SELECTED ASPECTS OF RETROACTIVITY IN TAXATION FROM A COMPARATIVE AND SUPRANATIONAL LAW PERSPECTIVE IN THE EXPERIENCE OF ITALY AND THE EUROPEAN UNION

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Abstract

This paper is based in an analysis of the developments in retroactivity in the Italian tax system and the state of the art in retroactivity in European tax law. Emphasis is made on problems concerning the effects of judgments and supranational (primary and secondary) legislation in time. The article combines both the national and supranational level in order to show how the different instances of legal pluralism are reconciled in the framework of a multi-level system driven by the rule of the supremacy of European Union law over the law of the Member States, specially referring to the application of rulings issued by the ECJ by Member States.

Resumen

Este estudio se basa en un análisis de la forma en la que la retroactividad se ha desarrollado en el sistema tributario italiano y hace un estado del arte actual en el derecho tributario europeo, haciendo énfasis particular en los problemas relativos a los efectos de las sentencias y la legislación supranacional (primaria y secundaria) en el tiempo. El artículo combina la normatividad nacional italiana con la normatividad supranacional para mostrar de qué manera se reconcilian las diferentes instancias del pluralismo legal en el marco de un sistema multinivel guiado por la regla de la supremacía del derecho de la Unión Europea sobre el derecho de los estados miembros, en especial en lo atinente a la aplicación de los fallos del Tribunal Europeo en los ámbitos nacionales de los estados miembros.

Key words

Retroactivity, Retroactive Application of Tax, Italian Tax System, European Tax Law, Ex Nunc and Ex Tunc Application of Tax Norms, Legal Certainty and Legitimate Expectations, Taxpayer Rights.

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Palabras clave

Irretroactividad, Aplicación Retroactiva de los Tributos, Derecho Tributario Italiano, Derecho Tributario Europeo, Aplicación Ex Nunc y Ex Tunc de Normas Tributarias, Sistema Tributario, Principio de Legalidad, Seguridad Jurídica, Protección a los Contribuyentes, Confianza legítima.

Summary:

1. Introduction

This paper has at the same time a comparative and supranational law goal and is drafted in a way that facilitates reading also by a tax expert that is neither Italian, nor familiar with European Union law. Although there is no specific reason (other than the personal national legal expertise of the author) for choosing Italy as the national system object of this paper, it does make sense to combine both the national and supranational level in order to show how the different instances of legal pluralism are reconciled in the framework of a multi-level system driven by the rule of the supremacy of European Union law over that of the Member States.

Accordingly, this paper is structured in two parts. First, the comparative part of the paper looks at the way in which retroactivity has developed in the Italian tax system. Second, the supranational part focuses on the current state of the art in European tax law, putting the emphasis in particular on problems concerning judgments and supranational (primary and secondary) legislation.[1]

Both parts do not represent an exhaustive analysis of retroactivity in tax matters, but have been conceived within a framework where some issues are selected in order to illustrate the critical points on which the author wishes to draw the attention of the readers. For the purpose of aligning the analysis with the standards that have been the object of discussion in the framework of the European Association of Tax Law Professors, this paper takes into account the points that were included in the questionnaire of the congress held in 2010 in Leuven (Belgium).[2]

1 On legal pluralism see further on this in Pistone, P., Soft tax law: steering legal pluralism towards international tax coordination, in Weber, D. (ed.), Traditional and alternative routes to European tax integration, IBFD Publications, 2010, at 97 and ff.

2 See further on this in Gribnau, H. and Pauwels, M.R.T., General report, EATLP 2010 Congress; and Amatucci, F., Italian national report, EATLP 2010 Congress.

2. Retroactivity in Italian Tax Law

The topic of retroactivity has traditionally been the object of attention by Italian tax scholars and case law, possibly due to its immediate impact on the levying of taxes and the rule of Law.[3]

There is a universally accepted categorization of tax retroactivity based on its object and including three groups, such as retroactivity of tax, of its effects and full retroactivity. Retroactivity of tax is regarded as the levying of tax in respect of facts that have occurred in the past. Retroactive effects arise when a tax provision applies to facts occurred after the entry into force of such provision, but producing effects in respect of the past.[4] Full tax retroactivity is a combination of both previous categories and arises when a provision applies to facts occurred in the past and producing effects in respect of a previous moment to that of its entry into force.[5]

From a conceptual perspective there is a common understanding throughout the Italian legal system as to the fact that law may only have prospective effects. This is confirmed by the fact that the preliminary rules to the Civil Code, which in Italy are often also regarded as an expression of general principles of law, specifically demands this solely prospective function.[6] This constitutes a fundamental value of legal civilization and a general principle of the legal system, with which the legislator must in principle comply in order to avoid the violation of constitutional values protecting legal certainty and the legitimate expectations of taxpayers.[7]

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3 The main monographic studies on retroactivity in the Italian tax system are at present by Amatucci, F., L'efficacia nel tempo della norma tributaria, Milan, Giuffrè, 2005 and Mastroiacovo, V., I limiti alla retroattività nel Diritto tributario, Milan, Giuffrè, 2005.

4 Typical examples of this kind of retroactivity are the ones concerning procedural rules, such as for instance the ones indicating how a tax return must be filed, but also the ones concerning the conditions to apply for a tax amnesty. In such cases the tempus regit actum rule applies, requiring the application of the rule in force at the time that the procedural or amnesty rule applies, but producing its effects on situations that have occurred in the past.

5 The traditional example of this kind of retroactivity is the one concerning the provisions adopted by the Parliament to replace a temporary decree (decreto legge) of the Government that was not validated by the Parliament within the time set by the law.

6 Article 11 of the Preliminary Rules to the Civil Code (Disposizioni Preliminari al Codice Civile).

7 See Corte Costituzionale 7 June 1999, n. 229; 4 November 1999, n. 416, 20 May 2008, n. 162.

Before the issuing of the law, however, there can be no actual legal effects that could be claimed. Accordingly, the potential announcement of legal amendments receive no legal protection until the moment in which they are officially enacted. Indeed, the Ministry of Finance is more and more often making public its reform drafts. However, no taxpayer could possibly invoke any legal protection in respect of drafts. The situation is of course different in respect of acts that have temporary legal effects, such as the Government Temporary Decrees (*Decreti Legge*), throughout the days within which the Italian legal system allows for the Parliament to validate them.[8]

The prohibition of retroactivity receives a much stronger protection in tax matters, which goes well beyond the level of ordinary legislation, for being the levying of taxes strictly related to the constitutional principles of legality (Article 23 Constitution) and ability to pay (Article 53 Constitution). Such protection is ensured within the Italian tax system through an ex post interpretation by the Constitutional Court (*Corte Costituzionale*), which in some cases has also consider retroactive taxes to be incompatible with the protection of the freedom to undertake economic activities (Article 41 Constitution).[9] Never, until now the same issue has been raised from the perspective of compatibility with the right of ownership under the European Convention of Human Rights.

In particular, the principle of legality requires taxes to be due on the basis of an existing provision. Accordingly, a direct violation to such principle arises any time that no such provision exists when the payment of a levy would be due. The boundaries of such principle, however, only cover taxing provisions, i.e. the ones that immediately affect the levying of a tax , or also the conditions at which a tax may be levied at lower rates or exempted. Consequently, retroactivity issues involving all other tax provisions, such as the ones of a procedural nature for instance, do not raise per se a potential conflict with the principle of legality.

8 In case of failure to obtain the validation by the Parliament, however, such decrees retroactively lose all their effects, exception being made for the application of the rapporti esauriti doctrine, on which see further below in the text.

9 See Corte Costituzionale 20 July 1994, n. 315; 4 April 1999, n. 416.

As for the principle of ability to pay, the interpretation by the Constitutional Court requests a link between the levying of taxes and the moment in which the taxpayer is requested to make the payment,[10] thus preventing in principle any tax based on a past ability, though allowing for pre-payments of tax to the extent that the final payment of tax may only be requested once the tax year has expired .

However, various critical issues have arisen in respect of the concrete interpretation and application of such constitutional principles.

The principle of legality has often received a weak protection against retroactive statutes in respect of the so-called interpretative norms, i.e. provisions aimed at clarifying the correct interpretation of a previously issued statute, taking into account its proper rationale. As indicated in tax literature,[11] the Constitutional Court has often tolerated the use of this tool to correct the politically undesired living law. This situation has repeatedly occurred through technically complex provisions patching normative gaps in non-exceptional circumstances, thus in a framework that for its own nature could be in conflict also with the Taxpayers' Bill of Rights.[12] The author regards such problems to be in striking contradiction with the very essence of a system that applies the principle of strict legality and prevents courts from filling up the gaps through judicial interpretation.

Critical issues on the compatibility with the principle of ability to pay have occurred in respect of the levying of taxes that takes into account a past moment to measure the entire ability to pay of a taxpayer in the present, such as in respect of some cases of taxation of capital gains.[13] According to the terminology adopted by the EATLP General Report, in this type of situations there would be an issue of retrospectivity rather than of retroactivity, as instead

10 See Corte Costituzionale 4 April 1990, n. 155.
11 See Tesauro, F., Istituzioni di diritto tributario, vol. I, X edition, Turin, 2010, at 54.
12 Article 1 of the Italian Taxpayers' Bill of Rights (Law 27 July 2000, n. 212) only allows interpretative norms in the presence of exceptional circumstances, which need to be explicitly specified in norms officially designed as instruments of authentic interpretation.
13 See Corte Costituzionale, 23 May 1966, n. 44, which ascertained a conflict of a tax levied on the increase in the value of immovable property over a period that could include the ten years before the introduction of the taxing rule.

it would be the case under the common terminology used in Italian tax law. Further critical issues have arisen when the legislator intervenes on taxes due in respect of a tax year that has already started, but before its end, or anyway before the moment in which the taxpayer is requested to make the payments of tax related to such year. From a theoretical perspective the author believes that such conflict is present anytime that the taxpayer is requested to make a payment of tax different from the conditions that would be due in the very moment in which he completed the taxable event.

The author also believes that critical issues should arise also in case where procedural rules are amended and apply in compliance with the *tempus regit actum*, but produce effects that could not reasonably be expected when the taxpayer carried out the relevant facts for the application of a procedural rule. A good example of this kind, yet not being discussed in Italian tax literature, could be the extension of statute-of-limitation rules for cases tainted of tax fraud. On the one hand, the author believes that even in cases of fraud the legal system should not invoke the necessity of effectively countering such very dangerous phenomenon to alter the existing rules, for this would otherwise affect the overall legal certainty within the system; on the other hand, the author is also concerned with the situation of a person that is unduly alleged of being liable for such kind of violation and eventually proves to be innocent. In such circumstances the legal system would expose such person, acting in good faith, to an undue supplementary burden, which could not have been foreseeably expected when he carried out the relevant facts in the past, thus also affecting his overall right to defence.[14]

For specific reasons retroactivity is then required in some further situations and forbidden in other ones.

The former case occurs for obvious reasons in respect of tax amnesties, but also when a milder sanction applies than that due at the time in which a violation

14 A more specific cluster within this category was instead the object of attention, when Italy extended the statute-of-limitation rules in the cases for all taxpayers not requiring the amnesty. See ECJ, 17 July 2008, case C-132/06, Commission vs. Italy [tax amnesty].

took place. The latter case occurs in the opposite situation, i.e. when heavier sanctions become applicable at a later moment than that in which a violation occurred, as a consequence of a general principle applicable under Italian criminal law, which applies also to mere administrative fines in tax matters since 1998.

Further specifications are required in order to more precisely circumscribe the effects of the retroactive application of legislative changes that introduce a more favourable sanction to the taxpayer than the one existing at the time when the violation was carried out. In particular, the retroactive effects can be invoked until the levying of the sanction has not become final, except for the cases when the sanction is completely abolished (*abolitio criminis*).[15] However, under no circumstances the taxpayer may request the reimbursement of the sanctions already paid. Such limits to retroactive effects in respect of more favourable rules concerning sanctions are generally meant to be the consequence of the "*rapporti esauriti*" doctrine, according to which when a legal relationship has completed its effects, it may not be reopened even in exceptional situations.

The "*rapporti esauriti*" doctrine also applies to the effects of judgments of the Constitutional Court that declare the incompatibility with the provisions of the Italian Constitution, thus implying that such judgments may retroactively apply to the extent that the levying of taxes and sanctions has not become final, i.e. that the taxpayer has either the right to appeal or has not yet been notified a non-appealable judicial decision, or that the taxpayer has not yet made final payments.[16] This doctrine has repercussions also on situations raising problems of compatibility with European Union law, due to the application of the EU principle of equivalence, which requires national procedural autonomy to provide for the same rules in respect of purely national and intra-EU situations.[17]

More in general, there is no limitation to the retroactive effects of judgments within the Italian system, thus requiring the intervention of the legislator to issue transitional rules whenever gaps arise from a given judgment. However,

15 See Article 3, Decree 18 December 1997, n. 472.
16 See further on this Corte di Cassazione, Tax Chamber, 24 February 2002, n. 4698.
17 See further on this below in paragraph 3.

taxpayers are generally allowed to invoke the protection of their legitimate expectations, also in respect of interpretative changes in the practice of tax authorities, in order to avoid their liability for sanctions.[18]

3. Retroactivity in European Tax Law

The analysis of retroactivity in EU Tax Law[19] raises some issues that are only partly equivalent to the ones that have been analysed so far at the national level in the Italian tax system. Various reasons could exist for such discrepancy, two of which are briefly reported below.

First, European Union law is supranational law that Member States of the European Union share and that prevails over national law that each of such countries applies within its respective territory. Accordingly, European Union law is structurally combined with legal pluralism, which it runs under the supremacy of its law, but which requires cooperation at the national and European level as to the enforcement.

Second, European tax law is a complex set of rules, which results from the interaction between national and supranational law, since no complete surrender of powers to the European Union level has been realised until now. In such circumstances, taxing powers are in principle maintained at the national level, unless where the existence of specific obstacles on cross-border situations within the European Union and the impossibility to remove them at the national level by means of international coordination, requires their shifting in full or part to the EU institutions in order to ensure compliance with the supremacy of European Union law.

18 See Article 10.2 of the Taxpayers' Bill of Rights on the non-liability for sanctions in respect of changes in the practice of tax authorities.

19 This section focuses on European Tax Law by taking into account the sole supranational law of the European Union and its Member States, thus leaving out other legal systems based on other European conventions, such as for instance that of the European Convention on Human Rights.

By contrast, procedural rules remain in principle at the national level under the so-called principle of procedural autonomy, which excludes the application of the same rules throughout the whole territory of the European Union, fragmenting legal remedies according to the State from time to time specifically involved. However, each Member State of the European Union remains fully sovereign, only to the extent that it ensures compliance with the two basic principles of equivalence and effectiveness.[20] Under the principle of equivalence, States are required to apply the same procedural rules in respect of purely domestic and cross-border situations within the EU, whereas, under the principle of effectiveness, regardless of whether such rules are equivalent, the State should in any case ensure that the protection of rights granted by European Union law is not make too burdensome to exclude in fact an effective degree of protection. Accordingly, more burdensome conditions for exercising rights granted by European Union law are considered to be equivalent to cases in which such rights in fact enjoy no remedy.

In general, retroactive application of tax measures may raise some conflicts with the basic European law principles of legal certainty and legitimate expectations, which in fact share a common mould with their equivalent forms at the national levels that have been previously described when analysing the Italian national system.

Both principles will now be the object of a more specific analysis, which will be carried out respectively by taking into account the impact that limiting the retroactive application of judgments by the European Court of Justice would have on legal certainty and the effects that limits to supranational law would determine on legitimate expectations of taxpayers.

Legal certainty raises a more complex pattern than at the national level, since it applies here in a context of legal pluralism, where the norms of supranational

20 See further on this ECJ, 19 November 1991, joined cases C-6 and 9/91, Francovich, para. 43. This case law was confirmed several times in the field of indirect taxes (see ECJ, 16 December 1992, case C-210/91, Commission vs. Greece, para. 20; 1 July 1993, case C-312/91, Metalsa, paras. 14-15; 26 October 1995, case C-36/94, Siesse, para. 22; 17 November 1998, case C-228/96, Fallimento Aprile, para. 18; 12 July 2001, case C-262/99, Louloudakis, para. 69.

law must secure their effective supremacy over national law also by means of national Courts, which are required to set national provisions aside in case of clear cut conflicts. For such reason, the European Court of Justice has strongly protected the value of legal certainty[21] even in cases of final judicial and administrative decisions, allowing for their reopening only in exceptional cases.[22]

The need to enforce the principles of European law and apply the interpretation of its rules not just at the supranational level, but also and especially at the national level, is possibly why the problems of retroactivity have more frequently been the object of attention in respect of the effects of the judgments by the European Court of Justice. For this reason, the author has selected this issue for reconstructing the boundaries of retroactivity in European tax law, based on the understanding that they will reflect the two basic principles of legal certainty and protection of legitimate expectations that have been reported before in this section.

The issue of retroactivity arises in respect of ECJ judgments from the opposite perspective of the one that has been the object of the previous section of this paper. While the retroactivity of norms produces some negative effects on the legal certainty, it is here the non-retroactivity of judgments of the European Court of Justice that can achieve the same detrimental result.

For the purpose of properly understanding the negative implications that could arise from a limitation of the retroactive effects of an ECJ judgment, one could for instance consider the situation of three taxpayers, two of which referring a problem of compatibility with European law from one Member State of the European Union and the third one referring a substantially equivalent problem of compatibility with European law in respect of a different norm from another EU Member State. In principle, if the European Court of Justice limited the retroactive effects of its judgments, the only taxpayer to be ensure an effective protection of the rights granted by European Union law would be the one who made it faster to access the European Court of Justice. This would start up a

21 See further on this ECJ, 26 April 2005, case C-376/02, Stichting Goed Wonen.

22 The European Court has addressed this issue in various judgments concerning the power to reopen final judicial decisions and the need to protect the stability of rights derived therefrom. See ECJ, 16 March 2006, case C-234/04, Kapferer; 18 July 2007, C-119/05, Lucchini; 3 September 2009, case C-2/08, Fallimento Olimpiclub.

race to Luxembourg and be extremely unfair, especially insofar as one considers that the implications of national procedural autonomy can also give rise to some structural longer times to have questions of compatibility referred from some Member States of the European Union than from others. Furthermore, in respect of the two taxpayers from the same Member State, there would be an additional problem of equality in respect of one and the same national provision.

Based on the settled case law of the European Court of Justice,[23] the author believes instead that ECJ judgments have a mere declaratory function of ascertaining the correct meaning and scope of European Union law from the time of its entry into force. Accordingly, limiting the temporal effects of an ECJ judgment would in principle be equivalent to limit the effects of European law and its supremacy over national law, which is of course unacceptable.

A different conclusion should therefore only be reached in exceptional circumstances,[24] where there is an overwhelming interest to protect the stability of rights claimed by persons acting in good faith, which prevails over that to give full effects to the supremacy of European Union law over national law. The ECJ settled case law admits this only where a Member State provides concrete evidence that it had acted in good faith in respect of a provision of European law surrounded by an objective and significant legal uncertainty and to the extent that such State proves that the ex tunc application of a judgment would seriously undermine its economy.

The interpretation of such three conditions by the European Court of Justice has generally been rather strict in its tax case law. Accordingly, general budgetary concerns have never been admitted as relevant grounds for justifying the temporal limitation of the effects of an ECJ judgment. The evidence of good faith by the Member States is to be proved in the light of the legitimate expectations that a Member State acting in good faith could derive

23 See ECJ, 6 March 2007, case C-292/04, Meilicke 1 et aa., para. 34.
24 The European Court of Justice has repeatedly affirmed such conditions in a fairly large number of tax and non-tax cases.

from the position held by any EU institutions, such as for instance the EU Commission, excluding that it could occur when the European Court of Justice had already provided its clear-cut interpretation in a previous judgment. In the latter case, the more recent case law of the ECJ seems unwilling to concede the non-retroactive effects of a second judgment, unless the conditions of objective uncertainty require to do so in the first judgment.[25]

An additional issue arises as to determining how the temporal limitation of the effects of an ECJ judgment should produce its effects. In principle, the European Court of Justice seems unwilling to admit this on a general basis, thus shaping the non-retroactivity as an exception that can be agreed on a case-by-case basis. Accordingly, this approach allows the effects to be limited in respect of a single Member State only. Furthermore, the settled case-law of the European Court of Justice rejects the position that the limitation of temporal effects of its judgment could affects rights already claimed by other persons before a national Court at the time when such judgment was delivered. This position shows concern for taxpayers who had shown an active approach to seek for the enforcement of rights granted by European Union law, but the author believes that uncertainties still exists in tax matters as to the exact identification of this dividing line. In several Member States of the European Union, litigation before a Court is only possible after a preliminary administrative contentious procedure with tax authorities has been completed. Regardless of whether the duration of such procedure can be short or long, the author believes that the rights of taxpayers to escape the non-retroactivity of an ECJ judgment that has been meanwhile delivered on the same issue should be protected, since they clearly did all they were allowed to do in order to seek the enforcement of a right granted by European Union law.[26]

Considering the mere declaratory function of ECJ judgments on the meaning and scope of European Union law, the author wonders whether an even stronger limitation should be set to the non-retroactivity of ECJ judgments. In particular, especially considering the frantic and continuous development of ECJ case law in the field of direct taxes, the author believes that it is not necessarily fair to require all persons to carry out a constant update

25 See ECJ, 6 March 2007, case C-292/04, Meilicke 1 et aa., paras. 37-38.
26 This view can be reconciled with the position held by the European Court of Justice in the EKW case. See ECJ, 9.3.2000, EKW, case C-437/97, para. 60

on such development in order to escape the negative implications that a non-retroactive ECJ judgment could determine on the exercise of their rights. From such perspective the author would therefore submits that the non-retroactive effects should only be produced in respect of those taxpayers who were given a time to file a request for repayment of a tax incompatible with European law and did not timely exercise such right. Indeed, this position would imply significantly lowering the threshold and considerably reducing the non-retroactive effect of a judgment, but it would also set some reasonable conditions for the exercise and effective enforcement of rights granted by European Union law. Furthermore, the author still believes that in principle if a tax is incompatible with European law, Member States should in principle be prevented from legitimately obtaining revenue from its collection. Therefore, any collected revenue as such already represents a problem from a legal perspective.

An even clearer framework arises for the protection of legitimate expectations of taxpayers if we shift the focus of our analysis to the interpretation of supranational law. For such purpose it seems appropriate to refer to fields like VAT, where there is a degree of harmonization that has brought the exercise of taxing powers to the supranational level and leaves Member States of the European Union with the function of implementing the EU directives. In such context the question arises as to whether the legitimate expectations of taxpayers to exercise a right granted by an EU directive, such as for instance the right to deduction, can be retroactively limited by a Member State. This specific issue has already been addressed by the European Court of Justice in the Stichting Goed Wonen case,[27] which provides a clear-cut answer to our problem.

In general, the European Court of Justice strongly protects the right to input tax deduction in VAT, with a view to allowing that such tax preserves its neutrality from producer to consumer and exactly corresponds to the value-added that has accrued to consumed products and services. Accordingly, AG Tizzano advised the European Court of Justice in the Stichting Goed Wonen case to conclude that the right to deduct an already borne input tax could not be retroactively limited by a measure introduced at a later moment by a

27 ECJ, 26 April 2005, case C-376/02, Stichting Goed Wonen.

Member State. This position seems natural insofar as one considers that a purchaser of a good or service has a legitimate expectation to deduct such tax from the very moment in which it receives such good or service. Furthermore, there seemed to be no issue as to the good faith of the taxpayer in such case. However, the decision by the (Grand Chamber of the) Court took a different position and gave a considerable weight to the justification put forward by the Member State, according to which this measure was necessary in order to effectively counter a massive fraudulent scheme concerning the right to deduction. The ECJ eventually left the final decision up to the national Court in order to ascertain whether the retroactive introduction of the limit to the right of deduction was necessary for such purpose. Although the author recognises this second condition as reflecting the case law of the European Court of Justice on the retroactive application of supranational law in the field of VAT[28]; the conclusion reached by the ECJ in this case leaves the author rather surprised, since it departs from the standards that the European Court of Justice usually applies in respect of this type of problems, in particular where the action in good faith by the taxpayer is not an issue. The author feels that the legitimate expectation of a taxpayer acting in good faith were sacrificed by this decision that preferred instead to endorse a non-proportionate reaction to a risk of fraud, whereas the ECJ -in its previous and later settled case law[29] normally counters the actual occurrence of such phenomenon.

Accordingly, it came as no surprise that the ECJ concluded in the Uszodaépitő case[30] that retroactively setting more burdensome conditions for the exercise of the right to deduction in respect of the application of VAT by reverse charge is as such incompatible with the common EU VAT system without further need of specification.

28 Also see ECJ, 29 April 2004, case C-17/01, Sudholz, para. 33.
29 See inter alia ECJ, 18 December 1997, joined cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide et aa.; 12 January 2006, joined cases C-354/03, C-355/03 and C-484/03, Optigen, para. 52, 6 July 2006, joined cases C-439/04 and 440/04, Axel Kittel et aa., paras. 45-46; 21 February 2008, case C-271/06, Netto Supermarkt, para. 28.
30 ECJ, 30 September 2010, case C-392/09, Uszodaépitő, para. 44.

4. Conclusions

The analysis of national and supranational law carried out in the previous sections of this paper yield a common outcome, showing that there is little room left for retroactivity in modern tax law.

From the perspective of national law, as resulting from the analysis of Italian tax law, retroactivity harms the features of fairness and the rule of Law within the tax system and is generally prohibited unless when special reasons exist that either allow for it or, as in the case of amnesties, even require it. Although there is general consensus in tax literature as to such conclusions, relevant problems still arise in specific situations, where the interest to protect the Revenue in the collection of taxes leads the legislative power to introduce exceptions, sometimes also disguised as authentic interpretation statutes, that the judiciary too frequently tolerates with a view to closing the loopholes within the tax system. The author regards such tolerance as a contradiction of the very foundations of tax systems, which protect the rule of Law and legal certainty and should in principle admit no exceptions in this respect. Furthermore, for the same reasons, insofar as one agrees that the function of the judiciary is merely to record the meaning and scope of provisions existing within a given legal system, also the limitation of the retroactive effects of judgments should be seen as an exception to apply in a very limited number of cases.

European Union law shows a more restrictive position on retroactivity, possibly due to the clear perception that it would significantly harm the certainty of law and protection of legitimate expectations in the context of legal pluralism that is inextricably linked to its interpretation and application. Supranational law, as interpreted by the European Court of Justice, possibly provides the most advanced standards and rules to achieve fairness in tax matters, ensuring an effective protection of taxpayers in all cases where States abuse of their powers to introduce provisions in tax matters and would accordingly infringe the basic rules of a tax system. When a Member State of the European Union is merely implementing supranational law, as in the field of VAT, it must then comply with such stricter standards, no matter what is the level of tolerance of retroactivity within its national system.

The existence of legal pluralism could in principle provide a more complex framework to observe and thus justify some wider degree of exception to retroactivity of the judgments by the supranational Court. However, the European Court of Justice seems committed to use the prerogative of admitting such exceptions to a very minor extent, thus strengthening the protection of taxpayers and the rule of Law. From such perspective the author regards it as a model that also other legal systems around the world should consider to adopt from a comparative legal theory perspective, in order to affirm that retroactivity is a highly exceptional feature within a legal system. And this is even more the case in tax matters, since the State would otherwise have the power to break legal certainty and affect the legal expectations of taxpayers acting in good faith in cases where this would go to their detriment.