ROTTERDAM EATLP CONGRESS

NATIONAL REPORTS

TAXATION OF CHARITIES

Italian Report

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I General questions

1. Are there special (preferential) tax rules for non-profit activities in general? Are these given in statutory law or have they been created by case law?

Yes, there are several special (preferential) tax rules for non-profit activities carried out by "non-commercial bodies", "non-profit organizations of social utility", "charities" and "voluntary organizations".

The discipline is provided by the national tax law. We have to mention among these:

1a) Rules of tax company (IRES[2]) exemption for non profit organizations

Art. 73 of Presidential Decree no. 917/1986 (TUIR[3]) is one of the most important rules concerning the income taxation of non-profit organizations. This provision - that as general rule provides that *"even non-commercial entities which do not have as their exclusive or main object the exercise of business activities are subject to corporate income tax [see art. 73, paragraph 1, letter c) of Presidential Decree no. 917/1986]"* - determines non-taxation for non-business activities carried out by those entities and not having profitable purposes.

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[2] Corporate Income Tax, so-called "IRES", "*Imposta sul reddito delle società*". It's provided by articles 72 and following of Presidential Decree no. 917/1986. In particular, the income produced by capital companies and subject assimilated, residents and non-residents, as well as by commercial entities and non-commercial, is taxed.

[3] The so-called TUIR (*Testo Unico Imposte sui Redditi*) is adopted with Presidential Decree no. 917/1986.

It's relevant the existence of material conditions (see Part II Income tax) concerning nature of activities and purpose of business activities for the application of IRES exemption of non profit organizations.

Article 143 of Presidential Decree no. 917/1986 also provides that for, non-profit organizations and charities, aren't considered commercial services the ones not included in the article 2195 Italian Civil Code[4] made in accordance with institutional purposes of the body without specific organization and toward payments that do not exceed the cost of direct charging[5].

Art. 148 Presidential Decree no. 917/1986 - for associations, that are non-profit organizations (political, religious etc) formed by a group of natural persons or legal entity (members) linked by the pursuit of a common purpose - enshrines their exclusion from company taxation (IRES) if the activity is carried out in the interest of its members or participants, in accordance with the institutional goals of the association, on condition that they are not provided for specific payments;

Art. 149 of Decree no. 917/1986, in addition, point out that "regardless of the articles of incorporation, the entity loses the status of non-profit organizations if it carries out mainly business activity for the entire tax period".

1b) Other special schemes for non profit organizations in the field of direct taxation.

It is possible to grant a different special rule for certain non-profit organizations in simplified accounts that carry out, as secondary activity, a business activity. This special rule is an option that the non-commercial entities must exercise from year to year; in this case, the entity applies a rate of income (fixed by the law, for example, 15% - see art. 145 of Decree no. 917/1986).

[4]Art. 2195 of Italian Civil Code refers to industrial production of goods and services, to intermediary activities in the movements of goods, to transport activity, to banking or insurance, to auxiliary activities of previous.

[5] Ministerial Resolution n. 11/274 of 23 October 1992 said that the services do not contribute to the formation of corporate income (they are not taxed) if they have the following characteristics (which must use jointly): carried out by non-profit bodies in accordance with the institutional aims; carried out without a specific organization; the bodies can't receive fees that exceed the cost of direct charge. □

Article 6 of Decree no. 601/1973 also provides that the corporate taxation (IRES), for the no profit entities and charities that have a legal personality, is reduced by half for the following subjects:

a) institutions and social welfare institutions, mutual societies, hospitals, institutions of assistance and charity;
b) institutes of education and institutes of study and experimentation of general interest non-profit-making, scientific bodies, academies, foundations and associations historical, literary, scientific, experience and research to cultural purposes only;
c) institutions whose purpose is treated by law for the purposes of charity or education;
c-bis) autonomous institutions for social housing, in each way denominated, and their consortia.

The Italian case-law stated that the reduction of the tax is just reserved for entities described and indicated in art. 6 of Decree n. 601/1973. This allowance does not extend to persons who do not carry out the activities provided by the rules. The tax benefits are exceptional and must be interpreted restrictively (Court of Cassation, 23 April 2010, no. 9758). Recently, the court stated, as established by European Court of Justice, that the banking foundations may not benefit of the tax treatments provided by art. 6 of Decree no. 601/1973 (Joined Chambers of Italian Court of Cassation, Judgment no. 1593/2009)[6] because they violate the community prohibition of State Aid.

1c) Rules relating to direct taxes for non-profit organization of social utility (ONLUS[7]).

The rules relating to ONLUS (Not Lucrative Organizations of Social Utility) provides a special tax system for the institutions which pursue non-profit purposes, of "social solidarity". The “ONLUS” carry out only institutional activities with the exception of those directly related to statutory purposes (see answer to question no. 2).

[6] Court of Justice, Case C-222/04 of 10 January 2006; See F. Amatucci, *I requisiti di non commercialità dell’attività svolta dalle fondazioni bancarie per il riconoscimento delle agevolazioni fiscali* in Rassegna Tributaria, 2006, p. 134; GALLO, Fondazioni e fisco, Rassegna Tributaria, 2004, 1164.

[7] Non-profit Organizations of social utility governed by Decree n. 460/1997 (Organizzazione non lucrative di utilità sociale).

Article 150 of Decree no. 917/1986 provides that does not constitute exercise of commercial activity the institutional activities in pursuit of exclusive purpose of social solidarity. At a glance:

The way to calculate tax base of ONLUS is determined as for associations and moreover:

1) the exercise of institutional activities does not constitute commercial activity;
2) the income arising from the exercise of activities directly related are not taxed.

1D) TAX TREATMENT OF GIFTS TO NON – PROFIT ORGANIZATIONS

Gift and Donation received by ONLUS and the non-profit organizations are not taxed .

The Italian taxpayer that makes a donation may deduct this one from his income tax. According to the Decree Law no. 35/2005 (Converted into Law no. 80/2005), since March 17, 2005, the Italian taxpayer can deduct from his income tax donations to ONLUS for an amount not exceeding 10% of the total declared income. The maximum inference is 70,000 euro per year.

According to Presidential Decree no. 917/86, which is still in force, in alternative, the taxpayer may deduct, from gross tax, 19% of the amount donated, up to a maximum of 2,065.83 euro. In alternative, he can choose to deduct from his declared income the donation to ONLUS for an amount not exceeding 2% of the total declared income.

1e) Rules relating to the value added tax (VAT)

There are some special tax rules concerning VAT for non profit organizations

(see 2 b and part II VAT)

2. Which activities are within the scope of not for profit activities benefiting from special tax rules? (non-market activities such as religious, political, philosophical, philanthropic activities, non-professional amateur activities, or activities which may be conducted as a business activity but which are conducted for public benefit such as

education, health care, cultural, artistic and sports activities, pure business activities conducted for non-profitable goals etc.)

2a) Direct taxes

Following Art. 148 of Decree no. 917/1986, (see answer question 1) for associations of social utility, the following activities are not considered within the scope of not for profit activities, even if carried out by payment of specific fees:

- the administration of food and drinks carried out by bar and similar exercises, at the premises where the institutional activities is carried out;
- the organization of travel and accommodation, provided that, the above activities are closely related to the ones carried out in direct implementation of institutional aims and in respect of the associates[8].

For some associations (trade unions and category), sales of publications and the assistance given mainly to the members or participants in the field of application of the same contracts and labor legislation, made toward payment of fees which in both cases do not exceed the cost of direct charge, are not considered as carried out in the exercise of business activity.

Special requirements have to be respected by the ONLUS must pursue objectives of social solidarity, within the context of the areas rigidly prescribed by law. Article 10 of Decree no. 460/1997 provides that purpose of social solidarity are pursued when the supplies of goods and services - relating to the statutory activities (see answer question 3a) in the fields of health care, education, training, sport, the promotion of culture and art and the protection of civil rights - are benefit from the following people:

a) persons disadvantaged by reason of physical, psychological, economic, social or family conditions;
b) components foreign communities, limitedly to humanitarian aid.

[8] The organization of trips and tourist stays referred to in paragraph 5 shall not be considered commercial even if carried out by political organizations, trade unions and category, as well as by associations recognized from the religious denominations with which the State has concluded pacts, agreements or arrangements, provided that it is carried out for the members.

Article 10, moreover, provides that associations, committees, foundations and cooperative activities, that carry out the activities in some sectors identified by law, are considered ONLUS[9] [see para. 1 lett. (c]

2B) ACTIVITIES EXCLUDED FROM VAT

The VAT Decree also provides for some special reliefs. Article 3 (3) of VAT Decree provides that advertising services in favor of non profit organizations are not subject to VAT.

Art. 4, Paragraph IV, Decree no. 633/72 provides that the supply of goods carried out in accordance with the institutional purposes by political organizations, trade unions and professional, religious, charitable, cultural amateur sports, social promotion and training extra-scholastic of the person, are excluded from VAT.

Moreover, the following activities are not considered commercial: operations relating to gold and foreign currencies, including deposits in current account, carried out by the Bank of Italy and the Italian foreign exchange office; the management, by military Authorities or the Police, of canteens reserved to their employees admitted to benefit about it for special reasons of service; the provision of mutual guarantees and services concerning control of the quality of the products, including the application of quality marks to members of a consortium carried out by consortia or cooperatives; the supply of goods and services carried out on the occasion of exhibitions propaganda by the political parties Represented in national and regional assemblies; the supplies of goods and services by the Presidency of the Republic, by the Senate of the Republic, by the Chamber of deputies and the constitutional Court, in the pursuit of theirs institutional purposes; health services paid with share of cost of health care provided by local health units and the hospitals of the national health service.

Article 4, Para. 5, of Decree no. 633/1972 states that some of the following activities are, in any case, commercial and subject to value added tax (VAT): supplies of new goods products for sale, except the publications sold mainly to the political associations, trade unions or professional organizations; religious, charitable, cultural or amateur sports associations;

[9] Social and health care; health care; Charity; Education; Training; amateur Sport; Protection and promotion of historic buildings or and crafts; Protection and improvement of the environment, Culture and promotion of art; Protection of civil rights; scientific research in the public interest, carried out by foundations or universities.

social promotion and training extra-scholastic organizations; supplies of water, gas, electricity and steam; management of trade fairs and exhibitions, of factory outlet stores, canteens and delivery of meals; transport of goods and persons, etc [10].

3. ARE THERE SPECIAL FORMS OF LEGAL ENTITIES REQUIRED FOR NON-PROFIT STATUS?

In Italy, there are some rules that provides special legal forms for carrying out of non-profit activities.

The special tax rules (see art. 148 of Decree no. 917/1986 for IRES and art. 4 of Decree no. 633/1972; for VAT see answer question 2b **for association religious, political, social promotion etc**) applies on condition that the certificate of incorporation and statutes - drawn up in the form of public act or private certified or registered writing - of non-profit organizations, contain the following clauses:

a) prohibition to distribute even in an indirect way, profits of management as well as funds, reserves or capital during the life of the association, except that the destination or distribution are not imposed by law;
b) the obligation to devote the assets of the institution, in the event of dissolution for any reason, to any other association with similar purposes o purposes of public utilities, o to any other destination imposed by law;
c) equal rules of the associative relationship and how to join times to ensure the effectiveness of the relationship itself, expressly excluding the temporariness of participation in the associative life by providing - for the adult associated, the right to vote for the approval and modification of the rules and regulations and for the appointment of the governing bodies of the association;
d) obligation to draw up and adopt an annual economic and financial statement according to the statutory provisions;

[10] The Italian Court of Cassation (Judgment no. 11391/2008) has declared that the management of exercises of bar-coffee - for serving drinks to the associates, carried out toward payment of fees specific - is not in any way between the institutional aims of a sports club, cultural and recreational activities and, therefore, this activities has a commercial nature, the proceeds of which are subject to VAT. In the same sense, Court of Cassation, judgment no. 9753/2007. A few years before, on the other hand, the Court of Cassation, judgment no. 280/2004, had stated that it is for the VAT exemption for the benefits of provision of meals and drinks to the inside of the premises of a recreational club, toward payment of consideration, carried out in accordance with the institutional purposes of the association.

e) eligibility of administrative bodies; principle of the single vote; sovereignty of the assembly of members or participants and the criteria for their admission and exclusion; appropriate public forms of convocation of assembly, of deliberations, of balance, of statements, of expenses;
f) prohibition of transfer of share or associative contribution, except the transfers for death; prohibition of revaluation of membership fee.

3a . Provisions for constitutive acts and statutes of ONLUS

Art. 10 of Decree no. 460/1997, for non-profit organizations activities (expressly indicated in answer to the second question), provides that the constitutive acts and statutes of ONLUS - drawn up in the form of public act or private certified or registered writing - should contain the following elements:

1) exclusive pursuit of purpose of social solidarity;
2) prohibition to carry out activities rather than the ones provided by law with the exception of those directly linked;
3) prohibition on distribution, even indirectly, of profits, scrap management, funds, reserves or capital in favor of members and third parties;
4) requirement to use profits or management surplus only for institutional or related activities;
5) obligation to the devolve assets to other ONLUS, in case of dissolution of ONLUS
6) obligation to draw up the budget or the annual account;
7) effective associative relationship without time limits and with the right to vote;
8) obligation to use the term "Non-profit Organization of Social Utility" or the abbreviation "ONLUS" in name and in any communication addressed to the public.

4. Are there special rules for non-resident or international non-profit entities? In that respect are there tax rules for non-resident non-profit organisations that may raise problems under the application of the basic EU treaty freedoms? Have there been any significant changes in the domestic law due to EU law (Infringement procedures, EU case law, or directives)?

Non-resident or international non-profit entities are governed by articles 153 and 154 of Decree no. 917/1986 (TUIR) .

According to art. 153, the Italian tax law take into account only the income earned in national territory except those exempt from tax and those subject to withholding ax. For the taxation, it also takes into account the unrealised gains and losses of goods relating to the business activities in State territory, even if there is no permanent establishment.

Article 154 provides that the income of non-resident non-profit entities is determined, in the same way of non-resident individuals (Art. 23 of Decree no. 917/1986).

According to paragraph 3 of the article 154, non-profit entities - that have exercised business activities through Permanent Establishment in national territory - must keep separate accounts for these operations.

The Italian Tax Agency with circular letter no. 24/E of 26 June of 2006, recognizes for non resident non-profit organizations , the ONLUS status and the same tax treatment. In practice, there is nothing to prevent the recognition of ONLUS status in favor of non resident entities and, therefore, they are allowed to benefit of fiscal allowances (if they respect the before mentioned conditions enshrined by article 10, Paragraph 1, of legislative decree n. 460 Of 1997).

II Income Tax

1. **What are the material conditions for special tax status? (nature of the activities, size of the business activities, purpose of the business activities, time-span within which business income must be spent, remuneration or benefits of the members or employees of the association etc.). Are there different conditions between special treatment of the activities and special treatment for contributions to the activities**?

In the civil code is permitted for non-profit organization to become a “persona giuridica”- so called “recognised as juridical person”. To achieve this qualification is requested a very complex procedural and, in fact, this procedural is requested only to very big associations, but for all the foundations. So most of the Italian non-profit organisations are “no recognised as juridical person”. By the civil code we can find “associazioni”/”associations” and “fondazioni”/”foundations” and also “società semplici”/”simple societies”. All these subjects

are introduced for non-profit activities by the Italian civil code. The association are essentially "person based" non-profit organizations. Foundation are essentially "good based" non-profit organisations.

In tax law where there are no absolute presumption based on legal form for special tax treatments of the entities and associations but a lot of derogation based on material conditions are applied.

According to national rule tax (Art. 73, Para. 4 – 5 see part I of questionnaire), it is important to put in evidence the exclusive or main purpose of the resident bodies or entities that is determined on the basis of the law, of the certificate of incorporation, of the statutes, if existing in the form of a public act or private writing, registered or authenticated. The main purpose of the body is considered as the essential activity to achieve the primary goal [11].
According to the doctrine and case law, in absence of incorporation or the statutes in the above forms, the main object (existence of business activity) of the resident entity is determined on the basis of the nature of activities actually carried out in the territory of the State[12]. This criterion applies in each case to non-residents entities and organizations.
The remuneration of the members of association and non profit organization concerning supply of services are considered as business activities and taxed on the basis of art. 148 TUIR (see part. I 2a).
There are not different (material) conditions between special treatments of activities and for contributions to the activities (see Part 1 answer point 1d of Questionnaire) .
There is an important distinction between business activity concept in national tax Law and the same concept in EU law .The question arise in application of State aid in case of special tax treatment of non profit organizations (see Dec. Cass 8082/2010).

[11] FICARI, *Attività commerciale non principale e agevolazioni IRPEG*, Rivista Diritto Tributario, 1996
[12] CASTALDI, *Gli enti non commerciali nelle imposte sui redditi*, Torino, 1999, 230. The jurisprudence establishes that the determination of exclusive or main character of commercial activity, it should not be made on the basis of mere statements, names and qualifications of the staff regulations of the institution, but on the basis of the interpretation of the provisions of the regulations with regard to the real nature of the work that the institution seeks to exercise and the specific rules of conduct (Court of Cassation, Judgment no. 10409 of 10 April 1991; Judgment no. 5839 of 16 May 1992; Judgment no. 7061 of 28 July 1994). For VAT, the Italian tax rule states that is important the real exercise of the enterprise, if it is actually designed to achieve the planned production purposes (among the many judgments, see Court of Cassation, Judgment no. 5555 /2000 and Judgment no. 10919/1992)

2. **What are the formal conditions for special tax treatment? (official permission from administration, finance, culture, sports, social affairs, central, regional, local, formalities for obtaining permission, duration, renewal)**

In the Italian legislation concerning non-profit organization the formal conditions for special tax treatment are different for each kind of provisions but they are not always relevant.

For all the non-profit organization is very important the content of the constitutive act or statute (art. 73, par 3 TUIR) or established by the law (see part I) . The constitutive act or statute is required in particular written form (a public deed or requires an authentication from a notary or by a public office).

Moreover, for recognition of special tax treatments of non profit organizations some legal clauses of statutes are required by art 148TUIR (see Part I answer question 3) .

Even if the commercial entity does not carry out business activities but its own object contains the indication that this activity is "prevalent" it has to be considered commercial organization

2 a) Other formal conditions are requested for favorable tax treatment of ONLUS (see part 1 1d)

To be instituted an ONLUS must be registered and it needs a official permission from the Ministry of finance (art. 11, D.Lgs. 4/12/1997, n. 460). Following to a very important reform of the non profit organization in tax system have been introduced an authority that has to control ONLUS. This is a formal condition to be considered ONLUS in add to the material conditions.

2B) Voluntary associations (L. 266/1991)

Voluntary association are introduced by the l. 266/1991: both civil and tax profiles had been regulated. So it is a very good example of good legislation. The voluntary association have to respect some particulars conditions and formalities :

Voluntary associations have to be registered in a regional register established in a Italian region that have to control the activities they want to do.

A particular protection is provided by constitutional law for church entities. Art.20 expressly declaim that the ecclesial character or the church scope of an association or institution can't determine any particular legislative limitation, or **special tax burden**, for its juridical capability or any form of activities.

2c) Pro loco association (L. 398/91)

This regime used first of all by pro loco association and little sport association or club has been extended to other associations. It requires limitation in the activities (spectacles and sport) and the amount from commercial income. There are also limitation in the amount of taxable income increased in the last few years. They have also very simple accountability.

3 – Tax treatment of income from purely non-profit activities.

Tax treatment of income from purely non-profit activities are : IRES exemption for non profit organizations which carry on purely non profit activities ; Other special schemes for non-commercial bodies in the field of direct taxation; Rules relating to direct taxes for non-profit organization of social utility **(ONLUS**) (see part I). The income coming from the ONLUS activities that are directly connected with the institutional activity (purely non profit) doesn't have to be considered in the tax base of corporate tax. A particular favourable tax treatment is reserved to Voluntary associations for purely non profit activities**(see above question 2 b)** . They have nowadays the widest range of reduction and exemption. They can only do marginal commercial activities and all their income have exemption if is destined to the institutional activities.

4 **Tax treatment of business income used to support non-profit activities**.

In general business activities (instrumental) to support non profit activities are taxed.

Some special regimes are introduced to support non profit activities for:

- Voluntary association
- ONLUS (see answer 2a and 2 b)

An important distinction has concerning the fact that there are associations and foundation

For the associations are not considered income taxable sales to association or component of other association that are “affiliate”. Art. 148,. 1st and par 3.

5 –INVESTMENT INCOME USED TO SUPPORT NON PROFIT ACTIVITIES

There are no particular provisions regarding investment income used to support non profit activities except tax treatment for gift and donations (part I answer 1d)

Also for non profit organisation have to be applied the antifraud and avoidance rules as that requires that bank transfer superior to certain amount have to be communicated to the tax agencies.

6 – REMUNERATION OR REMBURSEMENT OF EXPENSES

As we have already explained it Is not possible for voluntary association to have remuneration except for those necessary to assure the life of the association.

There are general rules that could be applied regarding the costs involved in.

The “inerenza”/”inherence” rules point out that costs can’t be deducted if they doesn’t refer to commercial activities.

All the reimbursement have to be documented. If not documented is not possible to consider it as cost both for the commercial or the non commercial activities.

7 – GIFTS, CONTRIBUTIONS AND PUBLIC SUBSIDIES IN THE TAX BASE

Gifts, contributions and public subsidies to non profit are not included in the tax base of non profit organization (see part I 1 d) . They are included in some particular cases as public contributions directed to the commercial activities.

8 – ACCUMULATION OF INCOME AND OR WEALTH

There are no particular rules on this matter. Ordinary rules are applied.

9 – LIQUIDATION OF A NON PROFIT ORGANIZATION

Some non profit organisation have a destination constraint. So they have to devolve in case of liquidation what balance to other non profit organization as indicated by the constitutive act or statute.

The destination constraint is request as essential condition for the registration of ONLUS and voluntary association.

10 – DEDUCTIONS OF GIFTS AND CONTRIBUTIONS

Gifts, contributions from physical person and societies to non profit organizations are deductible from their own income taxes in some particular cases.

Some public contribution (5 per mille or 10 per mille) is grant after of taxpayer choice in its own tax return where they indicate the beneficiary (non profit and charities) . Also in this case some particular requirement are necessary.

A particular communication has to be done from non profit organization to tax authorities as to achieve this contributions and is so called ASE model.

In this model non profit organisation has to describe following a closed schema their activities, where these activities have been done, to whose people they want to do institutional activities or commercial, what are their "essential activities" and some other economic and accounting information.

Part II - VAT

1 . What are the material conditions of special VAT status ?

Charities and non profit organizations are treated no differently for Italian VAT purposes than any other non-commercial entity.

The main business purpose is the material condition for taxation of charities, and non-profit organizations. It would be subject to VAT in accordance with the general criteria to identify their business activities.

It follows that charities may register and account for VAT on their business activities.

It should be noted that the exemption under Article 132 of VAT Directive is partially included – under national legislation – in the provision of "exemptions" (Article 10 of Decree n. 633/1972, hereinafter VAT Decree) whereas the Article 4, concerning the "business activity", puts outside the scope of VAT all entities which not have the carrying on of business or agricultural activity as main or exclusive object of their activity.

In this perspective, the underlying factor (material condition for VAT status) is the analysis on **the economic or business activity concept** and the verification of the main activity performed by the entities.

The general rule is that, to be taxable for VAT purposes, a person or an entities must supply goods or services in the course or furtherance of business, or artistic or professional enterprise (article 1 of VAT Decree). Then, Article 4 is devoted to notion of "business activity" such as those activities, exercised on a regular, habitual basis, specified in Articles 2135 and 2195 of Civil Code as well as such activities by those who are not organized as an enterprise.

Moreover, under the VAT Decree, some activities are automatically deemed to fall within the definition of "business" for VAT purposes. This absolute **presumption** applies to all the supplies of goods and services made by companies and similar entities (Art. 4(2) VAT

Decree). It extends to all supplies of goods and services made by consortia, associations, public bodies and other collections of persons, which have the carrying on of a business or agricultural activity as their main or exclusive object.

The other entities and associations, consortium if they not have the carrying on of a business or agricultural activity as their main or exclusive object, fall into the scope of VAT only for those activities which are of a commercial or agricultural nature (Art. 4(4) VAT Decree).

The Italian rule qualifies the company's business as to VAT in a very articulated way so it refers to private law rules and it requires, in addition to the concerning, in some cases (different from kind of business activities specified in art., 12135 and 2195 civil code) , the organization of the activity as an enterprises. Some activities of public entities are considered in any case as commercial .

The national legislator's excessive discretion may raise doubts about the correct implementation of VAT directive into national tax system. The rule provides a series of exclusions for certain activities which are not considered commercial (see answer question 2).

In the Italian tax system, VAT business activity concept therefore, does not coincide with the wider and generic meaning of enterprise in EU law , which was affirmed by the European Court of Justice [13].

2 Are there specific formal conditions for special VAT status?

In addition to some formal condition already examined (art. 4 par. 2 Decree 633/72 question 1 above), all supplies made by consortia, associations and partnerships to their own shareholders and members are also considered to be made by way of business (Art. 4(3) VAT Decree) except for those activities made by certain entities (of political, religious, cultural nature) in accordance with their institutional and social scope. This exclusion is granted if formal conditions of article 4 (7) similar to direct tax (see part I answer question 3) are met (*id est* articles of incorporation has to provide effective democracy of the entity, prohibition to distribute profits, obligation to transfer the assets, upon the dissolution, to other similar entities).

[13] F. Amatucci *Identificazione dell'attività di impresa ai fini fiscali in ambito comunitario* in *Rivista Diritto tributario,* 2009 n. 10, 781**;** *Problemi interpretativi della sesta direttiva e stato di armonizzazione dell'IVA in ambito comunitario, Rivista diritto tributario internazionale,* n. 3, 2007, 157.

For mentioned entities VAT can be deductible if it is directly attributable to purchases and importations effected within commercial and agricultural. Deduction is recognized only if these activities are separately accounted from institutional activity (Articles 20 e 20-bis of Presidential Decree n. 600/1973).

In the case of mixed activities it is possible to recover only VAT on purchases and importations related to business activities.

3 Are there any special rules with respect to the operation of the VAT exemption?

According to Art. 10 of Decree no. 633/1972, in addition, the following activities are exempt from VAT:

- transport of sick or injured persons with specific vehicles;
- medical services for the diagnosis, care and rehabilitation of persons;
- hospital services;
- home health care;
- services rendered to children, elderly, disadvantaged;
- educational activities for children and youth.

Article 10 (1) n. 12 provides that the free supply of goods to associations, foundations, public bodies with social scope are VAT exempt. The discipline of VAT exemptions provided for by the sixth directive and analytical and detailed is characterized by specificity and technicality but, unlike other provisions previously examined, there is a consolidated restrictive view. The exemptions are regarded as independent concepts of EU law independent from the discretion of the national legislator (see sent ECJ 3.3.2005 C- 428/2005) .The European Court of Justice, case C-45/95, stated that the Italian Republic did not respect the directive no. 13, Part B letter c), of the sixth Council directive no. 77/388/EEC on the harmonization of the laws of the Member states relating to turnover taxes - common system of value added tax: uniform basis of assessment - in so far as his fiscal rule does not exempted from VAT the supplies of goods destinated solely to exempted activity or otherwise excluded from the right of deduction.

Article 10 of Decree no. 633/1972, indeed, contains a detailed and exhaustive list of "exempt transactions", but it does not provide any exemption for supplies of goods intended exclusively to an exempt VAT activity.

Special requirements are provided for Not Lucrative Organizations of Social Utility (ONLUS), a kind of no profit organization which benefits from specific of *favor legis* regime for both direct and indirect taxation.

The organization can benefit from these tax reliefs only through an acknowledgment as an ONLUS made by Revenue Agency.

The *status* of ONLUS can be recognized, according to Legislative Decree n. 460 of 1997, only to associations, foundations, committees, social cooperatives and other private bodies.

The governing documents of these bodies have to satisfy several conditions indicated in Article 10 of mentioned Decree n. 460/1997.

Moreover, specific provisions are established by VAT Decree for the ONLUS, *i.e.*: the free supply of goods to ONLUS is VAT exempt (Article 10 (1) n. 12 of VAT Decree); advertising services in favour of ONLUS are not subject to VAT (Article 3 (3)); some services rendered by ONLUS (assistance, medical and instruction services) are VAT exempt (Article 10 (1) nn. 19, 20, 27-ter).

4- What are the VAT rules for cross-border services or supply of goods

Further, Article 68 lett f) Decree n. 633/72 provides that VAT is not chargeable on the importation of donated goods by public bodies or associations which are founded exclusively to provide help, relieve distress, education, instruction, study or research (this relief also applies to the importation of goods donated for the relief of communities afflicted by earthquakes and other natural disasters).

With reference to cross border operations, it is known that from 1 January 2010, following the VAT directive implemented at last, there are two general place of supply rules, depending on whether the recipient is a business or a consumer: (i) for supplies of business to business services, the place of taxation is the place where the recipient is established; (ii) for supplies of business to consumer services, the place of taxation is where the supplier is established.

In this context, non commercial entities are taxable persons also for purchases of services related to their institutional activities.

In reference to intra-community acquisitions, it is necessary distinguish between non commercial entities which do not engage any relevant activities subject to VAT on one side, from other non-commercial entities that are taxable only for some activities on other side.

Specifically, non-taxable non-commercial entities:

a) if they make purchases of goods for less than Euro 10.000 per year, they should not pay VAT in Italy, but they pay it in the country of origin of goods;

b) if they make purchases of goods for an amount exceeding Euro 10.000 per year, they should: i) ask the VAT identification number to Italian Tax Office; ii) integrate the invoices with VAT; iii) annotate documents in a special register; iv) monthly pay VAT, using the INTRA model n. 12, without filing the annual return VAT; v) file the Intrastat model of purchases;

c) if they do not perform other transactions subject to VAT, making purchases for less than Euro 10.000 per year, they may opt for the regular payment of VAT in Italy. The option enters in force from the year during which it is exercised and it is valid until it is revoked, and, in any case, until the end of the second year following the year during which it is exercised, and provided it the remaining requirements.

Otherwise, taxable entities – just identified for VAT in Italy - are required to apply VAT on all purchases made within the Community, both inherent to their business and related to institutional activities, even if in the latter case, the purchases have not exceeded the limit of Euro 10.000.

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III - INHERITANCE AND GIFT TAXES

1-2 – Specific and formal definition or conditions

Italian inheritance and gift taxes were abolished by Law n. 383/2001, in respect of gifts made or succession proceedings started after 25 October 2001. Since then inheritance and gift taxes have been reintroduced by Law Decree n. 262/2006, subsequently amended and supplemented by the Budget Law 2007.

Inheritance/gift tax applies to the transfer of rights/estates and *mortis causa*/gift transfers governed by Italian civil law. In the case where the *de cuius*/donor is an Italian resident, inheritance/estate tax/gift tax applies on any right or estate wherever located in the world. In the case where the *de cuius*/donor is a non-resident, inheritance/estate tax/gift tax applies only on the right or estate which is located in Italy.

On basis of the Budget Law 2007, the transfers by inheritance in respect of succession proceedings started on the 3 October 2006 is subject to inheritance tax at different rates depending on grade of family relationship (where the beneficiary is the spouse or a relative in direct lineage, the value of goods transferred to each beneficiary exceeding Euro 1.000.000 is subject to four per cent inheritance tax; where the beneficiary is the brother or sister, the value of goods transferred to each beneficiary exceeding Euro 100.000 is subject to six per cent inheritance tax; when the beneficiary is a relative within the fourth degree or a relative-in-law in direct line with other relatives-in-law in a collateral lineage up to the third degree, the value of goods transferred to each beneficiary is subject to six per cent inheritance tax).

When the beneficiary is a person other than spouses, direct line relatives, brothers and relatives, the value of goods transferred to each beneficiary is subject to eight per cent inheritance tax.

4 Specific tax rules

Presidential Decree n. 346/1990 provides subjective and objective exemptions from inheritance and gift tax.

Article 3 provides that exemptions apply in case of transfer, *inter alia*, to legally recognized foundations or associations with exclusive purpose of assistance, study, scientific research, education or any other purpose for public benefit and also to so called ONLUS. The status of ONLUS can be recognized, according to Legislative Decree n. 460 of 1997, only to associations, foundations, committees, social cooperatives and other private bodies (see above, VAT chapter).

Further, the above mentioned exemption also applies to transfers to legally recognized public bodies, foundations and associations other than those previously noted, if the transfers are made for purposes previously referred to.

In addition, the exemption applies to foreign public bodies, associations and foundations established abroad if the requirement of reciprocity is met. This condition may be removed by treaty specifically dealing with inheritance and gift tax. Such a treaty may provide for a non discrimination clause (for example Italy-France Treaty) or specific exemption for non profit entities (for example Italy-Israel Treaty).

With reference to trusts, there are no specific provisions in the Presidential Decree n. 346/1990 dealing with taxation for the purposes of Italian inheritance and gift tax.

Nonetheless, the matter has been dealt with quite extensively by the Tax Authorities through Circular Letter 48/E of 6 August 2007 and Circular Letter 3/E of 22 January 2008.

In particular, in Circular 3/E, the Tax Authorities have taken the view that inheritance tax must apply at the time of the settlement of the property (as opposed to the time of vesting) irrespective of whether it is possible to ascertain the precise amount of assets that will go to each beneficiary (so it appears that the tax authorities' view is that, though as a general rule the applicable rate must be determined on the ground of the relationship between the settlor and the beneficiaries, in case of a class of beneficiaries having different grade of relationship one must apply the highest rate as the case may be). However, this position is not shared by some courts: for example, in one of the first cases on such matter, the Provincial Tax Court of Florence (case n. 30 of 12 February 2009), recently stated that inheritance and gift tax must be applied only when assets are actually transferred in favour of somebody.

It must be said that trust is not used, in the Italian experience, as legal instrument to serve public interest purposes, but actually it appears to be more suitable to fit sophisticated needs than foundation or donation.

So, it is welcomed that Italian Tax Authority, in the recent Circular Letter n. 38/2011, specified that a trust can be considered as a ONLUS if conditions provided by Decree n. 460/1997 occur (see above, VAT chapter).

As far as wills, gifts, or transfer of assets by domestic non-profit organisations to domestic or foreign beneficiaries, the exemption is granted in accordance with the general rule of mentioned Article 3 of Presidential Decree n. 346/1990.