

Joint Seminar on 14th/15th March,
2014

Base Erosion and Profit Shifting
(BEPS)

**Towards a general anti-avoidance
clause in the Italian legislation**

Avv. Isabella Cugusi

Towards a general anti-avoidance clause in the Italian legislation

Does a **general anti-abuse** or **anti-avoidance rule** exist in the Italian tax system?

Towards a general anti-avoidance clause in the Italian legislation

EU Commission Recommendation 6.12.2012
C(2012) 8806 final
on aggressive tax planning

4 General Anti-Abuse Rule

4.1 To counteract aggressive tax-planning practices which fall outside the scope of their specific anti-avoidance rules, Member States should adopt a general anti-abuse rule adapted to domestic and cross-border situations confined to the union and situations involving third countries;

4.2 To give effect to point 4.1, Member States are encouraged to introduce the following clause in their national legislations:

‘ An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance. ’

Towards a general anti-avoidance clause in the Italian legislation

OECD - REPORT
ADDRESSING BASE EROSION AND PROFIT SHIFTING
BEPS

In order to address base erosion and profit shifting, which is fundamentally due to a large number of interacting factors, a comprehensive action plan should be developed quickly.

The different components of the action plan will include proposals to develop:

More effective anti-avoidance measures

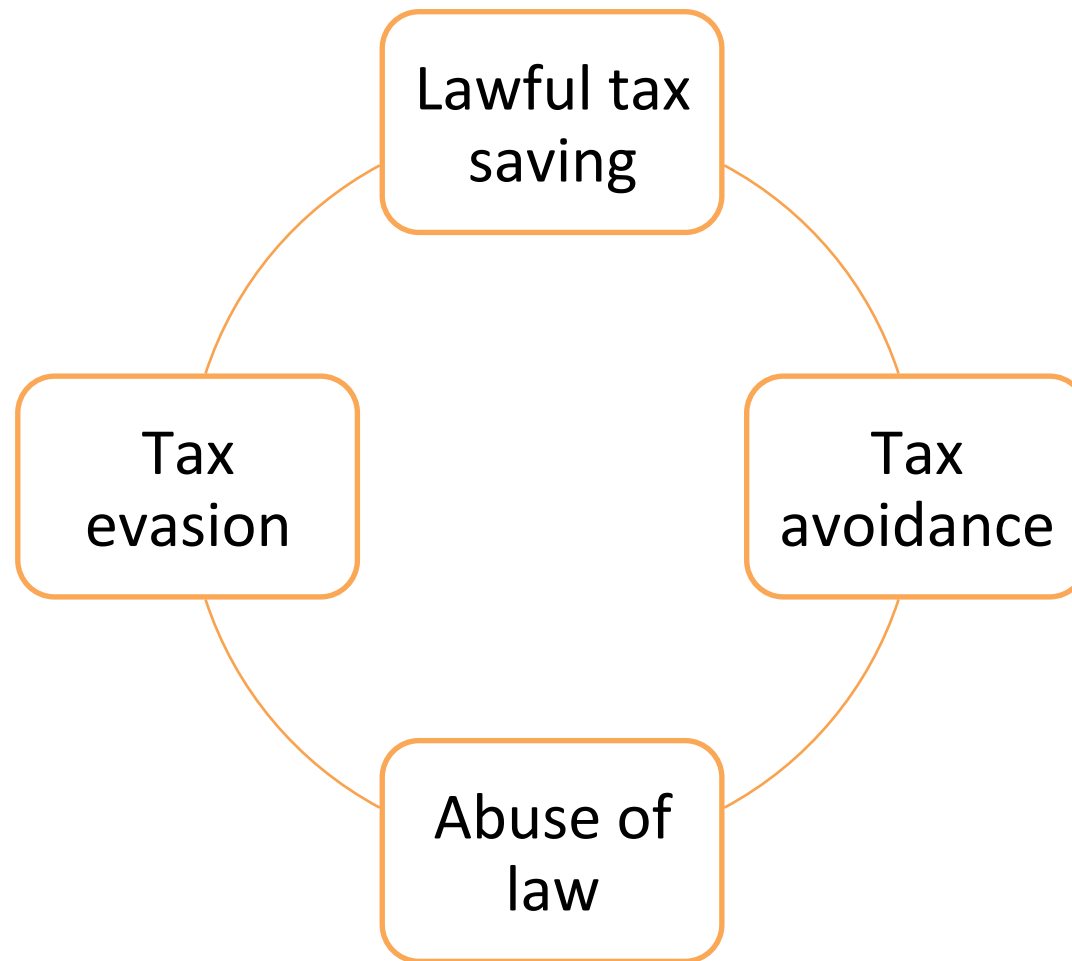
General anti-avoidance rules or doctrines, which limit or deny the availability of undue tax benefits, for example, in situations where transactions lack economic substance or a non-tax business purpose.

Towards a general anti-avoidance clause in the Italian legislation



A **core question** when considering GAAR — and often a difficult question to answer — is what types of transactions or arrangements are potentially subject to challenge under the GAAR.

Towards a general anti-avoidance clause in the Italian legislation



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Where is the borderline between lawful tax saving and reprehensible tax avoidance ?



Tax avoidance results when actions are taken to minimize tax, while within the letter of the law, those actions contravene the object and spirit of the law.



The term "tax avoidance" includes all unacceptable and abusive tax planning. Aggressive tax planning refers to arrangements that "push the limits" of acceptable tax planning.

Towards a general anti-avoidance clause in the Italian legislation

What is an “abusive” or “avoidance” transaction?



An abusive practice can be found to exist only if the transactions, notwithstanding formal application of the law, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of the law. [Halifax C-255/02 February 21th, 2006]

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The Italian case

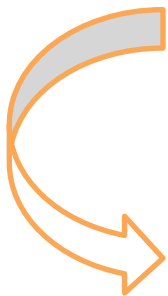


The Italian Courts applied the opposite principle of "*form over substance*" in tax cases, except where there was express anti-avoidance legislation.

**Art.23 of the Italian
Constitution**



The legality principle



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S.Court 3 April 2000, n. 3979

S.Court 3 September 2001, n. 11351

S.Court 7 March 2002, n. 3345

In the opinion of the Court, a transaction cannot be considered “abusive” in the absence of an express anti-abuse provision, even if it carried out solely for the purpose of obtaining tax advantages.

The Court tried to find legal remedies in the general provision of Italian **Civil Code** that establishes that a contractual agreement is null and void if it lacks valid consideration (that is, it does not have economic substance) and is used to circumvent binding provisions of law.

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Art. 37*bis*, of Presidential Decree n. 600 of 29 September 1973

This provision is applied to a transaction, or series of transactions part of a scheme, **which lack economic substance** and are carried out to avoid tax obligations and obtain undue tax benefits.

Effects



The Tax Administration may disregard the tax effects of the abusive transaction or transactions carried out without valid economic reasons and apply the taxes that would have been due in the absence of tax avoidance.

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The law's provision requires three conditions for its application



1. The achievement of an “undue” tax reimbursement or an “undue” tax reduction;
2. The circumstance that deeds, facts or agreements referring to the relevant transaction are aimed to circumvent obligations or prohibitions provided by tax law;
3. The lack of valid business reasons.

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Is the Art. 37*bis* a general anti-abuse clause?

NO

Its application is limited to the specific list of transactions contained in paragraph 3 of Art. 37*bis*.

Therefore, we can correctly consider it not a GAAR but a TAAR (targeted anti-avoidance rule) or a “almost/quasi-general” anti-avoidance provision which applies to a number of listed transactions.

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What's has happened recently?



In recent years Italian Supreme Court has changed interpretation and, for the first time, has considered the existence of a general anti-abuse clause, although it is not expressly provided by any tax legislative provision, as a general principle of our legal system based on the general principle of “taxation according to the concrete ability to pay taxes” contained in the art. 53 of the Italian Constitution (judgments nn. 30055/2008, 30056/08, 30057/2008, 30058/2008).

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The source of a general anti-avoidance principle, in the case of non harmonized taxes – such as direct taxes - derives not from EU law but directly from the Italian Constitution.

In fact, the principle of ability to pay taxes (art. 53, first paragraph of the Italian Constitution) and progressive taxation (art. 53, second paragraph of the Italian Constitution) are the base both of tax norms in a strict sense.

The consequence is that it is a direct derivation of the constitutional norms the principle for which the taxpayer cannot obtain tax benefits from a distorted (even if not contrasting any specific norm) use of a legal instruments suitable for tax saving, if there are no other economic reasons to justify the transaction different from tax saving.

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The judicial principle of abuse of law in the Italian tax system created a great confusion and gave an enormous discretionary power in the hands of the Tax Administration and of the Court.



The adoption of a general anti-abuse clause is widely believed the best way to give taxpayers a framework of certainty and stability in tax legislation and administration.

A poorly designed or administered GAAR is in neither the taxpayer nor the Government's interest.

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The Government will be required to work on the current anti-avoidance set of rules by harmonizing them with the general unwritten principle of abuse of law to provide more certainty to taxpayers.

The Government should also coordinate the existing provisions with the guidelines included in the 2012/772 Recommendation by the EU Commission on aggressive tax planning.

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Italy

*The Legislative Decree
("Delega Fiscale") and the
Strategic Orientation of Tax
Reform*

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Article 5

(Rules on the abuse of rights and tax avoidance)

1. With the legislative decrees as of Article 1, the Government is delegated to implement the review of current anti-avoidance provisions in order to introduce the general principle of the prohibition of abuse of rights, extended to non-harmonised taxes, implementing the following principles and criteria

- a) to define the abusive conduct as distorted use of legal instruments suitable to get a tax saving although such conduct does not infringe any specific provision;
- b) to guarantee the taxpayer's freedom of choice between different operations entailing also a different tax burden, and, for such a purpose:
 - 1) to consider the aim of getting undue tax advantages as main reason of the abusive operation;
 - 2) to exclude the existence of an abusive conduct if the operation is justified for relevant reasons unrelated to taxation; to establish that such reasons are also those not necessarily producing an immediate profitability of the operation but meet organisational needs and consist in a structural and functional improvement of the taxpayer's business;
- c) to provide for the unforceability against Tax Administration of legal instruments as of letter a) and the ensuing power of Tax Administration to deny the tax saving;

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- d) to regulate the regime of the proof laying on the Administration the burden to prove the abusive intention and the modes of functional manipulation and alteration of the legal instruments used as well as their compliance with an ordinary market logic and conversely laying on the taxpayer the burden to allege the existence of sound alternative or concomitant reasons unrelated to taxation justifying the use of such instruments;
- e) to set forth the inclusion in the grounds of the tax assessment a formal and precise identification of the abusive conduct, in default of which it is void;
- f) to lay down specific procedural rules ensuring an effective adversarial procedure with the Tax Administration and safeguarding the right of defence at any stage of the assessment procedure and in any stage and tier of the tax judgment;
- g) to envisage that in case of appeal penalties and interest are collectable after the decision of the provincial tax court.