



ISSN: 2036-5438

The Constitutional Court gives fiscal federalism new opportunities, but only for regions endowed with special autonomy

by Marco Calcagno

Perspectives on Federalism, Vol. 1, single issue, 2009



Abstract

These are hard times for fiscal federalism. Although many political parties consider it a sort of flag, despite always being present on the political agenda, the implementation of article 119 of the Italian Constitution still looks very far away. Within this stagnating situation, sentence no. 102/2008 discloses optimistic opportunities for Italian fiscal federalism, but only for Regions endowed with special autonomy (hereinafter Special Regions).

Key-words:

Fiscal federalism, Italian Constitutional Court, Special Regions



These are hard times for fiscal federalism. Although many political parties consider it a sort of flag, despite always being present on the political agenda, the implementation of article 119 of the Italian Constitution still looks very far away. Within this stagnating situation, sentence no. 102/2008 discloses optimistic opportunities for Italian fiscal federalism, but only for Regions endowed with special autonomy (hereinafter Special Regions). Indeed, the positive conclusions of the Court cannot be extended to ordinary regions, even though greater fiscal autonomy is particularly required in these regions, which do not currently enjoy the considerable fiscal attributes of the 5 Special Regions. Sentence no. 2008 of 15 April 2008 sets a clear reference mark for the fiscal power of Special Regions, showing its boundaries and perspectives.

Given these preliminary remarks, we can reconstruct the most relevant passages of the sentence which summarises the constitutional judgement of the regional provisions setting up the so-called “luxury tax”. These provisions were included in Sardinian regional law no. 4/2006 in the original version and in regional law no. 2/07 in the version amended in consideration of the initial state censures. But we also have to underline that the sentence makes *expressis verbis* reference to order no. 103/08, where, for the first time, the constitutional judge defers to the European Court of Justice the question relating the consistency of the aforementioned provisions to the EC Treaty: but this is not the right time for these interesting considerations¹.

Therefore, the state government has impugned the regional provisions establishing the 4 taxes on tourism, improperly called “luxury taxes”^{II}. In particular, these taxes are: a) tax on the capital gain achieved by selling holiday homes; b) property tax on holiday homes; c) tax on aircrafts and pleasure boats; d) regional visitors’ tax.

First of all, the Court investigates the boundaries of fiscal legislative power, which are the constitutional parameters of legitimacy used by the judges. Indeed, the government stated that special regions had the same boundaries as ordinary regions by virtue of the reform of Title V of the Constitution, so that they cannot set up regional taxes while the coordination principles of the fiscal system are still lacking, whereas the Court has the opposite opinion. In fact, the constitutional judge deems that Special Regions have more jurisdiction than others by virtue of art. 10 of constitutional law n° 3/2001. Therefore, when the statute of the Special Region attributes greater powers than the amended Constitution, the parameter of legitimacy referring to the taxes of Special Regions is to be found in the regional statute.



According to this conclusion, the limit that the regional lawgiver has to observe must be in line with the principles of the state fiscal system^{III} as stated by art. 8 of the Sardinian statute^{IV}.

Having clarified the parameter of legitimacy, the Court investigates each tax. With regard to the tax on the capital gain achieved by selling holiday homes^V located near the sea and destined for use as second residences, the constitutional judge reveals a clear contrast with the principles of the state fiscal system, because the regional tax is superimposed upon the state income tax on real estate capital gains pursuant to art 67 dpr 917/1986 (Tuir). Therefore, the Court declares both the original version of the regional law and the amended one to be unconstitutional. Indeed, judges underline the transgression of the capability contribution principle, considering that the regional tax has the same presupposition as the state tax. Moreover, the Court declares the breach of the principle of reason, considering that non-residents (in Sardinia) are the only persons subjected to this regional imposition.

Also the regional property tax on holiday homes^{VI}, addressed to non-residents, is stated as being unconstitutional. In particular, the Court not only declares the different treatment between residents in Sardinia and non-residents to be unreasonable, but also underlines an incorrect “reverse discrimination” against Italian citizens who are not resident there. Indeed, when a foreigner owns real estate in Sardinia he is considered as having his fiscal domicile in Sardinia for fiscal law^{VII} and, therefore, he is exempted from the regional tax. Moreover, the Court states that the patrimonial *ratio* of the regional property tax is placed upon another state tax, i.e. ICI (municipal property tax), considering that both property taxes have the same presupposition.

Otherwise, the Court declares the regional tax on aircrafts and pleasure boats to be constitutional and places judgement concerning the consistency with the EC Treaty in the hands of the European Court of Justice. The Constitutional Court however declares the government censures to be groundless. Indeed, the constitutional judge states not only the irrelevance of the fact that the regional tax does not refer to tourism subjects^{VIII}, but also the irrelevance of the fact that this tax is not inspired by the capability contribution principle^{IX}, considering that this principle has to inspire the whole fiscal system, not each single tax.



Last but not least, let us consider visitors' tax, which Municipalities can enforce by virtue of the regional law^X. In spite of the fact that the only subjects of this imposition are again non-residents in Sardinia, the Court does not class the different fiscal treatment as unconstitutional, because this discrimination is justified by the destination of the yield to environment and sustainable tourism. The most important aspect of this judgement is the fact that the Court doesn't declare a regional law setting up a municipal tax to be unconstitutional. Therefore, a regional law allowing Municipalities to enforce a visitors' tax is consistent with our constitution.

After the exposition of the judgement synthesis, we can make some remarks that the sentence no. 102/2008 discloses.

New light, but still a lot of shade. If the Court, on one hand, allows Special Regions to set up regional tax even though the coordination principles of the fiscal system are still lacking, on the other, the judge himself sets stringent limits to the regional power.

Regional taxes cannot be placed upon the taxable base of state taxes: otherwise the regional imposition will be declared unconstitutional. Therefore, the question is: how is it possible to achieve fiscal federalism considering that almost every income or asset is already the presupposition of a state tax?

It's reasonable that fiscal federalism occurs in "purpose taxes" (their yield finances particular works) or "commutative taxes" (in exchange for particular services)^{XI}. This also is the implicit solution of the Court when it declares visitors' tax to be appropriate: in fact, visitors' tax has been conceived either as a benefit in recognition of the added costs burdening tourist municipalities or as a way of financing sustainable tourism.

The judgement introduces another significant step towards fiscal federalism, but only with regard to Special Regions. Indeed, the constitutional Court admits the presence of a "regional fiscal system" so that the reserve of law pursuant to article 23 of Constitution, required for the institution of any tax, is observed.

The visitors' tax, which Municipalities can put into force, is the first regional tax to overcome the constitutional judgement, which for a long time has represented (and will be probably continue to do so in the near future) a sort of Caudine Forks for fiscal federalism. But the implementation of art. 119 of the Constitution is still defective and we cannot attribute this deficiency to judges: what is really lacking is the political willingness to put into practise the potentialities of fiscal federalism that the amended constitutional reserves



both to ordinary and Special Regions when the constitutional provisions are more favourable in relation to the latter.

^I We invite you to read Paolo Fusaro's article in this review.

^{II} E. De Mita, Corr. Trib., 43/2008 underlines that the expression "luxury tax" is incorrect, because these taxes are related to any state service.

^{III} If the reader wants to closely examine the distinction between principles of the state fiscal system and the coordination principles of the fiscal system, we invite him to read G.G. Carboni, La Corte riconosce la più ampia autonomia finanziaria delle Regioni speciali e detta le regole per la costruzione del sistema tributario della Repubblica (nota a Corte cost. n. 102 del 2008), in *federalismi.it*, no.14/2008

^{IV} Consequently we notice that Special Regions, including Sardinia, have greater fiscal power than others, because they can avoid regional taxes in the absence of the coordination principles of the fiscal system, while observing the principles of fiscal system. It's of note that Special Regions can draw this principle from the laws in force.

^V Art. 3 of the regional law 11 May 2006 no. 4, amended by art. 2, of r.l. 29 May 2007, no. 2.

^{VI} Art. 4 of the regional law 11 May 2006 no. 4, amended by art. 3, of r.l. 29 May 2007, no. 2

^{VII} Precisely in art. 58 of DPR 29 September 1973, no. 600. Please note that the fiscal domicile significantly differs from the fiscal residence.

^{VIII} The common denominator of state censures is the fact that these taxes are not referring to tourist subjects, presupposing that art. 8 of the Regional Statute assigns Sardegna complete fiscal power only in the aforementioned subject. On the contrary, the Court considers that Sardinian fiscal federalism can be upheld for all other taxes with different presuppositions from those of the state, not only with regard to tourist subjects.

^{IX} We ought to point out the different part played by the capability contribution principle for the regional tax on aircrafts and pleasure boats and that for the value added tax achieved. In this second situation, the Court declares breach of the capability contribution principle because the regional tax is superimposed upon state tax, so that a subject must pay twice for the same income. Otherwise, with regard to tax on aircrafts and pleasure boats, the regional tax doesn't hit the taxpayer twice on the same income, indeed while the regional tax has regressive elements (it doesn't take into consideration the number of calls) the aforementioned principle plays a less relevant part, so the Court states that it must inspire the fiscal system *in complexu*, not each individual tax.

^X Art. 5 of regional law no. 2/2007

^{XI} Therefore, these tributes are stably related to the regional territories, so that "purpose taxes" and "commutative taxes" are constitutional are financial tools to achieve the policy objectives included in the regional competences (so-called principle of "competence").