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by Piergiorgio Valente

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PRACTITIONERS' CORNER

Italian Rules Regarding Disputes of Transfer Pricing Violations

by Piergiorgio Valente

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Italian tax rules regarding disputes for transfer pricing violations are based on article 110(7) of the Italian Income Tax Code (Testo Unico delle imposte sul reddito, or TUIR).

The rules substantially regulate the taxable base, which is also true for other antiavoidance provisions, such as the rules governing controlled foreign corporations.

The rules place the burden on the taxpayer to prove that the transfer pricing method employed was on an arm's-length basis.

When analyzing the legal aspects of the Italian rule, the application of article 110(7) of the TUIR should be verified for the following aspects:

- subjective application basis;
- relationships criteria; and
- contents of the *conditio juris* (condition of law).

Application Criteria

Subjective Basis

The Italian transfer pricing rule requires a three-fold subjective test: The first pertains to the Italian company, the second to the foreign company, and the third to the legal-economic link between the two entities.

As far as the resident entity is concerned, the legislature uses the term ''enterprise.'' That term refers to the various types of companies through which the business activity is carried out — joint-stock companies, partnerships, or companies assimilated to partnerships; also important is the positioning of the rules within the TUIR before and after the corporate income tax reform (the IRES).

The Ministry of Finance's Circular 9/2267 of September 22, 1980, sets forth the application of the regulation to sole ownerships and permanent establishments of foreign companies operating in Italy.

Regarding foreign entities, the law uses the term ''non-resident companies in the State's territory.'' Scholars and case law give the term a broader sense, just as Circular 9/2267 does, which states that the term includes:

> all kinds of corporate bodies that are legally acknowledged by the foreign State even where these are lacking the multi-entity requirement, such as the French Groupement d'intérêt économique, the German ARGE, Anglo-Saxon trusts, the Stiftung, and the Anstalten.[1]

Intercompany Relationships

Once the nature of both parties involved in intercompany transactions has been determined and they comply with the relevant rules, one must look at the legal-economic relationship between the resident and nonresident entities.

This condition is particularly significant if one of the two interested parties is in a position to control the

[1]Italian MOF Circular 9/2267, Sept. 22, 1980.

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other (or if both are controlled by a third party); one must determine what the value of the arm's-length transaction actually is, because the price might have been affected by the existence of an intercompany relationship.[2]

The rule itself extends beyond the notion of strictly legal control, attributing significance to cases in which sales and placement activities involve raw materials, product manufacturing, or processing by a national enterprise on behalf of nonresident companies and regarding transferred goods and services rendered by the companies.

Thus, under Circular 9/2267, the concept of control includes all forms of potential or effective economic influence, such as:

- exclusive sale of products manufactured by the other enterprise;
- impossibility of the enterprise's functioning without the capital, products, or technical cooperation of the other enterprise (including joint ventures);
- having the right to appoint members of the board of directors and the company's management committees;
- having common members of the board of directors;
- having relatives between or among the parties;
- granting relevant credits or prevalent financial dependence;
- participating in procurement or sales pools;
- participating in cartels or consortia, in particular if these are aimed at price fixing;
- procuring or opening of new market controls;
- signing agreements actually creating monopolistic situations; and
- generally, all cases in which an undue potential or effective influence is exercised on entrepreneurial decisions.

The presence of a single element does not allow one to reach an affirmative conclusion regarding the existence of control.

The *Conditio Juris*

Article 110(7) of the TUIR sets forth a condition for the provision to be legally effective: ''if an income increase derives therefrom.'' The condition is particularly biased toward the taxpayer, because the rule may not give the right importance to those situations in which the taxpayer found itself having declared higher income in Italy, perhaps because of an audit abroad, incurring the risk of double taxation. This condition is not to be underestimated; it restricts the tax authorities' powers in making adjustments only at the taxpayer's level in conjunction with more general attributions provided by article 39 of Presidential Decree 600/73.

Determining the existence of the *conditio juris* presumes the exact determination of transfer prices, considering that only after such an operation is it possible to state that income was actually subtracted from Italy.

A literal interpretation of the provision would lead the tax authorities to audit any situation in which the application of transfer pricing methods might produce a higher income in Italy, without attributing any importance to the tax avoidance intent. Consequently, the assessment would be admissible even when the income theoretically transferred abroad had been taxed there at higher rates. The most recent positions adopted by the courts seem to prefer a more systematic and substantial interpretation of this condition in order to drive the company's will toward the achievement of higher tax savings.

Transfer Pricing Tax Audits

Arm's-Length Concept and Audit Motivations

It is important for the proper determination of transfer prices to identify the actual arm's-length value of the transferred good.[3]

To determine intercompany transfer pricing transactions accurately, one must establish the meaning of normal value (that is, arm's-length value) of goods or services being exchanged. Article 9(3) of the TUIR, to which article 110 refers, considers arm's-length value the price generally recognized for the same or similar goods and services, reached through free competition and at the same phase of distribution, at the time and in the place where the goods or services were acquired

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[2]Although the rule under examination does not explicitly refer to article 2359 of the Italian Civil Code, the notion of control referred to is the one attributed by the Civil Code. According to the provision, controlled companies are:

> 1) companies in which another company holds the majority of votes that may be exercised in an ordinary shareholders' meeting;
>
> 2) companies in which another company holds sufficient votes to exercise a dominating influence in the ordinary shareholder's meeting; or
>
> 3) companies subject to the dominating influence of another company by virtue of special contractual obligations towards such company.

For application purposes of numbers 1) and 2) of the first paragraph, votes belonging to controlled enterprises, trust companies, and third parties are also computed; votes pertaining to third parties are not computed.

[3]Italy has aligned its tax legislation with transfer pricing principles in force. Article 110(7) of the TUIR provides that:

> income components deriving from transactions with companies that are not resident in the State territory and which directly or indirectly control the enterprise, are evaluated on the basis of the arm's length value of goods transferred, services rendered or of goods or services received.

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or rendered. Generally, to determine the arm's-length value, reference is made to price lists and tariffs of the party that supplied the goods or services. Market reports, Chamber of Commerce price lists, and professional tariffs are also used, taking special discounts into account.

The Ministry of Finance makes a clear distinction between two different kinds of criteria used in determining the arm's-length value:

- Traditional criteria:
  - — comparable uncontrolled price method;
  - — resale price method; and
  - — cost-plus method.
- Alternative criteria:[4]
  - — transactional net margin method;
  - — profit-split method; and
  - — gross margin method of the economic sector.
- Profitability method of invested capital.

The tax authorities' standard practice is to simply refer to the methods described above, as established by the OECD guidelines.[5] This is especially true when the other company is incorporated in a state with which Italy has an income tax treaty.[6]

It is first necessary to determine the likelihood of an audit procedure being performed. It should be determined whether the tax authorities may challenge the commercial choice made by the taxpayer. This is a rather sensitive issue that leaves no room for uncertainties that might seriously jeopardize the parties' contractual autonomy.

Points 1.36 through 1.41 of the OECD transfer pricing guidelines are significant, as they state the principle that ''a tax administration's examination of a controlled transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described.''[7]

The guidelines leave room for the power for adjustments regarding the transaction agreed between the parties, but only ''in other than exceptional cases.'' The provision goes even further, by offering an explicit description of the exceptional cases that may be traced back to:

- when the economic substance of a transaction differs from its form; and
- when, while the form and substance of the transactions are the same, the arrangements made regarding the transaction, viewed in their totality, differ from those that would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price.

The first case is particularly clear and does not require further comments: The taxpayer has actually simulated the features of the transaction, thus realizing an agreement that does not correspond to reality. Such clearly fraudulent behavior cannot possibly be ignored by the tax authorities and compels the redefinition of a price that keeps into account actual procedures by means of which the transaction was carried out. Such a hypothesis would also be subject to punishment under Italian legislation, considering that the definition of arm's-length value in article 9 of the TUIR, to which article 110(7) of the TUIR refers, requires that the same be determined on the basis of the price of transactions that are effectively comparable.

For the second case, we are faced with a borderline situation in which the taxpayer has behaved irrationally. The application of the arm's-length value would

[4]According to ministerial instructions, this second class of criteria should be considered as supplementary and as further support to the determination of the arm's-length value in article 9(3) of the TUIR, which article 110(7) makes reference to.

[5]OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration, 1995, pp. I-15, I-16, and I-17.

[6]In such cases, article 9 of the OECD model treaty, which regulates adjustments that may be applied by one country to an intercompany transaction, specifies that:

> Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits.

Nevertheless, the commentary to the article clearly asserts that the adjustments may be exclusively based on the methods set forth in the OECD guidelines:

> The Committee has spent considerable time and effort (and continues to do so) examining the conditions for the application of this Article, its consequences and the various methodologies which may be applied to adjust profits where transactions have been entered into on other than arm's length terms. Its conclusions are set out in the report entitled Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, which is periodically updated to reflect the progress of the work of the Committee in this area. That report represents internationally agreed principles and provides guidelines for the application of the arm's length principle of which the Article is the authoritative statement.

(Footnote continued in next column.)

[7]OECD, *supra* note 5. The agreement between the parties cannot be called into question by the tax authorities, which, when examining the price of the transaction, must comply with methods adopted by the taxpayer if these are aligned with the guidelines themselves.

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not be possible considering that no independent enterprise would have carried out the transaction in that manner. The guidelines require that all the conditions as a whole must prove to be irrational. To achieve the absence of any conflict of interest, an intercompany transaction may be entirely peculiar and meet the interests of the entire group rather than of the single operators; thus, a price adjustment might be necessary and justified.[8]

The Italian regulations strictly provide that such kinds of relationships ''are assessed on the basis of the arm's-length value,'' which obviously refers to the issue of the price agreed by the parties and not to the type of transaction carried out.

On the other hand, article 9 of the OECD model treaty expresses the same views since it allows only for the ability to adjust shared profits resolved by the parties and not to modify the nature of the transaction itself.[9] Note that the description of the commentary on this issue is all but appropriate, when it states that adjustments are feasible only if special conditions have been met by the two group companies and not, instead, when such conditions are ''normal'' (that is, at arm's length).[10]

The other aspect under examination is the price applied between the parties and whether it complies with the arm's-length value.

It should be established which of the parties bears the burden of proof. As stated above, the rule fixes in the arm's-length value the amount that the taxpayer is authorized to deduct or obliged to declare; as such, it is difficult to maintain that it is the taxpayer's duty to identify and apply the arm's-length value if it differs from the intercompany price. The fact that the taxpayer only declares, without providing any evidence, that the price applied is *fair* does not allow the tax authorities to reach an unfavorable conclusion for the taxpayer. This is especially true regardless of whether the circumstance involves profits or losses. It is true that the burden to prove the accuracy of the cost rests with the taxpayer, but the proof evidently wears itself out in proving that the subject matter of the supply has occurred and that the same corresponds to agreements between the parties as well as to the relevant invoicing and payments.[11]

An audit in the area under examination may proceed in two different directions, depending upon whether the comparison of prices or margins may occur on the basis of internal or external accounting data.

In the first case, the proof is direct and documentary. Accounting records disclose a transaction that is perfectly comparable, with a third client, the price or margin of which differs from the intercompany price. Also in this case, a perfect and immediate comparability is rather unlikely, and consequently, it will be necessary to proceed with further reasoning and evaluations leaving accounting data aside.

Therefore, it is most likely that the audit in question will be an ''analytical/off-the-books'' one.[12]

Analytical-Inductive Audit

The audit in question is aimed at an accounting evaluation that considers both formal and substantial reliability. The credibility of data disclosed is not solely due to its formal consistency and compliance with rules following an orderly identification. It also depends on the completeness and the truthfulness of such data.

A substantial control must aim to rebuild a relation grid[13] among the most significant corporate components that are subject to control, and to do so, the legislature also indicated — in addition to the possibility of basing adjustments of declared incomes on analytical and documentary findings — simple presumptions among evidentiary means that may be adopted by the tax authorities.

For such presumptions to constitute a basis for audit, they must contain the requirements of gravity, accuracy, and consistency.[14] It is once more the principle of *id quod plerumque accidit* (that which occurs most likely or that which constitutes common experience),

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[8]The burden of proof regarding the irrationality of the behavior and its not being repeatable between independent parties rests with the tax authorities, and it is far from simple to prove.

[9]*See* OECD, Commentaries on the Articles of the Model Tax Convention — Article 9 (2005):

> The provisions of this paragraph apply only if special conditions have been made or imposed between the two enterprises. No rewriting of the accounts of associated enterprises is authorised if the transactions between such enterprises have taken place on normal open market commercial terms (on an arm's length basis).

[10]The expression requires the condition to define what is ''special'' and what is ''normal,'' which is not a simple matter. Reference may be made only to indications provided by the OECD. Consequently, only if there is a difference between the operation's substance and form or if the conditions entered into by the parties cannot in any way be identified in transactions between independent parties, may an adjustment be effected.

[11]It cannot otherwise be deemed that the law also requires proof of the price's ''fairness,'' because even admitting that such proof is necessary, it is not clear how the tax authorities would proceed to a tax audit and declare part of the cost as nondeductible without necessarily defining the arm's-length value first, the deductibility of which is entirely irrefutable.

[12]Article 39(1)(d) of Presidential Decree 600/1973.

[13]*See* MOF Circular 944/E.

[14]The principle refers to the need to take into consideration logical and factual assumptions that must lead to an univocal conclusion.

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which must direct the tax authorities behavior,[15] screened through general criteria of prudence and good faith.[16]

Hence, the problem shifts to the verification by the tax authorities of when such bases actually characterized the reconstruction activity.

From that viewpoint, the position adopted by the Supreme Court at the time is very interesting.[17]

Revenue Gaps in the Tax Year and Statistical Values

Article 62-*sexies*, paragraph 3, of Decree-Law 331 of August 30, 1993, provided that the tax authorities may use sector studies or may adopt guidelines that were fleshed out by the Revenue Department.

The courts repeatedly ruled on the need to supplement statistical data with further evidentiary elements in order to reach the threshold of gravity, accuracy, and consistency required by the law.

The Supreme Court upheld the lawfulness of the presumptive information retrieval tools, although making a distinction between traditional audits (in which automated calculating tools are lacking) and more recent ones based on statistical calculations (such as guidelines and sector studies).[18] Only these latter are actually suitable, for authenticity purposes, to reverse the burden of proof.

Conversely, the taxpayer would have only to prove alternatively:

- the tax authorities' ''impossibility to use the presumptions in that particular case'';
- the ''unreliability of results obtained through the said presumptions''; and
- ''the validity of its behavior'' also having recourse ''to other presumptions'' that are contrasting.[19]

The above denotes the peculiarity of statistical survey tools, of which the Supreme Court observes an ever-increasing diffusion since 1995:

> lawfulness on the basis of standard practice is evaluated in advance on a general basis, to the point that in the last few years sector studies have been taking root and have been offering solutions that are increasingly accepted and shared.[20]

Contrary to what may emerge from a first analysis of the rule, however, the Supreme Court did not wish to recognize that sector studies have an absolute evidentiary value with a consequent reversal of the burden of proof. What surfaces from the pronouncement, although not very clearly, is that the judgment is based not only on results derived from the application of sector studies, but also on other and different presumptive evidence gathered from the tax authorities. A testimony in that sense clearly emerges from the closing statement of the decision: ''such powers were not apodictically used in this case, but were anchored to certain elements that were stated in the decision.''[21]

Discrepancies Between Revenues and Remunerations

Having examined the Court's approach toward the use of statistical data, the analysis of other data collected by the tax authorities upon which the audit rests is much more complicated. This is because of the great variety of situations that may occur or the significance of factual elements that characterize the situation.

The courts are analyzing situations in which the taxpayer's behavior may seem unreasonable from an economic standpoint.[22]

The Supreme Court's Decision No. 1821 of October 18, 2000, is especially important as it upholds the possibility to have recourse to an analytical-inductive audit in the presence of the taxpayer's anti-economic behavior, having established that:

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[15]*See* Supreme Court decisions No. 4555 of 1998 and No. 8089 of 1996.

[16]The audit will require the acquisition of elements regarding both features of transactions to be compared and their actual comparability, and the identification of the arm's-length range, which must reach, in the aggregate, the required gravity, accuracy, and consistency threshold set forth by the law.

[17]For a more structured reading, the decisions were grouped under two homogenous categories. The first refers to cases in which the presumptive evidence was based on the difference assessed between revenues for the financial period and statistical values, which in this case involve parameters and sector studies. The second refers to cases in which the evidence was based on serious discrepancies assessed between revenues, remunerations, and considerations declared, and the ones that may be rightly inferred through the characteristics and the conditions of the activity carried out during the financial period.

[18]*See* Supreme Court Decision No. 2981 of December 21, 2000.

[19]*See* Supreme Court Decision No. 2981 of December 21, 2000.

[20]Before the entry into force of sector studies, the Supreme Court had said that the average values of the sector, if properly determined, are not to be considered a ''known fact'' but rather the result of a statistical extrapolation of different data. *See* Supreme Court Decision No. 9265 of 1995.

[21]This position is in line with the previous approach adopted by the Court itself, given that it had acknowledged the use of sector studies as being lawful for presumptive purposes, but only if these were strictly supplemented by:

> deeds and documents (questionnaires, tax returns, receivable and payable invoices, tax receipts), including other cognitive data (personnel, number of tables, towels, tablecloths and tablecloth guards), surely appropriate — if considered as a whole and correlated among themselves — to allow a reliable reconstruction of the company's business context.

[22]The Supreme Court upheld the lawfulness of below-cost transactions, but reversed the burden of proof. The taxpayer had to substantiate the motivations that led to the granting of the favorable conditions to its client, not justifiable otherwise from an economic standpoint.

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the inspirational rule for any party carrying out a business activity is to reduce costs, on the same basis as all other conditions. Thus, in case of behaviors that circumvent such common sense parameter and in the absence of a different rationalization, the suspicion that the discrepancy is only apparent and that it is concealing a different reality is legitimate.

Furthermore, such critical attitude was fostered by some inappropriate passages of the decision that supports the requirement to justify anti-economic transactions, regarding the following provisions:

- article 37-*bis* of Presidential Decree 600/1973 (which has no connection to the case at issue); and
- article 10 of Law No. 212, dated July 27, 2000, regarding which a ''backward'' interpretation of the motivation requirement, ratified at the tax authorities' level, is provided.

The Supreme Court did not mean to express economic evaluations on the taxpayer's behavior, but only acknowledge the irrationality of such behavior, which, combined with other evidence, was deemed sufficient for the purposes of supplementing the requirements of gravity, accuracy, and consistency.

A different Supreme Court case involved a professional who had declared income that was disproportionate to the number of clients. The Court remarked that ''professionals do not generally provide services free of charge nor do they extend payment terms for fees.'' The presumption based on the number of clients may be overcome solely ''through precise and specific evidence, and not through a mere assertion.''[23]

The criterion, based on discrepancies between quantitative elements involving the activity carried out by the taxpayer, is quite evident in Supreme Court case law, according to which the income of a restaurant may be presumed on the basis of the number of place settings, which in turn may be deduced by the number of napkins washed,[24] or, in other cases, on the basis of electric energy consumption,[25] or more generally, of raw materials.[26]

The Supreme Court said that for this kind of presumption:

- it is not necessary that the existence of the unknown fact represents the only possible consequence of the known fact, but it suffices that the unknown fact may be construed from the known fact, according to a probability judgment based on the above *id quod plerumque accidit*[27]; and
- it is not necessary that the unknown fact be surmised from a vast number of known facts (that is, by various reliable sources that equally converge towards one and the same logical deductive result); one known fact is more than sufficient when all of its aspects, where circumstances to the contrary are lacking, clearly and univocally agree on the occurrence of the unknown fact.[28]

A further confirmation of the position adopted by the Supreme Court may be obtained from a later ruling,[29] in which the Court said that:

> it is possible to assess higher proceeds as opposed to those declared, if the mark-up percentage applied by the taxpayer is lower than that generally applied in the relevant sector, to the point of reaching abnormal and/or unreasonable levels.[30]

In a recent decision, the Supreme Court, while confirming a prior and well-established position,[31] said that discrepancies in a tax return (VAT in this case):

> cannot be inferred by the fact that the percentage of declared added value (i.e., the percentage of surcharge applied on the cost of sold goods) is notably lower than the average that may be generally found in the relevant sector of activity in similar businesses, bearing in mind that sector averages do not constitute an historically proven known fact, from which a reasoning on the unknown fact — constituting the subject matter of the proof — may be derived, and which is not by itself sufficient, as a foundation for the presumptive evidence, but the result of a statistical extrapolation of a multiplicity of data that establishes a rule of experience, pursuant to which one may statistically deem those cases that are far

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[23]*See* Supreme Court Decision No. 14292 of February 17, 2000.

[24]*See* Supreme Court Decision No. 5 of January 7, 1999.

[25]*See* Supreme Court Decision No. 239 of January 11, 1992.

[26]*See* Supreme Court decisions No. 51 of January 7, 1999; and No. 12774 of December 22, 1998.

[27]*See* Supreme Court decisions No. 12212 of April 19, 2000; No. 5082 of June 6, 1997; No. 2700 of March 26, 1997; and No. 2605 of March 6, 1995.

[28]*See* Supreme Court decisions No. 12482 of December 11, 1998; and No. 11117 of December 12, 1996.

[29]*See* Supreme Court decisions No. 6337 of February 5, 2002; No. 11645 of November 17, 2001; and No. 1530 of November 29, 2000.

[30]In the case at issue, the value of the good sold was higher than the value of the same good at the time it was resold. When an anti-economic approach or marked difference from the average of the relevant sector was not abnormal or irrational, the Court did not fail to penalize the tax authorities' behavior.

[31]*See* Supreme Court decisions No. 1376 of February 7, 1992; No. 11473 of November 20, 1993; No. 10850 of December 17, 1994; No. 1628 of February 15, 1995; No. 5850 of May 26, 1995; No. 5903 of May 27, 1995; No. 9265 of 1995; No. 8535 of August 27, 1998; and No. 8835 of June 28, 2001.

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removed from average values to be less frequent than those that are closer.[32]

A further example of this critical approach is found in a recent decision[33] on the topic of directors' fees, in which the Supreme Court, reviewing its previous position,[34] denied the existence of an evaluative power (presumably) available to the tax authorities, which may go as far as adjusting costs that are deemed excessive.[35]

The Search for Presumptive Evidence

The proper application of the arm's-length principle, as defined by the OECD, is generally based on a comparison of conditions involving a controlled transaction with those regarding noncontrolled transactions. Thus, the top priority is to identify ''comparable situations.''

For some transaction categories, the identification of comparable situations is easy. For most transactions, however, similar market values do not exist. The auditor must identify the ''third independent party'' from which the required information must be acquired for the research of comparable transactions. In this phase, the tax authorities are obliged to adopt a different procedure according to the controlled transaction that is to be examined.

When the subject matter of the controlled transaction is the supply of services, one must distinguish whether the service has been rendered to the company located outside national borders or whether it was received by an associated company abroad.

When the service has been rendered to the resident company, the third independent party may be identified by requesting the information from the Tax Registry Office. For transactions involving both tangibles and services rendered, a search for comparables may again be done through the Tax Registry information system.

The problem for the tax authorities consists of establishing whether access to the premises of comparable third independent parties is possible or whether questionnaires may be sent to them, not for audit purposes, but only to acquire the elements of comparability.

Article 52 of Presidential Decree 633/1972 states that it is always possible to ''organize the access . . . to proceed to inspections, audits, research, and any other survey deemed useful to assess the tax and to counteract evasion and other violations.'' Once the data have been acquired from the third-party competitor, the audited taxpayer will have the ability to be informed about the sensitive data regarding its competitor (for example, production costs, gross margins, or commercial policies).

On the issue, no indications have ever been provided by either the tax authorities or the courts.[36] It is clear, however, that the issue should be examined more thoroughly and resolved, ensuring that the comparables are suitable and not merely through the identification of the company's name. ◆

[32] *See* Supreme Court Decision No. 14500 of April 10, 2000.

[33] *See* Supreme Court Decision No. 6599 of 2002.

[34] In the past, the Supreme Court has said the tax authorities may challenge the adequacy of a cost without having to give evidence of other irregularities. *See* Supreme Court decisions No. 13748 of 2001 and No. 12813 of 2000.

[35] The attitude of the Supreme Court was just as negative when audits were based on data that were extraneous to the activity and that were not directly connected to it. In those cases, the Supreme Court said the data and the news upon which the reconstruction rested were general and did not indicate — from either a qualitative or quantitative standpoint — the necessary elements of certainty so as to qualify as a known fact. *See* Supreme Court Decision No. 12450 of 2002.

[36] The Regional Tax Commission of Piedmont (April 14, 2010, No. 25) said the taxpayer may not challenge the method applied by the tax authorities during the audit; however, it focused its judgment on the actual comparability of data, recognizing that the defendant had the ability to obtain those data only at a later stage. The issue does not refer to the fact that the taxpayer obtained the data during the debate, but rather that the right to a defense might be jeopardized because of the secret comparables.

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