

Tax concessions and co-operatives in direct taxation in Italy.

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Abstract - This work focuses on tax concessions in favour of co-operatives in Italy. It outlines how, as a result of company law reforms, these concessions have been proposed exclusively for the benefit of co-operatives “a mutualità prevalente”, i.e. with prevalence of mutual aid, according to their “social function” in the exercise of the economic activity. Taking this utility into account, the concessions outlined by tax legislation are examined, in order to verify to what extent these laws coordinate with their civil law counterparts, so that the problems arising from the application of fiscal concessions only to co-operatives with prevalence of mutual aid may be analyzed.

1. Introductory comment- The Italian company law reform [ex art.8, Bill (D.L.gs) n. 6/2003, Bill (D.L.gs) n. 37/2004 and Bill (D.L.gs) n. 310/2004], which has substituted Title VI of the civil Code, has singled out from within the generic category of co-operative companies the specific difference between the “co-operative with prevalence of mutual aid” and the “co-operative not with prevalence of mutual aid” and has stipulated a particular and articulated discipline regarding the former. Art. 223- 12, subsection 6 on the actuation and transitory norms of the civil code decrees that “*le disposizioni fiscali di carattere agevolativo previste dalle leggi speciali si applicano soltanto alle cooperative a mutualità prevalente*”. That is, “the tax concessions contemplated by the special legislation can only be applied to co-operatives with prevalence of mutual aid”.

It is above all in the matter of tax or fiscal concessions that these various types of co-operative receive different treatment. The legal relevance of the distinction can be seen from the fact that only the co-operatives which answer to particular requisites of “prevalent mutuality” can benefit from the tax concession norms, this being accounted for by the greater “worth” which the lawmaking body attributes to the social function as the objective of such co-operatives.

The “social function” of the co-operative is recognized by our Constitution as being one of its fundamental principles. According to art.45 of the Constitution, the social function, i.e.

the founding of a business that “democratically manages itself”, is a consequence of the mutual nature of the co-operative as such. In line with this social function, the legal system promotes and favours the co-operative as a type of association using the most suitable means, and, with opportune controls, ensures its nature and objectives.

However, the civil Code contemplates so-called “spurious mutuality” and, in virtue of the statutory autonomy, admits that there may be a slackening of the objective of mutuality, allowing the co-operative to carry out activities with third party persons, involving the creation of profit and therefore with an intrinsic aim of possibly creating profit.

The reforms in civil law disciplining the co-operative has a notable impact on the tax concessions which have been decided by tax legislation (special laws). All co-operatives, in as much as they are co-operatives, are an expression of that social function which is decreed by the constitution. The lawmaking body does, however, apply different treatment in tax questions, and this, not in a general and uniform manner for all co-operative companies, but only for those which feature among the parameters of “mutuality” and “prevalence”.

2. The question of qualification of the civil law institutions and of the discrimination made by the legislation in favour of co-operatives with prevalence of mutual aid

Regarding the points already mentioned, before making a close examination of the tax concessions in favour of co-operatives, it would be opportune, first and foremost, to look at the definition of the ideas of “mutuality” and “prevalence”, which are described in a different sector of legal discipline, and at the question of lawfulness, in the light of the constitutional principles, of making such concessions to these types of co-operatives.

2.1 “Prevalence” – The first question is a formal one pertaining to the law system. When posed with a term which is used in a tax context, whose definition is not to be found among those in a code of fiscal law, we are used to this tax legislation making automatic reference to other sectors of jurisdiction in order to validate its meaning or technical notions. In our case, this alternative sector of jurisdiction is civil law and hence it is civil law that we use as our reference point. If these concessions are to benefit co-operatives which according to the civil Code can qualify as being “of prevalent mutuality”, the appropriate branch

of civil law which has in fact elaborated the definition of such a category should be used as a reference.

The civil Code however makes a distinction between companies whose aim is profit and whose profit is devolved to the benefit of the partners or associates, and companies (co-operatives) whose democratic management and organization characterizes them. In this case, the law speaks of “an aim of mutuality”, but it does not clearly elaborate what is meant by “an aim of mutuality”.

Nonetheless, it is generally accepted that the qualifying character of a co-operative is the mutual advantage (either immediate or deferred) for the associates instead of profit. This advantage, of an economic nature, is distinguished from the company profit in as much as it satisfies a common requirement or need, because it offers the associates goods or services, purchased or realized within the co-operative itself, at an advantageous price, or it offers its associates a higher retribution than that of the market for goods or services which they themselves may confer to the co-operative. Such advantages for the associate mean a higher cost and a lower return for the co-operative.

Associates may also reap the benefits of mutuality indirectly (the so-called “ristorni”, i.e. co-operative bonuses), for example in the case where the production and work company confers a sum to the associates in the form of a supplement to their retribution or when the co-operative and its consortia confer a sum in the form of restitution of a portion of the price paid for goods and services or in the form of increased retribution for services supplied. (see *infra* par.4.1.1.)

Company law emphasizes the concept of “prevalence” for which it offers detail regarding both quality and time length. The Code stipulates the qualitative conditions of prevalence; once these are in place, the economic activity of the co-operative is carried out for the most part to the advantage of the associates of the co-operative themselves. Such conditions (art. 2512) imply (differently where there is a different type of mutual exchange) that : a) the supply of goods or services goes to the benefit of the associates, in prevalence (*consumers’ co-operatives*); b) that the purchase of goods and services on the part of the co-operative are made from suppliers who are in prevalence associates (*producers and processing co-operatives*); c) that the work supplied for the co-operative activity is for the most part carried out by the associates of the same (*worker co-operatives*).

Regarding the other aspect, the Code also stipulates numeric criteria (quantitative) in order to determine objectively the subsistence of a prevalent situation (evaluation which must be verified by the administrators and auditors of the co-operative on a yearly basis) and the parameters for the results must be posted in an integration to the yearly balance sheet of the co-operative (art. 2513). The criteria are set at the revenues from sale of goods or services to associates of more than 50% of the total revenues, or else, when the labour costs of the associates are in excess of 50% of the total labour cost. Likewise in agricultural co-operatives, the total value of assets contributed by the associates must exceed 50%. If various mutual exchanges occur, then the “prevalence” is considered by calculating an average.

Besides “conditions” and “criteria”, the Code requires the co-operative to respond to further “requisites” for it to qualify as “with prevalence of mutual aid”. These requisites, which could be referred to as “statutory” because they must be stated in the social charter, include some prohibitions and an obligation requiring that the subjective profit partners should be limited. (art. 2514). Lastly, civil legislation on co-operatives regulates the consequences of a loss of the “prevalence” element (art. 2545- para. 8).

“Prevalence” is a necessary *conditio*, however it is not a sufficient criterion for the co-operative to be eligible for tax concessions. The co-operative with prevalence of mutual aid must be in the (first) section of the official Register officially instituted by the D.M. i.e. the Ministerial Decree of the 23 June 2004 with art 9 of the D. Lgs, i.e. Bill n. 6 of 2003 and of art. 223- 16 on the actuation and transitory norms of the civil code, specifying, in addition, the particular “category”. This registration is not a mere “formality” nor a simple duty of the public administration. The benefit of the tax concessions is, however, retroactive, being valid as from when the request for registration is presented and not from when it is granted. Once the prevalence has been acknowledged and the co-operative registered in the official Register of Co-operatives of the Ministry for Production, sector of the official Register of businesses which is managed by the local Chambers of Commerce, there should be no further obstacle to the due concessions and benefits from the tax office.

2.2. The legitimacy of reserves on concessions. Our second comment regards the substance. Is it or is it not legitimate for the law to make a discrimination among co-operative companies

on the basis of greater “merit”, an approach which, in reality, translates into a choice of laws having been made to limit tax concessions only to those particular co-operatives with prevalence of mutual aid? The distinctive legislative feature of the co-operatives with prevalence of mutual aid is that in addition to the patrimonial advantages already inherent to the mutual nature of the co-operative business, the associates also benefit from a tax regime which favours them economically.

In reality, taking into account unreal or spurious mutual aid and the possibility for the company to devolve goods or services to any person who is not an associate of the co-operative, the crux of the question remains the same both for civil legislation and fiscal legislation, i.e. where to establish the break-off point where the reduction of taxes for mutual aid activity and the corresponding tax on increase of profit of the co-operative renders the latter in fact on the same footing as the profit-based companies. Furthermore, this latter situation is inevitably responsible for creating distortions in the market. The privileged company statute enjoyed by co-operatives and the tax concessions in their favour have been structured and articulated with mutual activity in mind. If these benefits can be enjoyed by co-operatives where mutual aid is not prevalent with respect to profit, this obviously creates a sizeable problem for free competition between companies!

Before the company law reform, it was considered inopportune and untoward to outline a clear solution with civil norms which would impose a precise measure of mutual aid activity. For this reason, the mutual aim was considered case by case. From the outside, through a system of administrative and judicial control and from within the co-operative, through systems of participation and monitoring of the associates.

A similar empiric approach to the problem of managing the mutual and the profitable activity is to be found in tax legislation. Here, on the one hand, limits have been established that are both practical (total restriction of distribution of profits and reserves) and formal (registration with certain official institutions) to discipline the application of the special taxation regime for co-operatives (usually exemption from tax payment) and, on the other hand, a decision to make certain clear and explicit choices, at a management level, in favour of establishing the degree of mutuality of a company.

Not even the civil reform of company laws has managed to clarify the embroilment of a “correct” rapport between mutuality and profit. Art. 223-12,- actuating the content of art.

5, subsection 1e), of the enabling act n. 366/2001- makes the point of clarifying that to benefit from tax concessions will only be the co-operatives which are of prevalent mutuality and not all co-operatives.

In order to remain coherent with the premise that the social function, through mutual aid activity, is the characteristic of the co-operative as a phenomenon and hence all co-operatives are therefore in possession of an eligibility which distinguishes them from profit-based enterprises, these –with no particular distinctions made – should be eligible to enjoy the benefit of tax support, as art. 45 of the Constitution declares. The question remains, then, why has the legislator reserved the possibility of accessing, by exclusive rights, a part of the entire system of tax concessions for “co-operatives with prevalence of mutual aid”? This legislative choice appears to be anything but arbitrary and irrational. The reason for the advantageous tax treatment ensured in favour of certain co-operatives may be explained in by the fact that the co-operative with prevalence of mutual aid has greater difficulty in maintaining the mutual nature when carrying out its activity than other “not prevalently mutual aid co-operatives”. It is obliged to operate, for the greater part, only with and among its associates which, from a management point of view, may jeopardize full economic development. However, along with this, the “statute” declares the obligation to limit subjective profit.

It is the reasons of “greater” worth, therefore, which pertain to certain types of co-operative in carrying out the social function as established by the Constitution; the same reasons which, after legal evaluation, render these most suitable of special treatment than other types, that justify the reserved treatment of tax concessions.

One could obviously discuss (but not here) whether the configuration of “co-operative with prevalence of mutual aid”, as described by the reform of company law, does in fact attribute a distinct social function to this type of company to a sufficient degree for it to merit particular tax consideration.

3. The application of the tax dispositions: the true nature of the special concessions regarding co-operatives.

Under the general corporate cooperative form, only those cooperatives which are “prevalently of mutual aid” are eligible for the extra economic advantage of tax concessions beyond that of their mere mutual nature. This does not exclude the possibility for all co-operatives, even those which are not with

prevalence of mutual aid, to benefit from certain advantages different from those pertaining to taxation, because even though these measures or precepts may be formally considered as being of a tax nature, in reality they are not and, therefore, all co-operatives can benefit from them.

It is necessary, therefore, to read beyond the at-times-imprecise terminology of the law, to discover the real nature of such “tax concessions” contemplated by the various taxation norms regarding co-operatives.

This is no simple matter. The approach to tax or fiscal concessions - call them what you will- is generally of a case-record or empirical nature, due to the lack of its disciplining by Italian tax law, the results of which approach are not always convincing. The legal doctrine has worked to define the distinctive traits of tax concessions and has arrived at a distinction between *concessions*, in the true sense of the word, and *concessions* in a broader sense. It oscillates between the two.

a) One theory gives the notion of tax concessions, in the proper sense, as recognisable every time tax discipline applies a “subtraction” in taxation or applies a “modification” to the tax structure in derogation from the normal system of taxation. The tax norms of concession are therefore derogations, exceptions, to the general norms which establish the abstract tax case law or regulate the functioning of the tax system. These derogations from the rules subtract certain goods or individuals from the position of being subject to the normal taxation for the purposes of mere technical tax.

b) A different theory suggests that tax concessions (this time in a broader sense) consist of “positive sanctions”, that is the legal pleasant consequence provided by “rewarding” tax norms which come into action as a consequence of observing other norms. The State enjoys tax concessions because socio-economic interventionism features among its duties. When the State - in carrying out its monitoring and management of the economy and society- intends to encourage certain economic activity, which it does not take upon itself to carry out, it can create tax measures (concessions) which aim to reward, in this case indirectly (through total or partial tax relief) those subjects who have carried out the economic activity encouraged by the State, those who have, therefore, observed other juridical norms. It can be seen that tax concessions constitute an abstract and not a general set of measures provided by the law to benefit certain taxpayers by alleviating the pressure of

taxation, but the purpose of the system is essentially promotional and not strictly fiscal. State intervention in the economy and social relations through the tax law in this manner is justified and considered admissible constitutionally, with the sole limits being moderation and no arbitrary intervention.

Such, in brief, are the reference points regarding tax concessions, which should be compared with the content of the EU law on the matter of State aid, as in art. 87, TCE, now art. 107, TFUE.

In this scenario, it is necessary to verify which category of concessions provided by tax legislation in favour of co-operatives that the specific treatment falls under. Those concessions which are merely applicable for technical tax legal reasons (classified as being concessions in the proper sense) are not identifiable as the concessions which only and exclusively the co-operatives with prevalence of mutual aid enjoy. We have mentioned that the reasoning behind the exclusive treatment reserved for those types of co-operatives differs with respect to “co-operatives not with prevalence of mutual aid” in as much as, for the former, “eligibility” or “merit” becomes a deciding factor, as the accompanying report to the D.Lgs. i.e. the Bill n. 6/2003- states, and this because the “co-operatives with prevalence of mutual aid” are considered to be better suited to carrying out the social function required of co-operatives in general, as stipulated in art. 45 of the Constitution.

So, in the case of tax norms in favour of co-operatives it is important, first of all, to discern whether the special treatment falls under the category of a concession in the proper sense or if it is a concession in the broader sense of the term. It can also be concluded that all co-operatives are eligible for concessions in the proper sense of the term, whereas only those with prevalence of mutual aid are eligible for concessions in the broader sense.

Consequently, it can be seen that the legislative reserve regarding certain fiscal benefits in favour of co-operatives with prevalence of mutual aid is in fact based on elements disconnected from the technical requisites of tax legislation itself. However, the benefits are fully justified and hence correctly applicable when the concessions are in support and promotion of the mutual activity of the co-operative. So, in line with this provision, the definition of “tax concession” in as much as a special concession, and as applicable to co-operatives with prevalence of mutual aid, is no longer truly

effective for the treatment which establishes “exclusion” from the duty of certain taxation. The latter treatment (to be understood as “tax concession” in the proper sense) is indeed applicable to all co-operatives.

Moreover, the case could also arise where tax law itself declares that only the co-operatives with prevalence of mutual aid may benefit from tax concessions. Likewise, the law has the faculty to extend certain beneficial treatment to all co-operatives, which are not necessarily of a particular “tax” nature, or indeed the benefit of similar “non-tax” concessions could be reserved solely for co-operatives with prevalence of mutual aid.

It must be stated that the art. 223-12 proposed an interpretation which excludes the possibility of tax avoidance. The regulation was drawn up not to circumscribe the nature of the concessions which are to be reserved for the co-operatives with prevalence of mutual aid but to prevent other co-operatives which are not prevalence of mutual aid from taking advantage of them. The law is intended to discourage tax avoidance.

4. The main tax concessions regarding direct taxes. Having looked into certain problems regarding concessions in favour of co-operatives, we can go on to analyze the main tax laws on concessions in the matter of direct taxation, which are disseminated among the various Economic Laws and corrective manoeuvres (Acts 112/2002, 311/2004 and 133/2008)

4.1. Provisions common to all types of co-operatives with prevalence of mutual aid.

For co-operatives with prevalence of mutual aid and their consortia the following regulations are applicable.

A portion of the net annual profit equal to 30% , or 50% in the case of consumer co-operatives, are subject to IRES, whether or not this profit is put into indivisible reserves. This quota of net profit is lowered to 20% solely in the case of agricultural co-operatives and small fishing co-operatives and their consortia. This quota of profit, however, can be used freely in respect of limitations posed on the matter by civil legislation.

The co-operative can benefit from the specific provisions for the remaining percentage of net profit (equal to 70% or 45%

accordingly) on the basis of what amounts destined to the following are not part of the taxable income:

-Indivisible reserves (art. 12, Act 904/77)

-Mutual benefit funds equal to 3% of the net profit (art. 11, Act 59/92)

-Free revaluation of shares (art. 7, Act 59/92).

4.1.1. Admissible deductions from income. Co-operatives (art. 12, D.P.R. 601/73) can deduct from their revenue “*reimbursement in favour of associates of a part of the cost of goods and services purchased or as retribution for services yielded. Such amount may be considered in excess of the social shares.*” These are the aforementioned co-operative bonuses and are entirely deductible from the profit of the activity which is subject to tax, either when they are directly the result of the accountable activity (in the form of lesser profits or major costs, etc.) or if they are deducted before being accounted through variations of the taxable income in reduction.

The annex circ. n. 1/E of 3 January 2001 of the Ministry of Finance has specified the extent of the concessions. In the circ. n. 35/E of 9 April 2008 the Inland Revenue agency has clarified the measures regarding refunds, making reference to the circ. n. 34/E of 15 July 2005.

4.1.2. Financing and the Associates. As stated in the provisions of art. 13 of the D.P.R. i.e. of the Presidential Bill 601/73 in certain conditions, the interest and income on capital conferred to the co-operative in favour of the investing associate resident in Italy is only liable to 20% taxation.

This deduction is applied to ordinary associates and financial backers, but not for honorary associates or for shareholders who are not associates. The concessions are subject to certain conditions.

All large co-operatives with prevalence of mutual aid are required by law to devolve 5% in solidarity to less fortunate citizens defined in art. 81, subsections 29 and 30 of Act 133/2008 (subsections 25 and 26 of Act 133/2008).

The interest earned by associates on their social loans are only liable to 20% tax unless the co-operative is classified as a micro or small business as defined by the UE recommendation, n°

361 of 2003. In this case the co-operative is liable only to 12.5 % taxation.

4.1.3. Passive interest paid to associates. Passive interest matured on sums which individuals confer to the co-operative or to other associates is only deductible up to a limit, as the provision of the article art. 13 D.P.R. 601/73. The interest is not deductible for the amount which exceeds the minimum interest on postal bonds, with an increase of 0.90%. This provision has priority over the general limitations of the deduction on passive interest stated in art. 96 TUIR.

4.1.4. Tax abatement of indivisible reserves. Art. 12 of the Act of 16 December 1977, n. 904 states that the sums destined to indivisible reserves are not subject to taxation for co-operatives and their consortia "*providing that all possibility is definitively excluded that these reserves may be shared among the associates in any way, either during the life of the co-operative or in the case of its dissolution* "

The exoneration from tax of the profits devolved to indivisible reserve funds represents a concession. Only co-operatives with prevalence of mutual aid are eligible for such exoneration. The reason for this lies both in the limits posed by the law on article 12 cit. regarding these co-operatives and solely the "*quota of annual net profit devolved to the minimum compulsory reserve*" (art. 6, subsection 1 of the D.L. i.e. Bill n. 63/2002) and in the fact that the law was intended to favour the increase of equity of those co-operatives, i.e., with prevalence of mutual aid, which have difficulty obtaining risk capital.

This law was limited by the Financial Act for 2005 and by the economic adjustments of summer 2008 with the result that, even if the concession is intended for indivisible reserves, the following combine to form the taxable income IRES:

- 20% of the net annual profit of the agricultural co-operatives, small fishery co-operatives and their consortia. This law limits art. 10 del DPR i.e. of Presidential Bill 601/1973 mentioned in paragraph 4.2.
- 55% of the net annual profit of the consumer co-operatives and their consortia;
- 30% of the net annual profit of other co-operatives and their consortia.

Social co-operatives and their consortia are excluded from the application of these laws which restrict concessions as stated in art. 12 of Act 904/1977.

The Financial Act of 2007 introduced a limit to the volume of admissible loss equal to a certain share of the civil profit destined to indivisible reserves for the co-operatives which benefit from a partial concession (art. 84, subsection 1, TUIR). The loss generated during exercise is reduced to the level of the profit which was not included in the income during the previous exercise.

4.1.5. Profits devolved to free increase of capital. Co-operatives and their consortia may devolve a certain share of their annual profit to increase the registered and already conferred social capital. (art. 7, subsection 1, Act n. 59/ 1992). The maximum limits of shares and quotas held by associates, natural persons, as in art. 2525 of the civil code, may be exceeded as long as the extent of excess is within the limits of the variations to the general index of consumer prices for the period when the social exercise was carried out to produce the aforementioned profit. The law is considered current and applicable to co-operatives not with prevalence of mutual aid.

The third subsection of art. 7 states that the share of profit devolved to social capital increase, within the limits stated by the subsection 1, is not included in the taxable profit as far as direct taxation is concerned. This means that the co-operative reaps a benefit from this act.

The third subsection states also that the re-imburement of capital is subject to deductions at the source in the form of tax (at a present rate of 12.5%) payable only by the associates in the taxation period in which such capital is reimbursed and up to a maximum of the increase on quotas and shares.

Even though it is the associates who are subject to the duty on the re-imburement of the corresponding part of the capital, both the co-operative and the relative social companies receive a different and favourable treatment compared to that reserved for other types of institutions and commercial businesses and their respective shareholders and associates. Such benefit has no other objective than that of supporting co-operatives. As such, it qualifies as a tax concession in the broader sense,

consequently being applicable, according to present legislation, only to co-operatives with prevalence of mutual aid.

4.2. Agricultural and small fishery co-operatives. Art. 10 of the D.P.R. i.e. Presidential Bill n. 601/73, in revised art. 2, subsection 8 of the Act of 24 December 2003, n. 350 deals with agricultural co-operatives and small fisheries and it features two specific concessions, but co-operatives with prevalence of mutual aid may benefit only from one of these, i.e. the tax exemption as stated in subsection 2 of art. 10 of the D.P.R. i.e. Presidential Bill 601/73 and reserved for the income of small fishery co-operatives and their consortia. This concession is granted taking into account the difficulties of their type of activity. However, this concession is considered partial and not total in as much as the law does not apply for 20% of net profit which goes to create the taxable income IRES even if this is devolved to special reserves, as stated by the legal provision of Bill 112/2008.

The other law which exempts agricultural co-operatives and their consortia from income tax arises from the necessity to create coherence in the tax system and prevent double taxation. This could occur where the co-operative carries out the same activities that have already been taxed on the associates, e.g. tax on their agricultural property or other agricultural activity.

4.3. Worker and production co-operatives. The same concessions as illustrated in par. 4.1 and 4.2 are applicable to co-operatives of work and production. For the incomes of work co-operatives, art. 11 of the above- mentioned D.P.R., i.e. Presidential Bill n. 601/1973, makes, on the one hand, a concessionary tax law and on the other a provision which is basically the opposite. Undeniably, the exemption and reduction provided by subsection 1 for both co-operatives and consortia constitute a tax concession. Conversely, the deduction, stated in subsection 3, does not introduce any derogation from the common system of taxation of companies and commercial institutions. The direct consequence of this is that co-operatives not with prevalence of mutual aid can benefit from this deduction.

Art. 11 also stipulates that production and work co-operatives and their consortia are exempt from tax if the total retribution of the associates, who on a permanent basis render work or service to the co-operative, amounts to less than 50% of the

total sum of all other costs with exception of those incurred by purchase of raw and subsidiary materials.

If this percentage falls between 50% and 25%, IRES is halved. In this case, the taxable income IRES is to be considered inclusive of IRAP (subsection 462, art. 1 of Act 311/2004) except in the case of social co-operatives excluded by subsection 463. This act must, however, be read together with article 6, subsection 4 of Bill 63/2002, revised by Bill 112/2008 as from the 25th June 2008. Therefore, as far as IRES is concerned, 30% of the net annual profit is subject to taxation. Total or partial exemption from IRES, as stated by article 11, is only valid for taxable income deriving from the non-deductible amount of IRAP from IRES.

4.4. The Co-operative Credit Banks. The same laws for co-operatives with prevalence of mutual aid are also valid for the co-operative credit banks, with the particularity that the share of net profit subject to IRES amounts to 27%. The minimum share of profit that these institutions should devolve to reserves in fact amounts to 70% (art. 37 of Bill 385/ 93), to which 3% of net profit to be devolved to the compulsory mutualistic fund is to be added.

4.5. Social co-operatives. Social co-operatives are a particular case. They are still considered with prevalence of mutual aid in nature because of their social function, which is constantly in respect of the mutuality principle. For this reason they are eligible to benefit from the concessions in favour of co-operatives with prevalence of mutual aid. The tax concessions are extended to consortia which are made up of at least 70% of social co-operatives (Circ. Min. i.e. Ministerial Memorandum of 18 June 2002 n. 53/E). Furthermore, social co-operatives can benefit from total IRES exemption from income when they can present at the same time:

-the requisites necessary to be classified production and work co-operatives;

- total retribution for associates of not less than 50% of the total costs incurred excluding costs of raw and subsidiary materials.

Finally, the law poses a limitation to the possibility of deduction of passive interest accumulated by associates.

5. Conclusion. The tax concessions in favour of co-operatives in the direct taxation system as outlined above is object of verification from the Court of Justice to ascertain that national legislation is in fact in line with EU legislation, both regarding competition and State Aid and regarding the principles of abuse of the tax laws.

No decision has been made by the Judges in Luxemburg. A few days ago the conclusions of the Advocate-General at the Court of Justice, Niilo Jääskinen, were released. After this assessment, the system of tax concessions to co-operatives in Italy will have a more precise interpretation.

Bibliography

BASILAVECCHIA M., 2002, “Agevolazioni, esenzioni ed esclusioni”, *Rassegna Tributaria*, n.2, pp.421-452

CASTALDI L., 2003, “Utili e ristori: disciplina fiscale”, in M. Sandulli e V. Santoro, *La riforma delle società. Commentario del d.lgs. 17 gennaio 2003, n. 6. Società cooperative. Artt. 2511-2548 cod. civ.* pp.20-42.

DI PIETRO A., 2004, “Le ragioni fiscali delle nuove cooperative”, in Vella *Gli statuti delle imprese cooperative dopo la riforma del diritto societario*, Giappichelli, Torino.

FANTOZZI A., 1999, “Riflessioni critiche sul regime fiscale delle cooperative”, *Rivista di diritto tributario*, I. pp.424-452.

FICARI V., 1998, “Strumentalità dell'attività commerciale e fine non lucrativa nella tassazione delle associazioni”, in Fedele, *Il regime fiscale delle associazioni*, Milano, Cedam. pp.76-92.

GALLO F., 2003, “Schema di decreto legislativo recante “Riforma dell'imposizione sul reddito delle società” (Ires), Audizione informale presso la Commissione Finanze della Camera dei Deputati”, *Rassegna Tributaria*, n.5, pp.1661-1694.

INGROSSO M. – TESAURO G., 2009, *Agevolazioni fiscali e aiuti di Stato*, Napoli, Jovene.

- LA ROSA S.**, 1994, “Le agevolazioni tributarie”, in Amatucci *Trattato di diritto tributario*, Padova, Cedam, pp.382-410.
- MARASÀ G.**, 2004, “Problemi della legislazione cooperativa, in Marasà *Le cooperative prima e dopo la riforma del diritto societario*, Padova, Cedam, pp. 4-25.
- MARONGIU G.**, 1997, “Il regime fiscale delle cooperative: profili costituzionali”, in Schiano di Pepe e Graziano, *La società cooperativa. Aspetti civilistici e tributari*, Padova, Cedam, pp.307-322.
- MENTI F.**, 2003, “La ripartizione dei ristorni e la distribuzione dei dividendi nelle società cooperative e l'imposizione sui redditi”, *Diritto e pratica tributaria*, I, pp.631-645.
- QUATTROCCHI A.**, 2008, “Le norme in materia di «aiuti» di Stato in ambito comunitario e il regime tributario delle società cooperative”, *Diritto e pratica tributaria*, pp.1093-2018.
- SACCHETTO C. – BARASSI M.**, 1991, “Le cooperative e i consorzi di garanzia fidi”, *Bollettino tributario*, I, pp.818-832.
- SALVINI L.**, 2003, “La riforma del diritto societario: le implicazioni fiscali per le cooperative”, *Rassegna tributaria*, n.3, pp.839-856.
- STEVANATO D.**, 1994, *Inizio e cessazione dell'impresa nel diritto tributario*, Milano, Giuffrè.
- URICCHIO A.**, 1986, “Il principio di "mutualità" nella cooperazione tra disciplina civilistica e fiscale”, *Diritto e pratica tributaria*, I, pp.1158-1188.