UNIVERSITÀ DEGLI STUDI DI ROMA "LA SAPIENZA"
DIPARTIMENTO DI SCIENZE POLITICHE

RIVISTA DI DIRITTO TRIBUTARIO INTERNAZIONALE

INTERNATIONAL TAX LAW REVIEW

1
2023
gennaio/aprile

Sapienza Università Editrice
SAPIENZA UNIVERSITÀ EDITRICE

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The Italian VAT discipline of shell companies: a critical analysis on Its compatibility with the European legal system*

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*Articolo sottoposto a revisione con il sistema della *blind peer review*, nel rispetto dell'apposito regolamento adottato da questa Rivista.

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Parole chiave: società di comodo; principio di neutralità IVA; Direttiva Unshell; diritto dell'Unione Europea.
Keywords: shell companies; neutrality of VAT; Unshell Directive; European Union law.

Abstract

La normativa italiana in tema di società di comodo, di cui all'art. 30 della L. 23 dicembre 1994, n. 724, è nota per i severi regimi para-sanzionatori che prevede in tema di imposte dirette ed IVA. Con riferimento a quest'ultimo tributo, i profili di irrazionalità della disciplina appaiono marcati poiché disallineata rispetto alla matrice del sistema IVA ed alla sua evoluzione. La Corte di Giustizia dell'Unione Europea, chiamata a pronunciarsi sulla compatibilità di questa disciplina con l'ordinamento unionale, riconoscerà, con massima probabilità, la violazione del principio di neutralità dell'IVA, nonché dei principi di proporzionalità e certezza del diritto, che costituiscono fondamentali valori europei. I tempi appaiono quindi maturi affinché il legislatore intervenga sul tema, coordinandosi con i contenuti della proposta di Direttiva 22 dicembre 2021, n. 565 (c.d. Direttiva Unshell) sugli enti transfrontalieri di comodo.

Abstract

The Italian legislation on shell companies, art. 30 of Law 23 December 1994, n. 724, is known for the severe para-sanction regimes It provides in the field of direct taxes and VAT. With reference to the latter, the irrationality of the discipline appears evident since It is totally misaligned with respect to the European matrix of the VAT system and Its evolution. The European Court of Justice, expected to rule on the compatibility of this discipline with the Union legal order, will most likely recognize a violation of the principle of neutrality of VAT, as well as of the principles of proportionality and legal certainty, which are fundamental European values. Therefore, the time has come for the legislator to intervene on this issue and to reshape the discipline, also in the perspective of the proposal for Directive 22 December 2021, n. 565 (so-called Unshell Directive) on cross-border shell entities.

1. Introduction

The Italian tax discipline of shell companies, pursuant to art. 30 of Law 23rd December 1994, n. 724, constitutes one of the Italian regulations that have most aroused the interest of scholars due to Its unsystematic and irrational contents which, despite the changes made over the years by the legislator and the clarifications offered by the Financial Administration, demand an extremely urgent structural reform[1].

[1] The first and most relevant commentators on the Italian discipline on shell companies did not hesitate to show, even with great harshness, its critical features, which are the result of a

From an exegetical perspective, the expression «shell company» is used, in the context of such discipline, to describe companies that deviate the corporate scheme from Its traditional commercial vocation, taking advantage of the corporate structure for the sole purpose of passively holding assets and, therefore, elude the tax legislation[2].

Indeed, within the Italian framework, all companies are subject to the so-called *statuto fiscale dell'impresa* (enterprise tax statute in English), which consists of a complex *acquis* of rules and institutes specifically designed to qualify and quantify the taxes owed to the Financial Administration, according to a logic founded on the generation of taxable material as a physiological outcome of their business activity, in compliance with the statutory provisions of articles 2082 and 2195 of the Italian civil code[3].

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sometimes superficial and poorly considered legislative technique. Indeed, see both the harsh position of F. Tesauro, *Prefazione*, in *Le società di comodo. Regime fiscale e scioglimento agevolato*, *Il fisco*, 1995, n. 22, p. 9 according to which this regime expresses «a technically degraded way of legislating and therefore in need of intense and difficult work of commentary» and the vivid thoughts of G. Falsitta, *Le società di comodo e il paese di Acchiappacitrulli*, in *Per un fisco civile*, Milan, 1996, 14 who stated that «the discipline of shell companies had been conceived on paper by the creators as an enormous net that was supposed to allow the taxman to fish for tuna, sea bass, sea bream, cod, in short, the cream of marine fauna. In the end, we ended up manufacturing a tool which, by dint of tears, exclusions, holes and shreds, with related patches, became a net that will allow the treasury to catch a myriad of sardines, mullet, clams and many crabs. The big and medium fish stand by, grin, or celebrate the narrow escape». All the quotations that are originally in Italian, in this note and in the following ones, have been freely translated into English.

[2] It is important to point out that the issue of shell companies is also being studied in the branch of company law, although for obviously different reasons from those highlighted here. In particular, without the need to delve into a theme that goes beyond the present discussion, the reflections of the company law doctrine have set up the study of the phenomenon in terms of atypical content of the negotiating cause of the corporate contract, which would deviate from the function and purpose to which It is usually conceived. See, in this sense, P. Greco, *Le società di comodo e il negozio indiretto*, in *Riv. dir. comm.*, 1932, I, pp. 757 ss.; G. Marasà, *Le società senza scopo di lucro*, Milan, 1984, pp. 6 ss.; G. Iudica, *Società di comodo*, in *Quadrimestre*, 1988, pp. 147 ss.; more recently B. Libonati, *Caratteri generali, nozione e tipi*, in *Diritto delle società*, Milan, 2004, p. 16.

[3] The rules that make up the «enterprise tax statute» represent one of the fields of study on which tax doctrine has focused the most, starting with the reforms of the 1970s. For an analytical examination of the role of companies in tax law and to deepen its evolution over time, please see to the contributions of G.A. Micheli, *Reddito di impresa e imprenditore commerciale*, in *Riv. dir. fin.*, 1974, I, pp. 396 ss.; G. Tinelli, *Il reddito d'impresa nel diritto tributario. Principi generali*, Milan, 1991, p. 16; A. Fantozzi, *Imprenditore e impresa nelle imposte sui redditi e nell'IVA*, Milan, 1982; Id. *Impresa ed imprenditore*, in *Enc. Giur.*, XVI, Roma, 1989, *ad vocem*; A. Fantozzi – F. Paparella, *Lezioni di diritto tributario dell'impresa*, Padua, 2014.

Whereas a company does not carry out any concrete commercial activity and, therefore, can be regarded as «shell company», the application of the «enterprise tax statute» is highly dystonic and generates undue distortions on the tax side, allowing this subject to obtain advantageous tax regimes to which, otherwise, It would not be entitled[4].

The tax legislator, through the regime set out in art. 30 of Law 23 December 1994, n. 724, pursued the objective of discouraging the establishment and diffusion of such companies, that are not «enterprises» in the strict sense, providing for a highly penalizing discipline, both on direct taxes and VAT[5].

Despite the appreciable and worthy purpose, the mentioned discipline is characterized by several rules and tax regimes misaligned with the constitutional values of equality and tax liability, enshrined in articles 3 and 53 of the Constitution, which should, on the contrary, permeate the entire tax law framework[6].

In particular, with respect to VAT, the current rules on shell companies introduce a double level of restrictions, consisting firstly in a prohibition on using the excess VAT resulting from the tax declaration and subsequently, in the case of persistent conditions of inoperativeness, in a rigid preclusion

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[4] The case study is represented by the tax regime reserved for assets that fall within the perimeter of a company, which obviously benefit from a limited proportional taxation instead of the progressive, much more onerous one, which belongs to assets intended for personal use. This aspect is clearly noted by R. Miceli, *Società di comodo e statuto fiscale dell'impresa,* Ospedaletto - Pisa, 2017, p. 26.

[5] This essay welcomes and shares the exegetical reconstruction of the discipline proposed by R. Miceli, *op. cit.,* pp. 189 ss. Indeed, according to such author, the shell companies' regime performs a precise function of contrasting the diffusion of companies that do not respect the «enterprise tax statute». It must be said, for the sake of completeness, that different reconstructive theories have also emerged in doctrine which have recognized the discipline as having an anti-evasion or anti-avoidance function. See, respectively, R. Lupi, *Le società di comodo come disciplina antievasiva*, in *Dialoghi dir. trib*., 2006, p. 1096 ss.; M. Nussi, *La disciplina impositiva delle società di comodo tra esigenze di disincentivazione e rimedi incoerenti*, in *Riv. dir. fin*., 2010, pp. 491 ss.

[6] In fact, it has been noted in doctrine that shell companies, like any other taxpayer, should be subject to a balanced tax regime that complies with the income capacity actually expressed, since the adoption of a regime that is purely «para-sanctioning» is not admissible, being detached from the principles set out in art. 53 of the Italian Constitution. See R. Miceli, *op. cit.*, 303. See also the provocation of L. Peverini, *Società non operative: una patrimoniale mascherata da criterio (contronatura) di determinazione dei redditi*, in *Dialoghi tributari*, 2014, p. 133 who asks the following question: «if the company does not carry out an economic activity, what is the point of assuming that it has produced an income?».

to the vertical compensation of the VAT credit, so as to make the latter, *de facto*, non-deductible[7].

This system, based on the need to sanction subjects who cannot be regarded as «enterprises», according to a purely formal interpretation of that expression, is however on a collision course with the VAT principles of the European legal system, which provide for the application of a substantial approach, by emphasizing the effective performance of an economic activity and the unavoidable neutrality of the tax[8].

The asymmetries of the Italian VAT regime of shell companies are evident, in particular, in relation to the different types of subjects to whom they are applicable (non-operating companies and low-profit companies) given that, for each of them, multiple arguments can be found which would justify a substantially different treatment, compliant with the European tax system and with the jurisprudence of the European Court of Justice.

Indeed, with the interlocutory ordinance n. 16091 of 15th May 2022, the Italian Court of Cassation referred the question regarding the compatibility of the aforementioned VAT regime of shell companies with the principles and rules of the European legal system to the European Court of Justice, marking the first formal step for a future substantial revision of this discipline[9].

The purpose of this essay is, therefore, to investigate the profiles of irrationality of the aforementioned discipline, trying to anticipate the probable conclusions that the European Court will soon reach and to suggest some legislative amendments, bearing in mind both the upcoming global reform

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7 It is clearly stated by G. Ferranti, *Società di comodo*, Milan, 2013, p. 143.

8 Without the need to anticipate considerations that will be developed later, we recall the witty considerations of A. Comelli, *La natura dell'imposta*, in AA. VV., *L'imposta sul valore aggiunto*, in *Giurisprudenza sistematica di diritto tributario*, Turin, 2001, 1399 for which the founding nucleus of VAT, as elaborated by the European Union legal system, can be seen in the constant economic shift of the tax within the various phases of the economic cycle, which allow it to be considered a tax on consumption, having a non- cumulative nature. See also L. Salvini, *Rivalsa, detrazione e capacità contributiva nell'imposta sul valore aggiunto*, in *Riv. dir. trib.*, 1993, I, pp. 1287 ss.

9 In fact, It is important to highlight that the Italian discipline on shell companies, despite the constant criticisms received from the studies of the doctrine, has never been subject to examination by the Constitutional Court or by the Court of Justice of the European Union. In fact, the aforementioned ordinance of the Court of Cassation recalls that the only circumstance in which this discipline has been brought to the attention of the European institutions is constituted by the question to the Commission no. P-9064/10IT, in response of 30 November 2010, by which It was considered that it complied with the principle of proportionality.

of the Italian tax system and the proposal for the *Unshell Directive*, which are considered as having the uttermost importance in aligning the content of the aforementioned art. 30 to the general structure of principles that emerges from the European legal system[10].

2. The subjective area of application of the Italian tax discipline on shell companies

The essential step to understand - and, therefore, solve - the problems posed by the VAT regulation of shell companies in Italy is represented by the preliminary analysis of the rationale on which this discipline is based and of the subjects to whom It is applicable.

It has already been said that the main purpose of the art. 30 of Law 23 December 1994, n. 724 consists of the need to discourage the diffusion of companies that betray their traditional commercial function[11], passively holding assets that should instead be employed in business activities, through the provision of highly penalizing tax regimes.

This basic approach is directly reflected in the subjective scope of application of the discipline which, following the amendment made by art. 9, paragraph 1, of Legislative Decree 21st June 2022, no. 73 (converted with Law 4th August 2022, n. 122) that removed the companies in systematic loss, pertains only to companies that declare a quantity of revenues and income inconsistent with the assets owned[12].

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[10] Indeed, art. 9 of the aforementioned draft for a tax reform in Italy (Chamber Act 1038), precisely provides for a structural reform of the regulation of shell companies, the contents of which are however, at the time of writing, merely sketchy.

[11] Regarding the «active» nature that companies must necessarily possess in order to be qualified as such in the context of tax matters, see G.A. Micheli, *Reddito di impresa e imprenditore commerciale*, op. cit., p. 396; A. Giovannini, *La nozione di imprenditore*, in AA. VV., *Imposte sul reddito delle persone fisiche*, Turin, 1994, p. 439, V. Ficari, *Reddito d'impresa e programma imprenditoriale*, Padua, 2004; P. Boria, *Il sistema dei tributi. Imposte dirette*, Turin, 2018, *passim*.

[12] The companies in systematic loss were not included in the original subjective scope of application of the discipline, having been introduced within art. 30 many years later, by art. 2, paragraph 36 decies and undecies, of Legislative Decree 13 August 2011, no. 138, converted with Law 14 September 2011, n. 148. Pursuant to this legislative amendment, companies could also be considered as non-operating if i) for five consecutive tax periods were in a situation of tax loss according to the tax return or which ii) were in this condition for four tax returns of consecutive incomes and for a tax period with income lower than the minimum, determined

In particular, the gateway to the regime of shell companies, in the light of Its current formulation, is constituted by a so-called *effectiveness test*, by means of which the overall value of the company revenues, increases in stocks and ordinary income, described in Its profit and loss account, is compared with a figurative income, determined through a complex system of calculation by coefficients, calibrated on the value of the assets held by such subject[13].

This is a typical predetermination technique of the tax basis, by virtue of which It is assumed, according to a purely inferential logical scheme, that It is possible to determine a *minimum* profitability threshold that the company should in any case reach, given the assets at disposal[14].

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according to the general regulation of shell companies. Over the years, this regulatory provision has been the object of very severe criticism by the doctrine since it discounted an evident logical error: loss-making companies are not non-operating companies that avoid an ordinary productive activity, since if they have losses, It is precisely because they carry out an economic activity in the market (which even acts as a prerequisite for losses). It is no coincidence that the legislator, in 2022, decided to intervene in order to abolish this unreasonable provision from the discipline on shell companies. For further information on the topic, see among others a D. Stevanato, *Società di comodo, un capro espiatorio buono per ogni occasione*, in *Corr. Trib*., 2011, pp. 2889 ss.; Id., *Società senza utili, imposte senza ricchezza: un caso di darwinismo fiscale?*, in *Dialoghi dir. trib*., 2012, pp. 502 ss.; R. Miceli, *Nuova disciplina fiscale delle società non operative,* in *Treccani, Libro dell'anno* 2013, Rome, 2013, p. 424; Id., *Società di comodo e statuto fiscale dell'impresa*, op. cit., pp. 139 ss.; for comments on the new law which got rid of the rules relating to companies having systematic losses, see G. Ferranti, *Abrogata la disciplina delle società «in perdita sistematica», ma soltanto dal 2022*, in *Il fisco*, 2022, pp. 2917 ss.; S. Trettel, *Società in perdita sistematica: abrogato il regime, il contrasto all'evasione passa per i comportamenti antieconomici?*, in *Il fisco*, 2022, pp. 3719 ss.

[13] With regard to the *effectiveness test* on shell companies, the Financial Administration has repeatedly intervened over the years with numerous documents, aimed at providing an analytical framework of how to proceed with the execution of the aforementioned test. In this regard, see Circular 4th May 2007, n. 25/E, as well as the Resolutions of 18th January 2008, n. 13/E and 08th March 2007, n. 36/E.

[14] The technique of regulatory predetermination, on which the Italian discipline on shell companies and the *effectiveness test* are based, belongs to the broader category of legal presumptions, widely known in tax matters. This is a classic theme in doctrine, for which we suggest to see the works of L. Tosi, *Le predeterminazioni normative nell'imposizione reddituale*, Milan, 1999, 14 and R. Lupi, *Metodi induttivi e presunzioni nell'accertamento tributario*, Milan, 1988, 27. The doctrine that has dealt most with shell companies has not hesitated to define such predeterminations as completely «apodictic» and therefore unreliable. In these terms R. Miceli, *Società di comodo e statuto fiscale dell'impresa*, op. cit., pp. 135 se also D. Stevanato, *Società di comodo, orrore senza fine: da imposta su presunti redditi di fonte patrimoniale a tributo extra-fiscale sul patrimonio*, in *Dialoghi dir. trib*., 2014, pp. 133 ss.

It should be noted, without the need to deepen a topic that is not central to the purposes of the present analysis, that this discipline identifies some «causes of exclusion», through which the shell company regime does not apply to the taxpayer. These causes of exclusion share a precise rationale: whenever the *effectiveness test* cannot be passed for objective reasons, which are factual impediments to an adequate production of revenues - think, for instance, of companies that are in their first year of activity - It is not possible to believe that the company has knowingly renounced to operate in the market and consequently It is neither possible to impose sanctions[15].

If there are no suitable causes of exclusion and the company fails to pass the *effectiveness test* - i.e., the figurative incomes are higher than those formally declared - the company can be defined as «shell entity» or «non-operating entity» and therefore can be subject to the punitive regimes that characterize this discipline

This passage appears to be fundamental.

Indeed, the fact that the application of the discipline on shell companies is a mere consequence of the negative outcome of the *effectiveness test* and, consequently, of a tax declaration which appears to be not consistent with the company's assets, means that essentially two categories of subjects are affected: non-operating companies and low-profit companies.

The first ones are enterprises that possess the typical form of an ordinary company but which, at the same time, decide to passively hold their own assets, made of both movable and immovable properties, with the primary aim to put them at free disposal for shareholders and their families, thus not generating any taxable wealth (or at least generating it to a lesser extent than potential).

These are corporate entities whose legitimacy, on the civil level, appears consolidated[16] and which, on the fiscal side, are certainly worthy of a dif-

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[15] The causes of exclusion are provided in paragraph 2 of the art. 30 of Law 23rd December 1994, n. 724 and, for the remaining part, in the Provision of the Director of the Italian Revenue Agency of 14th February 2008, n. 23681, subsequently integrated by the Provision of 11th June 2012, n. 87956. Added to these ones, there is a general cause of exclusion, with a residual function, pursuant to paragraph 4-bis of the aforementioned art. 30. Pursuant to the latter provision, the general cause of exclusion occurs in any other hypothesis the taxpayer is able to demonstrate the effective commerciality and/or operation of the company, regardless of the income results achieved, and It is applicable both trough a ruling or before Tax Courts. For further information on the causes of exclusion, see the reflections of M. Nussi, *op. cit.*, pp. 491 ss.

[16] The reference is to non-operating civil law partnership, which constitute a peculiar corporate typology with respect to which, overcoming the original reluctances of doctrine and

ferent treatment compared to ordinary commercial companies, due to the fact that they escape the legal logic of the so-called «enterprise tax statute», justifying the application of regimes that determine a minimum contribution to public expenditure, in compliance with the provisions of art. 53 of the Italian Constitution.[17]

The main problems, for such non-operating companies, are represented by the legislative technique and by the operational choices made by the legislator which, in the case of the VAT regime, as It will be seen later, show marked profiles of irrationality since they are totally detached from the VAT tax assumptions, as elaborated in the European legal system, and introduce severe restrictions for subjects who should not fall within the scope of application of the tax, due to the fact that they do not exercise any economic activity.

At last, the second category to which the tax discipline of shell companies is applicable, after the elimination of the systematic loss-making companies in 2022, is represented by low-profit companies.

This term does not describe a homogeneous group of subjects - as in the case of non-operating companies - but refers to a complex set of corporate entities which, for multiple reasons, often related to the type of the economic activity carried out in the market or to the assets owned, do not pass the *effectiveness test*, even though they do operate in the market and produce/sell goods or services.

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jurisprudence, It is now believed possible to allocate movable and immovable assets by exploiting the corporate scheme. In these terms, expressly P. Spada, *Dalla società civile alla società semplice di mero godimento*, in *Riv. not*, 2016, pp. 834 ss. The main reasons for which non-operating civil law partnership can perform the function of mere possession of assets depends on i) both from the progressive diffusion of the form of «company without an enterprise» through specific special laws (think of the well-known case of partnerships between professionals) and ii) by the express provision by the tax legislator (art. 21, paragraph 1, Law 17th February 1985, n. 17) to favour the transformation of shell companies into civil law partnership. This has led the doctrine to believe that «the *causa societatis* seems to have once again embraced, at least for civil law partnership, the hypotheses in which It is preordained to the mere enjoyment of collective goods». In these terms K. Martucci, *Le società di godimento nel diritto italiano oggi*, in *Riv. dir. civ.*, 2009, p. 468; see also G. Baralis, *Riflessioni sui rapporti tra legislazione tributaria e diritto civile. Un caso particolare: le società semplici di mero godimento*, in *Riv. dir com.*, 2004, pp. 171 ss.; Id., *L'eretica società semplice di mero godimento immobiliare: riflessioni*, in *Studio di impresa*, 2016.

[17] It is no coincidence that the discipline on shell companies finds its constitutional foundation in the fiscal interest of the State, as a declination of the principles set out in art. 53 of the Italian Constitution. More precisely, the Constitutional Court, starting from the well-known sentence of 26th June 1965, n. 50, has constantly highlighted that the task of tax matters is to combat any phenomenon that could fuel tax evasion or avoidance.

The application of the shell companies discipline to low-profit companies constitutes one of the most evident effects of the logical and juridical unreliability of the *effectiveness test* since the coefficients and percentages of return applied therein are determined *a priori* and are detached from the contingent economic context, thus allowing such entities to be qualified as «shell ones» even if they are quite normal enterprises that just obtain very limited revenues from the assets they own[18].

The effect, on the VAT perspective, is that a preclusive and penalty regime is applied to operators who, from every point of view, are completely comparable to any other economic entity carrying out business activities in the market, which, however, undergoes the application of this tax according to the ordinary rules and without limitations of any kind.

Therefore, It is already evident that the subjective scope of application of the tax discipline of shell companies and, more precisely, of the related VAT regime, is capable of generating distortions and application problems, the effective dimension of which can be perceived precisely by proceeding to a Its direct examination.

3. The VAT regime of shell companies

Companies not passing the *effectiveness test* undergo the application of extremely severe regimes which, in the case of direct taxes result in the presumptive determination of a minimum income[19], and in the case of VAT

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[18] This is one of the most critical aspects of the discipline on shell companies. In doctrine, for example, see L. Tosi, *Relazione introduttiva: la disciplina delle società di comodo*, in AA. VV., *Le società di comodo*, Padua, 2008, pp. 5 ss. according to whom these coefficients «have never been the subject of a comparison, have not received any empirical appointment, do not come from a verifiable historical investigation», while for R. Miceli, *Società di comodo e statuto fiscale dell'impresa*, op. cit., p. 266 «the percentages of profitability for individual assets are quite high, somewhat generic and above all not related to the current economic phase. In particular, the presumed value of real estate or intangible assets is excessive. This value, however, is generally addressed to the whole category of assets (with the exception of a specification with reference to real estate located in Municipalities with less than 1000 inhabitants), as if the assets all had a return comparable to a homogeneous value».

[19] As known, companies classified as shell companies are prohibited, for the purposes of direct taxes, from declaring an income lower than that determined presumptively by applying certain coefficients, as determined in the *effectiveness test*. The logic underlying this predetermination is clear: if there is an increase in the value of the assets owned by the company, it should, in abstract, lead to a greater income production capacity. See on these topics R. Lupi, *Le società di*

consist of rigid preclusions, regarding the ordinary functioning mechanisms of such tax.

In detail, the VAT regime is given by a double level of restrictions with progressive activation.

The first level occurs immediately, upon failure to pass the test, given that art. 30, paragraph 4, of Law 23 December 1994, n. 724 provides for a general restriction in the use of the excess VAT resulting in the tax return.

The shell company will not be able to make use of this excess in any way, given that It is unable to i) request the refund, ii) proceed with the compensation pursuant to art. 17 of Legislative Decree 09th July 1997, no. 241, as well as iii) to transfer it to third parties pursuant to art. 5, paragraph 4-ter, of Legislative Decree 14th March 1988, no. 80.

The resulting effect is therefore evident: the only possibility of using the aforesaid VAT excess consists in deducting it from the total VAT amount due to the Financial Administration and, in case it should not be possible, carrying it forward.

As noted in the doctrine, this evidently translates into a highly preclusive circumstance for all companies that do not have active transactions given that the VAT surplus will be totally unusable[20].

The second level of restrictions is far more stringent and requires, in order to be activated, that for three consecutive tax periods the company fails to carry out active transactions for an amount at least equal to the presumed minimum income according to the criteria of the *effectiveness test*, thus confirming Its condition of substantial inoperativeness.

Such restriction consists of a whole prohibition of vertical compensation of VAT credit, so that the credit claimed in relation to the purchase of goods and services and thus become non-deductible, is no longer usable, weighing entirely on the company.

This one, as a corollary, becomes a full-fledged final consumer since It is subject to the tax without the possibility of being able to transfer the weight of the levy to the next phase of the economic cycle, as if it had purchased goods or services with the main purpose of consuming them[21].

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comodo come disciplina antievasiva, op. cit., *passim*; L. Tosi, *Relazione introduttiva: la disciplina delle società di comodo*, op. cit., pp. 6 ss; R. Schiavolin, *Considerazioni di ordine sistematico sul regime delle società di comodo*, in AA. VV., *Le società di comodo*, Padua, 2008, pp. 59 ss.

[20] It is clearly highlighted by R. Miceli, *Società di comodo e statuto fiscale dell'impresa*, op. cit., p. 186.

[21] The deduction mechanism that acts as a structural element of VAT is essentially interrupted,

It is therefore evident that the main effect that derives from the Italian VAT regime of shell companies and, more precisely, from this double level of restrictions, consists in a progressive attenuation, until arriving at a total elimination, of the principle of neutrality which, as known, forms the cornerstone of the VAT system[22].

4. The rationality of the VAT system for shell companies in the light of the European legal system

What precedes is fundamental to knowingly address the central theme of this essay: the rationality of the VAT regime of shell companies, outlined by art. 30, paragraph 4, of Law 23 December 1994, n. 724, in the light of the principles and main features of this tax, as developed by the European legal system.

It is therefore necessary to put the two plans of analysis, previously examined, in direct relation, given that It is from the study of the subjects that fall within the scope of application of the discipline on shell companies that the main discrepancies with the principles of the VAT system emerge.

For the sake of clarity, we will therefore proceed to analyse, first, the problems posed by the VAT restrictions applied to non-operating companies and, subsequently, the several problems related to the low-profit companies.

4.1. The relations between the VAT restrictions referred to in art. 30, paragraph 4, of Law no. 724/1994 and non-operating companies

The non-operating companies, as illustrated above, represent corporate bodies that are dedicated to the mere possession of assets, placing them at the

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even if It is the only feature that allows the tax to reach the full neutrality, which constitutes its typifying aspect. On these topics, L. Salvini, *Rivalsa nel diritto tributario*, in *Dig. comm.*, XIII, Turin, 1996; Id., *Rivalsa, detrazione e capacità contributiva nell'imposta sul valore aggiunto*, in *Riv. dir. trib.*, 1993, I, 1287 e ss.; see also F. Gallo, *Profili di una teoria dell'imposta sul valore aggiunto*, Rome, 1974; Id., *L'Iva: verso un'ulteriore revisione*, in *Riv. dir. fin.*, 1978, I, 595 ss.; P. Filippi, *Valore aggiunto (imposta)*, in *Enc. dir.*, XLVI, Varese, 1993; M. Basilavecchia, *Situazioni creditorie del contribuente e attuazione del tributo*, Padua, 2000.

[22] In these terms, in relation to the principle of neutrality, see R. Lupi, *Imposta sul valore aggiunto (iva),* in *Enc. giur. Trecc.*, XVI, 1989 and A. Comelli, *Iva nazionale e comunitaria. Contributo alla teoria generale dell'imposta sul valore aggiunto*, Padua, 2000, p. 675 ss.

disposal of the shareholders and their family members, without using them in the context of a lucrative business activity conducted on the market.

It has already been said that this represents a deviation from the functions and purposes to which such entities are traditionally avowed in the domestic legal system, given that, since companies are an expression of an association contract pursuant to art. 2247 of the Civil Code, the assets transferred therein must be preordained to the pursuit of the corporate purpose, consisting in carrying out the business and, therefore, in obtaining profit[23].

It follows that non-operating companies constitute a *sui generis* corporate scheme, in which the purpose is «non-economic» or, more precisely, «non-commercial» since they do not carry out an activity aimed at the production or exchange of goods and services, limiting themselves to manage goods and to enjoy the fruits they produce.

In this perspective, the difficulties in applying the VAT preclusions of the aforementioned art. 30, paragraph 4, to these subjects appear evident, given that the conflict with the European VAT legislation is clear.

It is widely known that, in the European legal system, art. 9, par. 1, l. a) of Directive n. 2006/112/EC (the main VAT directive) establishes that is subject to VAT any person who carries out an economic activity on the market, carrying out transactions that are relevant for the purposes of the tax and therefore suitable for triggering the mechanism of tax deduction[24].

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[23] According to S. Pescatore, *Attività e comunione nelle strutture societarie*, Milan, 1974, p. 130 «in companies - since It is a collective exercise of the enterprise - the activity is placed in function of production and exchange».

[24] The notion of passive VAT subjectivity outlined by the aforementioned art. 9 is the following «a "taxable person" is anyone who carries out, independently and in any place, an economic activity, regardless of the purpose or results of said activity. An "economic activity" is considered any production, marketing or provision of services, including mining, agricultural, as well as those of self-employment or similar. In particular, an economic activity is considered the exploitation of a tangible or intangible asset to obtain revenues of a stable nature». This notion is broad and all-encompassing, so much so that the Court of Justice of the European Union has repeatedly clarified that the form in which economic activity is conducted is irrelevant, as long as It is habitual and exercised in the free market. In this sense, *ex multis*, ECJ, 21st October 2004, C-8/03, ECJ, 26th September 1996, C-230/94. See A. Comelli, *Iva nazionale e comunitaria. Contributo alla teoria generale dell'imposta sul valore aggiunto*, op. cit., *passim*; M. Giorgi, *Detrazione e soggettività passiva nel sistema dell'imposta sul valore aggiunto*, Padua, 2005. On this topic, It is relevant the essay of R. Miceli, *La disciplina nazionale IVA sulle società di comodo al cospetto della Corte di Giustizia. Si preannuncia l'incompatibilità europea,* in *Giustizia Insieme*, 2022, p. 10 who states that «at the European level, the subjective assumption of VAT is instead qualified according to an exclusively substantial type approach, on the basis of which It is admitted that the tax must be paid by subjects who carry out economic activities aimed at

The fundamental requirement for having a passive subjectivity for VAT purposes, within the European legal system, is therefore given by the concrete exercise of an economic activity, any other connotation becoming irrelevant as, for instance, the formal nature of the subject (self-employed, company, single entrepreneur, etc.)[25].

The consequences of this approach are immediately perceptible: those who do not carry out an economic activity on the market cannot be subjects of the VAT system, lacking of an essential requirement, duly identified by the aforementioned art. 9 of Directive n. 2006/112/CE.

Therefore, due to their own ontology, non-operating companies are placed outside the application perimeter of VAT, as established by the European legislation and, as a result, should not be subject to the tax mechanisms, in the guise of taxable persons, in relation to the various phases of the economic cycle.

Indeed, the Court of Justice of the European Union, multiple times, has excluded the activities of mere possession of goods as relevant operations for the purposes of VAT tax liability since they are functionally detached from the market within which, on the contrary, the performance of any economically relevant activity must be carried out[26].

The Italian legislator, aware of this orientation, has introduced paragraph 5 to art. 4 of the D.p.r. 26th October 1972, n. 633, by means of which It was established that, upon the occurrence of certain requisites,

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the market independently and under of competition. This notion includes both business and self-employment activities and focuses on the requirement of the effectiveness of the activity carried out with reference to the aforementioned characteristics, regardless of subjective status, the purposes of the activity or the results of the same».

[25] This is one of the aspects in which there is the greatest difference between the domestic VAT system and the European one. Indeed, in the domestic legal system, the passive subjectivity of VAT is strictly correlated to a formal *datum* represented by the exercise of a business, arts or professions pursuant to articles 4 and 5 of the Presidential Decree 26 October 1972, no. 633. Companies, regardless of the species they belong to, are always VAT taxable persons. See F. Amatucci, *Identificazione dell'attività d'impresa ai fini fiscali in ambito comunitario*, in *Riv. dir. trib.*, 2009, p. 781.

[26] The reference is, for example, to the rulings of the ECJ of 20th June 1991, C-60/90, ECJ of 27th November 2001, C-16/00, ECJ of 20th January 2021, C-655/19. In the latter, It is stated that «a transaction by which a person acquires immovable property in the context of an enforcement procedure undertaken for the purpose of recovery of a loan which had previously been granted and, consequently, sells that property does not constitute, in itself, an economic activity, where that transaction falls within the scope of a simple exercise of the right of ownership and of the sound management of private assets, such that that person cannot, in the context of that transaction, be considered a taxable person».

non-operating companies can no longer be considered commercial and, as a result, be considered VAT taxable persons[27].

The VAT regime of shell companies, if applied as an alternative to the last-mentioned paragraph 5 art. 4 of the D.p.r. 26th October 1972, n. 633, thus appears misaligned with these consolidated European guidelines since entities that should not be taxable subjects for VAT (i.e. non-operating companies) are still subject to the tax but only in relation to some profiles, for instance represented by active transactions or accounting and tax return obligations.

Scholars have not hesitated to define this circumstance as an inadmissible hybridity [28], which is even more irrational if read through the perspective lens of art. 9, par. 1, l. a) of Directive n. 2006/112/EC, by means of which It is clear that non-operating companies, for VAT purposes, should not be subject to a punitive regime such as that of shell companies, since they should be totally excluded from the application of the tax and the correlated «tax recovery and deduction» mechanism.

In essence, at present, the VAT regime of shell companies generates a curious application of the tax, which we could define as «variable geometry», detached from the European legal matrix and evidently devoid of rational justification.

4.2. The relations between the VAT restrictions referred to in art. 30, paragraph 4, of Law no. 724/1994 and low-profit company

Similar considerations can also be made in relation to low-profit companies which, as illustrated, consist of enterprises that are unable, physiologically, to pass the *effectiveness test*.

It is important to point out that these subjects - who do not incur significant losses but obtain very modest revenues - could in abstract make use of the general cause of exclusion pursuant to par. 4-bis of art. 30 and could therefore offer adequate proof of their ordinary difficulties in reaching the

[27] The aforementioned paragraph 5 was introduced by Legislative Decree 02nd September 1997, no. 313. See, on this point, R. Lupi, *Le società di mero godimento tra irrilevanza IVA e autoconsumo*, in *Rass. trib.*, 1998, pp. 12 ss.; M. Interdonato, *Gli imprenditori*, in AA. VV., *L'IVA, Giur. sist. di dir. trib.*, Turin, 2001, p. 141.

[28] R. Miceli, *La disciplina nazionale IVA sulle società di comodo al cospetto della Corte di Giustizia. Si preannuncia l'incompatibilità europea,* op. cit., p. 11 expressly use the word «hybridity» with reference to the VAT regime applicable to non-operating companies.

minimum profitability threshold, so as to escape the application of the shell company regime.

However, in concrete terms, there may be multiple cases in which such cause of exclusion cannot actually work.

This can happen, for example, due to the negligence of the low-profit company (for instance, the latter forget to challenge a tax assessment notice that apply the shell companies regime before the competent Tax Court) or due to the effects of an unfavourable judgment which, even if unjust and erroneous, has become definitive[29].

In such cases, the enterprise is treated as if It were a shell company, despite actually operating on the market and producing revenues, even if not congruent with the assets it holds, and is thus subject to the severe VAT regime.

This produces, in relation to the topics of this analysis, a further and unacceptable violation of European principles.

More precisely, low-profit companies fully comply with the provisions of art. 9, par. 1, l. a) of Directive no. 2006/112/EC since they carry out an economic activity and, therefore, appear to be ordinary economic operators, who produce or exchange goods and services on the market, taking advantage of the free competition scheme. This circumstance is a necessary and sufficient condition for recognizing low-profit companies as VAT taxable persons and, therefore, for granting them an unconditional right to VAT refund or deduction[30].

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[29] As R. Miceli, *La disciplina delle società di comodo e il rilievo delle scelte imprenditoriali*, in *Riv. trim. dir. trib.*, 2020, pp. 213 ss., points out the general cause of exclusion constitutes the most important test bench in which the taxpaying company can demonstrate the effectiveness of the activities carried out, given that they may include «an innumerable series of non-formalized and non-typified hypotheses but verifiable from time to time in relation to their probative suitability to demonstrate the absence of a mere enjoyment of the assets». In this context, the entrepreneur can provide proof of the impossibility of achieving adequate revenues due to market contingencies or, also, due to erroneous business choices. In this sense also Court Cass., Section V, 12 February 2019, n. 4019.

[30] In the VAT system, as devised in the European legal system, the exercise of an economic activity and the execution of taxable transactions are relevant from the fiscal perspective and grant access to the deduction mechanism as it must be applied immediately in relation to all VAT fiscal levies intervened in the business cycle. The right to deduct, in particular, is aimed at fully relieving the economic weight of VAT, safeguarding the neutrality of taxation. See A. Comelli, *Iva nazionale e comunitaria*, op. cit., p. 675 ss.; P. Boria, *Il sistema dei tributi. Imposte indirette*, Turin, 2019, 5 ss.; Id., *Diritto tributario europeo*, Milan, 2017, p. 351 where It is stated that «It is fully consolidated in the European jurisprudence that neutrality constitutes a qualifying feature of the structure of the value added tax as It is functional to guarantee

It is clear that their natural low profitability does not derive from the consumption of the company assets by shareholders or family members but, on the contrary, from a correct management of the whole enterprise which is merely not satisfactory and which even presupposes the actual use of the aforementioned assets.

Therefore, the effective economic nature of low-profit companies makes them, to all intents and purposes, ordinary taxpayers pursuant to the European legal system.

The application of the Italian VAT regime for shell companies, which results in the absolute impossibility of using the accrued VAT credit, determines a marked misalignment with the guidelines that underlie the general logic of this tax, resulting in an irrational equation through which an ordinary economic operator is treated as a final consumer[31].

The tension towards entrepreneurship that these corporate entities demonstrate should therefore prevent the application of the VAT regime; the effectiveness of the activity they carry out is clearly incompatible with the restrictions provided by the aforementioned art. 30[32].

5. VAT regime of shell companies and the preliminary ruling before the European Court of Justice

The several aspects of irrationality that the VAT regime of shell companies shows, following the innumerable criticisms expressed by the doctrine over

the full competitiveness of companies and the pursuit of the fundamental freedoms of the community order». In the European jurisprudence see instead the well-known cases ECJ 1st April 1982, C-89/81; ECJ 03rd March 1988, C-252/86; ECJ 20th June 1996, C-155/94; ECJ, 16th September 2008, C-288/07.

[31] Not surprisingly, the European judges have specified, on several occasions, that the right to deduct is inalienable if the economic entrepreneur, regardless of the revenues or proceeds achieved, obtains the supply of goods or services from another taxable person and provides for their use «downstream», in the context of operations subject to tax, and therefore there is possession of a regular invoice. In these terms, see the recent judgment of the CJEU, 12 February 2023, C-519/21 where It is stated that «the right of VAT deduction is a fundamental principle of the common system of VAT, which in principle may not be limited, and is exercisable immediately in respect of all the taxes charged on the taxable person's input transactions (judgment of 10 February 2022, Grundstücksgemeinschaft Kollaustraße 136, C-9/20, EU:C:2022:88, paragraph 47 and the case-law cited)».

[32] M. Nussi, op. cit., p. 496, uses the expression «tension towards entrepreneurship» for which it should act as the only criterion for evaluating the possibility of applying the regulations on shell companies, regardless of the economic results of the taxpayer.

a good thirty years, have recently been analysed by the Italian Court of Cassation which, with the well-known ordinance n. 16091 of 19th May 2022, referred before the European Court of justice the issue of compatibility of art. 30, paragraph 4, of Law 23th December 1994, n. 724 with the articles 9 and 167 of Directive 2006/112/EC[33].

In particular, the European judges are now expected to rule on the legitimacy of a national regulation which denies the status of VAT subjectivity (and therefore the right of deduction) to an entity who carries out active transactions to an excessively limited extent compared to what could abstractly result from the use of the assets at Its disposal.

Regardless of the fact that the aforementioned ordinance pertains to the case of a company in systematic loss, which we know is no longer relevant today for the purposes of applying the Italian discipline on shell companies, it nonetheless allows us to develop wide-ranging considerations.

Indeed, this is the first occasion in which the European Court of Justice is called to reflect on the legitimacy of this regime and is therefore a fundamental circumstance for testing Its critical issues and stimulate a substantial reform of Its contents.

The arguments proposed by the Italian Supreme Court reveal a clear condemnation of the choices made by the tax legislator who, although legitimated to fight against tax evasion, even derogating to the principles that underlie the European legal system, is nonetheless called to respect the principles of proportionality, neutrality and legal certainty[34].

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[33] For sake of completeness, it should be noted that the European Court of Justice has recently ruled on the Italian discipline of shell companies also with the decision 6th October 2022, no. 433 – joined cases C-433/21 and C-434/21, with which It established that art. 49 TFEU must be interpreted as not precluding national legislation which restricts the ground for exclusion from the scope of the measures to prevent tax avoidance by shell companies to companies whose securities are traded on national regulated markets, excluding from the scope of that ground for exclusion other companies, whether national or foreign, whose securities are not traded on national regulated markets but which are controlled by companies and entities listed on foreign regulated markets. This decision does not deal with any of the issues submitted with the abovementioned ordinance of the Court of Cassation.

[34] It is in fact known that the rules to combat tax evasion can justify any derogations from European standards and principles, given that the fight against evasion represents an «imperative reason of general interest» which must be assessed as a phenomenon harmful to the tax interest of the Member States and, therefore, of their stability. On these topics G. Melis, *Perdite intracomunitarie: imposizione e territorialità*, in *Rass. Trib*. 2008, pp. 1491 ss.; Id., *Trasferimento della residenza fiscale ed imposizione sui redditi*, Milan, 2009, pp. 610 ss.; P. Laroma Jezzi, *Integrazione negativa e fiscalità diretta. L'impatto delle libertà fondamentali sui sistemi tributari dell'Unione europea*, Ospedaletto (Pisa) 2012, pp. 75 ss. e 137 ss.; G. Bizioli,

The European VAT system is based on certain incontrovertible principles, which can be directly retracted from Directive 2006/112/EC and that consists, especially in i) the nature of VAT person pertains to anyone who carries out an economic activity on the market independently, pursuant to the repeatedly mentioned art. 9; ii) the immediate right to deduct the VAT paid in relation to the goods or services purchased, pursuant to articles 167, 168 and 178 of the same Directive.

The VAT regime of shell companies, as developed in the Italian legal system, violates these principles since it denies passive subjectivity and, as a result, elides the right of deduction for subjects who do not pass the *effectiveness test*, relating a full exercise of VAT rights to the mere existence of revenues and income deemed appropriate and consistent with the assets owned.

From this comparison, the Italian Supreme Court detects a well-founded doubt of incompatibility with the European legal system, which is essentially expressed in the difficulty of finding a rational connection, proportional to the objectives of combating tax evasion pursued, between the insufficient achievement of revenues and the restrictions imposed by the VAT regime on shell companies[35].

In this perspective, It is probable that the European Judges shall find, in art. 30, three main profiles of incompatibility with the VAT principles, as established in the VAT Directive.

The first of these profiles concerns the violation of the principle of VAT neutrality which, as mentioned, constitutes the cornerstone of the tax and whose compression appears inadmissible.

VAT finds in the feature of «neutrality» the element that best identifies Its European matrix and that expresses Its ontological characterization since this tax is conceived to be physiologically unsuitable for influencing entrepreneurial decisions and economic phases as it must weigh, exclu-

Il principio di non discriminazione, in AA.VV., *I principi europei del diritto tributario*, a cura di A. Di Pietro, Padua 2013, pp. 220 ss.

[35] In the interlocutory ordinance, the Court of Cassation raises several questions in the preliminary ruling before the European Court of justice, assuming a negative answer: i) the possibility of denying the VAT passive subjectivity pursuant to art. 9, par. 1 of Directive 2006/112/EC to subjects who declare revenues that are inconsistent with the assets owned and who cannot access any cause for exclusion; ii) if the answer to the previous question is negative, whether the restrictions established by the VAT regime of shell companies can be deemed consistent with the principles of VAT neutrality, proportionality and legal certainty.

sively, on the final consumer, independently of the relationships between the economic operators which are located upstream[36].

From a European point of view, this is directly functional to increasing the efficiency and stability of the common market and of the free competition system.

It is no coincidence that the legislator, both domestic and European, has always paid the utmost attention to the instrumental obligations of the VAT, which are obviously conceived to ensure the perfect functioning of the deduction mechanism and, therefore, to preserve Its full neutrality; the reference, for instance, is to the obligation of invoicing and recording all the taxable transactions, the debit/credit notes, the VAT return, the refund procedure or the subsequent reimbursement which, evidently, would become useless, if not even mere formal trappings, where to an economic operator, effectively included in the production cycle, the passive subjectivity of VAT and the right to deduct would be denied[37].

By applying these arguments to the present case, it follows that the principle of neutrality strongly opposes all restrictions to non-operating companies since they are extraneous to any phase of the economic cycle and, therefore, *a priori* outside the perimeter of VAT, while in relation to low-profit companies there is no legitimate need, let alone of a punitive nature, nor any rational argument that can justify Its violation, even if only partial.

The second profile concerns the proportionality of the Italian discipline on shell companies with respect to the objectives pursued.

As known, the European Court of Justice has admitted that principles and rules of European law may be subject to limitations, by domestic legislation, where this appears justified by reasons of general interest; however, these limits must express a reasonable relationship, declined in terms of

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[36] On the neutrality of VAT, as an ontological connotation of such tax, see the studies of R. Musgrave, *Fiscal systems*, New Haven 1969, passim; F. Bosello, *L'imposta sula valore aggiunto, Aspetti giuridici*, Bologna, 1979; L. Cecamore, voce *Valore Aggiunto (imposta sul)*, in *Dig. comm.*, XVI, Turin, 1999; A. Fantozzi, *Presupposto e soggetti passivi dell'imposta sul valore aggiunto*, in *Dir. prat. trib.*, I, 1972, pp. 729 ss., M. Devereux – M. Pearson, *Corporate tax harmonisation and economic efficiency*, Londra 1989; L. Carpentieri, *L'imposta sul valore aggiunto*, in *Il diritto tributario*, Turin, 2003, pp. 930 ss.

[37] The centrality of instrumental obligations in the VAT system is clearly illustrated by P. Boria, *Il sistema dei tributi. Imposte indirette*, op. cit., p. 8 who states that «depending on the conceptual complexity of the tax and in any case due to the peculiarity of the functioning mechanism centered around the institutions of compensation and deduction, in the logic of VAT an absolutely central role is covered by the instrumental obligations and the formal fulfilments required to the taxpayer».

proportionality, to the objectives to be achieved, implied that measurement is not permitted if i) the objective to be achieved is not worthy of protection or if ii) there are alternative tools to which resort, capable of determining a lesser restriction of European interests[38].

Therefore, with specific reference to the area of harmonized taxes and VAT, the European jurisprudence admits the possibility of having a compression of the principle of neutrality of the tax, since It is possible to deny the right to deduct the tax if the taxpayer is part of a fraudulent mechanisms, aimed at causing a direct *vulnus* to the fiscal interest of the State-community and to the collection of taxes [39].

In the case of the VAT regime of shell companies, the only goal pursued by the legislator is to discourage the spread of corporate entities having this nature, which escape the domestic logic of the so-called «enterprise tax statute», through a punitive and para-sanctioning discipline, which is, however, recessive with respect to the supremacy attributed to the principle of neutrality and, therefore, can be considered not proportional to the purpose[40].

Finally, the last profile of incompatibility emerges in relation to the principle of legal certainty which, according to the constant interpretation given by the European Court of Justice, requires the legislator to introduce

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[38] See ECJ, 11th June 1998, C-361/96; ECJ, 8th July 1999, C-254/97; ECJ, 13th December 2005, C-446/2003; ECJ, 15th May 2008, C-414/2006. In doctrine, with specific reference to the relationship between the principle of proportionality and VAT, also A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, Ospedaletto (Pisa), 2012, passim; G. Petrillo, *Il principio di proporzionalità e diniego di detrazione per 'consapevolezza' nelle frodi IVA,* in *riv. trim. dir. trib.,* 2017, pp. 431 ss.

[39] In particular, this is stated in the well-known judgments ECJ, 12th January 2006, C-354/03 and ECJ, 21st June 2012, joined cases C-80/11, C-142/11. On this point see also G. Petrillo, op. cit., p. 434 according to which "in the context of VAT, the denial of the right to deduct is an exception to the application of the fundamental principle that this right constitutes. In particular, to deny the right of deduction, the Tax Administration is required to provide proof of the subject's participation in the fraudulent mechanism to the extent that the benefit of the right to deduct VAT must be denied where It is demonstrated, in the light of objective evidence, that the taxable person, to whom the goods or services underlying the right of deduction were supplied, knew or should have known that this operation was part of an evasion committed by the supplier or by another upstream operator».

[40] See also R. Miceli, *La disciplina nazionale IVA sulle società di comodo al cospetto della Corte di Giustizia. Si preannuncia l'incompatibilità europea,* op. cit., p. 12 where it can be read that «we are not in any of the aforementioned hypotheses, having completely ruled out that shell companies are placed in the area of tax violations or fraudulent conduct. Consequently, It emerges that the VAT regulations envisaged for shell companies present clear profiles of European incompatibility».

precise rules, which allow all citizens and entities to be able to know *ex ante* their own rights and obligations and, therefore, allowing to plan each choice, especially if having economic nature, according to standards of reliability and safety[41].

The non-deductibility of VAT, which derives from the application of shell companies discipline to low-profit companies (and, until 2022, to companies having systematic losses), determines a clear violation of this principle since the enterprise starts Its production cycle in the belief that it can deduct VAT according to the ordinary tax mechanisms, but then finds itself treated as any final consumer, due to the very modest revenues it has achieved.

It is a regime which clearly causes a sudden variation of the tax obligations and a significant increase in the tax burden - the company becomes to all intents and purposes a final consumer and bears the burden of VAT – even if an economic activity, which has simply not generated the proceeds predetermined by law, has been carried out effectively on the market.

In substance, the VAT regime of shell companies produces an unpredictable compression of subjective legal situations, placing the economic operator in a condition of uncertainty as to the existence of the right to deduct; such uncertainty is not admissible in the European Union legal system and has been subject to harsh criticism by the European judges[42].

It is likely that the latter will intervene on the VAT regime of shell companies recognizing their incompatibility with the European legal system and, in particular, with the guidelines of the VAT legislation, as established in the Directive 2006/112/EC, censuring the undue violation of the prin-

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[41] The European Court of Justice has often established that the need to guarantee legal certainty in the national legal systems of the Member States must be preserved at any cost. Among the many see ECJ, 09th July 1981, C-169/80; ECJ, 13th February 1996, C-143/93; ECJ, 16th October 1997, C-177/96; ECJ 07th December 2010, C-285/09, ECJ 13th December 2012, C-395/11. See also E. Castorina, *Certezza del diritto e ordinamento comunitario: riflessioni intorno ad un principio comune*, in *Riv. Ital. Dir. Pubbl. Com*. 1998, pp. 1177 ss.; R. Schiavolin, *Il principio di certezza del diritto e la retroattività delle norme impositrici*, in AA.VV., *I principi europei nel diritto tributario*, edited by A. Di Pietro, Padua 2013, pp. 27 ss.

[42] As noted in the ECJ, 14th September 2006, C-181/04, the principle of legal certainty can first of all be declined in terms of expectations, it being essential to offer ample protection to the legitimate expectation of a legal consequence (also in terms of tax regime) in favour of the subject who has held a specific conduct in the light of the known data and the legal rules at his disposal. The sudden non-deductibility of VAT which follows from the Italian shell companies regime obviously conflicts with this approach.

ciple of neutrality and proportionality, which takes the form of an inadmissible obstacle to legal certainty and to a legitimate tax-planning freedom.

6. Future perspectives of the Italian discipline on shell companies hovering between a global tax reform and the proposal for the *Unshell* Directive

On this basis, the Italian legislator is expected to intervene on the existing discipline of shell companies, introducing structural changes to the methods of access (and, therefore, to the *effectiveness test*), to the causes of exclusion, as well as to the punitive regimes applicable in the area of direct and indirect taxation.

The draft for a global reform of the Italian fiscal system, presented to the Parliament on the 23rd March 2023, shows that the Government intends to address this issue, having expressed the need to develop new criteria, which allow the regime of shell companies to be brought back to Its original context, just represented by the need to tackle the spread of companies that deviate the corporate scheme from Its typical commercial and productive nature[43].

In particular, the Government wants to reshape the current legislation in compliance with the parameters dictated over the years by the Italian Court of Cassation and the Court of Justice of the European Union.

The imminent decision of the European judges will therefore have the most significant impact on the future configuration of the VAT regime within the ambit of this discipline; indeed, given the certain declaration of incompatibility with the European Union principles, the tax legislator shall modify, if not even completely eliminate, the current and stringent limitations regarding the use of the VAT credit and the prohibition of deduction, which no longer appear admissible.

[43] The art. 9 of the mentioned draft, in paragraph 1, letter b), numbers 1) and 2), states that the discipline of non-operating companies will have to be «reviewed, providing for: 1) the identification of new parameters, to be updated periodically, which make it possible to identify companies without a business, also taking into account the principles developed, in the field of value added tax, by the jurisprudence of the Court of Cassation and the Court of Justice of the European Union; 2) the determination of causes of exclusion that take into account, among other things, the existence of a congruous number of employees and the performance of activities in economic sectors subject to specific regulatory regulations».

Furthermore, low-profit companies should always be given the possibility of escaping the application of the punitive regimes, reinforcing, and better outlining, the causes of exclusion, which could be linked to a right to be heard[44], in order to avoid that ordinary corporate entities may be treated as shell companies by the tax authorities, on the basis of a mere discrepancy with the data emerging from the *effectiveness test* (whose coefficients will also have to be updated).

At present, however, It is not possible to identify the precise substantial content of this reform, given that the published draft offers very few clues, just stating the need to overcome the current legislation on shell companies.

Finally, it must stand out that the mentioned reform shall have to coordinate with relevant upcoming European rules, since the European institutions are expected to give a definitive approval of the proposal for Directive 22 December 2021, n. 565, better known as the so-called Directive *Unshell*, which should enter into force starting from 1st January 2024 in order to counter the use of cross-border entities (not necessarily corporate entities) which pretend to carry out commercial activities, not having adequate structural features, for the sole purpose of allowing members to benefit from certain tax benefits[45].

Although, also in this case, we have a mere draft that has not yet been transformed into a rule of law, Its contents are however much more outlined and It is strongly believed that will have a direct impact on the development of a new domestic regulations relating to shell companies.

In summary, the *Unshell* Directive proposal provides for the execution of a so-called *substance test* on the entity - similar to the domestic *effective-*

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[44] It is, however, a topic not new to the tax system. Indeed, while the Italian Tax Courts have often recognized the right to be heard if the discipline of shell companies must be applied (see Provincial Tax Commission of Vicenza, 27th July 2012, n. 146), the Court of Cassation on the other hand, it has often shown its opposition due to the absence of an express rule of law providing for that right within the framework of art. 30 (Cass. Court, Section V, 10th November 2020, n. 25266).

[45] For further information on the path that led to the development of this Directive proposal, see P. Pistone - J.F. Pinto Nogueira - A. Turina - I. Lazarov, *Abuse, Shell Entities and Right of Establishment: A Plea for Refocusing Current Proposals and Achieving Deeper Coordination within the Internal Market*, in *World Tax Journal*, 2022, pp. 187 ss.; S. Kleefstra, *The Unintended consequences of the Proposed Unshell Directive*, in *Journal Articles and Opion Pieces*, IBFD, 2022, pp. 19 ss.; M. Baldascino – G. Mazzotti, *La proposta di Direttiva sulle Shell Companies: società intermedie alla prova della sostanza economica*, in *Corr. trib*., 2022, pp. 581 ss.; R. Michelutti - A. D'Ettorre, *Shell Companies: Direttive Madre-Figlia e Interessi-Canoni e approccio look-through*, in *Corr. Trib*., 2023, pp. 331 ss.

ness test - with which to verify whether Its construction is merely formal or genuine[46].

The aforementioned test has a complex structure since i) it first requires an objective examination of the company through the application of certain parameters, the so-called *gateways*, having a quantitative content, and ii) if the outcome is positive, the entity is expected to prove the full effectiveness of Its economic activity by producing multiple documents which shall be attached to the tax return, relating, for example, to the availability of production plants or of employees[47].

In the event that the *substance test* confirms the existence of a sufficient organizational structure and of an activity actually carried out in the market, the entity is deemed to have a *minimum substance* and will not be subject to further checks while, where the documentation presented is not sufficient, the entity shall be called to provide the domestic financial administration with evidences and proves to demonstrate Its effectiveness[48].

The imposed sanctions, if the company fails this phase of control, are significantly penalizing if It operates on a cross-border basis since they determine, on the one hand, the disapplication of the Conventions against double taxation, of the Directives 2011/96/EU (so-called Mother-Daughter Directive) and 2003/49/EC (so-called Interest and Royalties Directive), as well as, on the other hand, the application of a tax transparency regime on its shareholders[49].

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[46] The first commentators highlighted a lack of clarity regarding the content of the *substance indicators*, for which a review is needed before the final approval of the Directive. In these terms S. Morri – F. Nicolosi, *Proposta di Direttiva sulle Shell Companies per prevenire l'uso improprio di entità di comodo*, in *Il fisco*, 2022, pp. 2053 ss.; S. Kleefstra, op. cit., pp. 19 ss.

[47] In particular, the gateways of the Unshell Directive proposal provide that the entity must have declared i) for a two-year period, 75% of the income pertaining to the statutory activity; ii) cross-border transactions from which at least 60% of the relevant income derives; iii) in the preceding two tax years, outsourced the administration of day-to-day operations and the decision-making on significant functions.

[48] This proof, according to the Unshell Directive proposal, may be freely declined by the Member States but, in any case, must allow to demonstrate i) the commercial logic at the basis of the entity; ii) detailed information on all employees; or iii) that it has generated income consistent with Its scope of operations or iv) that it has incurred risks.

[49] The relevance of the tax consequences that will arise from the future application of the Unshell Directive is well summarized by the analysis of Assonime, *Osservazioni sulla proposta di direttiva che stabilisce norme per prevenire l'uso improprio di entità di comodo ai fini fiscali – COM2021-565final*, in *Consultazioni*, 2022, according to which «the proposal for a directive certainly represents a unicum, both at European and at OECD level, differing from all the other initiatives in progress which share similar aims».

It is clear that this proposal for a Directive has a partially different scope of application compared to the domestic legislation on shell companies, since it pertains to entities that operate on a cross-border basis, but It is believed that it can contribute decisively to Its substantial reform, first of all by imposing an essential coordination and offering some ideas that could also be implemented internally[50].

The reference is, in particular, to the analytical proof that the taxpayer is expected to provide and which is made mandatory because It is expressly stated in the rule of law, as well as to the possibility, where a non-operating nature of the company is fully recognised, to activate a transparency taxation procedure on Its shareholders, which appear useful in sterilizing the purposes of such elusive schemes.

7. Conclusions

The strict VAT regime envisaged by the Italian discipline on shell companies, pursuant to art. 30 of Law 23 December 1994, n. 724, is in evident contrast with the values expressed by the European legal system, both for the subjects to whom It is applied and for the limitations to the normal functioning of VAT that It entails.

Indeed, these discrepancies emerge on several levels, since non-operating companies should not be considered VAT subjects and should therefore be placed outside the scope of application of this regime, while low-profit companies should have a full right to deduct the tax, like any other economic operator.

Moreover, the *effectiveness test*, through which this punitive regime is applied to entities who fails to reach the profitability threshold, appears anachronistic with respect to the current evolution of the economic context and is therefore misaligned, as much as the effects they produce on the taxpayer, with respect to the values that permeate the European legal system, aimed at guaranteeing a perfect balance between the protection of the market and of fundamental freedoms with the effective needs of contrasting the phenomena of tax evasion and avoidance.

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[50] See D. Deotto – A. Gaeta, *Società senza impresa: la revisione della disciplina sulle società di comodo si uniforma ai principi unionali*, in *Il fisco*, 2023, pp. 1537 ss.

The result is an undue compression of the primary axiological values of the European system, both of a purely fiscal nature, as occurs with the principle of neutrality of VAT, compromised by the absolute prohibition to deduct the VAT paid upon acquired goods and services, and of a more general nature, with reference to the principles of proportionality and legal certainty, undermined by legislation with punitive and, at times, vexatious connotations.

The VAT regime of shell companies essentially marks an extra-fiscal use of the tax, being founded on a severe disincentive logic, which does not appear in any way attributable nor reconcilable with Its original European matrix[51].

The Court of Cassation, with the referral ordinance to the European Court of Justice regarding the compatibility of the aforementioned legislation with the European legal system and with Directive 2006/112/EC, paved the way for a complete revision of such discipline, which has been long-awaited[52].

The Italian Government seems to have taken into account such urgent problem and shows the will to bring back the regime within the context of domestic constitutional principles and European rules, which will soon be joined, also, by the Unshell Directive.

The challenge that looms on the horizon is, therefore, to combine such strategic discipline with the fundamental needs of fiscal rationality and system coherence, according to paradigms of modernity and efficiency of the law.

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[51] VAT, due to Its genetic connotations as developed in the European legal system, is aimed above all at guaranteeing the full competitiveness of economic players and the efficiency of the single market, through a homogeneous taxation on trade operations in all Member States. In relation to the VAT system principles, please see A. Berliri, *Appunti per una costruzione giuridica dell'Iva: individuazione dell'obbligazione tributaria e delle obbligazioni connesse*, in *L'imposta sul valore aggiunto*, Milan, 1971 and G.A. Micheli, *L'IVA: dalle direttive comunitarie al decreto delegato*, in *Riv. Dir. Fin*. 1973, 436 ss.

[52] See the concluding remarks in the monographic work by R. Miceli, *Società di comodo e statuto fiscale dell'impresa*, op. cit., p. 302 where It is declared that a «necessary step is a revision of the discipline in question both in a formal and in a substantive key. (…). The same should be reviewed and reformulated within a unitary regulatory text that collects Its essential elements, some of which are now contained in atypical interpretative acts. In this operation, a simplification of the discipline would also help to recover a certain coherence and logic of the rules, guaranteeing taxpayers and the tax authorities greater ease in applying the various provisions. On a substantive level, the discipline should be reviewed in the light of Its basic function, eliminating the asystematic provisions, reducing the aspects of excessive rigour, repealing the provisions which express an anti-evasion function, as well as those which are justified exclusively in the name of a narrow-minded tax interest in the acquisition of revenue».