

Doubled periods and the question of retroactivity

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Paragraphs 2-bis and 2-ter, added to Article 12 shortly afterwards, doubled the periods within which the tax authorities could assess the income presumed under the new rule and the penalties for violations of the monitoring obligations relating to assets in listed jurisdictions.¹ For a Swiss account, the Agenzia delle Entrate therefore had up to ten years to assess the presumed income instead of the ordinary five. The question whether these rules applied to tax years before 2009 was litigated for a decade. In its order No. 2662 of 2 February 2018, the Corte di Cassazione held that the presumption in paragraph 2 was a substantive rule that could not be applied to tax periods before its entry into force. It accordingly annulled assessments for the years 2005 to 2007.² The court treated the doubling of the period for monitoring penalties in paragraph 2-ter as procedural and therefore applicable to earlier years, a distinction that commentators criticized.³

The presumption was the legal centrepiece of the Italian offensive of 2009. It meant that, for the same Swiss account, the exposure of an Italian client after 2009 was considerably greater than before, which raised the value of the amnesty offered at the same time. It also explains why the removal of Switzerland from the black list of 1999 became a Swiss priority, and why the Italian government held it back as a negotiating asset until 2023.

1 The inspections of October 2009 and the political confrontation

Italian pressure in 2009 went beyond legislation. On 28 October 2009 officers of the Guardia di Finanza (the Italian financial police) and the Agenzia delle Entrate visited 76 branches and agents of Swiss banks in Italy, including offices of UBS and Credit Suisse, as well as banks near the border with San Marino. The authorities described the operation as a routine check of the obligation of intermediaries to report their clients' financial

relationships and stressed the value of that information in the fight against international tax crime.⁴ The visits took place six weeks before the first deadline of the *scudo ter* on 15 December 2009. They were widely read as a warning to Italian clients of Swiss banks. Reports of systematic checks of vehicles at the border, of inspections on trains and of the observation of persons entering Swiss banks accompanied them.

The confrontation became personal and political in Ticino. On 29 November 2009 a member of the Ticino Grand Council, Lorenzo Quadri, filed a parliamentary question about insulting remarks on the people of Ticino that the press attributed to Minister Tremonti. His question also referred to the *scudo*, to alleged unlawful surveillance and to the checks at the border.⁵ In July 2011 the canton went further. On 30 June 2011 the Ticino government blocked the transfer of CHF 28.5 million, half of the *ristorni* due to the Italian border municipalities for 2010, in order to force Italy to negotiate on the black lists and the frontier workers. The freeze provoked protests on the Italian side. In the same weeks Tremonti remarked that there were more Cayman companies in Lugano than in the Cayman Islands.⁶ The Federal Council, through the head of the Federal Department of Finance, Eveline Widmer-Schlumpf, acknowledged that the agreement of 1974 no longer corresponded to the circumstances. The episode showed that, from the Ticino perspective, the Italian question in banking could not be separated from the labour market and the cantonal budget.

Common misconception. It is often said that Switzerland abolished banking secrecy in 2009. The Federal Council decision of 13 March 2009 left Article 47 of the Banking Act untouched and stated expressly that banking secrecy remained in place. What changed was the scope of administrative assistance: under renegotiated treaties Switzerland would answer specific requests concerning identified taxpayers even in cases of mere tax evasion.⁷ Italy obtained such assistance only with the Protocol that entered into force on 13 July 2016, and only for facts from 23 February 2015 onwards.

2 Notes

1. Gaetano Manzi, "Attività ed investimenti in Paesi a fiscalità privilegiata: sulla retroattività dell'art. 12, comma 2-ter, D.L. n. 78/2009", [dirittobancario.it](https://www.dirittobancario.it), October 2018, https://www.dirittobancario.it/wp-content/uploads/sites/default/files/allegati/manzi_g_attivita_ed_investimenti_in_paesi_a_fiscalita_privilegiata_2

018.pdf. Manzi describes para. 2-bis as providing for "il raddoppio dei termini di accertamento di imposte, interessi e sanzioni" and para. 2-ter as doubling the periods for monitoring violations relating to the assets covered by para. 2. Insertion of paras. 2-bis and 2-ter by Decree-Law No. 194 of 30 December 2009, converted by Law No. 25 of 26 February 2010. ↩

2. Corte di Cassazione, order No. 2662 of 2 February 2018 (above); "Presunzione degli investimenti detenuti nei paradisi fiscali, non è retroattiva", Edotto, 3 February 2018, <https://edotto.com/articolo/presunzione-degli-investimenti-detenuti-nei-paradisi-fiscali-non-e-retroattiva>. ↩
3. Manzi (above), who argues that para. 2-ter should likewise not apply retroactively. ↩
4. "Italian Police In Mass Inspection Of Swiss Bank Branches", Family Wealth Report, 28 October 2009, <https://www.familywealthreport.com/article.php/Italian-Police-In-Mass-Inspection-Of-Swiss-Bank-Branches->. ↩
5. Lorenzo Quadri, parliamentary question No. 319.09 of 29 November 2009 to the Consiglio di Stato of the Canton of Ticino, <https://www4.ti.ch/fileadmin/POTERI/GC/allegati/interrogazioni/pdf/319.09.pdf>. The remarks are those reported in the press; the question itself is the only source consulted here. ↩
6. Clementi, "Il vil denaro fa litigare Svizzera e Italia" (above), also reporting that a complaint against the Ticino authorities over the freeze was dismissed on 22 July 2011. ↩
7. Federal Council press release of 13 March 2009 (above). ↩

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