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LIGHTS AND SHADOWS ON THE IMPLEMENTATION OF THE ALTERNATIVE DISPUTE RESOLUTION (ADR) SYSTEM IN THE ITALIAN AND CROATIAN TAX TRIAL¹

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Summary

This paper discusses the ADR systems in tax matters as set forth in the Italian and Croatian doctrine and legislature. The first part focuses on the Italian experiences and the second part discusses the Croatian developments. Both parts are involving the doctrines and throughout the chapters emphasizes the historical and theoretical aspects, as well as the practical implications of the doctrine of public law on the emergence and development of ADR's in the comparative surveys of Italian and Croatian current situation of tax disputes resolutions.

Keywords: *tax disputes, alternative dispute resolution mechanisms, Italian experiences, Croatian developments.*

1. UNDERSTANDING ITALIAN TAX COURTS: SPECIAL JUDGES MANAGING A SPECIAL TRIAL

The Italian Judiciary system crafted in the Post-war Constitution (1948) was inspired by ideals and principles that were obviously opposite to those which characterized the previous regime. Even now, right after some amendments that affected the relevant provisions in the Fundamental Charter, those pillars still inspire the Italian trials both in Civil and Criminal law. The judiciary is fully independent from any other constitutional power, self-governing, accountable only to itself. The law regulates the career of the judges, their economic status and their prerogatives as well². On the top of this, another cornerstone idea in the Italian legal order was that any special judge has to be progressively removed and substituted by the ordinary judge, capable of deciding on every case and situation³. The Fascist regime made an

1 This paper has been supported in part by the Croatian Science Foundation project no. 9366 "Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies' Restructuring" and in part by the University of Rijeka project no. 13.08.1.2.01 "Protection of beneficiary on the Croatian and European financial services market".

2 Constitution, Article 102.

3 Article 102, § 2 and Transitional and Final Provisions to the Constitution, Article VI.

impressive use of Special judges appointed to deal with qualified cases and under the scrutiny of the executive power. The Republican democratic experience, on the opposite, wanted the system to be built on Civil judges, Criminal Judges Administrative ones (the so-called natural judges as defined by the law⁴). All the others would have repealed or abolished progressively, and they actually had been, with one remarkable exception: Tax judges.⁵

Today, the tax litigation in front of the Court is still decided by special, part-time, judges whose jurisdiction is actually limited to taxes (both national and local)⁶ an consistently with a specific law regulating the trial (see § 2).

In a number of cases, the Italian Constitutional Court has confirmed the fact that the current situation is consistent with the Fundamental Charter⁷, considering the long standing tradition of the Special Tax judges and, in particular the workload they are supposed to deal with⁸. Even if in these days a number of draft bills are pending in the Parliament and are trying to change the way in which tax justice is delivered, eventually replacing the current, part-time judges, it is more than unlikely that one of them will be actually passed⁹.

The reasons are that despite the current lacks, failures and alleged qualitative inefficiencies of the Tax Judiciary, a little more than 6000 part-time judges are actually taking care of all the tax litigation in Italy. If we compare the time-to-decision by the tax judges in the Country, it is possible to discover that it is more than three times quicker than the equivalent in Civil law¹⁰. It's well known that, as a matter of principle, Tax Trial is not covered by Article 6 European Convention on Human Rights as Civil Trial is¹¹, but even if it were, no serious litigation would emerge in Strasbourg due to excessive length of the tax process.

In other words, and in a quantitative perspective, Italian Tax Judiciary is capable of delivering on time while respecting the principles of impartiality, independency, and justice as they are carved in the European Convention on Human rights and in the Italian Constitution¹².

However, the wind of change that blown on the Civil Trial in recent years played a role also in the latest amendments to the tax one. This was also due to the fact that the overall situation was considered to be unsatisfactory by the Italian Revenue

4 Constitution, Article 108

5 Simone, A., *Il giudice tributario, passato, presente e future*, Milan: Ordine dei Dottori Commercialisti, 2014, pp. 1–21.

6 Article 1, Legislative decree December 31st 1992, n. 546.

7 Very recently this position has been maintained with the decision ten on October 20th 2016, n. 227

8 Greggi, M., *Una riforma pericolosa per la giustizia tributaria*, 2015, retrieved: January 7, 2017, from <http://www.lavoce.info/archives/42084/una-riforma-pericolosa-per-la-giustizia-tributaria/>

9 See § 3 below.

10 See the data retrieved in the article cited at footnote 8.

11 Greggi, M., *The protection of Human Rights and the Right to a Fair Tax Trial in the Light of the Jussila case*, Intertax, 2007.

12 Article 111.

Service (the Tax Agency, or Tax Office¹³) that was (and somehow still is) concerned by the excessive amount of cases decided in front of the Tax Courts.

It's not relevant, so far, to assess how influent the foreign experiences have been in terms of ADR implementation in Civil Trial, but it's important to remember that starting from 2010¹⁴ ADR has been made available to Civil Trial too, and on some circumstances it has been made compulsory before the decision of the case.

ADR is actually a very comprehensive concept that hardly fits in the Italian Trial experience. It actually might cover a number of institutes, ways and means to settle disputes without the ordinary access to Civil litigation (Legal actions, Summons, etc.). Broadly understood, arbitration procedure might as well fall into one of the ADR schemes.

For the purposes of this paper and in the Italian perspective, ADR is to be intended in a narrow way, basically as the instrument introduced by the Act passed on 2010¹⁵ empowering the plaintiff-to-be to summon his counterpart in front of a Special body authorized by the law to deliver this qualified service, in the attempt to solve the dispute according to a simplified process. This option is made compulsory in some situations decided by the law, while in others is still elective¹⁶, and if no settlement is reached at this point, nonetheless the Judges will consider the behaviour of the parties during this phase, the documents delivered and the positions taken.

It's all in all a way to gently persuade parties to settle the dispute without accessing an engulfed Civil litigation.

The (discussed) success of this instrument persuaded the legislator to extend it also to Tax Trial, in the attempt to furtherly reduce the number of cases filed every year in front of the Tax Court, but the very different nature of tax litigation, including the identity of the counterpart (Tax office) made some changes compulsory. In order to understand better the implementation of the ADR system in tax law it is necessary to outline briefly the way in which justice is delivered in tax Trial and the essentials on (Italian) tax Litigation.

1.1. Understanding the Italian Tax Trial: its Nature, Rules, the Role of the Parties

The Italian Tax Trial is hybrid in its very nature¹⁷ and its complexity stems out

13 The reference is made to the Italian "Agenzia delle Entrate" that can be translated in various ways, including Tax Agency, Tax Office, Revenue Service. For the scope of this paper, the three definitions have to be considered equivalent.

14 This change has been made consistently with the provisions set forth by Directive 2008/52/CE, art. 1, §1.

15 Legislative decree n. 28 approved on March 4th 2010, article 5, § 1 *bis*. The impact of this provision on the Italian Civil Procedure has been clarified in the decision by the Italia Supreme Court n° 24629 issued on October 7th 2015.

16 The EU directives on consumers protection make this possibility elective, depending on the choice by the latter (see directive 2013/11/EU)

17 For further details covering the various theories on the topic see Tesauro, F., *Manuale del processo tributario* (2nd ed.), Turin, Giappichelli, 2014.

of the difficulty to understand completely the tax as obligation under law and from the theory of taxation as is has been developed in the last decades by the mainstream literature.¹⁸

Italian academics took in the past different positions¹⁹ on what had to be considered the source of the duty to pay taxes: the law itself or the order issued by the Public authority (that is, the reassessment decision by the Revenue service) addressing the taxpayer. The supporters of the first position argued that the law is clear in this respect and according to the text of the Constitution the duty to pay taxes is imposed on the taxpayers by the law and under the law (articles 3 and 53 of the Constitution). The supporters of the second theory observed on the other side that the literal provisions of the law were to be intended as addressing the Public authority, empowering the latter to ask for the payment of taxes. Such a request is sound and can be actually pursued only if it is entirely consistent with the law.

This theoretical distinction, that does not attract the attention of the modern literature any more, played a significant role in shaping the nature of the Trial in taxation and of the power of the judge in deciding cases. If the second position is considered to be prevalent, then the judicial control on the reassessment and audit activity would be considered as a judicial review as it is currently intended, for instance, in Common law countries. The Judge in this case would be called either to validate the decision taken by the Tax office or alternatively to consider it null and deprived on any affect due to a violation of the law or lack of fundamental, formal, requisites of the decision taken by the Tax office.

On the other side, if the first position is taken, the judge would also have the power to change the findings of the reassessment decision, virtually amending any part of it as far as it is consistent with the law applicable. The judiciary would assess the duty to pay the tax, calculating the exact amount of it, virtually overriding the tax return by the taxpayer and the tax reassessment by the Office.

Despite the different positions in literature, and the sophisticated arguments used to support both of the position, Tax Courts these days are currently acting consistently with the second of the positions summarized above. They claim they have the power to change, edit, amend the decision of reassessment issued by the Office as it is challenged by the taxpayer, and within the limits according to which it has been brought to the attention of the Court. In other words, if the taxpayer challenges the reassessment on three points of law, the Court can't consider the audit as null and deprived of any effect on a fourth ground that has not been brought to the attention of the judges by the plaintiff before.

The Constitutional duty to pay taxes played also an important role in shaping tax trial and in limiting for years the actual implementation of any ADR mechanism in the Country. In the past, mainstream literature always considered the duty to pay taxes in the amount prescribed by the law (or imposed by the decision of the authority if the first of the two theoretical positions is taken) as non-disposable and non-negotiable by the Tax Office.

18 Fregni, M. C., *Obbligazione tributaria e Codice civile*, Turin, Giappichelli, 1998.

19 Selicato, P., *L'attuazione del tributo nel procedimento amministrativo*, Milan, Giuffrè, 2014.

Literally, tax administration has no power to negotiate with the taxpayer the amount of the tax to be paid if some discrepancies had emerged between the amount reported by the latter and the amount due, upon a preliminary investigation by the Office. Academic doctrine argues that there's a complete lack of discretionality by the Tax administration in the enforcement of taxes.²⁰

Obviously if this restrictive position is taken, there would be no leeway in the system for any ADR mechanism, inspired as it commonly is by justice, reasonability, and equity too.

This restrictive position was considered unsatisfactory by the Revenue service as well, since all the controversies had to be remitted to the judiciary to be solved, including those that would have been very simple to settle with the rule of reason and in a way of an informal negotiation (consistent with the public interest). Tax judiciary was at that time jammed by a number of cases where a solution would have been possible even outside the halls of justice if this option would have been made legally feasible.

In 1997 the Italian Tax legislator implemented the first remarkable change in the legal system legally allowing the tax Office to negotiate the amount of the tax due with the taxpayer in doubtful situations, particularly in those where the Courts and the literature have no unanimous positions and where the result of a tax litigation would be unpredictable²¹. In practice this would be the case concerning the possibility for a business to deduct some advertisement expenses considered to be excessive, disproportionate and unreasonable (thus irrelevant for tax purposes), by the tax Office. In a situation like this, the Office is more than willing to admit the possibility to deduct advertisement costs only *in parte qua*, to be determined after a kind of negotiation (plea bargaining, in a way) with the taxpayer.

That decision would not open the floor to ADR, but was crucial in piercing the *Mayan veil* that surrounded the duty to pay tax for decades: the tax as a legal obligation and the non-negotiability of this duty. Once the legislator opened the floor to this possibility, the actual implementation of a modern ADR system would be only a matter of time.

1.2. ADR inside and outside the Trial: Dispute Settlement made easy

The current Italian tax system is characterized by a significant number of provisions empowering the Tax office to make deals on the tax actually due and, more than that, on the fines to be applicable for the alleged violation of the law, and possibly tax evasion. This is made possible despite the strong and well established theoretical foundations concerning the non-negotiability of the tax obligation, as it has been mentioned above.

Amongst the various legal instruments, the Consensual audit (in Italian *accertamento con adesione*) is perhaps the most important one considering its effects, the advantages granted and the capacity to settle a number of potential legal cases

20 De Mita, E., *Interesse fiscale e tutela del contribuente*, Milan, Giuffrè, 2006.

21 Legislative decree n. 218 passed on June 19th 1997.

before going to court²². It has been so far the most successful legal instruments aimed at reducing the activity of the Court even if it can't be considered as an ADR mechanism *stricto sensu* understood.

The Italian *Consensual Audit* allows the Tax office to negotiate with the taxpayer the amount of payment actually due in the framework of an adversarial procedure, which is loosely regulated by the law.

It can be applicable to income taxes, VAT and on other qualified indirect taxes, such as inheritance and registration ones, etc. In all these occasion the taxpayer may ask for a Consensual audit as soon as preliminary investigations are initiated till as late as the final reassessment decision is communicated to him. There is actual contrast between the final decision by the Office and the possibility (still made available) to negotiate on it. In that case the taxpayer would actually have two options made available to him: (1) File an appeal to the tax judge challenging the final reassessment under points of law fact or either; (2) formally try submit to the Tax office a request for a negotiation. On its side, Tax office may decline it (with a motivated decision) or proceed negotiating.

Irrespectively of the final outcome of the decision, its submission has one very important effect: it delays by 90 days the deadline for submitting an appeal to the Tax Court against the reassessment (or the audit) communicated. In According to domestic law, once a reassessment decision is notified, taxpayers have 60 days to challenge it if front of the Tax Court. If a formal request for negotiation is submitted, the deadline practically climbs up to 150 days.

The negotiation is not fully regulated by the law, neither in terms of number of meetings or formalities attached to them, nor in terms of possible amount of the tax that might be forfeited by the Tax office in the discussion with the taxpayer. Considering the formalistic nature of the Italian legal system, and the over-cautious approach of the legislator in many fields, is it quite surprisingly to note in this respect that the Tax office has got an impressive, discretionary power in determining how much of the tax requested can be waived. Local offices of the Revenue Service in this respect are assisted by internal regulations and strict Code of conduct in order to prevent unreasonable discriminatory approaches and decision on case-by-case basis, that in the past gave rise to cases of possible malpractices too.

Once the agreement is reached on the tax and therefore on the fines due for the violation, the final decision is signed by both the parties (taxpayer and manager of the local Tax office) and becomes binding on both under law. The advantages for the taxpayer are considerable: fines are reduced to 1/3 of the minimum, criminal sanctions (if applicable) are cut by 50% (so any imprisonment for the most serious cases of tax fraud is drastically reduced) and eventually any accessory fines (revocation of business license, for instance) are removed.

Just like any other reassessment, even the one issued with the consensus of the taxpayer needs to be motivated and the Tax Office has to justify the reason why it decided to make a deal according to the conditions of the case. This clause is crucial in terms of possible internal audit by the Tax Office.

22 See footnote 20 above.

Complex as it is, the Consensual audit should not be considered as an ADR mechanism, in the narrow sense of the concept, for a number of reasons. Even if the adversarial procedure is imposed during the negotiation, including the duty on the office to answer accurately to the objections raised by the taxpayer, it is clear that the whole legal mechanism is managed and operated by the very same office (and in most of the occasions by the very same individuals) who drafted the reassessment (or carried on the audit or the inspection).

Impartiality and neutrality are therefore absolutely missing throughout the process and during the negotiation. On one side the taxpayer negotiates to enjoy a reduction of the tax and of the fines, while on the other side the Tax office negotiates basically to get the money quicker, prevent the need to defend its position in the Court and eventually to speed up the collection process of the tax. There are therefore good reasons on both sides to reach a deal, and that helps in understanding the success of the formula, even if at the same time some criticism arose through years, and very recently.

Most of the criticism relies on the extreme discretionality of the office in reaching arrangements, and the complete lack of publicity to them. Accessing a negotiated audit is still today a random walk for most of the taxpayer engaged. On the other side many observed the disproportionality between the tax (allegedly) evaded together with the fines (unreasonably high) imposed and the possibility to end up the inspection, enjoying the remarkable discount offered by the law.

In other words, it might happen that the tax office would aim high both in terms of tax allegedly evaded and of fines (potentially) applicable just to begin the negotiation on higher ground.

In order to solve this situation and considering the (increasing) success of the ADR system in Civil law litigation, the legislator intervened in 2011 and 2015²³ on the reassessment procedure in order to inoculate in the mechanisms those aspects of impartiality and neutrality that actually were missing during the negotiation describe above.

Yet it had to strike a balance between this needs and the jealousy of the Revenue service in managing an alternative to tax trial in defining a tax controversy.

1.3. ADR within the Trial: introducing Mediation (Technical Aspect of the 2011 – 2015 Reforms)

In order to address the flaws and inefficiencies of the Consensual audit, the Italian legislator, for the first time in recent history, enacted an ADR mechanism²⁴ in taxation in 2011 that was progressively extended to a wider number of cases in 2015.

For all the controversies whose valour does not exceed € 20.000 the appeal to

23 Decree – law July 6th 2011, n. 98, Article 39, § 9 that introduced the new art.17 *bis* to the Legislative decree December 31st 1992, n. 546 (this latter decree is to be considered the Code of the Tax Trial, in a way). Legislative decree September 24th 2015, n. 156 that amended article 17 *bis*, extending the number of cases falling into the Mediation procedure.

24 Or a *quasi*-ADR mechanism, for the reasons expressed below.

the tax Court is considered, under law a petition opening a separate session outside the control of the judiciary: the Mediation. This session is in a way between the procedure and the process, and its aim is to try and bring the parties to an agreement which was not possible to achieve earlier. Its complexity derives from the fact that the formal appeal to the Court by the taxpayer has a sort of dual capacity under law: it has the effect of an appeal and (before than that) of a mediation attempt.

This is a crucial aspect not to be underestimated also under a practical perspective, since Italian Tax lawyers have to draft legal papers in a way to make them consistent with both the formal conditions. More precisely, they should write down on paper and in advance the amount their client would be ready to pay – if this condition occurs – to settle the case before proceeding to the Court.

In this way, the Italian system implemented a solution that is at the borderline between an attempt to review the reassessment (the audit), and offer a possibility for mediation even before the litigation in the Court actually begins.²⁵

The most delicate aspect of the Mediation / ADR system is the one concerning the legal entity empowered to proceed consistently with the proposal by the taxpayer and review the reassessment issued by the Tax office. The legislator decided to grant this power to the very same Tax Administration: more precisely to an “*ad hoc*” bureau inside of it.

It turns out that while tax reassessments are issued by the Tax office, *Inspections Bureau*, the Mediation and the attempt to solve the potential dispute is given to the Tax Office, *Mediation Bureau*: the same structure, the same legal entity, although different people.

On one side, this can be considered a remarkable improvement if compared to the situation recorded in the past, where negotiation has to be carried on with the very persons who drafted the reassessment and were less than incline to accept a mediation (considering that this would be considered as an implicit admission that some errors were made during inspection). On the other side, there’s no need to stress the absolute lack of impartiality on the body empowered to resolve the dispute.

No authors in the past advocated the necessity to appoint third, neutral bodies for this kind of activity like it usually happens in Civil law allowing the Tax Office to keep a kind of monopoly on the tax procedures, compliances and, very recently, collection of taxes too.

The theoretical reason for this conclusion, and for the choice by the Italian legislator to allow the Tax office to rule and take control of the ADR too, is arguably to be found on substantive aspects of the tax obligation. It was stressed in § 1 that the Italian tax system is still remarkably inspired by a theory that dates back to the first years of the latest century, and has been developed right after the implementation of the constitution.

Tax Law is considered part of Public law: thus regulated by principles and provisions of the latter. The Public nature of the discipline covers both substantive

25 This latter statement is not entirely accurate, since the litigation is formally considered as ‘pending’ when the mediation proposal is delivered, even if in that moment it can’t be processed by the Court and is, in a way, frozen.

and procedural aspects of it, limiting the possibility to apply Private law to the tax obligation and preventing private bodies to play a central role in the compliance activities. The only remarkable exception in this sense till 2016 was *Equitalia spa*, a private company empowered to collect taxes: but it was controlled by the Tax office anyway.

Even if in a legal perspective it is possible to attribute public functions to private entities²⁶, the decision taken in the Country, due to the very specific, delicate and cornerstone position of tax reassessment, was to attribute it to Agencies, just like the Italian Revenue Service, that can be considered as an equivalent of the Commissioner in Common law countries. The Agency (Tax office) is not part of the Ministry of Finance, although is under the control of the latter, and acts consistently with a contract signed with the government, with a proper budget and adequate resources.

There is therefore no leeway for the activity of other independent bodies in tax dispute resolution, since the Agency acts as a sort of “impartial part” of the procedure and of the litigation.

1.4. Assessing the Effects of the Reform and the Constitutionality Test

The brief analysis carried on at § 1.3. above, draws the attention to qualified aspects of the Italian ADR system. First of all, ‘*Alternative Dispute Resolution*’ is not used in taxation and arguably won’t be in the next future: the term preferred is ‘*Mediation*’. The nature of the obligation involved (a tax) its public nature and the over-cautious approach that the Italian administration has while dealing with it.

On the other side, it could be theoretically argued, that the two definitions do not overlap, and there are remarkable differences between them starting from the way in which they interact with the trial. The ADR system is inspired to offer a complete alternative to the trial in the traditional sense of the world, and is aimed at delivering a comprehensive and impartial analysis of the situation. The whole process is operated by a third, neutral body. Equity may be used, but the law plays an important role.

Mediation is a similar process in the aim pursued (making ordinary access to justice unnecessary), yet with a different approach. The goal in this case is to strike a balance between the position manifested by the parties, in the attempt to focus their attention on trigger point that satisfies both of them.

Equity is used, a *bona fides* approach takes the lead and priority is to settle the various positions. Apparently, ADR would fit better in taxation law rather than Mediation, but this is not the Italian situation.

In a way, the Italian *Mediation* is much closer to ADR than other Mediations (in the classical sense of the word) are, since the whole phase is managed in the respect of the law (and equity should not be considered, at least, as a driving factor in taking the decision). There’s however a subtle connection between Mediation and Trial that it is not possible to record elsewhere. According to the law, ADR / Mediation is made compulsory for qualified cases and the appeal to Mediation is the very same appeal that introduces the trial. In a purely legal perspective, the paper lodged by the

26 Napolitano, G., *Pubblico e privato nel diritto amministrativo*, Milan, Giuffrè, 2003.

taxpayer's advocate has a sort of dual capacity.

The point that make mediation different from ADR as applied elsewhere in Europe is the nature of the legal entity managing it. It is true, on one side, that the Tax Office incorporated special (*ad hoc*) offices to receive the mediation request and to re-consider audit. But even if internal regulations are quite strict on this respect in granting absolute independency of the *Mediation Bureau* within the Tax office from the influence of the audit and investigation ones, it is evident the absolute lack of impartiality and neutrality. In this respect, data made available are discordant. The Italian Tax Office emphasises the success of Mediation and encourages the legislator to furtherly extend it, while the Barrister association and the Guild of accountants hold a different position.²⁷

2. AN OVERVIEW OF CROATIAN TAX LITIGATION SYSTEM WITH HISTORICAL PERSPECTIVE

Tax disputes were governed in Croatian law as the 1-tier judicial review of tax decisions until the time it was in force the Administrative Disputes Act as from 1991.²⁸ It is interesting to mention that this was the Act of taking over the Administrative Disputes Act, meaning that 1991 Act takes over the Administrative Disputes Act of former Yugoslavia²⁹ as the republican law. This Act has not been changed for several decades and to this 1990-days was considered in many issues as enough or quite good legislative framework. The act that changed it was the new Administrative Disputes Act, form 2010 year,³⁰ in force as of January 1st, 2012 and significantly changed the former concept of the administrative judiciary. Instead of the single Administrative Court of the Republic of Croatia, the Act has introduced four administrative courts, in Zagreb, Split, Rijeka and Osijek and the High Administrative Court seated in Zagreb.

Administrative disputes are in principle adjudicated in two instances, the High Administrative Court decides on appeals against decisions of the administrative courts. Procedural rules prescribe the obligation of the administrative courts to conduct an oral hearing in the first instance.³¹ Such procedural solution allows the court to independently determine the facts and the parties' right to appeal against decisions of the administrative courts should assure higher legal certainty and better protection.

There are opinions that former model of administrative disputes resulted in long lasting procedures and great number of unsolved cases, so the aim of administrative judiciary reform in 2010 were in higher legal certainty, better protection and improved quality with speed of adjudications and some kind of harmonizing with the EU legal

27 Siciliotti, C., *Per una vera mediazione serve terzietà*, 2010, retrieved: January 7, 2017 at: <http://www.cndcec.it/Portal/News/NewsDetail.aspx?id=1e002899-1a06-4ebf-b74f-ff4f99f25bc6>.

28 Published in the Official Gazette of the Republic of Croatia ("Narodne novine") No. 53/91, corrections OG 9/92. i 77/92).

29 Official Gazette of SFRY, no. 4/77

30 Published in the official gazette of the Republic of Croatia "Narodne novine" No.20/10 (OG 20/10)

31 Exceptional cases are defined by law.

standards.

An historical overview gives us a base to conclude that almost the only purpose of tax dispute before the court - administrative dispute purpose was the control of the tax act legality, still remain unchanged. It is to say, that the assessment of the tax act's legality is still the dominant way of resolving tax disputes while still lacking addressing the rights and obligations.

Such an approach, dominant in tax matter from the beginning of the reform of the Croatian administrative judiciary, remains unchanged to the present day.

Academic literature properly claim that resolving tax disputes and cases through mere review of the legality of the tax act means not only a longer and more difficult road to a lawful decision, but at the same time creates the possibility that the Administrative Court decides on the same subject and case several times. There is no doubt that such an approach and solution makes administrative courts less effective, and overburdened with tax cases, since the tax administration leaves to the courts a resolving of complex cases.³²

Despite the fact that an administrative dispute court settlement in tax matters for a long time was reduced to a dispute about the legality of an administrative tax act, recent times records that tax cases are sometimes before administrative courts handled as full jurisdiction disputes, in which the court decides on the facts that court has found and determined. This is especially important finding considering that an administrative dispute as full jurisdiction dispute is in accordance with the guaranteed judicial protection of the taxpayer's rights. The administrative courts facilitating and achieving the effective legal protection of citizens in matters of taxation are the aim that provoke as necessary thoughts on the development of a new and additional instruments or mechanisms of tax disputes resolutions.

Indeed, it is obvious that the development of society creates new and changes the existing rules and regulations, leads to the development of new branches of law, and consequently uses a new "models of justice". As a consequence, today administrative dispute involves a large number of legal areas. Such a large number and variety of legal areas and issues that derive from them led to further specialization and development of special administrative courts, such as the financial courts, tax courts, labour courts, etc. At the same time, this development is present and represents a constituent part or component of an "European process" characterized by the movement towards a common European model of administrative justice. In this sense, it is possible to conclude on the inevitability of further development and the organization of special administrative courts and even extra-judicial mechanisms for the resolution of administrative, including tax disputes.

The last few years amendments of Croatian tax procedural code, General Tax Act (hereinafter: GTA)³³ provide some new aspects of contracting and agreements

32 See, more, Pičuljan, Z., Britvić-Vetma, B., *Primjena i evolucija upavnog spora pune jurisdikcije*, Zbornik radova Pravnog fakulteta u Splitu, god. 47, 1/2010, p. 59.

33 *Opći porezni zakon* [General Tax Act: GTA], Official Gazette Nos. 147/08, 18/11, 78/12, 136/12, 73/13, 26/15 and 44/16. New GTA, in force from January 2017, published in Official Gazette No. 115/16. did not bring amendments in this field. The paper was written before amendments.

between tax payers and tax authorities, still under the tax procedure, where while preserving the legality, reduce the need for administrative court dispute resolution and taxpayer's protection.

It is known that the Council of Europe Recommendation³⁴ of 2001 proposes a number of different instruments, such as conciliation, mediation, arbitration and communication, with the aim of facilitating the administrative judiciary.³⁵ The current dysfunction in the relationship between tax authorities and taxpayers might be an additional reason for proposing a different model of resolving tax disputes.³⁶

Subsequent fragment of the paper presents short overview of present procedural instruments and mechanisms of Croatian tax procedural rules with the same aim – facilitating the administrative judiciary and reducing the tax disputes. In other words, following chapter brings short overview of preventing mechanism.

2.1. Selected tax procedural instruments and reducing tax disputes: ruling system, tax audit's final interview, tax settlement, horizontal monitoring, taxpayer's special status agreement

The literature³⁷ distinguishes between pre-filing measures to avoid disputes and avoiding conflicts during audits. Avoiding disputes before filing a tax return relates to interpretation of tax laws. Such a mechanism is rulings system. Croatian tax law has adopted institute of advance tax rulings through the GTA amendments in 2015, after a previous failed attempt in 2009. Advance tax rulings are important element of modern tax systems that aims are the protection of taxpayers' rights and achieving the predictability of tax authorities' actions with avoiding or reducing tax litigations.³⁸ The Croatian GTA³⁹ sets out that rulings may be requested for determining taxable supplies for dividing input VAT purposes, tax treatments of investment projects of value over EUR 2.66 million, determining corporate tax base in mergers, divisions, transfers of assets and exchanges of shares, implementation of tax treaties and tax treatment of business activities which for their features cannot be comparable or usual with business activities performed in Croatia.⁴⁰ The cost of ruling depends on the taxpayers' earnings. Rulings are binding on tax administration. Ever since Croatian tax system has just recently introduced advance tax rulings it is not possible to determine any practice or effectiveness.

34 Rec(2001), from September 5, 2001.

35 Koprić, I., *Europski standardi i modernizacija upravnog sudovanja u Hrvatskoj*, Zagreb: Institut za javnu upravu, 2014, p. 12-34.

36 An illustrative example: the taxpayers debt in 2014 was 51 billion HRK or 14.95 GDP. See, in Rogić Lugarić, Tereza and Čičin-Šain, Nevja, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?* Zbornik Pravnog fakulteta u Zagrebu, 64(3), 2014, p. 348.

37 See, Thuronyi, Victor and Espejo, Isabel, *How can an Excessive Volume of Tax Disputes Be Dealt With?* Tax Law Note, IMF, 2013, p. 6.

38 del Campo, Carolina, *Dispute resolution procedures in international tax matters*. Cahiers de Droit Fiscal, 101a., 2016, p. 33.

39 GTA, Article 9a (new GTA, Art. 10).

40 Cipek, K. and Houška, M. *Obvezujuća mišljenja – novost u praksi Porezne uprave*, Porezni vjesnik, 9, 2016, p. 48-55.

The final interview as part of audit procedure is regulated by Art. 111 GTA also might be a kind of mechanism that serve to the same goal: avoidance or reduce disputes in very early stage, with the goal of informing the taxpayer with the result of audit procedure prior to the issuance of minutes and to discuss all disputable facts, legal assessments, conclusions and their effects on the assessment of tax liability and make a note for the file thereof. Tax administration on that occasion should provide the taxpayer with the opportunity to learn from tax inspector about the evaluation of business records. Also should be provided with the possibility to present his standpoint and through the dialog and discussion clear any vagueness.⁴¹ However, in practice⁴² this instrument merely allows the taxpayer to express his views to the tax inspector, without providing a mechanism to resolve any disagreement arising from the final interview. Taxpayers complain about the lack of coherent approach in proceedings by tax officials and interpretation of the laws so such treatment leads to mistrust in tax administration. The final interview should not be purely formal but efficient and economic model of communication.⁴³ Both parties of the final interview should contribute to determining facts and the progress will be made if both parties agree on matters they previously disagreed on and any disputes which may arise in the future is avoided.

Tax administration and taxpayers may agree on tax settlement for newly determined obligations during audit. Tax settlement relates to amount of tax due in procedures where tax was estimated, deadline for payment of taxes, reduction of interests and waiver from processing tax offence. In order to reduce uncertainties which may occur during an audit, this instrument was introduced to help parties reach an agreement about the tax liabilities. The taxpayer accepts the tax liability and waives the right to use legal remedies while the tax administration allows the reduction of the amount of tax due and more successfully collects the taxes due. As well, the duration of tax procedure is reduced, taxpayers are encouraged to voluntarily comply to the tax obligations and hence reduce any dispute that may occur.

The precondition for a tax settlement is to accept newly determined tax liabilities by the taxpayer and his renunciation from using remedies. The tax settlement must be in the written form and may not be against the regulations, the public order or the rights of a third party. It may also not be used if the case has elements of a criminal act.⁴⁴

The horizontal monitoring is seen as a new form of tax audit and control based on the mutual trust between tax administration and taxpayers but horizontal monitoring or horizontal supervision as system of quality control, based on mutual trust, understanding and transparency of taxpayers and tax authorities in dealing with tax risks has preventive function and might reduce tax disputes.⁴⁵ Croatian tax

41 Vukšić, Z., *Zaključni razgovor u poreznim nadzoru*, 22 *Porezni vjesnik* 2,2013, p. 91-102.

42 T. Rogić Lugarić, N. Čičin-Šain, *Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?*, 64 *Zbornik Pravnog fakulteta u Zagrebu* 3, 2014.

43 Vukšić, p. 101.

44 See, GTA.

45 Vukšić, *Zdravko, Provedba horizontalnog praćenja u velikih poreznih obveznika*, *Porezni vjesnik*, no. 5, 2012, p. 84.

administration just began with the application of this institute so experiences are still not known.

The 2016 Ordinance on the methods of granting and the abolition of the special status of the taxpayer for the purpose of promoting voluntary compliance (hereinafter: Ordinance), sets out the legal framework for conclusion of the Agreement on the voluntary fulfillment of tax obligations and granting the special status for taxpayers. The number of these special agreements between tax administration and the taxpayer is restricted on 30 per year. As it is a new institute in Croatian tax law it is not possible to conclude on the efficiency of such instrument in the reducing the number of tax disputes.⁴⁶

2.2. Background of the appearance of ADR's in tax matters

Changing the taxation paradigms is seen as the consequence of trend in modern societies that goes from a concept that taxation is based on the power, which is given to the authorities and based on principles and legal rules to a new, more intensive, stronger but enhanced relationship whose foundations are not in power or force but in the correct or fair-play approach. Such a new approach stems from a kind of voluntarism and voluntary compliance of taxpayers.⁴⁷

The fundamental approach that is experiencing change is based on the concept of public law in which the relationship between taxpayers and tax authorities is based on the realization of a power to tax. This concept is mostly derived from the German 19th century public legal doctrines, according to which it is a relationship in which is realized the power to tax. Hence the understanding that the tax payment is a tax obligation created and originated by the public authorities. This power to tax is legalized and is grounded in law, so the principle of legality as a rule is of the fundamental importance according to which there is no taxation without representation. In other words, the realization and implementation of such power and right of the state to impose taxes, provides tax administrations with such administrative powers as part of public authority's power of taxation. This supremacy of public and tax authorities is through tax procedural rules specifically emphasized. The other, the private legal concept influences that relationship indeed, changing the nature of that relationship and balances it, so the participants of this relationship are becoming closer to the relationship of creditors and debtors. However, unlike private-debt relationship in which the creditor can give up its claims, in the tax law relationship as public law relationship, the principle of legality and equality does not give the right to public/ tax authority to withdraw from its requirements but on the contrary, it has a duty to insist

46 Žunić Kovačević, N., Gadžo, S., Klemenčić, I., Flexible Multi-Tier Dispute Resolution, Working paper /under publication process, IBFD.

47 Similar, see: Soler Roch, M., *Tax administration vs. Taxpayer. A new deal?*, available at : <http://www.eatlp.org/uploads/public/Reports%20Rotterdam/Moessner%20lecture.pdf>, (1.5.2012.), see also, Part I. The Concept of Tax in EU Member States Draft 06 05 2005 – General Introduction and Comparative Analysis, available at : http://www.eatlp.org/uploads/public/part_I_concept_of_tax_in_eu_member_states_05_05_09.pdf (20.12.2016.)

on its request to the debtor - taxpayer to pay a tax.⁴⁸

A comparative point of view shows that the tax systems of European countries in the last decade experienced key changes. The relationship between taxpayers and tax authorities is more and more based on the concept of fair play, mutual cooperation and even emphasized voluntarism. The OECD's 2012⁴⁹ study brings the so-called models of stronger cooperation and enhanced relationship models that should result in the new relationship of the taxpayer and the tax authorities based and maintained on mutual trust.

The complexity of the Croatian tax system and its frequent changes has become common reason for increasing incidence of tax litigations before administrative courts. In the same time legal security of tax payers is seriously compromised with frequent interferences in tax laws that have become almost a practice. Serious interventions into the rights of taxpayers should be done with consultations, not only with experts but also with taxpayers and other stakeholders who have an interest to be involved and should precede to the legislative interventions into the fundamental rights of taxpayers. Incidence of tax disputes before administrative courts is a clear indicator of the inevitable considerations on the issue of alternative forms of resolving tax disputes.⁵⁰

3. CONCLUDING REMARKS: TOWARDS A MORE EFFICIENT (AND IMPARTIAL) ADR MECHANISM IN ITALY AND CROATIAN PERSPECTIVE

The Italian Mediation procedure can hardly fit in the traditional concept of ADR. According to the mainstream literature, the Alternative dispute resolution systems may be vary, but have a common background: the impartiality of the entity managing the conflict.

The Italian solution is completely lacking of this feature, and this absence makes the whole mechanism both inefficient and inadequate to match the constitutional standard required by our fundamental charter that are compulsory in the Court, but nonetheless should inspire procedure as well (right to a fair procedure).

There are, at the moment, some draft bills proposals pending at the Italian parliament and finalized at changing article 17 *bis* mentioned above, introducing truly impartial bodies. One of these proposal has been actually submitted by the Government⁵¹ but the current complex political situation in the country makes it impossible to have forecasts, even in the short run.

48 Lončarić – Horvat, O., Zastara u poreznom pravu, Pravo i porezi, br. 6/2003.,p.4., See, also, Žunić Kovačević, Nataša, "Europeizacija" hrvatskog poreznog postupovnog prava - o dosadašnjim ne/uspjesima kroz prizmu zadanih i imperativnih promjena, Godišnjak Akademije pravnih znanosti Hrvatske, vol V, No..1., 2014., p. 78-91.

49 OECD Tax Intermediaries Study - Working Paper, No.6 – The Enhanced Relationship, available at: <http://www.oecd.org/tax/administration/39003880.pdf> (12/12/2016).

50 Žunić Kovačević, Nataša, Upravnosudska kontrola u poreznim stvarima, Hrestmatija Upravno sudovanje, Nacionalni i usporedni aspekti, Split/Paris, 2016, p. 381-400.

51 See the draft text available and released on October 19th 2016.

The changes in the paradigm of taxation makes it clear that the state is responsible for creating mechanisms for the dialogue as preventing or reducing tax disputes and litigations instrument. As expected, a certain number of tax disputes is inevitable. But, it is of the great importance to mention the right to the effective judicial protection in tax matters as a guarantee is one of the grounds of the rule of law.

As Croatian legislator still do not offer solution for new mechanism of tax dispute settlements, considering an increasing number of such disputes, it is useful to follow foreign experiences. It seems pragmatically to propose a mandatory mechanism, following the Italian practices. Such, a piece of legislation would significantly increase the achievement of legal security and the efficiency of tax law. For the meantime, there is a still room for additionally build up a new, preventing measures and to improve the same, above described prevailing preventing measures.

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Sažetak

USPONI I PADOVI U IMPLEMENTACIJI SUSTAVA ALTERNATIVNOG RJEŠAVANJA SPOROVA U TALIJANSKOM I HRVATSKOM POREZnom SUDOVANJU

Autori u radu daju prikaz sustava alternativnog rješavanja sporova (ADR - Alternative Dispute Resolution) u poreznim stvarima, kroz komparativnopravnu prizmu, odnosno u svjetlu talijanske i hrvatske pravne doktrine i zakonodavstva. U prvom dijelu rada fokus je na talijanskim iskustvima implementacije ADR sustava. Drugi dio rada prikazuje razvoj hrvatskoga pravnog okvira u pokušajima izgradnje ADR mehanizama. Rad u oba dva dijela sadrži prikaz doktrinarnih stajališta, a u poglavljima se naglašava povijesni i teorijski aspekt tematizirane problematike. Autori raspravljaju i prikazuju, na komparativnoj razini i provedbene implikacije. Utjecaj doktrine javnog prava na pojavnost i razvoj ADR sustava naglašen je u komparativnom izlaganju recentne prakse talijanskog i hrvatskog sustava rješavanja poreznih sporova.

Ključne riječi: porezni sporovi, mehanizmi alternativnog rješavanja sporova, talijanska iskustva, razvoj hrvatskoga sustava.

Zusammenfassung

HÖHEN UND TIEFEN IN DER UMSETZUNG DER ALTERNATIVEN STREITBEILEGUNG (*ALTERNATIVE DISPUTE RESOLUTION*) IN DER ITALIENISCHEN UND KROATISCHEN STEUERERKLÄRUNG

Diese Arbeit diskutiert die alternative Streitbeilegung (*ADR - Alternative Dispute Resolution*) in Steuerangelegenheiten, wie sie in der italienischen und kroatischen Doktrin und Legislatur dargestellt ist. Der erste Teil befasst sich mit den italienischen Erfahrungen und der zweite Teil diskutiert die kroatischen Entwicklungen. Beide Teile befassen sich mit den Doktrinen und in den Kapiteln betont die historischen und theoretischen Aspekte sowie praktische Auswirkungen der Doktrinen des öffentlichen Rechts auf die Entstehung und Entwicklung von ADR anhand einer vergleichenden Darstellung der italienischen und kroatischen aktuellen Situation der Steuerstreitigkeiten Resolutionen.

Schlüsselwörter: Steuerstreitigkeiten, ADR-Mechanismen, italienische Erfahrungen, kroatische Entwicklungen.

Riassunto

LUCI ED OMBRE NELL'ATTUAZIONE DEL SISTEMA DI RISOLUZIONE ALTERNATIVA DELLE CONTROVERSIE NEL CONTENZIOSO TRIBUTARIO ITALIANO ED IN QUELLO CROATO

Nel lavoro gli autori esaminano il sistema della risoluzione alternativa delle controversie (ADR - *Alternative Dispute Resolution*) nelle questioni fiscali in un'ottica comparatistica, ovvero alla luce delle legislazioni e delle dottrine italiana e croata. Nella prima parte del lavoro l'attenzione è rivolta all'esperienza italiana di attuazione del sistema ADR; mentre la seconda parte del lavoro è dedicata all'evoluzione del quadro normativo croato nei tentativi di costruzione di meccanismi di ADR. Il lavoro in entrambe le sue parti contiene una rassegna degli orientamenti dottrinali e attraverso i vari capitoli si sottolinea l'aspetto storico e teorico della questione esaminata. Gli autori dibattono ed espongono sul piano comparatistico anche le implicazioni dell'attuazione del sistema in esame; mentre l'influenza della dottrina di diritto pubblico sulla comparsa e lo sviluppo del sistema ADR viene evidenziata mediante l'esposizione della recente prassi italiana e croata del sistema di risoluzione dei contenziosi tributari.

Parole chiave: *contenziosi tributari, meccanismi di risoluzione alternativa delle controversie, esperienza italiana, evoluzione del sistema croato.*

