EALTP 2013 CONGRESS

Corporate income tax subjects

ITALY

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1. General presentation of CIT in Italy (*)

The Italian system of taxation of companies is ruled by articles 73 and followings of the «Testo Unico delle imposte sui redditi» (Income Tax Code, ahead briefly «ITC»). The part of the ITC regarding taxation of companies has been deeply reformed by legislative decree No. 344 dated December 12, 2003, entered into force on January the 1st, 2004, which introduced a new «Imposta sui redditi delle società» (IRES), replacing the former «Imposta sui Redditi delle Persone Giuridiche» (IRPEG) in force until December 31, 2003. Explaining the change, the Italian Revenue Service (Agenzia delle Entrate) underlined the need to harmonize the Italian regime with the similar changes already adopted by the most part of the other EU Member States and to be compliant with the European Council’s recommendations delivered in Lisbon in March 20001.

The change in the name of the tax – which substituted the word «società» (in English «companies») with the words «persone giuridiche» (in English «legal persons») – is not relevant, because before and after the reform subjects other than companies and not only legal persons have been considered liable to tax. Generally speaking, the inclusion of entities having not the legal structure of a company into the group of Corporate Income Tax (ahead briefly «CIT») taxpayers could be explained with the common nature of the subjects therein included, who are, in any case, characterized by enough autonomy to be considered taxpayers on their own2. Anyway, is common opinion that CIT taxpayers, also if legal personality is not always needed, must at least have a legal

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1 By Pietro Selicato.
2 F. GALLO, La soggettività ai fini IRPEG, in UCKMAR – MAGNANI – MARONGIU (eds.), Il reddito d’impresa nel nuovo Testo Unico, Padua, 1988, p. 661 and foll., clarifies this concept pointing out that CIT subjects to tax are, at the end organizations of every kind, when they are «padrone di sé stesse» (owners of themselves) (p. 664). In this regard, see also G.C. CROXATTO, Redditi delle persone giuridiche (imposta sui), in Noviss. Digesto It., App., 1986, p. 3.
capacity, as intended in its meaning offered by Italian civil law, that is to say the ability to become a center of imputation of subjective legal situations.  

No modification on the concept of «subject to tax» have been introduced by Law Decree No. 344/2003. New measures were approved only some years after. Such measures were aimed more at enforcing the tax base then at widening the list of entities subject to tax. In this direction goes the explicit inclusion of trusts within the CIT taxpayers, and the new anti-avoidance regime aimed at counteracting the phenomenon of the so-called «foreign dressing» (fictitious residence fixed abroad by Italian companies for the sole purpose of obtaining illegal tax savings), by means of a set of measures based on presumptions.

It has to be underlined that in the past, the Italian literature pointed out that all subjective situations should have been considered by tax law in a «strictly instrumental function» related to the need to make it possible to assess and collect taxes. In some cases (e.g. non resident partnerships), the inclusion within the CIT subjects to tax is actually due to procedural reasons, being it easier to collect CIT by the entity as a whole than to ask single partners to pay their own income tax (personal or corporate income tax) on their part of income.

Although no changes regarding tax subjects have been introduced in the transition from IRPEG to IRES, the 2003 reform provided for important changes in the relationships between the different tax subjects. To better understand the reasons of these changes, it has to be considered in advance that about 95% of Italian enterprises (about 4,1 mln over about 4,3 mln) have no more than 9 workers and that a big part of them are organized in the form of limited liability companies. In fact, about 1,3 mln of the Italian enterprises (about 38,5% of the total amount) are held by corporate entities, but only 330 (more or less) are admitted in the Stock Exchange. For this reason, over the time CIT has become a tax applied on a large number of subjects, most of which are SMEs.

Considering this situation, the new system has put companies in a central position, giving to them the role of (substantially) definitive taxpayers of income produced by their activities. In this context, tax relationships between companies and individuals, and between different companies as well,  

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3 G.C. CROXATTO, Redditi delle persone giuridiche (imposta sui), in Noviss. Digesto It., App., 1986, p. 3, and for this reference, p. 12. In the same line is also F. GALLO, La soggettività ..., cited, p. 662-664, where the Author underlines that Italian private law rules typical and non typical subjects and that CIT subject to tax substantially coincide with private law subjects. More recently, in this same sense BORIA, L'imposta sul reddito delle persone giuridiche (IRPEG), in A. FANTOZZI, Diritto Tributario, Turin, 2003, p. 877, and in this regard p. 883-884.

4 See ahead, at § 3.3.3.

5 See art. 73, para. 5-bis and 5-ter, CIT, added by art. 35, para. 13 of Law-Decree 4 July 2006, No. 223, converted into Law 4 August 2006, No. 248.

6 See art. 73, para. 5-bis and 5-ter, CIT.

7 In this regard see SELICATO, L'attuazione del tributo nel procedimento amministrativo, Milan, 2001, p. 151 and foll.

have been deeply modified being now substantially based: I) on a new form of taxation of dividends and capital gains; II) on an eligible regime for taxation of groups.

I. Taxation of dividends – Legislative Decree No. 344/2003 has repealed the former regime based on tax credit on dividends, replacing it with a new system of partial exemption on dividends distributed to individuals.

The tax credit on dividends was introduced in our system in 1977 aiming at returning to individuals taxes paid by companies having legal personality, and at making CIT become substantially neutral in the perspective of avoiding the double economic taxation. In this way, CIT was imagined as a sort of fund in order to guarantee the payment of taxes by individual shareholders when income was distributed. In this way, after distribution income from dividends was taxed only once, according to the taxing rules of the shareholder. This mechanism ensured, at the same time, immediate collection of taxes on income from business (particularly small business) and a complete application of the progressivity principle.

Contrariwise, in the current regime income from business carried out by means of companies is taxed twice: a first time, in the moment in which a company obtains income, applying CIT on the same company; a second time when the individual shareholder gets the dividend, including a part of it in the tax base of the individual shareholder. Parent companies are not taxed at all on income from dividends. In this way income is taxed definitively on the company that produced them and not on shareholders anymore.

That is to say that in 2003 Italian legislation changed the former «imputation system» with a new system of partial exemption of dividends.

II. Taxation of groups – It is a long time that groups of companies are recognized in Italy as autonomous economic entities. In addition, many national laws have taken into account the organizational link between companies as a justification for special regimes. During the years, many different laws dealt with these situations. Among others: industry restructurings, business

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9 Law 14 December 1977, No. 904.
10 This idea is clearly stated by SACCHETTO, L’imposta sul reddito delle persone giuridiche, in A. AMATUCCI (dir.), Trattato di diritto tributario, Vol. IV, Padua, p. 61 and foll. (for these ideas see at p. 67-68).
11 Art. 47 of ICT, the tax base is calculated in a threshold of 49.72% of gross dividend, while the remaining part is exempt.
12 Art. 89, para. 2 states that dividend distributed between companies subject to ICT are 95% exempt. Taxable 5% of dividend is a forfeit of costs related to the shares, in the same way allowed by Parent-Subsidiary Directive.
14 In the opinion of CASSANDRO, I gruppi aziendali, Bari, 1954, groups are the more intensive and lasting form of aggregation between enterprises.
15 Law 12 August 1977, No. 675, and Law 21 May 1981, No. 240, regarding tax and financial benefits to consortia and between SMEs. Both laws make references to «collegamenti di carattere tecnico, finanziario, ed organizzativo che configurano l'appartenenza ad un medesimo gruppo», aiming at recognizing the subjects to whom grant benefits.
crisis\textsuperscript{16}, forced liquidation of trust companies\textsuperscript{17}, publishing enterprises\textsuperscript{18}, broadcasting system\textsuperscript{19}, competition\textsuperscript{20}, security exchange mediation\textsuperscript{21}, bank and financial activities\textsuperscript{22}, insurance\textsuperscript{23} protection of savings\textsuperscript{24}. All these rules adopt their own definition of group (giving relevance, time by time, to the notions of «control» and of «unified direction»), which is often different from the others, and it is difficult to bring all of them into a single legal notion\textsuperscript{25}. Nevertheless, they have contributed, on the whole, to build on a legal basis a general definition of «group». The final recognition of the connection existing between two or more companies has been given by Legislative Decree No. 6 dated January 17, 2003, which introduced in the Civil Code articles 2497 to 2497-septies under a new chapter IX entitled «Direzione e coordinamento di società», a general legal framework regarding groups. The new rules don’t provide for a formal definition of group but give fundamental relevance to the notion of «direzione e coordinamento», connecting to this notion liability of subjects having this power for debts contracted by other companies of the group\textsuperscript{26}. It is common opinion that after these changes civil law recognizes the notion of group not only when the formal requirement of «control» (property of a certain number of shares of a certain company) is achieved, but above all when the material requirement of an effective power of «direction» can be observed, whatever is the source from which this power derives.

Indeed, the said rules have an important role in assessing if groups of companies should be treated as autonomous subjects to tax.

The different opinions which came out in this regard could have been generated by the mismatch between two elements, both present inside the scheme of the groups of companies: on one hand the fragmentation of groups in single companies having their own legal personality; on the other hand,
the economic unity of the group globally considered, showed by the subject (the parent company or
its control shareholder, also if he/she is an individual) which has the direction of the whole entity27.

With reference to the first issue, the fact that groups are divided into legal entities gives force to
theories based on a formal approach: in this view, groups could not be considered as autonomous
subjects to tax28, and taxation of whole groups as single fiscal units has been intended as a legal
fiction implemented for procedural reasons and aimed at becoming a tool put at the disposal of
companies for tax benefit purposes29.

Looking at the second issue, the group’s economic independence could be taken into account not to
give companies a tool aimed at reducing their «normal» tax burden, but to recognize the correct
measure of the ability to pay which group as a whole actually shows, considering this as a kind of
«super-subject» having its own and autonomous link with the global income earned30.

Given the above, in the situation at stake the questions are: who is the subject related with the
taxable event? The single companies, or the group as a whole? And in the second case are groups of
companies «owners of themselves», in the meaning pointed out above, enough to be considered
autonomous subjects to CIT?

The answers to these questions are strictly related to the way of thinking on groups connecting both
legal and economic points of view. It must be underlined that our most authoritative scholars have
long pointed out since a long time that groups could be considered as autonomous subjects to tax if
civil law at first considered them as legal subjects or, at least, if law required forms of centralized
responsibility of the parent company (or of the shareholder which holds the power of direction31. As
already said, that is exactly what civil law now rules.

Indeed, it is generally recognized that the concept of ability to pay laid down in art. 53 of the Italian
Constitution has substantially an economic nature, which cannot be restricted within formal
schemes, and taxation must be applied on an effective tax base32. These general concepts can be

27 In this regard see SELICATO, Le somme compensate dei vantaggi fiscali attribuiti o ricevuti, in IORIO (ed.), L’attività di controllo sul consolidato
nazionale (spunti di dialogo tra A.F. e mondo accademico, professionale e imprenditoriale), Milan, 2006, p. 199.
28 This opinion is clearly pointed out by GIOVANNINI, I gruppi di società, in F. TESAURO (dir.), Giurisprudenza sistematica di diritto tributario. Imposta sul reddito delle persone giuridiche. imposta locale sui redditi, Turin, 1996, p. 107, and there at p. 119-123.
29 In this sense RICCI, La tassazione consolidate dei gruppi di società (studi preliminari), Bari, 2010, p. 89 and foll., esp. p. 110.
30 This is, for example, the advice clearly stated in TREMONTI (ed.), La fiscalità industriale. Strategie fiscali e gruppi di società in Italia, Bologna,
1988. For a more recent analysis see SELICATO, The Common Consolidated Corporate tax Base (CCCTB) between the exigencies of harmonization of
the corporate tax and the problems of compatibility with the national systems, in International Tax Law Review, 2009, No. 1-2, p. 145, especially at
p. 146-150.
31 This is the opinion of GALLO, I gruppi di imprese e il fisco, in VV.AA., Studi in onore di Victor Uckmar, Padua, 1997, Vol. I, p. 577, and there at p.
582. It is very interesting to see that this Author pointed out these ideas many years before that new articles 2497 and foll. entered into force. Also
UCKMAR, «Gruppi» e disciplina fiscale, in Dir. prat. trib., 1996, I, p. 3, wished that taxation of incomes earned by groups of companies were based on
a single tax base, irrespective of their fragmentation in different legal persons. In the same sense see RICCI, La tassazione consolidate dei gruppi di
32 The Italian Constitutional Court maintains an uniform advice in this sense. To deepen this topic see TOSI, Il requisito di effettività, in MOSCHETTI
(ed.), La capacità contributiva, in A. AMATUCCI (dir.), Trattato di diritto tributario, Vol. I, Padua, 1994, p. 61 and foll. For more recent remarks in
transferred in the analysis of taxation of groups by means of a decision of the Italian Constitutional Court\textsuperscript{33}. In the abovementioned decision the Court identified a sign of autonomously taxable wealth in the productive organization (meaning the «domain» upon the economic factors put together by the entrepreneur). The Court has traced back the suitability to contribution to a larger and broader socio-economic relevance of the requirements of application, legitimating any economically relevant fact that the legislator, discretionally, considers as evidence showing taxable wealth.

In this perspective, articles 117 and following of the Italian ITC, by recognizing groups of companies (by means of their parent company) as CIT taxpayers, are perfectly compatible with the ability to pay principle laid down in article 53 of our Constitution, because they consider the group as a whole as the effective owner of the global income separately earned by the single entities.

1.1. Legal forms of CIT subjects in Italy (*)

Subject to the limits and conditions outlined in this report, Article 73 of ITC, levies the Italian corporate income tax on the following groups of taxpayers: (i) companies; (ii) public and private entities other than companies; (iii) trusts; (iv) collective investment undertaking\textsuperscript{34}; and (v) organisations which do not belong to other taxpayers and fulfil tax conditions in a unitary and autonomous way.

Despite its vagueness, the latter category contains, in a nutshell, the main features of a CIT subject under the Italian law. In particular, the term ‘organisations’ entails that a CIT taxpayer must consist of a combination of persons and/or goods aimed to a particular purpose; whilst the expression ‘not belonging to other taxpayers’ means that this organisation cannot be part of another company, entity or organisation that is a \textit{per se} taxpayer. In addition, to be qualified as a CIT taxpayer, the organisation must fulfil tax conditions ‘in a unitary and autonomous manner’. Accordingly, as far as the ‘unitary’ requirement is concerned, the organisation must have legal personality (\textit{soggettività giuridica}) – \textit{i.e.} the capacity of being the holder of the legal effects of its activities – and, as far as

\begin{footnotesize}
\begin{itemize}
\item By Marco Muratore.
\item Collective investment undertakings have been recently included in the groups of CIT taxpayers by Italian Law Decree 24 January 2012, No. 1.
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the independence requirement is concerned, it must have a self-determination capacity (capacità di autodeterminazione) – i.e. its decisions may differ from those of its members\(^{35}\).

All CIT taxpayers share the aforementioned requirements and conditions. However, they have different natures and structures. What follows in this paragraph is an overview of the main legal features of Italian taxpayers falling within the groups sub (i), (ii), (iii) and (iv) above in light of the said requirements and conditions. On the other hand, group sub (v) above is considered by the prevailing Italian scholars\(^{36}\) as a residual category aiming at hindering the creation of atypical subjects which, in the absence of this group, would have fallen outside the application of both CIT and Italian personal income tax\(^{37}\).

I. Companies – Except for limited exception\(^{38}\), companies are entities founded with an associative agreement whereby two or more persons contribute assets for the common exercise of an economic activity with the aim of sharing the relevant profits. Depending on the role of their members, companies can be either non-corporate (società di persone) and corporate (società di capitali) entities.

In particular, members of the first kind of companies – i.e. partnerships, being Italian simple partnerships (società semplici), Italian general partnerships (società in nome collettivo) or Italian limited partnerships (società in accomandita semplice) – are liable for the company's obligations without limits; whilst members of the second kind of companies – i.e. corporations, being Italian joint-stock companies (società per azioni), Italian partnerships limited by shares (società in accomandita per azioni), Italian limited liability companies (società a responsabilità limitata)\(^{39}\), Italian cooperative companies (società cooperative), Italian mutual insurance companies (società di mutua assicurazione), European companies (società europee) or European cooperative companies


\(^{37}\) The Italian tax authority has qualified a number of organisations as belonging to this residual group of CIT taxpayers. In this respect, see, among others, the Italian Revenues’ Agency Resolutions 23 March 2005, No. 37 and 20 November 2002, No. 363 which qualified as a CIT taxpayer, respectively, a special enterprise founded by the Italian Chamber of Commerce and a local association of a non-profit institution. On the other hand, the qualification as CIT tax payers of other organisations was excluded by the Italian Supreme Court – see, in relation to earmarked assets for a given business (patrimoni destinati ad uno specifico affare), P. LAROMA JEZZI, Separazione patrimoniale e imposizione sul reddito, Milan, 2006, p. 338 ff. and S. CAPOLUPPO, Il regime fiscale dei patrimoni dedicati, in Fisco, 2004, 1, p. 1385 ff., who are favourable to such qualification; D. STEVANATO, Patrimoni destinati: ipotesi di regolamentazione fiscale, in Rass. trib., 1, 2004, p. 56 and V. FICARI, Soggettività tributaria e possesso del reddito nella disciplina dei ‘patrimoni destinati’, in Riv. dir. comm., I, 2003, p. 128 f., who maintain the contrary.

\(^{38}\) We refer, among others, to the possibility for Italian joint-stock companies (società per azioni) and Italian limited liability companies (società a responsabilità limitata) to be founded – not with an agreement but rather – with a unilateral deed.

\(^{39}\) Italian Law Decree 24 January 2012, No. 1 (converted into Italian Law 24 March 2012, No. 27) and Italian Law Decree 22 June 2012, No. 83 (converted into Italian Law 7 August 2012, No. 134) introduced two new forms of Italian limited liability companies (società a responsabilità limitata), being, respectively, the Italian limited liability simplified company (società semplificata a responsabilità limitata) and the Italian limited liability company with reduced capital (società a responsabilità limitata a capitale ridotto).
società cooperative europee) – are liable for the company’s obligations to the extent of their contributions.\(^{40}\)

According to Article 3, third paragraph, of the ITC, de facto\(^{41}\) and shipping\(^{42}\) companies are considered as partnerships as far as the levy of Italian taxes is concerned.

II. Public and private entities other than companies – An ‘entity’ is an organisation to which the legal system recognises legal personality (soggettività giuridica)\(^{43}\). To distinguish between public and private entities, the prevailing Italian case law\(^{44}\) adopts some of ‘indexes’\(^{45}\) which identify public entities.

The prevailing Italian jurisprudence\(^{46}\) distinguishes public entities into the following categories: (i) associative entities (e.g. CONI, the Italian Olympic Committee), whose representatives are directly appointed by the relevant members; (ii) representative entities (e.g. patronati), whose representatives are appointed by the organisations of the relevant members; and (iii) institutional entities (e.g. INPS, the Italian Social Security Institute), whose representatives are appointed by an external person.

Article 74 of the ITC narrows the application of the CIT to public entities by excluding the following organisations: (i) the bodies and the administration of Italian State, (ii) Municipalities, (iii) consortia among local entities, (iv) associations and entities managing the state property, (v) Mountain Communities, (vi) Provinces and (vii) Regions\(^{47}\).

The main private entities other than companies are: (i) associations; (ii) foundations; (iii) committees and (iv) consortia. In particular:

(i) associations are founded with an associative agreement whereby two or more members contribute assets for the common exercise of an activity. These entities are responsible for the

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\(^{40}\) The main exception to this rule is for general partners (soci accomandatari) and limited partners (soci accomandanti) since the former – even if they are members of Italian partnerships limited by shares (società in accomandita per azioni) – are illimitably liable for the company's obligations according to Article 2461 of the Italian Civil Code whilst the latter – even if they are members of Italian limited partnerships (società in accomandita semplice) – are liable for the company's obligations to the extent of their contributions as per Article 2313, first paragraph, of the Italian Civil Code.

\(^{41}\) A de facto company is concerned as long as its members did not formalise in a written or oral associative agreement but, however, entered into it implicitly per facta concludentia.

\(^{42}\) A shipping company can be founded by co-owners (caratisti) of a ship under Articles 278 ff. of the Italian Royal Decree 30 March 1942, No. 327, i.e. the Italian Shipping Code.


\(^{45}\) These indexes are, among others, (i) the foundation by the Italian State, (ii) the subjection to the control and influence of the Italian State, (iii) the partial or total financing by the Italian State and (iv) the title to exercise imperative powers.


\(^{47}\) In this respect, please see A. DAGNINO, La soggettività tributaria passiva dello Stato e degli altri enti pubblici, in Dir. prat. trib., 2004, I, p. 767 ff.; M. BARASSI, La imposizione sul reddito degli enti non commerciali, Milan, 1996, p. 97 ff.; and A. BALDASSARRI, La soggettività tributaria dello Stato e degli enti territoriali, in Dir. prat. trib., 1993, I, p. 24 ff.
obligations undertaken in their name and on their behalf up to the amount of their common fund – which consists of the contributed assets – as far as they are recognised under Italian law, i.e. whether they passed the legitimacy control\(^{48}\) by the Civil Governor (Prefetto) and were enrolled in the legal persons' register. Indeed, the persons who acted in the name and on behalf of a non-recognised association are jointly liable with the association for the obligations arising out from their actions, according to Article 38 of the Italian Civil Code\(^{49}\);

(ii) **foundations** are established with a unilateral deed – which can be either an *inter vivos* notarized act or a will – whereby a number of assets are earmarked for a non-economic aim. These assets are managed by a managing body under the control of the competent Italian governmental authorities, as per Article 25 of the Italian Civil Code. Foundations are granted with a ‘perfect patrimonial autonomy’, i.e. they are responsible for the obligations undertaken in their name and on their behalf up to the aggregate amount of their earmarked assets;

(iii) **committees** are founded with an associative agreement whereby two or more promoters undertake to collect gifts among the public which are earmarked for realizing an altruistic purpose. The liability for the committees' obligations depends on whether they are recognised\(^{50}\). Notably, recognised committees are responsible for their obligations up to the aggregate amount of the gifts gathered among the public; whilst all the components of a non-recognised committee are jointly liable for obligations undertaken in the committee's obligation and in the committee's name under Article 41, first paragraph of the Italian Civil Code; and

(iv) **consortia** are established with an associative agreement whereby two or more entrepreneurs undertake to exercise in common given phases of their businesses. If the *consortium* is established for carrying out an activity towards third parties, it must be granted by the relevant entrepreneurs with a fund and is responsible for the obligations undertaken in its name and on its behalf up to the amount of this fund, as per Article 2615 of the Italian Civil Code.

**III. Trusts** – Under Article 2 of the Hague Convention dated 1 July 1985\(^{51}\), trusts are ‘the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose’. One of the main features of trusts is that the trust assets, even if belonging to the trustee, constitute a

\(^{48}\) According to Article 1, third paragraph, of the Italian Presidential Decree 10 February 2000, No. 361, the main conditions to pass the legitimacy control and be registered in the legal persons' register are: (i) the aim of the association being a possible and lawful one and (ii) the common fund being suitable for pursuing that aim.

\(^{49}\) Under Article 5, third paragraph, letter c), of the ITC, non-recognised associations established among individuals for the exercise of trade and profession are considered as simple partnerships as far as the levy of Italian taxes is concerned.

\(^{50}\) The same procedure set out for associations applies. In this respect, please see under footnote No. 48 above.

\(^{51}\) The Hague Convention was ratified in Italy with the Italian Law 16 October 1989, No. 364.
separate fund which is not a part of the trustee's own heritage and, therefore, can not be attacked by the creditors of the trustee.

Trusts managed for the benefit of beneficiaries can be either transparent or opaque (or blind), depending on the visibility of their beneficiaries\(^{52}\). In particular, trusts are transparent whether their beneficiaries are specified – or, at least, are identifiable based on the criteria contained – in the relevant deed of trust; whilst they are opaque if the relevant deed of trust does not pinpoint the name of – or, at least, the criteria to identify – their beneficiaries\(^{53}\).

IV. Collective investment undertakings – Under Article 1, letter m), of the Italian Legislative Decree 24 February 1998, No. 58, \textit{i.e.} the Italian Consolidated Financial Act, collective investment undertakings are both (i) ‘equity raised independently through the issue of one or more fund units from among a number of investors, with the aim of investing the equity raised in accordance with a pre-established investment policy; divided into units pertaining to a given number of investors; managed upstream in the interests of the investors and fully independent of those investors’ and (ii) SICAV, \textit{i.e.} ‘open-end investment companies having their registered offices and head offices in Italy and the exclusive purpose of collective investment of the capital raised by offering their shares to the public’.

1.2. Historical evolution of CIT in Italy (*)

It is not a long time that taxation of companies has been formally established in Italy\(^{54}\). In the above paragraph 1, the more recent steps of the evolution of CIT are laid down. The following lines will deal with the origins of CIT and its more significant differences during the time.

The first statement in favour of subjectivity to income tax of companies can be found at the beginning of the past century. In 1910 the Italian Supreme Court\(^{55}\), discussing if companies were subject to tax on capital gains, recognized for the first time that these alone were able to be considered as taxpayers on their own. Nevertheless, at that time a special tax on income from


\(^{53}\) According to Italian Revenues' Agency Circular 6 August 2007, No. 48/E, a trust can be, at the same time, both opaque and transparent whether, based on the relevant deed of trust, a given portion of the trust's revenues must be assigned to identified beneficiaries and the remaining part must be allocated to the trust itself.

\(^{54}\) By Pietro Selicato.

\(^{55}\) This part will be limited at the most important steps of the evolution of CIT in Italy. A deeper historial analysis can be found in SACCHETTO, \textit{L'imposta sul reddito delle persone giuridiche}, cit. p. 62-63. Other references in P. SELICATO, \textit{L'attuazione del tributo ...}, cit., p. 151 and foll.. A complete analysis of the historical evolution of the Italian tax system has been carried out by BORBA, \textit{Sistema tributario}, in Digesto, Disc. prov., Sez. comm, Vol. XIV, Turin, 1997, p. 29, and there at p. 35, where it is pointed out that tax systems adopted by Italian States before the unification were inspired at the French tax system.

\(^{56}\) Italian Supreme Court, Rome, 19 February 1910.
companies didn’t exist yet, because income taxes were calculated separately on each category of income other than those derived from immovable properties (business, capital, labour), irrespective of the nature (individual or not) of the subject who earned the income. Up to 1924, individuals were also subject to the «Imposta complementare sul reddito», applying upon the global tax base with progressive rates. But no personal income tax was provided for Companies and other collective entities.

Discussion developed during this period concerned, first of all, the legitimacy of a tax levied on subjects other than natural persons. Indeed, until 1954 companies were considered as a tool of natural persons in producing income from business activities. This made possible to defer the tax burden until income was distributed to the shareholders, and allowed taxpayers to abuse of this opportunity, especially in case of small companies whose shareholders were natural persons.

In 1954 a special tax for companies was adopted for the first time in Italy. It was named «Imposta sulle società» and was applied both on capital (0,75% of taxable capital formed by finance capital paid, plus profit stocks) and on income (15% of income exceeding 6% of capital) of companies and other collective entities. Some authors pointed out immediately that the first reason why such a new kind of tax has been introduced was to obtain additional resources. But at the same time they underlined that taxation of companies would solve a specific problem of equality and justice in distributing the tax burden. The new tax on companies had the function to integrate taxes on business, aiming at levying a personal income tax for companies and not only for individuals.

Moreover, to counteract tax avoidance and evasion, the two forms of taxation were integrated each other, so that if a lower income was declared, a higher capital tax base was determined.

In 1958 a Consolidated Direct Tax Act has been adopted, which coordinated all the former laws regarding direct taxation, included CIT. The Consolidated Direct Tax Act remained into force until December 31, 1973.

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56 These taxes had different tax bases and rates, and were included in the common notion of «Imposta sul reddito di ricchezza mobile», introduced by Law 14 July 1864 and reformed by Royal Decree 24 August 1877, No. 4021. The Imposta sul reddito di ricchezza mobile was applied until 1973. A complete analysis of this tax has been made by GIANNETTA – SCANDALE – SESSA, Teoria e tecnica nell’accertamento del reddito mobiliare, Rome, 1966. In regard with this issue see COCIVERA, Guida alle imposte dirette, Turin, 1956, at p. 390, and also MORSELLI, Le imposte in Italia, Padua, 1959, at p. 68.
57 Royal Decree 30 December 1923, No. 3062.
58 See SACCHETTO, L’imposta sul reddito delle persone giuridiche, cit., p. 64-65.
59 In this regard see BORIA, Sistema tributario, cit., p. 93.
60 See, for example, MORSELLI, Le imposte in Italia, cit., p. 102.
61 See, again, MORSELLI, Le imposte in Italia, cit., p. 102, were it is pointed out that lack of taxation on capital companies made possible to escape progressive taxation on income of individuals.
62 Who were subject to the «Imposta complementare sul reddito» up to 1924. See again BORIA, Sistema tributario, cit., p. 93.
2. Legislative technique (*)

Legal sources of CIT are concentrated in the above mentioned ITC. In this way, rules regarding CIT are easy to find and enough coordinated.

Moreover, after reform of 2003, ITC has radically changed its way of regulating business income. Indeed, under the former regime, rules regarding the tax base of this kind of income were included in the part of ITC regarding business income produced by natural persons, being this income (like it is at now) one of the different categories of income constituting the global income of those subjects. On the contrary, in the current regime we have general rules on business income inside the part of ITC dedicated to the CIT66.

As already pointed out, up to 1974 no substantial changes interested rules regarding CIT subjects, which are still distinguished in four categories of subjects to tax, described in article 73, letters a), b), c) and d) of ITC67. Nevertheless, the distinction between the various groups of CIT subjects is not only based on legal requirements but mainly on the economic nature of the various entities.

3. Domestic entities

3.1. First approach (*)

According to the ITC, corporate income tax (IRES) applies to resident and non-resident companies. Resident companies are taxed on their worldwide income. Non-resident entities are subject to Italian tax only on income derived from Italy.

With respect to resident legal entities, according article 73 ITC, corporate income tax is levied on:

a) joint-stock companies;

b) limited liability companies;

c) partnerships limited by shares;

d) cooperative societies and mutual insurance companies;

e) public and private entities (other than companies), with or without legal personality, and trusts, whether or not their sole or main business purpose is the exercise of business activities;

66 For more details see AGENZIA DELLE ENTRATE, Circular letter 16 June 2004, No. 25/E.
67 In this regard see paragraph. 3.1.
Non-resident companies and entities of every kind (including partnerships) are subject to corporate income tax on income derived from Italy. For details see point 3.2.1.

The annexes of tax Directives (parent-subsidiary, interest-royalty and the draft CCCTB directive) do not contain differences on this matter.

There are other entities that are not subject to corporate income tax.

In particular:

a) State and public administrations, including those having an autonomous regulation, municipalities, provinces and regions;

b) partnerships (simple partnerships, general partnerships and limited partnerships) other than partnerships limited by shares are treated as transparent entities and are not subject to corporate income tax.

Regardless of name, IRES (imposta sul reddito delle società, corporate income tax) does not include all companies. For example, partnerships are companies from civil law but are not subject to CIT. At the same time, non-commercial entities are subject to CIT even if are not companies.

Italian scholars have clearly outlined this fundamental distinction\(^6^8\). In particular, differences are linked not only to the legal personality (partnerships do not have legal personality) but also in order to avoid tax avoidance and tax evasion\(^6^9\).

3.2. More details

3.2.1. Link relationship between company law and tax law (*

Persons subject to CIT could be also company according law definition. In this case, there is a legal assumption that we have a company subject to CIT, but article 73 ITC could be take into account also subject without legal personality\(^7^0\).

Moreover, according to Italian civil legislation, it could be possible to have a one-person company (società unipersonale), subject to CIT, because article 73 ITC take into consideration the legal form of the company. As we said, article 73(1)(a) ITC), include the limited liability company and the joint-stock company even if these are one-person company. Moreover, according article 116 ITC, a one – person limited liability company, in order to avoid double taxation, may opt for a partnership

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\(^6^8\) In this respect, please see, among others SACCHETTO, L’imposta sul reddito delle persone giuridiche, in A. AMATUCCI (dir.), Trattato di diritto tributario, Vol. IV, 1994, Padua, pages 61 and ff.; ZIEZO, Reddito delle persone giuridiche (imposta sul), in Digesto delle discipline privatistiche, Sez. Commerciale, Turin, 1996, p. 1, in which it is possible to find other references to Italian doctrine on this matter.


\(^7^0\) By Mario Grandinetti.
approach\textsuperscript{71}. At the end the shareholder pays tax on business profits and not on the dividend received from the company.

CIT is applied independently from the existence of a legal personality\textsuperscript{72}. Thus a subject without legal personality could be subject to tax. For example, foreign permanent establishments and foreign companies are considered resident (and so subject to CIT) in Italy. In the latter case, according article 73(5bis) ITC, it is necessary to underline that a foreign company is treated as a resident in Italy (and so subject to CIT) if it controls an Italian company and i) is directly or indirectly controlled by an Italian resident person or ii) is managed by a management board or other governing body composed for the majority of the Italian resident person. A foreign company is not a company according to the Italian civil code, even if it is subject to CIT.

The opposite statement is not applicable, because an Italian corporation is always subject to CIT.

3.2.2. Charitable organizations and associations (\textsuperscript{(*)})

Charities and associations are CIT subjects under letters b) or c) of article 73 ITC, depending on the kind of activity carried out. The question to solve is what is the meaning of «economic activity», under the Italian law and under the EU law as well\textsuperscript{73}.

It has to be underlined that these entities are obliged by their statutes and by the law to carry out their activities not for their own profit but in the general interest.

Looking at the National law, it has to be assessed if incomes earned by this kind of entities can be or not considered as a taxable income. This question rises why, normally, charities and associations are not carrying out activities for their own profit, but why they are inserted in a system of «horizontal» subsidiarity, in accordance with a formal recognition by the Government. In these situations, it should be correct to think that «income» produced by nonprofit entities is not «owned» by them, but that it is assigned to the activity carried out in the public interest, and cannot be distributed.

The EU law is aimed at ensuring that transaction of goods and services have no tax obstacles in the Single Market. Nevertheless, it seems that the EU Commission\textsuperscript{74} is not taking enough into account

\textsuperscript{71} See RASI, La tassazione per trasparenza delle società di capitali a ristretta base proprietaria. Profili ricostruttivi di un modello impositivo, Padua, 2012.

\textsuperscript{72} See GALLO, La soggettività tributaria nel pensiero di G. A. Micheli, in Rassegna Tributaria, 2009, p. 611.

\textsuperscript{73} By Pietro Selicato.

\textsuperscript{74} In Italy the debate about this topic is still open. For more details, please see SELICATO, L’imposta municipale unificata (IMU) e gli enti ecclesiastici: nuove norme per vecchi problemi, in www.federalismi.it, 2012.

\textsuperscript{74} See European Commission, C(2010) n. 6960 dated October, 12, 2010.
that when a system of public services is setup by the law there is not a «market»\(^{75}\) to protect and, for this reason, they don’t need to be subject to tax.

### 3.3.3. Miscellaneous on CIT subjects(♦)

Prior to the Law 27 December 2006, no. 296, there was a significant uncertainty on whether trust would be included in the CIT taxpayers or not.

In fact, many Italian scholars, especially in the earlier phase of this debate, excluded that trust could be CIT taxpayers, on the basis of several reasons (first of all, the lack of legal personality of trusts)\(^{76}\); in particular, some scholars thought that trustees must be included among the CIT taxpayers.\(^{77}\) On the contrary, the Italian Tax authorities included trusts among the CIT taxpayers since 1998\(^ {78}\) and according other Italian scholars trusts were included (under certain conditions) among the organizations which do not belong to other taxpayers and fulfill tax conditions in a unitary and autonomous fashion.

According to Article 73, first paragraph, letter d) of the ITC, as amended by Article 1, paragraph 74, letter a), n. 2), of the Law 27 December 2006, no. 296, trusts are now considered CIT taxpayers, even though they have not legal personality *stricto sensu* (i.e., even though trusts are not legal entities under the Italian law).

So, from 1 January 2007, according article 73 ITC, resident and non-resident trusts are subject to corporate income tax in accordance with the general principles. So, there are not special status with regard to CIT\(^ {79}\). In respect to the method of taxation, in the case of trusts whose beneficiaries are identified, the income of trust is attributed directly to the beneficiaries in proportion to their respective share of participation, or in any case, if it do not defined, in equal share. It is the same method used for the partnerships. Differently, in the case of trusts whose beneficiaries are not identified, the income is taxed directly on the trust and subject to the CIT.

### 3.3.4. CIT and partnerships (♦)

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\(^{75}\) According to the ECJ, an economic activity is aimed at offering good and services in a market. In this sense, see C-118/85, *Commission vs/Italy*, Racc. 1987, pag. 2599, point 7; C-35/96, *Commission vs/Italy*, Racc. 1998, pag. I-3851, point 36; moine cases C-180/98 - C-184/98, *Pavlov*, point 75.


\(^{*}\) By Mario Grandinetti.
Partnerships other than partnerships limited by shares are treated as transparent entities and are not subject to corporate income tax.

The partners of these three types of partnership are taxed on their share of the partnership’s profits. However, the Italian tax system provides a ‘consortium relief’\(^80\). The option is available to Italian resident companies, the shareholders of which are other resident and/or non-resident entities if they (a) are exempt from Italian withholding tax on dividends under the Parent-Subsidiary Directive, or (b) carry on a business activity through a permanent establishment in Italy in whose books the participation is recorded. The option must be exercised jointly by the relevant company and by all its shareholders and cannot be revoked for a 3-year period. If a partnership participates in an Italian company, the option is not available.

Each shareholder must hold at least 10% but not more than 50% of voting rights and is entitled to the corresponding percentage of the profits (share capital is not relevant). Under the ‘the consortium approach’, the profits of the company are imputed to the shareholders in proportion to their rights to participate in the profits (i.e. for this purpose voting rights and other financial rights are not relevant).

The participated company is jointly liable with each shareholder for the payment of taxes, penalties and interest arising from the imputation of the income. Interest expenses that otherwise are not deductible, under ‘the consortium approach’ may be recaptured if the participations are disposed of within 3 years from the purchase.

4. **Cross-border situations (\(*\)**

The present paragraph addresses the main features of the Italian taxation of non-resident entities carrying out business activity in Italy.

Under ITC, according to a general rule, non-resident entities shall fall within the scope of CIT where they earn incomes deriving from Italy (the so-called ‘source principle’).

Such criterion is an exception to the so-called ‘world wide taxation principle’\(^81\), which is generally applicable under the Italian law for resident taxpayers (even for individuals).

The relevant incomes for non-resident entities are those provided by Article 23 ITC. The main are:

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\(*\) By Luca Di Nunzio.
a) income and gains from real estate properties in Italy;
b) income from capital paid by the State, Italian residents or by Italian permanent establishments of non-resident persons;
c) business income derived through a permanent establishment in Italy;
d) other incomes (redditi diversi) derived from Italian activities;
e) capital gains realized through participations in Italian companies, other than those listed in financial markets not exceeding 5% of the capital or 2% of the voting rights.

In order to identify non resident entities, relevant for income tax purposes, no resemblance test is provided by the Italian Law. Accordingly, it is worth pointing out that foreign entities do not fall within the domestic characterization of ‘tax residence’. A foreign company is deemed to be resident in Italy for income tax purposes if, at least\(^\text{82}\), one of the following conditions are met for the greater part of the financial year (183 days per year)\(^\text{83}\):

a) its legal seat (sede legale) is not in the Italian Republic territory. The entity’s legal seat is to be understood as the place indicated in the articles of incorporation;
b) its place of effective management (sede dell’amministrazione) is not in the Italian territory. The place of effective management is the place from where the entity’s management is located (i.e. director’s place);
c) its main business purpose (oggetto principale dell’attività) is in not in Italy. The main business purpose is, usually, that indicated in the articles of incorporation or, in the absence, it has to be understood as the effective business carried out from the foreign entity\(^\text{84}\).

With reference to some entities, ITC provides specific requirements in order to identify their tax residence in (or out of) Italy:

a) collective investment schemes are considered as tax resident in Italy if they have been incorporated in Italy;
b) save the rebuttal evidence, trusts incorporated in black lists countries\(^\text{85}\) are considered by the ITC as tax resident in Italy where, at least, one of the settlors or one of the beneficiaries is tax resident in Italy. Furthermore, trusts established in a country other than those listed into the said

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\(^{82}\) MARINO, La residenza nel diritto tributario, Padua, 1999, page 257.

\(^{83}\) Article 73(3) ITC.

\(^{84}\) According to the Italian Supreme Court, judgement 10 December 1974, No. 4172, in order to identify the place of effective management as well as the main business purpose, it has to be investigated the effective activity which shall be different than that indicated by the articles of incorporation.

\(^{85}\) I.e. countries which does not allow and adequate exchange of information with the Italian Tax Authority according to the Ministerial Decree 4 September 1996.
black list if, after their incorporation, a tax resident subject transfers into such trust a real estate property by way of contribution.

Where the aforesaid conditions are met, the person is considered as a non-resident entity for income tax purposes.

It is worth noting that business income (i.e. incomes derived from a commercial activity), is subject to income tax if derived through a permanent establishment\(^86\). Where the non-resident entity acts in Italy through a permanent establishment, it is subject to the same tax provisions of resident entities. Accordingly, all Italian-source income is considered business income. Furthermore, non-resident companies are also subject to the regional income tax at the rate of 3.9%, provided that they maintain a permanent establishment in Italy for at least 3 months. The computation of the regional tax on productive activities follows the rules for resident companies.

As regards the ‘permanent establishment’ concept\(^87\), it is understood, from the domestic legislation\(^88\), as a fixed place of business through which the business of a non-resident entity is wholly or partly carried out in Italy. As regards the interpretation of the permanent establishments concept, usually reference is made to OECD guidelines and principles, which are adopted by the Italian Tax Authority\(^89\).

It is also relevant to point out that ITC provides for a special tax treatment on a pass-through basis (i.e. transparency regime)\(^90\). Under such tax treatment shareholders of resident companies may elect to include the company income in their own taxable income. The resident company taxable income is directly attributed to each shareholder in proportion to its shares. The election may be exercised under certain specific conditions. Non-resident entities which hold participation in a resident company may elect the transparency regime only if the Italian law does not provide for a withholding tax on dividends distributed by the Italian company\(^91\).

\(^{86}\) See Articles 151 ITC and, for non business activities, Article 153 ITC.

\(^{87}\) See also, LOVISOL, La stabile organizzazione, in ÜCKMAR, Diritto tributario internazionale, Padua, 2005, p. 439 and ff.

\(^{88}\) See Article 162 ITC.

\(^{89}\) See MINISTRY OF FINANCE, circular letter 30 April 1977, No. 7/1496.

\(^{90}\) See Article 115 and ff. ITC.

\(^{91}\) For a deeper analysis, see LEO, Le imposte sui redditi nel testo unico, II, Milan, 2010, p. 2200.