

ALL IN: A CONTROVERSIAL TAX LEVY ON GAMBLING WINS

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Abstract

With Operation “All in”, Italy tried to pursue capital wherever it was and subject it to taxation, overstepping both national and EU limits imposed on its power of taxation. In fact, the decision to include a new category of income in personal income tax was adopted administratively and not legislatively, violating the fundamental principle of legality and the specific reserve of law that the Constitution establishes concerning assets. Moreover, the Tax Agency pretends to subject to income tax only sums won in casinos abroad, while sums won in Italian casinos benefit from a tax exemption. This difference in treatment results in a discriminatory restriction on the free provision of services protected by the TFEU. The incompatibility of such discrimination with EU law is affirmed by the ECJ, which considers the act of the Italian State to be illegitimate.

TABLE OF CONTENTS

1. The Tax State: from national to EU limits.....	242
2. The state reserve in the field of gambling and betting.....	244
3. The compatibility of the Italian system of gambling and betting with EU law.....	245
4. The Italian tax system as regards gambling winnings.....	250
5. Operation “All in”: a case of manifest injustice.....	251
6. Operation “All in” in the decisions of national and EU courts.....	253
7. Some implications.....	257

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1. The Tax State: from national to EU limits.

The power of taxation¹ is one of the fundamental elements of state sovereignty². In the evolution towards the rule of law, the power to impose taxes was subjected to substantial and procedural limits. Modern constitutions contain a number of limitations on the power of taxation³ that protect citizens against the authority and link taxes with the democratic principle, expressed in the maxim of “no taxation without representation”.

Article 23 of the Italian Constitution states that “No obligations of a personal or a financial nature may be imposed on any person except by law”⁴. The rule of law in tax matters comes down from the general Constitutional principle by which a legislative act is required to have an effect in the sphere of property and personal freedom. The Government cannot establish new taxes without submitting them to Parliament for approval, thus guaranteeing the democratic circuit.

Therefore, in the national system, the power of taxation of the State encounters a dual limit: on the one hand, it has to respect the general principle of legality; on the other, it is subject to a specific limit consisting in the rule of law as laid down by Article 23 of the Constitution.

The limits foreseen by national standards have since been joined by the limits imposed under the legal system of the European Union. Tax matters have not been harmonised by the EU, and so remain within the competence of the individual states. But this does not mean that they are completely free of constraints in the exercise of the power of taxation. In fact, “although direct

¹ On the concept of the power of taxation and its evolution, cf. the contribution of J.M. Queralt, *La potestà tributaria*, in *Trattato di diritto tributario*, edited by A. Amatucci, vol. I, Tome I, (1994) 141.

² Under the Albertine Statute, the prevailing doctrine had identified the legal basis of taxation in the “subjection of the taxpayer, the sovereignty of the state: in other words, coercion” F. Cammeo, *Le tasse e la loro costituzionalità*, in *Giur. It.*, (1899) 202.

³ For a historical overview of the rule of law in tax matters, with particular reference to its genesis in Anglo-Saxon law, cf. G. Marongiu, *I fondamenti costituzionali dell'imposizione tributaria. Profili storici e giuridici*, 2nd ed., (1995).

⁴ The analysis of A. Fedele on Article 23 of the Constitution remains fundamental, *Commentario della Costituzione*, edited by G. Branca, (1978).

taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law"⁵.

A first limitation is contained in the Treaty on the Functioning of the European Union (TFEU), which in Article 30 establishes the prohibition of customs duties and taxes with equivalent effect. Moreover, the lack of legislation aimed at harmonising national laws did not prevent the Court of Justice (ECJ) elaborating and consolidating case-law regarding the limits that the Member States must comply with in tax matters. In particular, the ECJ has on many occasions highlighted the incompatibility of national tax rules with the fundamental freedoms of movement of people, goods, capital and services⁶.

Therefore, at a European level as well, the power of the state to impose taxes meets a dual limit, one of an absolute character, the other relative. On the one hand, the Member States can no longer exercise certain powers of taxation, such as the fixing of customs duties. On the other hand, some powers – in particular those with discriminatory or restrictive effects on freedom of movement – may be exercised only under certain circumstances.

For the purposes of this analysis, what is being highlighted are the conditions necessary to justify a tax system that produces restrictive effects on the free provision of services.

In particular, matters regarding the tax levy applied to gambling winnings offers numerous points for reflection. In the gaming industry, in the Italian system a state reserve applies, which in itself constitutes a restriction on the free provision of services. The ECJ, however, has long considered legitimate this attitude towards the gambling market, identifying the higher public interest that justifies the restrictions; at the same time, the

⁵ This principle was affirmed by the ECJ in its judgment in Schumacker, Case C-279/93, § 21, and subsequently consolidated with numerous pronouncements. The phrase quoted in the text is taken from the judgment in Marks & Spencer plc. Case C-446/03, § 29.

⁶ For a critical review of this case-law, cf. M.J. Graetz and A.C. Warren Jr., *Income tax discrimination and the political and economic Integration of Europe*, in 115 Yale L. J. (2006) 1186, which affirms the inconsistency of the case-law of the ECJ, in the face of the lack of harmonisation on tax matters. Moreover, the authors argue that the ECJ prevents Member States using the fiscal lever to stimulate their domestic economies.

Court has laid down the conditions and limits for the lawful imposition of restrictions.

The Italian State, in a recent operation carried out by its Tax Agency, has violated not only the EU principles established to protect the free provision of services, but also the Constitutional principles regarding the exercise of the power of taxation.

2. The state reserve in the field of gambling and betting.

As mentioned, in the Italian system there exists a state reserve in the area of gambling and betting, established by Legislative Decree no. 496 of 14 April 1948⁷. As a result, private individuals cannot legitimately carry out business activities in these sectors⁸. The exercise of such activities, in line with the original reserve, is granted only to the State, which may decide to grant it to private subjects through special concessions. In fact, to organise and exercise public gaming, as well as to collect bets, it is necessary to obtain a special licence and a public safety authorisation⁹.

The provision of the original reserve for the exercise of activities related to gaming is justified by the pursuance by the State of numerous public purposes relating to relevant and primary public interests. Among these, it is possible to count the prevention of the infiltration of criminal elements, the protection of public trust, of public policy, of the players, the prevention and limitation of the phenomenon of gambling addiction, which falls under public health protection. In reality, a unified and centralised management (albeit through concessions) allows the State to

⁷ Article 1 of the Legislative Decree, still in force, states that “*The organisation and operation of games of skill and forecasting, which pay out a reward of any kind and which require the payment of a monetary stake for participation, are reserved to the State*”.

⁸ On the institute of the original reserve and the subsequent concession system, cf. S. Cassese, *I beni pubblici* (1969). For an analysis of the evolution of the legal regime on public assets, also from a comparative perspective, cf. G. della Cananea, *From (Public) Ownership to Use: A Comparative Analysis*, in M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?* (2009) 297.

⁹ Royal Decree no. 773 of 18 June 1931, dealing with the Consolidated Laws on Public Safety establishes that to operate in the gaming and betting sector it is necessary to be in possession of an AAMS administrative concession and a police licence issued by the local police department.

eradicate the clandestine organising of gaming and betting, fertile ground for criminal infiltration, channelling gambling into lawful and regulated paths. Furthermore, clandestine gambling has always represented a threat to public order, to say nothing of the doubts regarding the fairness of such games. Finally, the regulation of gambling also allows the establishment of quotas or at least a restriction on the offer of the games themselves, in order to avoid an oversupply that could encourage or exacerbate the onset of diseases associated with gambling.

It remains to add that functions in the field of gambling and betting are attributed to the Autonomous Administration of State Monopolies, today known as the Administration of Customs and Monopolies¹⁰.

3. The compatibility of the Italian system of gambling and betting with EU law.

The gambling and betting sector is not the subject of harmonised regulations at EU level. Indeed, the European Commission, aware of the reserves and consequent monopolies in the Member States, has tried in the past to start a process of harmonising the national rules for the purpose of liberalising this market. In 1991 it published the paper *Gambling in the single market. A Study of the Current Legal and Market Situation*¹¹, which called for the overcoming of the then regulatory fragmentation and the introduction of rules based on the EU principles of the single market. In essence, the EU considered gambling and betting in the same way as a normal commercial activity (albeit with its peculiarities), which, therefore, had to abide by the usual market rules.

¹⁰ Under Article 23-*quater* of Law by Decree no. 95 of 6 July 2012, converted with amendments into Law no. 135 of 7 August 2012, from 1 December 2012, the Customs Agency took over the running of AAMS, assuming the new name of the Customs and Monopoly Agency. On the recent transformation of AAMS into ADM cf. the contribution of M. Macchia, *L'organizzazione dell'amministrazione dei giochi*, in A. Battaglia e B.G. Mattarella (eds.) *Le regole dei giochi*, (2014) 103.

¹¹ European Commission, *Gambling in the single market. A Study of the Current Legal and Market Situation* in the Publications Office of the European Communities, (1991).

This approach met with a firm and consensual opposition from the Member States, determined to defend their monopolistic prerogatives (with consequent advantages, also in terms of taxation), relying on the principle of subsidiarity. The almost unanimous resistance of the States was expressed during the Edinburgh European Council, held on 11 and 12 December 1992, at the conclusion of which it was asserted that the Commission, after consultations with interested parties, had declined to propose the regulation of gambling¹².

More recently, the Commission returned to the question and launched a public consultation that led to the publication of the *Green Paper on on-line gambling in the Single Market*¹³. As a result of the inquiry carried out (limited to online gambling), the Commission once again felt it inappropriate to propose unified regulations at EU level in this sector.

Therefore, public gambling is not controlled by uniform regulations and harmonised at European level because of a specific choice of the EU legislator¹⁴. In addition, many directives that regulate sectors and activities in which public gambling might be found or that might be abstractly considered also applicable to public gambling, contain specific and explicit rules of exclusion¹⁵.

¹² In the Conclusions of the Presidency the European Council in Edinburgh of 11 and 12 December 1992 it is explicitly stated that “the Commission can say that, following consultations with interested parties, it intends to abandon certain initiatives that had been planned. It will not, for instance, be going ahead with proposals on the harmonisation of vehicle number plates or the regulation of gambling”; the conclusions are available on the internet at http://europa.eu/rapid/press-release_DOC-92-8_it.htm.

¹³ European Commission *Green Paper on on-line gambling in the Single Market*, Brussels, 24 March 2011, COM (2011) 128 final version, amended on 20 April 2011. Subsequently, the Commission published a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European framework for online gambling*, Strasbourg, 23 October 2012, COM (2012)

¹⁴ On the lack of harmonisation in the gaming industry, cf. A. Littler, *Member States versus the European Union: The Regulation of Gambling*, (2011).

¹⁵ Directive 2006/123/EC of the European Parliament and Council of 12 December 2006 on services in the single market – the so-called Bolkestein directive – states in the preamble, in paragraph 25, that “gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive, in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection” and Article 2, paragraph 2, letter h) which provides that the Directive does not

Therefore, not only is there a lack of unitary regulation of the specific sector, but also the rules issued for other sectors that might impact on individual aspects of the regulations of public gambling are declared as not being applicable to them.

Therefore, in order to examine thoroughly the conformity to EU rules of the sets of regulations adopted by the Member States it is necessary to refer to the originating EU law, that is to the Treaties and the principles enucleated by the ECJ.

The activity of producing income in the field of gambling and betting falls abstractly within the scope of the free provision of services and the right of establishment¹⁶. Therefore, the state monopoly in this sector constitutes a restriction of those fundamental freedoms which are protected by EU law. The existence of a monopoly is not the prerogative of the Italian State, however, since it can be found in the other Member States. Therefore, the ECJ has addressed this issue in numerous rulings, concerning the norms on gambling of the different States. In

apply “[to] gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions”; Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on electronic commerce contains in paragraph 16 of the preamble the clarification that “The exclusion of gambling activities from the scope application of this Directive covers only games of chance, lotteries and betting which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services”, and consequently Article 1, para. 5, letter. d) excludes from the applicability of the same “gambling which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions”; also the directives on public procurement are not applicable to the gaming and betting sector, which come under the different definition of a public service concession.

¹⁶ The ECJ has made it clear on various occasions that the rules on the freedom to provide services also apply to activities which allow the participation, on payment, in a gambling game. A first statement of this approach is found in the Schindler judgment in relation to lotteries, which states that “the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a ‘service’ within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty”, Case C-275/92, § 37. In addition, the protection provided by EU law for the freedom to provide services must be guaranteed both to the service provider, and to the recipient, as affirmed in the judgment on Liga Portuguesa de Futebol Profissional and Bwin International, Case C-42/07, § 51.

particular, it has established the necessary conditions for a national legislation to contain a prohibition on the exercise of free economic initiative in the gaming industry (in the absence of the appropriate licence and authorisation issued by the State) to be considered compatible with EU law.

The ECJ has provided an extensive interpretation of Article 56 of the TFEU, which prohibits restrictions on the free provision of services. In fact, under this provision, not only must all the rules which constitute discrimination based on nationality be eliminated, but also the measures applicable equally to domestic and foreign service providers, if they are likely to “*prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services*”¹⁷.

However, in the gaming industry, the Court has long recognised a number of overriding reasons of general interest that justify the provision of restrictions on the free provision of services. In particular, the objectives of consumer protection, prevention of fraud and of inciting people to squander money on gambling, and the social problems related to gambling can legitimise restrictive measures provided they are applied without distinction to national service providers and those from other Member States¹⁸.

Whenever restrictive measures also discriminate against service providers from other Member States, they may be justified only if they fall within the category of derogations expressly permitted by Article 52 of the TFEU. Therefore, a discriminatory restriction is compatible with European Union law to the extent in which it is aimed at pursuing the objectives of public policy, public security or public health¹⁹, and provided it complies with the fundamental principle of proportionality²⁰.

For these reasons described briefly, the ECJ has repeatedly judged as legitimate the various restrictions imposed by the Member States in the gambling sector. In this regard, in fact, there are considerable differences between the Member States in moral,

¹⁷ Judgment on *Dirextra Alta Formazione srl*, Case C-523/12, § 21.

¹⁸ Judgment on *Commission/Spain*, Case C-153/08, § 36, and the previous case-law cited.

¹⁹ *Ex multis*, judgment on *Dickinger*, Case C-347/09, § 79.

²⁰ Judgment on *Liga Portuguesa de Futebol Profissional and Bwin International*, Case C 42/07, §§ 59-61 and judgment on *Pfleger*, Case C-390/12, § 43.

religious and cultural terms²¹ that justify the provision of restrictive monopolies and regulations. Therefore, each State must be able to determine the degree of protection of the interests at stake according to their own scale of values²².

The causes of justification operate with regard to the many and heterogeneous restrictive measures provided for in the Member States for gambling²³. However, the Court has established that the overriding reasons justifying restrictions on fundamental freedoms do not include the considerable tax income, since this is only an incidental beneficial consequence²⁴.

In the conflict between the free provision of services and general interests that justify a restriction thereof, special attention needs to be paid to the system of taxation on gambling winnings.

²¹ In the judgment on *Placanica*, Case C-338/04, the Court affirmed that “*In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order*” at § 47.

²² According to the Court, “*In the specific area of the organisation of games of chance, national authorities enjoy a sufficient measure of discretion to enable them to determine what is required in order to ensure consumer protection and the preservation of order in society and – provided that the conditions laid down in the Court’s case-law are in fact met – it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary to prohibit betting and gaming wholly or in part or only to restrict them and, to that end, to lay down more or less strict supervisory rules*”, judgment on *Pfleger*, Case C-390/12, § 45.

²³ Moreover, in the gambling sector the applicability of mutual recognition is excluded, as clearly stated in the judgment on *Stoß* joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07, C-410/07, §§ 109-113. The exclusion derives from a logical argument on the basis of which “*the Court openly and unambiguously accepts, albeit subject to certain conditions, monopolies and other restrictions relating to the number of operators in the gaming sector. [...] That eventuality having been accepted, there is quite simply no room for the uniform operation of a system of mutual recognition of gaming licences for the whole of the European Union. If a Member State in which a gaming monopoly (complying with the requirements of the Treaty) has been instituted had to take into account licences issued in other Member States of the Union, the abovementioned case-law would become impracticable and meaningless.*” (Point 94 of the conclusions of the Advocate-General).

²⁴ *Ex multis*, cf. the judgment on *Gambelli*, Case C-243/01, § 62 “*the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted*”.

4. The Italian tax system as regards gambling winnings.

The Italian Income Tax Code²⁵, after describing a series of income sorts on the basis of the source of production of the income, identifies the residual category of "other incomes". This legislative denomination reveals the function of closure carried out by this category. In it, in fact, what is intended to be included is all income, from heterogeneous sources, which cannot be included in the described income categories. The heterogeneity of this case does not allow its general definition. Therefore, Article 67 of the Income Tax Code provides a detailed list of the proceeds to be included among the different incomes, which include gambling wins²⁶. Such winnings, pursuant to Article 69 of the Income Tax Code, constitute income for the entire amount, since the taxpayer cannot apply any deduction to them.

Moreover, with the proceeds from gambling and bets paid by the State, public entities or by taxpayers, tax is withheld at source²⁷. Therefore, the majority of the income abstractly classifiable in this category of income is specifically exempted from personal tax, since tax has been withheld, which exempts the winner from any obligation to declare it.

The reflections in this article were prompted by the situation regarding winnings in casinos, which are subject to special rules. In fact, on the winnings paid by Italian casinos tax is not withheld at source, insofar as this is considered included in the entertainment tax paid to the State by the casino.

Therefore, sums won in Italian casinos do not lead to any declarative obligation for the winner, who is exempt from all taxation; the taxable subject is the casino, which has no obligation of recourse against the winner; the tax base is not the sum paid as a win but the difference between the amounts collected daily for taking part in gambling and those paid to players as winnings²⁸.

²⁵ Consolidated Income Tax Act, approved by Decree of the President of the Republic no. 917 of 22 December 1986.

²⁶ Article 67, para. 1, letter d) of Decree of the President of the Republic no. 917 of 1986, considers as other income "*wins in lotteries, prize contests, games and betting organised for the public and prizes resulting from tests of skill or luck*".

²⁷ Article 30, para. 1 of the Decree of the President of the Republic no. 600 of 29 September 1973 on "*Common provisions on assessment of income tax*".

²⁸ Article 3, para. 4 of the Decree of the President of the Republic no. 640 of 26 October 1972 on "*Entertainment tax*".

Essentially, the winnings in Italian casinos are net, because the winner does not have to pay anything to the Exchequer. The winning sum is not even subject to withholding tax, because it is included in the entertainment tax, which is calculated on the daily income of the gambling house, not on the winnings paid out.

5. Operation “All in”: a case of manifest injustice.

In a press release of 18 July 2011²⁹, the Tax Agency and the Financial Police announced the launch of Operation “All in”, which seeks to tax winnings from casinos abroad. According to this press release, the tax authorities conducted a series of investigations on poker tournaments held in casinos, which led to the identification of around four thousand Italian winners. In the period 2006-2009, they supposedly failed to report to the Revenue as much as 73 million euros of winnings, which the administration would like to tax.

Operation “All in” is the result of an idea born from the collaboration between the Tax Agency and the Financial Police³⁰. In the wake of the popularity of the poker phenomenon, especially Texas Hold’Em, the tax authorities decided to exercise their power to tax also on wins in poker tournaments held in casinos. As stated above, the winnings paid out by Italian casinos do not form part of the taxable income of the player by express provision of law. The attention of the authorities therefore focused on winnings from tournaments held in casinos abroad. The Tax Agency has, therefore, decided that money won at poker tournaments played at casinos abroad should be considered as “other income”. It follows that those winnings must be reported on the tax return and that they are to be subject to personal tax.

Before the tax authorities launched Operation “All in”, the tax laws had never been interpreted in such a way as to include winnings in foreign casinos in the tax base for personal income tax. It was no accident that tax return forms did not include entries to indicate such proceeds nor were they mentioned in the

²⁹ Available on-line on the website of the Tax Agency in the section dedicated to press releases.

³⁰ The operation was conceived and managed by a technical committee set up between the Central Office for the Fight Against International Tax Avoidance of the Tax Agency and the Special Revenue Unit of the Tax Police.

instructions for the declaration. As evidence of the novelty of the interpretation offered by the administration, just in time for Operation "All in" the tax return forms were modified with the insertion of a special entry for the indication of winnings abroad.

The Tax Agency therefore provided a series of recommendations to its offices, urging the start of tax controls on players who had won prizes in poker tournaments at foreign casinos in the years 2006-2009, i.e. the previous years to which tax could still be applied.

In essence, the tax authorities decided to interpret the tax laws in an innovative way, so as to include as other income, winnings at the green table in foreign casinos. According to this interpretation, income from casinos is subject to very different tax systems depending on whether the casino is in Italy or abroad.

In fact, winnings paid out by Italian casinos are effectively net for the players, because not only do they not form part of the tax base for personal income tax but they are also not subject to withholding tax, since the tax legislation deemed them to be included in the entertainment tax paid by casinos to the State³¹. The entertainment tax (*imposta sugli intrattenimenti* - ISI) can in no way be considered similar – in its assumptions and effects – to a tax on winnings. The tax base of ISI is constituted by income of the casino – the actual daily positive difference between the sums collected from gaming and the sums paid out to gamblers by way of winnings – being in no way attributable to the single win.

In addition to the unequal tax base, there is also an inequality in the rate applicable. In fact, even considering the winnings from games and bets paid by the State – to which withholding tax is applied on the amount won, thus making them comparable – the difference in treatment is obvious. For "winnings resulting from luck, games of skill, those arising from prize competitions, by forecasting and betting, paid by the State", tax law provides a maximum rate of 20%. Otherwise, if winnings at foreign casinos form part of the earnings subject to personal

³¹ For an analysis of the Italian tax system on gambling winnings, see N. Sartori, *Imposizione reddituale delle vincite conseguite presso case da gioco italiane ed estere*, in *Rass. Trib.* (2014) 987.

income tax, as maintained by the Tax Agency, the maximum rate is 43%³².

Moreover, attributing to winnings from poker tournaments held in foreign casinos the qualification of other incomes raises further issues: first, with respect to the prohibition of double taxation, since the majority of States apply the source criterion to winnings in casinos by providing a substitute taxation at source; second, with respect to the principle of effective ability to pay, since the prohibition to apply deductions to the amounts won gambling does not allow for the costs incurred to be taken into account – primarily the participation fee for tournaments.

6. Operation “All in” in the decisions of national and EU courts.

In implementing the instructions received with Operation “All in”, the regional offices of the tax office issued numerous notices of assessment which sought to tax winnings in foreign casinos, applying the personal income tax rate with related penalties. Many taxpayers challenged the notices of assessment, resulting in a substantial dispute, on which various national tax commissions and the ECJ have pronounced. All the courts ruled the operation of the tax authorities illegal, although for reasons that were not always entirely identical.

At national level, most of the Tax Commissions maintained that Italian legislation, as interpreted and applied by the Tax Agency, was incompatible with EU law³³. In some cases a violation of the prohibition of double taxation was also found, insofar as the claim of the agency was going to affect sums already taxed with a withholding tax on the part of the foreign state³⁴.

³² Moreover, the rate of entertainment tax is equal to 10% of the daily income of casinos, under Section 4 of the list of tariffs attached to the Decree of the President of the Republic no. 640 of 1972.

³³ This was the view of the Provincial Tax Commission of Gorizia, with judgment 101/2/11, the Provincial Tax Commission of Perugia, with judgment 514/8/14, the Provincial Tax Commission of Teramo, with judgment 131/01/14, and the Regional Tax Commission of Trieste, with the judgment 77/09/13.

³⁴ Provincial Tax Commission of Teramo, judgment 131/01/14.

If, in the judgments of the Tax Commissions, the breach of EU law is set out expressly and clearly, less emphasis is given to the violation of the national limits of the power of taxation. Failure to comply with the principle of legality and legal reserve are not explicitly mentioned, although they can be assumed from some *obiter dicta*. In fact, the courts hold that the interpretation of the norms put forward by the agency is “strained”³⁵ and that the power to “specify” the taxation regime for winnings should have been exercised legislatively and not administratively³⁶.

In some cases, the courts have also noted the unreliability of the sources used to obtain information on winnings. In fact, to speed up the assessment procedures, the agency had to find a way to trace the amounts won by Italian citizens abroad. The Tax Agency found a website which lists the results of poker tournaments around the world with a view to compiling a sort of league table. This website, run by private individuals and without any official status³⁷, was used as a primary source for the acquisition of information that formed the basis of tax assessments. The Tax Commissions repeatedly criticised the actions of the agency in merely referring to a website, without in any way verifying the veracity of the data recorded there³⁸.

Therefore, most of the tax commissions judged the work of the agency as illegitimate beyond any doubt, sometimes also condemning the agency to pay costs, a very rare occurrence in tax judgments. The case-law is not unanimous, however, and it is possible to find dissenting opinions.

³⁵ This definition is used by the Provincial Tax Commission of Gorizia in judgment 101/2/11.

³⁶ The Provincial Tax Commission of Perugia emphasises this aspect, even if it leads back to the principle of legal certainty rather than to the reserve of law, in judgment 514/8/14.

³⁷ Data on winnings were taken from the website www.thehendonmob.com, which merely publishes the data it receives from tournament organisers, without any sort of verification. To the extent that the league also includes clearly made-up names that have supposedly won invented poker tournaments that have never taken place. Moreover, the unreliability and incompleteness of the data is acknowledged by the site itself.

³⁸ The Provincial Tax Commission of Rome in judgment 16444/57/14, cites the unreliability of the sources used as an error in judgment due to flawed reasoning, and annuls the notice of assessment for that reason.

A section of the Provincial Tax Commission of Rome considered the previous rulings of the EU Court “*not directly binding*”, because they resulted from the evaluation of the justifying circumstances that individual States had adopted. The national court, therefore, decided to operate the preliminary reference instead of disapplying the Italian legislation contrary to European law.

From the order for reference³⁹ it can be deduced that the reason why the judges chose to submit the question to the ECJ is to allow the Italian State to justify its tax system. In fact, the Commission recognises the discriminatory nature of the tax rules on foreign winnings, and cannot but note its similarity with the tax laws of other States that have been deemed unconstitutional by the ECJ in the past. However, the national court considers that the peculiar Italian situation can justify discriminatory taxation. In a country with a high rate of corruption and Mafia-type criminality, the choice of taxing winnings in foreign casinos has as its aim countering money laundering abroad. According to the national court, then, Italy has a number of special features, consisting in high levels of organised crime and the considerable income it needs to recycle. These features may justify discriminatory tax laws aimed at countering the laundering of the proceeds of organised crime. From this perspective, the Tax Commission makes the preliminary reference in order to enable the Italian State to provide the ECJ with their justifying reasons.

The EU Court, having taken up the matter, with a very recent judgment⁴⁰, limits itself to reiterating the principles set out in the numerous precedents. In fact, the ECJ had examined the tax rules regarding gambling in other Member States⁴¹ on various occasions.

It was seen that in the gambling sector the ECJ considered some restrictive policies of the States legitimate, insofar as justified by overriding reasons of general interest. However, the EU Court has consistently judged discriminatory taxation as contrary to EU

³⁹ I wish to thank the lawyer Massimiliano Rosa for providing me with the paperwork relating to this case.

⁴⁰ Judgment in Blanco, Case C-344/13 of 22 October 2014.

⁴¹ On discrimination applied by fiscal means, cf. the comparative analysis of TA Kaye, *Tax Discrimination: A Comparative Analysis of US and EU Approaches*, in 7 Fla. Tax Rev. (2005), 47.

law. This, in fact, cannot be justified on grounds of public interest. The States have repeatedly tried to argue that the tax regime is only one aspect of the general gambling regime, in which the Court grants States wide discretion. However, the Court stated that tax revenue does not constitute an overriding reason for justifying restrictions on fundamental freedoms.

Furthermore, in accordance with the principle of fiscal neutrality, discriminatory tax impositions are not legitimate in any case. On the basis of these considerations, the ECJ has ruled, since its first judgement on the matter in 2003, that “*Article 49 EC prohibits a Member State’s legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable*”⁴².

The claim of the Tax Agency, made with Operation “All in”, had the effect that of considering liable for income tax gambling winnings obtained abroad, whereas winnings in national casinos are not taxable. That this is contrary to the principle, clearly established by the ECJ for more than a decade, is evident.

A tax which produces restrictive effects on the free movement of services and which also discriminates against foreign suppliers can be compatible with European law only if justified by one of the three grounds expressly referred to in Article 52 of the TFEU, namely public policy, public security or public health, and so long as it conforms to the principle of proportionality.

The national court considered that the Italian State could validly justify its tax laws invoking the pursuit of public policy objectives, referring to the particular national situation.

Also with respect to the justifications offered by Italy, the EU Court limits itself to referring to its precedents. In particular, the fight against the laundering of the proceeds of organised crime had been invoked by Spain to justify the tax exemption granted to the winnings paid out by national bodies, while a similar exemption was not granted to winnings obtained abroad. At the

⁴² Judgment on Lindman, Case C-42/02. A first analysis of the Lindman judgment can be found in J. Heinrich, *Direkte Steuern und Grundfreiheiten*, in Eur. Law Reporter (2004), 173

end of the appeal, however, established by the Commission with an infringement action⁴³, the Court stated that *“it is not justifiable for the authorities of a Member State to assume, in a general way and without distinction, that bodies and entities established in another Member State are engaging in criminal activity”*⁴⁴.

Therefore, the ECJ considered that the discrimination practised in Italy with Operation “All in” could not be justified by the pursuit of public policy objectives⁴⁵. Moreover, the State has not provided evidence that the proceeds of organised crime derive from or are recycled abroad. In any case, the Court underlines that the measure is disproportionate, insofar as the fight against money laundering may be pursued more effectively by means other than the provision of a tax exemption.

7. Some implications.

Operation “All in” goes beyond the limits – both Italian and European – imposed on the power of taxation of the state as briefly mentioned at the beginning of this paper.

With regard to the violation of national limits what is highlighted is the non-compliance with the general principle of legality and the specific reserve of law that the Constitution provides on the subject.

This joint operation between the Tax Agency and the Financial Police sprung from an innovative interpretation of the tax laws by these organs of the State. There is no legislative means to introduce a new tax levy by identifying a new taxable category as a prerequisite for the tax. In this case, the expansion of the tax base for income tax takes place as a result of a different hermeneutic hypothesis which the administration attributes to a provision of the law of 1986.

In fact, in 2011, the Tax Agency decided to consider as “other income” the winnings from foreign casinos, thus creating the requirement for taxpayers to include such sums in tax returns and pay personal income tax on them, whereas winnings from

⁴³ On infringement proceedings before the ECJ, cf. the in-depth and comprehensive analysis contained in P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials*, 5th ed., (2011), spec. 408 ff.

⁴⁴ Judgment on Commission/Spain, Case C-153/08, § 39.

⁴⁵ Judgment on Blanco, Case C-344/13, § 41.

Italian casinos benefit from a tax exemption. Before the start of Operation "All in", winnings in foreign casinos were not considered for income tax; the previous administrative practice was also consistent with that interpretation, since the winnings were not mentioned in the instructions for completing the tax return and were not the subject of any notice of assessment. In short, the new interpretation decreed by the financial administration is equivalent to the identification of a new tax, established by administrative and not legislative means; furthermore, it was a decision of a non-technical but decidedly political nature, the choice of which subjects to impose the tax burden on and by which means emanating not from the Government or the minister, but from an agency.

Moreover, the hermeneutic innovation carried out by the Tax Agency is applied retroactively. The instructions issued by the Agency with Operation "All in" were enacted in 2011, and they urged their offices to conduct an inspection for the tax years to which it could still be applied, that is from 2006 onwards.

Operation "All in" also transcends the limits of the power of taxation as laid down in the European legal system.

The claim of the Tax Agency, in fact, is manifestly contrary to the principles expressed on various occasions by the ECJ. Art. 1 of the Law no. 241/1990 regarding administrative procedure states that administrative action shall be consistent with "*the principles underpinning the Community's legal system*".

The different tax treatment reserved for winnings in Italian compared to foreign casinos leads to a discriminatory restriction on the free provision of services. This is not merely an analogous situation with regard to the judgments of the European Court on the matter. The relevant facts of the matter are completely identical to the previous cases.

The fiscal regulations that are object of the judgment – as interpreted by the Tax Agency – produce consequences identical to those that gave rise to the Lindman judgment. In fact, Finnish law considered winnings in Finland exempt from taxation, while winnings obtained abroad by Finnish citizens were subject to tax.

The reasons given to justify the discriminatory taxation are also identical to those put forward by Spain in the proceedings initiated by the Commission for non-execution.

This similarity of these situations makes the breach of EU law by the Tax Agency all the more manifest, so much so that the ECJ decides to judge the case without the conclusions of the Advocate General.

Moreover, it is interesting to note that in the acts issued by the Tax Agency – a resolution, various press releases, the acts of verification and assessment sent to numerous taxpayers – the administration made no reference to the precedents of the ECJ and EU law in general. The Tax Agency demonstrates an attitude that could be defined as self-referential, since it refers exclusively to its own acts and national standards as it interprets them, without considering EU law and the ECJ⁴⁶.

With Operation “All in”, Italy tried to pursue capital wherever it was and subject it to taxation, overstepping both national and EU limits imposed on its power of taxation. In fact, the decision to include a new category of income in personal income tax was adopted administratively and not legislatively, violating the fundamental principle of legality and the specific reserve of law that the Constitution establishes concerning assets. Therefore, the tax is unlawful insofar as it is established with an unsuitable means. In addition to the unlawfulness of the instrument used, the taxation of winnings in foreign casinos also presents profiles of illegality from the substantive point of view. In fact, the Tax Agency pretends to subject to income tax only sums won in casinos abroad, while sums won in Italian casinos benefit from a tax exemption. This difference in treatment results in a discriminatory restriction on the free provision of services protected by the TFEU. The incompatibility of such discrimination with EU law is affirmed by the ECJ, which considers the act of the Italian State to be illegitimate.

⁴⁶ An observer who only read the acts of the Tax Agency would struggle to believe that “*Today, the ECJ has no rival as the most effective supranational judicial body in the history of the world, comparing favorably with the most powerful constitutional courts anywhere*” as stated by A. Stone Sweet, *The judicial construction of Europe* (2004), 1.