International Tax Law

Second Edition

Edited By

Andrea Amatucci



Preface		XIX
Acknov	vledgement	xxxi
CHAPTER	K 1	
The Co	ntribution of Economic Analysis of Law to the Tax Law Methodology	1
Andrea	Amatucci	
§1.01	Oreste Ranelletti, the Founder of the Neapolitan School of Public	
	Finance Law	1
§1.02	The Three Phases of Ranelletti's Experimental Methodology	3
§1.03	The Testing and Analysis of Ranelletti's Methodology, Conducted	
	by the Scholars of the Neapolitan School	7
	[A] Francesco D'Alessio	7
	[B] Gustavo Ingrosso	8
	[C] Romanelli-Grimaldi	9
	[D] Vincenzo Sica	11
	[E] Giuseppe Abbamonte	11
§ 1.04	The Relationship between the Hard-line Conception of the Italian	
	School of Pavia and the Substantive View of the School of Naples	14
§1.05	The Pavia and Milan Schools of Tax Law and their Relationship to	
	Ranelletti's Scientific Achievements	18
§ 1.06	Methodological Rigor as the Foundation of the Scientific	
	Autonomy of Tax Law	22
§1.07	The Origins of Economic Analysis of Law in the United States	24
§1.08	The Expansion Phase of Economic Analysis of Law in the 1970s	26
§1.09	The Development and Consolidation Phase of Economic Analysis	
	of Law	28
§1.10 81.11	Economic Analysis of Law shows Elements in common with Realism Efficiency and Redistributive Justice as Selection Criteria of the Real	32

	Law Text Meaning		37
§1.12	How Tax Law Pursues Purposes of Redistributive Justice with Less		•
	Efficiency Loss than the Other Branches of Law		39
CHAPTE	R 2		
Tax La	W	~~	45
Nicola	d'Amati		
§2.01	Consistency and Systematic Nature of Tax Relationship in the		
	Traditional Doctrine		45
§2.02	The 'Assessment': 'Taxation' Alternative in the 1930s-1940s		
	Doctrine		46
§2.03	The 1950s Pre-reform and Role Mediation		48
§2.04	An Alchemical Formula: The Assessment at Variable Composition		50
§2.05	(Continued): Composition and Process		51
§2.06	The Tax Proceedings as an Alternative to the Tax Relationship		53
§2.07	The 'Pure' Doctrine of the Procedure		54
§2.08	Procedure and Direct Payment of the Tax		56
§2.09	From the 1951 Pre-reform to the Tax Direct Payment		59
§2.10	The New Forms of the Administrative Procedure		61
§2.11	The Annual Individual Income Tax Return as a Turning Point in		
	the Assessment Discipline		62
§2.12	Allorio's 'Nuove Riflessioni' and the So-Called Equivalence		
	Phenomenon		63
§2.13	The Tax Assessment from the Collecting Point of View		65
§2.14	From the Taxation without Declaration to the Declaration without		
	Taxation		67
§2.15	Centralizing Taxes		70
§2.16	Tax Payment		72
§2.17	Payment Control		73
§2.18	Liquidation		76
§2.19	Tax Compliance		77
§2.20	Tax Law between Obligatory Relationship and Tax Administrative		
	Procedure		79
СНАРТЕ	R 3		
Tax La	w and Private Law		85
Lerke (Osterloh		
§3.01	General Trends in German Tax Law		85
§3.02	Constitutional Standards for Fiscal Legislation and Application		
	of the Law and Their Implications in Legal Dogma		90
	[A] On Obligations Incumbent on the Legislature Handing		
	Down Tax Law to Adhere to the Basic Law		90

		Obligations to Adhere to the Basic Law in Interpreting	0.2
§3.03		cal Legislation al Contentious Issues on the 'Independence' of the	93
83.03		ation and Application of Tax Law	97
	-	certaining Income	97 97
		dependence of Tax Law ~~'	100
		rtnerships and Corporations	100
	[C] Fa	therships and Corporations	102
СНАРТЕ	R 4		
Admini	strative Pa	rovisions in Taxation Law	103
Christop	oh Trzaska	lik and Marion Petri	
§4.01	Tax Stat	utes Subject to Further Concretion	103
§4.02		cept of Administrative Provision	104
§4.03		tent of Administrative Provisions	104
§4.04		ctment Procedure	105
§4.05	The Lega	al Meaning of Administrative Provisions	106
3	_	nding Effects on Tax Authorities' Officers	106
		nding Effects on Citizens and Jurisdictional Authorities	106
	[1		
		Legislative Acts?	106
	[2]		
		Implement the Law	108
	[3]	Particular Meaning of Administrative Provisions in the	
		Ambit of the Discretionary Powers Recognized for Tax	
		Authorities within the Relevant Legislation	110
	[4]	Types of Administrative Provisions Requiring Abidance	112
		[a] Interim Decrees	112
		[b] Rules to Typify and Simplify Taxable Amount	
		Procedures	114
		[c] General Instructions to Ascertain the Facts of the	
		Precise Tax Case	115
§4.06	Final Co	mments	117
ANNEX '	ГО СНАРТЕГ	3 4	
Admini	strative P	rovisions in Taxation Law: Current Developments	119
Henning			
I	The Con	acept of Administrative Provisions	119
II		nd Functions of Administrative Provisions	120
Ш		ent of Administrative Provisions in a Federal State	122
IV		al Meaning of Administrative Provisions	123
V	_	amments	125

CHAPTER				
		rative Procedure for Determining Tax Liability		127
Eusebio	Gonz	calez		
§5.01	Syste	ems for Determining the Basis on which Tax Is Applied		127
30.00	[A]	-	·***	
	. ,	Estimation		130
		[1] Concept and Function		130
		[a] Indexes		131
		[b] Checked returns -		131
		[c] Forfeiting		132
		[2] Differences to be Established between Systems of		
		Direct Determination and Objective Estimation		132
	[B]	The System of Indirect Estimation		133
§5.02		acteristics of ihe Administrative Estimate Procedure		133
	[A]	First Characteristic		134
	[B]	Second Characteristic		130
	[C]	Third Characteristic		13′
§5.03		rol Functions of the Tax Authorities		13
Ü	[A]	Procedures of Legal Qualification, Assessment and		
		Investigation		13
	[B]	Procedures of Evaluation		139
	[C]	Settlement Functions		139
	[D]	The Function of Obtaining Tax-related Information		139
§5.04	The	Settlement Procedure in the Direct Estimation System		14
	[A]	Legal Nature of 'Voluntary Payment'		14
	[B]	Provisional Settlement: Concept, Characteristics and Legal		
		Nature		143
		[1] Concept		143
		[2] Characteristics		144
		[3] What Is the Legal and Administrative Nature of		
		Provisional Settlements?		14:
	[C]	Verification of the Existence and Evaluation of the		
		Chargeable Event		14
		[1] Concept and Classes		14
		[2] Legal Effects of the Checking Activity		14
		[3] Function and Structure of the Checking Procedure		14
		[4] Possible Discretionary Action by the Tax Authorities in		
		the Checking Procedure		14
§5.05	Sumi	mary		15
ANNEX T	О СНА	PTER 5		
		onments on Administrative Determination of Tax Liability		15

Antonio Vazquez del Rey

I	Administrative Procedure and Determination of Tax Liability	151
II	Determination of the Tax Base. Some Issues Regarding Presumptive	
	Taxation	153
III	Tax Authorities Guidance and Advance Instruments Regarding the	
	Determination of Tax	155
IV	Check compliance and Administrative Determination of the	
	Tax Liability	157
V	Summary	159
СНАРТЕБ	Ł 6	
Double	Taxation Conventions	161
Victor	Uckmar	
§6.01	Introduction	161
§6.02	The History of Tax Treaties and Model Conventions	162
§6.03	Purpose of Double Taxation Conventions	164
§6.04	Relationship of Tax Treaties and Domestic Law	166
§6.05	Tax Treaty Interpretation	168
	[Al The Vienna Convention on the Laws of Treaties	168
	[Bl Reference to the OECD Commentaries	170
	[C] The Interpretation Rule of Article 3(2) of the OECD Tax	
	Model Convention	172
	[D] Conflicts of Qualification	173
§6.06	Basic Contents of the Model Tax Treaty	175
	[A] Coverage and Scope	176
	[B] Income from Immovable Property	177
	[C] Business Income	177
	[D] Dividends, Interest and Royalties	181
	[E] Employment and Pension Income	183
	[F] Capital Gains and the 'Other Income' Article	186
	[G] Non-discrimination	187
	[H] Mutual Agreement Procedure, Exchange of Information	
	and Assistance in the Collection of Taxes	189
§6.07	Treaty Shopping	192
CHAPTE		
	eaties in the Americas: The United States Experience	195
Charles	H. Gustafson	
§7.01	Introduction	195
	[A] In General	195
	[B] Impact of Income Tax Treaties	196
	[C] Outline of This Chapter	196
§7.02	The Jurisprudence of Treaties in United States Law and Practice	197
	[A] Establishing a Treaty	197

	[B]	Posture of Treaties in US Practice	198
§7.03	Basic	e Provisions of US Income Tax Law and Practice	198
	[A]	General Rules *	198
	[B]	Tax Administration	202
§7.04	Taxa	tion of Inbound Transactions: US Taxation of US Income of	
	Forei	gn Taxpayers	_ 202
	[A]	Definition of Foreign Taxpayer	202
	[B]	Source Rules	202
	[C]	US Trade or Business Income	204
	[D]	Withholding Tax on Non-Trade or Business Income	205
§7.05	Outb	ound Transactions: US Taxation of Foreign Income of US	
	Taxp	payers	207
	[A]	Worldwide Taxability	207
	[B]	Entity Classification	208
	[C]	The Foreign Tax Credit	208
	[D]	Anti-Deferral Regimes	210
		[1] Foreign Personal Holding Companies	210
		[2] SubpartF	211
		[3] Passive Foreign Investment Companies	212
§7.06	US T	Tax Treaty Relations in the Americas	212
	[A]	The NAFTA Countries	212
	[B]	South and Central America	212
	[C]	The Caribbean	213
	[D]	Bermuda: A Special Case	213
§7.07	Prov	isions Favouring Country of Residence	214
	[A]	Withholding Tax Provisions	214
		[1] In General	214
		[2] Repatriation of Corporate Profits	214
		[a] Dividends	214
		[b] Branch Profits Taxes	215
		[3] Interest	216
		[4] Royalties	217
	[B]	Trade or Business Income	218
		[1] The Permanent Establishment Requirement	218
		[2] Provision of Services by Individuals	219
§7.08	Limi	itations on Treaty Benefits	220
	[A]	Problem of 'Treaty Shopping'	220
	[B]	Termination of Treaties	221
	[C]	Treaty Limitations	221
	[D]	Domestic Law Limitations	222
		[1] Judicial Decisions	222
		[2] Anti-Conduit Regulations	222
§7.09	Prov	risions Favouring Source Country	223
	[A]	In General	223

	[B] Tax Sparing	223
§7.10	Cooperation in Tax Administration	224
	[A] Bilateral Income Tax Treaties *	224
	[B] Tax Information Exchange Agreements	227
	[C] Mutual Legal Assistance Treaties	229
§7.11	Conclusion *"	230
ANNEX TO	O CHAPTER 7	
US Tax	Reforms	231
Roberta	Scarpato	
I	Housing and Economic Recovery Act	231
II	Emergency Economic Stabilization Act	233
	[A] Tax Exemptions for Homeowners	234
	[Bl Energy Incentives	234
	[C] Disaster Relief	235
III	Patient Protection and Affordable Care Act	235
CHAPTER	8	
The Cor	nmentary of the OECD Model Tax Convention as Two-Tier	
Soft Law	v: Rule of Conduct for Tax Authorities and Living Law for	
Taxpaye	ers	257
Konosuke	e Kimura	
§8.01	Defining the Issues	237
§8.02	Instruments to Analyse the Issues	245
§8.03	The Stains of the OECD Model Tax Convention	250
§8.04	The Status of the Commentary Thereon	252
	[A] Rule of Conduct for Tax Administration	254
	[B] Living Law for Tax Payers and Tax Practitioners	255
	[C] The Equal Application of Norm for Decision before the Courts	255
	[D] The Tentative Conclusion: The Commentary as Soft Law	256
§8.05	The Influence of the Commentary on International Tax Cases of	
	Japan	257
§8.06	Conclusion	258
CHAPTER	9	
A Europ	pean Legal Tax Order Based on Ability to Pay	261
Joachim	Lang & Joachim Englisch	
§9.01	The Need for a European Tax Order	261
§9.02	The Constitutional Core of a European Tax Order: Cross-Border	
	Ability to Pay	264
	[A] Foundation in Member States' Constitutions	264
	[B] The Cross-border Aspect Enhanced by the EC Treaty's	

		Provisions on Free Movement	270
		[1J The Constitutional Quality of the Provisions on Free	
		Movement in an Internal Market	270
		[2] -Personal and Territorial Scope	<i>27</i> \
		[3] Principles of Equal Treatment	272
		[a] De Jure and De Facto Discrimination ~~~	
		[b] A Step Too Far: A Second Constitutional Layer	
		of Liberal Freedom Rights	276
		[4] Tax Implications: A Cross-border Concept of Ability	
		to Pay	278
		[5] Complementation by the Basic Provisions on	
		Non-discrimination and Free Movement	280
§9.03	Cros	s-Border Ability to Pay in Direct Taxation	281
	[A]	Non-discrimination of Non-residents	281
	[B]	Non-discrimination of Foreign Source Income	285
	[C]	Equal Treatment of Different Alternatives to Realize a	
		Freedom?	288
	[D]	Abolition of International Double Taxation	289
	[E]	Most Favoured Nation Clause?	293
	[F]	Possible Justifications for Unequal Taxation	295
		[1] Budgetary Reasons	299
		[2] Reasons of International Equity	299
		[3] Reasons Aiming at Taxation According to Ability	
		to Pay	301
		[a] Prevention of Tax Fraud	301
		[b] Effective Tax Collection	302
		[c] Anti-avoidance Rules	303
		[d] Fiscal Cohesion	305
		[4] Extra-Fiscal Objectives	315
		[a] Economic Control	315
		[b] Social or Ecological Objectives	317
§9.04	Cros	s-Border Ability to Pay in Indirect Taxation	318
	[A]	Non-discrimination of Foreign Competitors in the Domestic	
		Market	320
	[B]	Proportional Taxation of Foreign Competitors in the Domestic	
		Market	328
	[C]	Non-discrimination of Domestic Competitors in the Foreign	
		Market	332
	[D]	Abolition of International Double Taxation	333
	[E]	Possible Justifications for Unequal Taxation	335
§9.05	Othe	er Constitutional Principles	338

ANNEX '	го сна	PTER 9	
Recent	Devel	opments in the European Legal Tax Order	341
Werner	C. Ha	slehner	
T	I4	duration.	241
I II		duction	341
11		elopments of European Constitutionalism and the European ~	241
		Tax Order	341
	[A] •	Legislative Developments: Enlargement, the failed	241
	m.i	Constitution and the Lisbon Treaty	341
	[B]	Fundamental Rights	343
		[1] EU Charter of Fundamental Rights	343
		[2] Accession to the ECHR	343
	[C]	Fundamental Freedoms	344
		 [1 j Relationship and Applicability of multiple freedoms [2] Fundamental Freedoms and the Abuse of EU 	344
		Law Doctrine	345
Ш	Deve	elopments in Direct Taxation	346
	[A]	Non-discrimination of non-residents	347
		[1] Foreign Loss Recognition of 'Virtual Residents':	
		The Demise of the Principle of Territoriality?	347
		[2] Withholding Taxation of Non-residents:	
		Three Approaches	348
	[B]	Non-discrimination of Foreign-Source Income	350
	[-]	[1] Foreign Loss Relief: 'Final' Losses	350
		[2] Foreign Capital Income: Credit and Exemption	352
	[C]	Neutrality of Legal Form	353
	[D]	International Double Taxation	353
	[E]	Most-Favoured-Nation Treatment	354
	[F]	Justifications for Unequal Taxation	355
	[-]	[1] Combating Tax Avoidance	355
		[2] Fiscal Coherence	356
		[3] Balanced Allocation of Taxing Power	356
IV	Deve	elopments in Indirect Taxation	357
. ,	[A]	VAT Fraud and Legitimate Expectations	357
	[B]	The Principle of Equality and VAT	358
CHAPTEI	2 10		
		ion Tax Law and Internal Tax Systems	359
_		lo Ollero & Miguel A. Caamaiio Anido	
§10.01	Intro	oduction	359
§10.02	The	EU and the Member States from the legal and Competence	
	persp	pectives	360
	[A]	The Transfer of National Competences to the European	
		Union	360

	$[\mathbf{p}]$	The Current Situation of the Distribution of Competences	
		between the EU and the Member States	365
§10.03	The	Atypical Sources of EU Tax Law *	368
§10.04	The	Crisis of the Principle of Legality	371
§10.05		-discrimination and Non-restriction at the Service of	
	Fund	lamental Freedoms	376
	[A]	Introduction	376
	[B]	Case-Law Evolution of the Characteristic Features of the	
		Concept of Fiscally Restrictive Measure	379
	[C]	The Causes for Justification of Discriminatory and/or	
		Restrictive Measures	382
		[1] Causes of Justification Established in the TFEU	382
		[2] Causes of Justification Adopted or Invoked before the	
		Court of Justice of the European Union	382
		[a] Causes of Justification Generally Inadmissible for	
		the Court of Justice of the European Union	383
		[b] Grounds for Justification Generally Accepted by	
		the Court of Justice of the European Union 3	84
	[D]	Evaluation of EU Case-Law on the Principle of	
		Non-discrimination	385
§10.06	Prote	ection of the Internal Market through the Control of State Aids	387
	[A]	Concept of State Aids	387
	[B]	Exceptions to the Concept of State Aids	391
§10.07		Canon of Proportionality in EU Tax Law	393
	[A]	The Principle of Proportionality in the Sphere of Harmonized	
		Taxation	394
	[B]	The Principle of Proportionality in Direct Taxation.	395
	. ,	[1] The Prohibition of 'Wholly Artificial Arrangements'	395
		[2] The Prohibition of General Clauses, Presumptions	
		and Legal Fictions	396
		[3] The Prohibition of Discretional Interference by the	
		Administration	397
		[4] The Rule of 'Impossibility'	398
	[C]	The Presence of the Principle of Proportionality in	
	[-]	Penalizing Tax Law	398
§10.08	The	Tax Dimension of the Principle of Loyal Cooperation	400
§10.09		Eu Taxpayer's Statute: Non-contractual Responsibility of the	
0		es and Refunding of Unduly Paid Taxes	404
	[A]	The General Principle of the Liability of the State	404
	[B]	Conditions for Incurring the Liability of the State	405
	[C]	The Procedural Means and the Limitations to Exercise the	.00
	[~]	Right to Financial Restitution	407
	[D]	On the Impossibility of Conditioning the Reparation of the	,
	r= 1	Existence of Blame	410

	[E]	The Actual Extent of the Reparation	411
	[F]	Extent of the Period Covered by Reparation	412
§10.10	Tax :	Law on Penalties from the Perspective of EU Law	412
	[A]	Classification Criteria of the Penalties	412
	[B]	The Principle of JVe Bis in idem	413
	[C]	Principle of Reasonable Time	413
	[D]	Principle of Comparative Equality and Its Effectiveness,	
		Deterrent Effect and Proportionality	414
	[E]	The Right to Non-self-incrimination	415
Commus Andrea	•	Acts and the Internal Public Finance System <i>succi</i>	419
§11.01		ectives and Instruments Imposed by the Treaty Establishing the pean Community	419
§11.02	Singl	le European Act, European Union, Maastricht, Amsterdam Nice Treaties and the EU Enlargement to New Member States	422
811.02			422
§11.03		ets of Self-executing Community Acts on the National Legal	430
811.04	Syste	ilict between Internal and International Tax Rules	430