ARTICLE

Transfer Pricing: An Overview of the Italian Supreme Court's Recent Rulings

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Rulings on transfer pricing matters issued in the last few years by Italian Courts covered various themes. Among these, the Tax Authorities frequently challenged the selection and application of transfer pricing methods, comparability analyses developed by taxpayers supporting intercompany policies, the analysis of special transactions such as intercompany loans and services as well as transactions related to intangibles. The lack of a frame of reference, on the one hand, and the (perceived) uncertainty of the subject, on the other hand, engendered difficulties as to the crafting of a uniform jurisprudential orientation, leading Judges oftentimes to settle disputes through a line of reasoning, not always consistent with the Organisation for Economic Co-operation and Development (OECD's) arm's length principle.

1 Introduction

In the last decade, a considerable increase of disputes in transfer pricing matters could be observed along with tax audits relating thereto issued by the Tax Authorities in application of Article 110, paragraph 7 of the TUIR (i.e., Italian Income Tax Code, hereinafter "TUIR").

Notwithstanding the rising trend of proceedings activated by the Tax Authorities within such context and, subsequently further scrutinized by Italian Judges, there is not—to date—a clear-cut jurisprudential orientation such to provide the interpreter with the necessary guidance in the reconstruction of intercompany transactions.

The thesis endorsed by the Judges treating transfer pricing matters is based on the persuasion that the normal value must be determined through the method indicated by international directives (i.e., Organisation for Economic Cooperation and Development (OECD) Guidelines), considering that national tax rules contained in the TUIR oblige to use normal value criteria to define the arm's length price.

Under this new approach, the Judges frequently nullified and revoked tax audits restating for higher income issued by the Tax Authorities because it is deemed inconsistent with factual situations.

Rulings on transfer pricing[1] issued in the last few years by Italian Judges involved various themes. Among them, first and foremost, the Tax Authorities challenges as to the selection and application of transfer pricing methods, comparability analyses[2] developed by taxpayers to support intercompany policies, the analysis of special transactions, such as financing and intercompany services[3] as well as transactions concerning intangibles.[4]

The lack of any frame of reference, on the one hand, and the (perceived) uncertainty of the subject-matter, on the other hand, created some difficulties in the creation of a uniform jurisprudential orientation, frequently leading Judges to settle disputes through a line of reasoning not always consistent with the OECD's arm's length principle.[5]

The following pages provide an analysis of some of the most recent and most important rulings issued by the Italian Supreme Court on the topic of transfer pricing.

Notes

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1 For details on transfer pricing methods, cf. P. Valente, *Transfer Pricing Manual* 63 et seq. (IPSOA-Wolters Kluwer 2015).

2 For details on the subject of comparability analysis, cf. P. Valente, A. Della Rovere & P. Schipani, *Comparability Analysis in Transfer Pricing: Applicative Methods* (*Analisi di comparabilità nel transfer pricing: metodologie applicative*) (Ipsoa-Wolters Kluwer 2013); P. Valente, *Transfer Pricing Manual* 2331 et seq. (IPSOA-Wolters Kluwer 2015).

3 For details on intercompany loans, cf. P. Valente, *Transfer Pricing Manual* 2693 et seq. (IPSOA-Wolters Kluwer 2015); P. Valente, *BEPS and Financial Transactions: International Erosion and Avoidance of Taxable Income* (*BEPS e transazioni finanziarie: erosione ed elusione internazionale delle basi imponibili*), in Il fisco, No. 6/2014.

4 For details on transfer pricing and intangibles, cf. P. Valente et al., *Trademarks, Patents and Know-How: International Management of Intangibles* (*Marchi, Brevetti e Know-how: gestione internazionale degli intangibili*) (Ipsoa-Wolters Kluwer 2013); P. Valente, *Transfer Pricing: Critical Aspects in the Remuneration of Intangibles* (*Transfer Pricing: criticità nella remunerazione dei beni intangibili*), in Il fisco, No. 13/2015; P. Valente, *Transfer Pricing Manual* 2425 et seq. (IPSOA-Wolters Kluwer 2015).

5 For details on the arm's length principle, cf. P. Valente, *Transfer Pricing Manual* 58 et seq. (IPSOA-Wolters Kluwer 2015); Y. Brauner, *Formula Based Transfer Pricing*, 42(10) Intertax 615–631 (2014); J. Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Kluwer Law International 2010).

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2 Analysis of the most recent supreme court rulings

2.1 *Exclusion of Tax Avoidance Function in Ruling Nos. 15282 and 15298 of July 21, 2015*

The Supreme Court, with Ruling Nos. 15282 and 15298 clarified some very important principles involving transfer pricing.

With the first Ruling, the Supreme Court confirmed the principle under which transfer pricing legislation:

> *aims to curb the economic phenomenon in and of itself, leaving aside the need to evidence a higher domestic taxation; it follows that the Revenue Office has no need to prove any avoidance function, but only the existence of transactions between associated companies; conversely, it is indeed, taxpayer's duty, according to general rules of the proximity of evidence, to prove that transactions were realized at market value to be considered normal pursuant to Article 9, paragraph 3 of the TUIR.*

The same principles are set forth in Supreme Court's Ruling No. 15282 of July 21, 2015. In this case, the Judges of the Regional Tax Court of Lombardy deemed the Tax Authorities' behavior to be appropriate in their determination of the normal value of intercompany transactions, which—in order to compare the normal value of intercompany transactions—made a comparison between the percentage charged back to the Plaintiff Company applied to transactions entered into with its own foreign associated companies, and the charge-back percentage applied by the same to third parties.

Moreover, with reference to the findings concerning the costs arising from purchases, the Second Instance Judges confirmed the tax recaptured by the Revenue Office, based on the reason that "*the tractors bought by the foreign associated company had been sold to third parties at a lower price than the purchase price and that, therefore the operation was not cost-effective.*"

With reference to the selected transfer pricing method, Plaintiff Company objected to the use by the Tax Authorities of a method (i.e., the Cost Plus method) "*ignored by relevant and mandatory rules,*" which "*admit and recognize a single criterion for the determination of normal value, i.e., the so-called price comparison.*"

In this scenario, the Supreme Court confirmed the Second Instance decision, in view of the fact that:

> *the Office, while controlling and comparing the price, as required by the law, did not apply a method that was not allowed by the system, but based itself rather on the same "normal value" adopted and determined (...) by the same company according to the so-called "cost plus" method and subsequently determined—on the basis of the same criterion—the prices applied to independent enterprises within the context of an arm's length regime.*

Moreover, the Plaintiff Company emphasized that:

- the tractors identified for comparison purposes, while having the same product code, were different as far as their technical out-fittings and configurations aspects were concerned;
- the compared reference markets may not be deemed comparable ("*on the one hand, the Italian market, on the other hand. the Swiss, German and Polish markets*");
- the requirement that there be an identical trading level is rather weak, given that the foreign associated companies are distributors of the group's products in the worldwide market, whereas the third independent parties are Italian dealers collecting/receiving orders from final customers.

The Supreme Court Judges quashed the appealed ruling and referred it to the Regional Tax Court as they deemed that the Second Instance Judges merely limited themselves to fully confirm the Provincial Tax Court's evaluations, without considering that the "*facts disclosed this day by the Plaintiff hereof and confirmed by means of the Deed of Appeal.*"

2.2 *Transfer Pricing and Non-interest-bearing Intercompany Loans in Rulings Nos. 15005 of July 17, 2015 and 27087 of December 19, 2014*

The case concerns a non-interest bearing loan granted by an Italian (Plaintiff) company to its French controlled company, later considered by the Tax Authorities as a transfer pricing case "*with subsequent redetermination of the interest rate in application of the 'prime time' ABI rate, in force at the time.*"

The Tax Authorities lodged an appeal with the Supreme Court against the ruling of Piedmont's Provincial Tax Court, which confirmed the ruling issued by the Court of First Instance and upheld the non-existence of a transfer pricing case.

The Supreme Court, after having clarified the main purpose of the transfer pricing regime, reiterated that (pursuant to the long-established Supreme Court orientation):

> *the burden of proof resting with the Revenue Office is strictly limited to substantiating the existence of transactions between/among associated companies and the evident gap between the agreed consideration and the market consideration (normal value), since this burden is not extended to prove the avoidance function of the operation (...) and taxpayer has the burden to prove – by force of the principle of proximity of evidence – (...) not only the existence and relevance of deducted costs, but also*

any other element that allows the Revenue Office to deem that the transaction took place at market value.

The Supreme Court Judges deemed that the application of transfer pricing rules (Article 110, paragraph 7 of the TUIR) is subject to the double condition that:

– the intercompany transaction shall give rise to profit and loss income components vis-à-vis the taxpaying company;

– the application of the normal value criterion shall give rise to a higher taxable income.

In the case hereof (i.e., non-interest-bearing loan), according to the Supreme Court "*the service supply itself is missing - concerning the payment of corresponding interests - which constitutes the necessary basis for comparison with respect to the normal value.*"

Lastly, the Supreme Court asserted that "*the normal value system (...) is, in effect, outside the framework of abuse of law cases*"*:* in the present instance, the company has evidenced that the granted loan met the need to provide the French subsidiary with the necessary funds to acquire a second-level controlled company, also French, thus substantiating the economic reasons of the transaction.[6]

With the aforementioned decision, the Supreme Court confirmed prior Court positions assumed with ruling No. 27087 of December 2014 according to which transfer pricing rules cannot be applied to intercompany non-interest bearing loans.

Pursuant to the Tax Authorities, the Second Instance Judges did not appropriately apply the transfer pricing rule, in consideration of the gratuity of the loan granted by the Italian holding company to the foreign subsidiaries, given that no taxable income increase would derive from the said transaction.[7]

According to the Revenue Office:

it is precisely the gratuity of the loan which emphasizes the vantage point of the foreign subsidiaries and which the rule aims to prevent, namely, an advantage that the company could not have enjoyed should they have been obliged to collect funds on the market, which would subsequently result into an abnormal financing transaction carried out by taxpayer (i.e., Italian holding).

The application of Article 110, paragraph 7 of the TUIR is subject to the double condition that:

– the intercompany transaction give rise vis-à-vis taxpayer company to profit and loss income components;

– the application of the normal value criterion may give rise to a higher taxable income.

In this case (non-interest-bearing loan), according to the Supreme Court "*the service supply itself is missing - concerning the payment of corresponding interests - which constitutes the necessary basis for comparison with respect to the normal value.*"

Supreme Court Judges emphasized how the Revenue Office superimposed:

separate legal levels, bringing together the legislation for evaluation of the quantum related to either the good or service, transferred or loaned within the context of intercompany transactions (…) with the legislation regulating law abuse, which is EU-sourced (…).

According to the Supreme Court:

the normal value system of the good or service exchanged, described in the joint provision of Article 9, paragraph 3 of the TUIR and Article 76, paragraph 5 of the TUIR goes beyond the framework of the law abuse case.

In the case at issue, the agreement for a non-interest-bearing loan granted by an Italian company to its Luxembourg and American subsidiaries does not involve:

– unlawful behavior, given that no breach of rule can occur without behavioral obligations;

– a simulation case, given that in the tax assessment notice there is no complaint against tax evasion by means of a simulated agreement aimed at concealing income actually earned by the Italian holding company;

– an avoidance behavior that could fall within the purview of law abuse: "*indeed, if the loan transaction is not producing any taxable income, the constitutive element of the abusive case of undue tax savings, required as the exclusive or absolutely preeminent aim of the transaction, is lacking.*"

According to the Supreme Court, the agreement for a non-interest-bearing loan could not be scrutinized by the Tax Authorities for the transaction's not being "cost-effective" for Lender, although the Second Instance Judges identified a specific interest of the holding company:

suitable to justify in economic terms the granting of the amount without interests (…) in view of the transaction's purpose being the optimization of available resources (…), the keeping of market shares and the prevention of H….'s excessive credit exposure (..), but it does neither include a distorted negotiation mechanism, nor an abnormal use of negotiation mechanisms

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6 For details on the relationship between transfer pricing and anti-abuse rules, cf. L. Pogorelova, *Transfer Pricing and Anti-abuse Rules*, 37(12) Intertax 683–693 (2009); Y. Brauner, *Transfer Pricing in BEPS: First Round – Business Interests Win (But, Not in Knock-Out)*, 43(1) Intertax 72–84 (2015).

7 The Regional Tax Court of Tuscany deemed the Tax Authorities' claims to be unfounded, observing that:

non-interest bearing loans granted by the controlling company to the controlled companies H. E. SA, with head offices in Luxembourg, and Balfour Quarry INC, with head offices in the US, could not be assimilated, for tax purposes, to the mentioned tax rule, to loan agreements entered into for good and valuable consideration, given that the rule does not set forth such provision and being gratuity justified, in any case, by the economic purpose pursued by the holding company ("optimize available resources, (…) keep market shares (…) prevent excessive credit exposure of H spa vis-à-vis third parties").

(considered disproportionate to the aim with respect to the means: in the case at issue, the agreement does, indeed, fully produce their corresponding legal effects), constituting symptomatic elements of avoidance behavior.

2.3 *Domestic Transfer Pricing Pursuant to Ruling No. 12844 of June 22, 2015*

With Ruling No. 12844 of June 22, 2015, the Supreme Court confirmed the application of the normal value criterion pursuant to Article 9 of the TUIR to intercompany transactions between entities residing in Italy.

In this case, the Revenue Office challenged intercompany real estate transactions between domestic companies, since they "*involved a very different value with respect to OMI (i.e., Italian Real Estate Market Observatory, hereinafter 'OMI').*"

The Court, albeit not excluding that a "*domestic transfer pricing*" transaction may give rise to tax avoidance, upheld the grounds put forth by taxpayer, deeming that "*the Revenue Office did not provide any suitable evidence.*"

Conversely, the Supreme Court Judges quashed the decision issued by the Regional Tax Court of Lombardy and upheld the Appeal lodged by the Revenue Office, confirming the same position adopted by the same Supreme Court in its Ruling No. 17955 in 2013.

In particular, pursuant to the Supreme Court, the normal value criterion set forth under Article 9 of the TUIR is also valid for transactions between/among entities belonging to the same Group residing in the State's territory:

in application of the prohibition of law abuse, which precludes taxpayer from obtaining tax advantages gained by the distorted use – even where not conflicting with a specific provision – of legal instruments suitable to obtain tax advantages or savings, in the absence of reasons other than the mere expectation of those benefits. Such principle, on the one hand, is based on community rules to protect the EU's own resources as well as on constitutional principles of taxpaying capacity and progressive taxation; on the other hand, it does not clash with the principle of subjectivity to the law (i.e., strictly subject to primary sources, not secondary sources of the law, namely, 'principio di riserva di legge'), which translates into the denial of abusive effects of transactions entered into for the purpose of avoiding any application of tax rules. Such transactions also comprise domestic transfer pricing schemes, triggered by the convenience, within a national context, of transferring taxable matter, by acting on agreed prices for the transfer of intercompany goods and services.

The Supreme Court first reiterated that the Second Instance Judges did not exclude that a domestic transfer pricing transaction might give rise to tax avoidance and subsequently evidenced the reasonableness of the claim lodged by the Revenue Office which raises objections with regard to the inappropriate evaluation by the Second Instance Judges of some given aspects of the intercompany transaction, such as, for example "*the enormous gap vis-à-vis OMI directives and the dubious corporate transaction only a few months after the conclusion of the contract.*"

The Supreme Court upheld the claim submitted by the Tax Authorities referring the case to the Regional Tax Court of Lombardy in order "*to proceed to a new evaluation of the circumstances, while also taking into consideration whether the transaction could give rise to a tax advantage for taxpayer.*"[8]

2.4 *Lawfulness of Transfer Pricing Adjustments in Ruling No. 9709 of May 13, 2015*

With Ruling No. 9709 of May 13, 2015, the Supreme Court underlined that transfer pricing adjustments by the Tax Authorities may be considered legitimate only if such adjustments occurred after a comparison between the verified transaction and the ones entered into between/among third independent entities that are effectively comparable.

In the case under examination, the Revenue Office recaptured to taxation non-declared revenues arising from purchases between Plaintiff Company and its foreign subsidiaries, in view of their being realized at a lower price than that charged to independent customers.

The audited company lodged a complaint against the notified tax assessment notice. Both, the First Instance Judges and the Veneto Regional Tax Court deemed the adjustments applied by the Revenue Office to be legitimate, while rejecting Taxpayer's complaint and appeal, who decided to file an appeal with the Supreme Court.

First, the Supreme Court reiterated that both domestic and international transfer pricing rules require a comparison between the transaction entered into by two companies of the same Group (controlled transaction), and the transaction entered into between independent parties, in order to identify the so-called *normal value* expressing arm's length values.

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[8] For the sake of completeness, please note that para. 2 of Art. 5 of the so-called Internationalization Decree (Legislative Decree No. 147/2015) provides that: "*The provision under Article 110, paragraph 7, of Presidential Decree No. 917 of 22 December 1986, must be construed in the sense that the provided regime is not applicable to transactions between companies residing or located in the State's territory.*" The rule in question is one of veritable interpretation, aimed at specifying that the regime under para. 7 of Art. 110 of the TUIR is irrelevant for the purpose of intercompany transactions between companies residing or located in the territory of the Italian State. In other words, the rules provided for foreign transfer prices are not applicable to international transactions between/among entities residing in Italy and belonging to the same Group.

In particular, Italian rules define the normal value as the average price or consideration applied on the average for goods and services of the same or similar kind, under conditions of free competition and at the same level of distribution, in the same time and place in which such goods or services were purchases or loaned, or should such references be lacking in the nearest time and place.[9]

In the case hereof, the Plaintiff Company called the attention—ever since the ruling issued by the Court of First Instance—as to the existence of two separate price lists, which contained notable differences between transactions with foreign subsidiaries and transactions with third Italian customers, with respect to both, "*level of distribution*" (and therefore in functions performed by the same) and contractual agreements underlying sales.

In particular, the following material was identified:

– a price list for Italian customers (retailer report, low quantities, rapid delivery, post-sales assistance, extended payment conditions, agents' commissions);

– a price list for foreign subsidiaries (sales report to distributor, high quantities, sixty-day delivery, scheduled orders, non-existing costs for catalogues and agents' commissions).[10]

The Plaintiff Company emphasized the Revenue Office's improper behavior, since the latter compared the company's sales to its subsidiaries and those to third independent Italian entities operating on a different level of distribution; on the contrary, pursuant to Plaintiff Company, it would have been more appropriate to compare the company's sales to third foreign independent entities, these too being distributors as the subsidiaries.

The Supreme Court concluded that the normal value in intercompany transaction must be identified after "*a strongly contextualized comparison viewed from a qualitative, commercial, time-related and local perspective.*"

2.5 *Normal Value and Comparability of Contractual Obligations Pursuant to Ruling No. 27296 of December 23, 2014*

The aforementioned decision originates from a tax assessment notice received by an Italian company belonging to a multinational group concerning a complaint about transfer prices between the company under audit and its German subsidiary.

The Italian company produces manufactured goods for heat detectors for trains, in compliance with the agreement for the use of the know-how owned by the German subsidiary. According to this agreement, the Italian company shall sell its production to the German subsidiary, or to a final customer located in Italy.

During inspection activities, the Tax Authorities recaptured to taxation EUR 373,017.91 on transfer of goods carried out vis-à-vis the German company, because the accounted fees were deemed as being lower than at "*normal value.*"

Due to taxpayer's claim, First and Second Instance Judges repealed the Tax Authorities' complaint, deeming transfer pricing rules inapplicable in view of the following reasons:

– a tax advantage cannot be deemed to exist for the group following the shifting of income, given that during the period in which the challenged transactions were carried out, taxation in Germany was higher than in Italy;

– even where the price at "*normal value*" is higher than the price agreed, it is necessary to consider that the financial analysis developed by the Tax Authorities is based on the comparison between two agreements that are both different in nature and subject-matter, and that the considerations relating thereto cannot, therefore, be deemed comparable.

The Tax Authorities based its conclusions on the examination of two sales agreements, i.e., one signed between the German company and the Italian controlled company and one signed between the latter and a third Italian company that does not belong to the Group.

The Revenue Office is of the opinion that the prices of the goods sold by the audited company to the German subsidiary were two or three times lower than the ones applied in the transaction between the audited company and the Italian final customer, notwithstanding the full-fledged identity of goods involved in the transactions and of the respective reference market.

Moreover, the Tax Authorities clearly evidenced the fact that the administrative, sales and warranty management of the product still remained with the German company; therefore, the higher price applied by the audited company to the Italian final third customer cannot be justified on the basis of the existence of further costs; conversely, the price must be considered at "*normal value*" of the goods transferred within an arm's length regime.

Notes

9 In the same meaning, OECD requires that there be comparability between the two transactions being compared, i.e., that there be no difference between them as such to influence the transaction price, or should there be any, such differences may be eliminated by means of specific adjustments. It is necessary to consider and assess the existence of any possible differences in the so-called *five comparable factors* given as recommended by the OECD *Transfer Pricing Guidelines*.

10 These differences in sales conditions were also evidenced in the ruling of Appeal, given that the Second Instance Judges underlined that:

> *in an equitable reduction of the tax recapture, the Provincial Tax Court had already considered the different conditions vis-à-vis subsidiaries which consisted in the higher quantities handled, the lack of commissions, swifter payments, etc.*

The Supreme Court confirmed the Court's decision, underlining that the Regional Tax Court of Tuscany remarked that the different contractual positions connoting the two relationships with the German subsidiary, owner of the intellectual property, have a significant incidence on the economic content of the same:

> *with the first, the taxpaying company acted as a producer of a good to be provided to the German subsidiary, owner of the intellectual property; with the second, having the right to produce on its own the equipment and to distribute the same, assumed the risks related to the transaction.*

Therefore, the Supreme Court Judges, by virtue of the different contractual position of the parties involved in the transaction, deemed illegitimate the tax recaptured to taxation by the Tax Authorities, while establishing that the price at normal value to be applied to transactions entered into with the German subsidiary should be the same as the price applied to the Italian final customer.

2.6 *Normal Value of Intangibles in Ruling No. 20911 of October 3, 2014*

With the aforementioned ruling, the Supreme Court confirmed the decision of the Regional Tax Court of Lombardy according to which, due to lack of documentary evidence of the effective—original or derivative—purchase of intangibles by the Italian subsidiary, costs charged back by the foreign holding and corresponding to the amortization rate are non-deductible; they must be reclassified as "*royalties*" and since the matter involves intercompany transactions with a foreign subsidiary, they must be quantified by applying the normal value criterion pursuant to Article 110, paragraphs 7 and 9 of the TUIR.

The Second Instance Judges observed, in particular, that the above intangibles:

> *did not result as having been acquired - for the indicated pro quota value—for the subsidiary's equity, given that the latter had not acquired an exclusive or common ownership, and that no contrary elements to the 'programme agreement' could be inferred (...), considering that the said conditions had not been transcribed in the clauses of the contract of use of formulas and patents signed with the Italian controlled company, with the consequence that costs charged back to the controlled company should be qualified as royalties and recorded in the Financial Statements as costs for the use of assets and rights owned by others, and as such, deductible, since they are intercompany transfer pricing transactions with companies not residing in the State's territory—within the limits of the normal value pursuant to Article 76, paragraph 5 (currently Article 110, paragraph 7) of the TUIR and of Ministerial Circular No. 32 of 22.9.1980 within the measure of 2% of sales turnover.*

In particular, the Supreme Court Judges upheld as legitimate the non-deductibility of costs as amortization rates of the intangibles, reclassifying them as royalties, (with subsequent re-quantification of the same pursuant to the transfer pricing regime), confirming the Court's position, according to which:

– the subsidiary used processing procedures, patents and chemical formulas;

– rights on the above intangibles were made available by the German holding, given that there was no documentary evidence for either the purchase or transfer of the said intangibles to the Italian subsidiary's equity;

– the Italian subsidiary's use of intangible rights—owned by the German holding—falls under the legal category of license agreement, and any related costs charged to the subsidiary by the holding company—exclusive owner of the rights—correspond to the royalties due for the temporary use of such intangibles.[11]

3 Supreme court's position on the burden of proof and transfer pricing documentation

Two topics that are frequently subject to heated debates in transfer pricing proceedings pertain to the burden of proof and documentation duties that multinational companies have to comply with, whenever required, to support transfer prices applied in the transactions with subsidiaries, to ensure compliance with the principle of "*normal value.*"[12]

In particular, the compilation of documents entails a number of critical factors, given that the differences—both legislative and economic—existing in the various States of residence of group companies, do not facilitate the collection of adequate data/information, particularly where identification of comparable transactions is rather complex (as is the case for certain kinds of intangibles).

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[11] For details on aspects regarding intangibles, within the context of the BEPS Project, cf. A. Oestreicher, *Valuation Issues in Transfer Pricing of Intangibles: Comments on the Scoping of an OECD Project*, 39(3) Intertax 126–131 (2011).
For details, in general, on transfer pricing of intangibles, cf. M. Markham, *The Transfer Pricing of Intangibles* (Kluwer Law International 2005).
For details on evaluation of intangibles in post-merger restructurings, cf. A. Oestreicher, *Transfer Pricing of Intangibles in Cases of Post-merger Reorganization: Lessons from the Revised OECD Draft*, 42(8/9) Intertax 509–524 (2014).

[12] For details on the principle of "normal value," cf. P. Valente, *Transfer Pricing Manual* 1330 et seq. (IPSOA-Wolters Kluwer 2015).
For details on transfer pricing documentation duties, cf. S. Schnorberger, I. Gerdes & M. van Herksen, *Transfer Pricing Documentation: The EU Code of Conduct Compared with Member State Rules (Part 3)*, 34(10) Intertax 514–519 (2006); R. Fletcher et al., *Transfer Pricing Documentation: The EU Code of Conduct Compared with Member State Rules (Part 2)*, 34(8/9) Intertax 406–417 (2006).

With regard to this specific topic, the Supreme Court firmly established its position pursuant to which the burden of proof involving non-compliance of the principle of "*normal value*" in relations with subsidiaries located in different States falls on the Tax Authorities.

In the *Ford Group* case, the Supreme Court's Ruling No. 11226/2007, rejected the following complaint:

– accounting and deduction of purchase costs of intangibles, according to Italian law, rests with the manufacturing company (reduction of taxable income to the advantage of other group companies located in low-tax countries);

– accounting and deduction of costs charged by a subsidiary, for services charged, in turn, also by another company provider of centralized costs by virtue of a cost-sharing agreement (duplication of costs).[13]

Supreme Court Judges established that cost-sharing agreements are perfectly relevant also in the relationship with the Tax Authorities of the State of establishment, under whatever form they might have been drawn up.

In the case at issue, the Italian Tax Authorities should have therefore complied with the OECD Guidelines, according to which the burden of proof for the existence of the precondition for a tax assessment restating tax at a higher amount rests with the Tax Authorities, which are obliged to compare transaction prices with the ones identified in transactions between independent parties, using the difference as leverage to challenge any transfer of taxable income to lower tax countries.

In other decisions, the Supreme Court further asserted that in transfer pricing disputes, the burden of proof rests with the Tax Authorities, through an analytical reconstruction of the amounts applied, on the average, among independent parties (in such sectors, in which transactions are subject to audit), alleged difference between:

– intercompany prices effectively applied;

– the normal value of transfers or supply of services.[14]

The position assumed by the Supreme Court is based on the observation of prevalent rules as well as on practice generally accepted within the OECD, both of which compel the Tax Authorities of Member States to shoulder the burden of proof, without laying it on taxpayers under audit.

Therefore, one might rightly assert that national transfer pricing jurisprudence has acknowledged the logical course endorsed by the OECD and also contained in Circulars Nos. 32/1980 and 2/1981.

In view of the afore-stated considerations, it is rather easy to understand as to why the Judges—more frequently than not—disregarded and/or refuted the claims advanced by the Italian Tax Authorities.[15]

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13 For details on the *Ford* case, cf. P. Valente, *Transfer Pricing Manual* 616 et seq. (IPSOA-Wolters Kluwer 2015).

14 For details on prior Supreme Court decisions, cf. P. Valente, *Italy: An Outlook on the Supreme Court's Transfer Pricing Decisions*, 41(4) Intertax 256–263 (2013).

15 It is worth noting that they had some difficulties in issuing rulings on cases concerning transactions involving tangibles as well as intangibles for the lack of shared frames of reference.