

Excise Duties and the Prevalence of Substance Over Form: The Omission of a Formal Compliance Requirement Does Not Preclude the Application of a Subsidized Tax Regime

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Giorgio Emanuele Degani (Università Cattolica del Sacro Cuore; Studio Legale e Tributario)

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The Court of Cassation (the Italian Supreme Court), in recent judgment no. 14983 of 15 July 2020, has set forth the principle of law that, as regards excise duties, **the omission of a formal compliance requirement** (notably, sending a monthly declaration to the Italian Customs Agency) **does not preclude the application of a subsidized tax regime**, given the objective nature of the latter. In this regard, the Italian Supreme Court ruled that it is sufficient that the substantive requirements included within the provision at hand are met for the taxpayer to be eligible to the tax benefit.

The facts of the case are as follows. The taxpayer omitted the submission of a monthly declaration under Italian tax law (as enshrined in Article 52 of Legislative Decree no. 504 of 26 October 1995), which is a condition required for a taxpayer to benefit from the subsidy on electricity. Only based on this omission, the Italian Customs Agency denied the subsidized scheme, although the taxpayer at hand had all the substantive requirements required by the legislation to obtain it. On appeal by the taxpayer, the Italian Supreme Court's judges found the denial by the Italian Customs Agency of the subsidy scheme at hand as being illegitimate, given the formal character of the aforementioned monthly declaration. Notably, the top-tier Court's judges considered the declaration at hand as being a requirement of secondary importance, whose omission therefore cannot in any way result in the loss by the taxpayer of the right to obtain the subsidy in question as prescribed by the law.

The Italian Supreme Court's position appears to be in line with the Court of Justice of the European Union (CJEU)'s assertions. With particular regard to value added tax (VAT), the CJEU has in fact made it clear that **non-compliance by taxable persons with formal VAT requirements** (e.g., VAT accounting, invoicing and declaration) **does not preclude the right to deduct input VAT, where the related substantive requirements** (e.g., actuality, certainty and inherence) **are met** [1].

In general, under EU law it is stipulated that, if the tax authorities have all the information necessary to ascertain the existence of the substantive requirements, the right to deduct for a taxpayer cannot be denied, even if certain formal obligations have been omitted by the taxable persons in question.

As such, the principle of the prevalence of the substance over form is now applied in the context of harmonized indirect taxes other than VAT, having the CJEU also extended its application to excise duties [2]. In this regard, it is stipulated that, if the objective elements of the products subject to excise duties are ascertained and not contested, the failure to fulfil certain formal obligations cannot preclude the application of the benefit to which a taxpayer is entitled, because such a denial would be contrary to the principle of proportionality.

In light of all these considerations, the principle of law affirmed by the Italian Supreme Court in the case at comment must be fully adhered to, not least because that decision has its ground on a proper appreciation of the principle of proportionality of administrative sanctions (which also covers sanctions in the tax field), pursuant to which penalties must be strictly proportionate to the violation committed by the taxpayer [3].

[1] See, e.g., CJEU, 11 December 2014, Case C-590/13, *IDEXX Laboratories Italy*, EU:C:2014:2429; CJEU, 8 May 2008, Case C-95/07, *Ecotrade*, EU:C:2008:267; CJEU, 12 July 2012, Case C-284/11, *EMS Bulgaria Transport*, EU:C:2012:458.

[2] CJEU, 2 June 2016, Case C-418/14, *Roz Swift*, EU:C:2016:400.

[3] See, e.g., CJEU, 12 July 2001, Case C-262/99, *Louloudakis*, EU:C:2001:407; CJEU, 26 April 2017, Case C-564/16, *Tibor Farkas*, EU:C:2017:302.