Parliamentary question number 604 of October 27, 2015 from Mr. Piedboeuf dd. 10/27/2015.

Concluding remarks

This paragraph contains a series of reflections on the object of study. Cultural heritage is a complicated object of study: it has definitional problems, can be approached from very different value perspectives, is a crossroads of disciplinary knowledge and a place of conflict between multiple interests.

This author would like to entrust the reader with the personal conviction that tax law is not the main instrument to ensure the protection of cultural heritage. This statement may be both strong and strange in the context in which it is made. However, the author believes that it is necessary to accept that tax law should not be asked to provide all the solutions in the field of cultural heritage protection, but that it can be an important ally in the challenge to safeguard the cultural heritage itself. .

Tax provisions dealing with cultural heritage seem not to start from a defined idea of the objectives to be pursued, i.e. there is no overview of what is being attempted for cultural heritage. Tax legislation for cultural heritage often appears episodic and fragmentary, when provisions are not born for different sectors that also affect cultural heritage without being

able to grasp its specificities.

According to this author, it would be necessary to start by collecting all the tax provisions concerning cultural heritage and bringing them together in order to simplify their knowledge and improve their accessibility by the operators concerned. In Italy, for example, this operation could lead to the inclusion of all this legislative material in the "*Codice dei Beni Culturali e del Paesaggio"*. The same operation of grouping together tax and financial provisions for cultural heritage is certainly feasible in other European countries, starting with Belgium.

Grouping is an operation that also brings with it that of ordering and leads to a second recommendation that this author considers useful to formulate. Tax incentives for cultural heritage should be catalogued in order to be better coordinated, as synergy can bring considerable benefits in terms of overall protection of cultural heritage.

The third recommendation concerns the reform of cadastral surveys, which should create valuation mechanisms for cultural properties subject to protection and constraints in order to reduce the tax burden on these goods, allowing private owners to use the resources saved in restoration

and enhancement interventions, which in turn would be subject to tax incentives.

In general, this author feels the need to highlight how a correct valorisation activity produces resources for the conservation of cultural assets and therefore hopes that scholars will be more open to restoration projects that include the possibility of correct economic use.

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