

# On the nature of the current tax on waste

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**Abstract:** *The nature of the current waste tax (TARI) is analyzed, starting from two recent arrests by Court of Cassation, which are critically reviewed. This is done, also in a diachronic key (with reference to the precedents of the TARI), to demonstrate how de iure condito the spaces for a punctual charge of private law (a TARIP, that is private law asset income) are few or nil, while it is possible a punctual charge (always TARIP) that is a tax. In coherence, the work identifies the referring principles and rules (national and European), and some important implications (regarding the duty of VAT and the identification of the judge to whom the disputes relating to TARI are devolved).*

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## 1. Preamble

*1.1. Environmental taxes and taxation on waste* – The increasing attention for the protection of the environment, either for the constitutional and legislative recognition (already in art. 9 of the Constitution soon after the birth of our Republic, but more so and recently with the changes made to art. 9 and 41 of the same<sup>1</sup>), also and especially supranational recognition (for example

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<sup>1</sup> Constitutional law of 11 February 2022, No. 1, intervenes on two fronts. On the one hand, it added a final paragraph to art. 9, which now states: «1. The Republic promotes the development of culture and scientific and technical research. 2. It safeguards the natural landscape and the historical and artistic heritage of the Nation. 3. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. The law of the State governs the methods and forms of animal protection». On the other hand, it modified art. 41, which now states: «1. Private economic enterprise is free. 2. It may not be carried out against

title XX of the TFEU dedicated to the environment, in which arises the principle that «the polluter should pay», referred to in art. 191 paragraph 2, TFEU<sup>2</sup>, or the rules for the protection and improvement of the environmental quality and compliance to sustainable development, referred to in art. 3 TEU<sup>3</sup> and art. 37 EUCFR<sup>4</sup>)<sup>5</sup>, or for the spread of increasing sensitivity and aware-

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the common good or in such a manner that could damage health, environment, safety, liberty and human dignity. 3. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes».

On the recent constitutional changes, for example, refer to: M. CECCHETTI, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, in *Forum di Quaderni Costituzionali*, 3, 2021, p. 286 ff.; G. DEMURO, *I diritti della Natura*, in *Federalismi.it*, 23 February 2022. More generally, on the constitutional role of the environment, for example, refer to: B. CARAVITA, A. MORRONE, *Ambiente e Costituzione* in B. CARAVITA, L. CASSETTI, A. MORRONE (eds), *Diritto dell'ambiente*, Bologna, 2016, p. 17 ff.; S. GRASSI, *Ambiente e Costituzione*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, 3, 2017, p. 4 ff.

On environmental tax measures in our constitutional Charter, for example, refer to: R. ALFANO, *Tributi ambientali. Profili interni ed europei*, Giappichelli, Torino 2012, p. 51 ff.; S. DORIGO, *Fiscalità e ambiente nella prospettiva costituzionale italiana*, in S. DORIGO, P. MASTELLONE, *La fiscalità per l'ambiente*, Aracne, Roma 2013, p. 123 ff.

<sup>2</sup> It is established here that: «Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that “the polluter should pay”».

<sup>3</sup> Particularly, it is noted that per art. 3 TEU paragraph 3: «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment».

<sup>4</sup> Art. 37, under the heading «environmental protection» provides that «A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development».

<sup>5</sup> On the gradual international and European claim to requiring environmental protection and the consequent appreciation of taxes as tools to achieve this, for example refer to, also for details: R. ALFANO, *Tributi ambientali. Profili interni ed europei*, cit., pp.7 ff., 127 ff.; P. MASTELLONE, *I tributi ambientali analisi economico-giuridica* in S. DORIGO, P. MASTELLONE, *La fiscalità per l'ambiente*, cit., p. 23 ff.; S. CANNIZZARO, *La matrice solidaristica dei principi europei e internazionali in materia ambientale e il ruolo della fiscalità nel sistema interno*, in *Rivista di Diritto Tributario*, 2017, IV, p. 95 ff.

ness due to the realisation of the mainly negative consequences of the exploitation of the environment (take, for instance, the *Global strike for future* occurred on 15 March 2019, which saw the participation of around ninety Countries and over 1325 cities<sup>6</sup>), also and inevitably concerns tax law.

It is no longer in doubt that: the consumption of scarce environmental goods creates diseconomies that must not be charged on the community, which should rather be dealt with by those who produce them; as well as taxes, aptly named environmental, are one of the successfully implemented tools to contain these diseconomies (and any social injustice that stems from them) and in some way internalise the environmental costs. However, the juridical debate on environmental tax requires some important clarifications that legislative intervention seems to be inadequately unaware of. The very notion of the environmental tax isn't easily interpreted: its conception is European, however there are precedents, even significant, in the rights of the States; the boundaries are uncertain due to flawed legislation within Europe, but more so at State level; there tends to be made a questionably useful distinction between environmental levy and levies with environmental function; they are not suitably framed in terms of their relationship with crucial constitutional principles, such as that of the ability to pay, especially when examining tax relief.

The purpose of this work is not to analyse environmental taxes<sup>7</sup>, rather the focus will be on one of these, the current «tax on waste», known as «TARI», regulated by paragraphs 641-668 of art.1 of Law No. 147 of 27 December 2013<sup>8</sup>: it is a municipal charge that applies to «the occupation or possession of premises and open land whatever their use, prone to producing urban waste»<sup>9</sup> and is due «by anyone who occupies or possesses premises and

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<sup>6</sup> The data have been sourced from ANSA (National Associated Press Agency) and are available on their respective website, [www.ansa.it](http://www.ansa.it) (where various dedicated articles are found, including, for the source of the data, [https://www.ansa.it/canale\\_ambiente/notizie/clima/2019/03/09/il-15-marzo-sciopero-globale-per-clima-studenti-in-piazza\\_6caf-bfa3-5ea8-47d5-b205-5d9dd6d13c30.html](https://www.ansa.it/canale_ambiente/notizie/clima/2019/03/09/il-15-marzo-sciopero-globale-per-clima-studenti-in-piazza_6caf-bfa3-5ea8-47d5-b205-5d9dd6d13c30.html)).

<sup>7</sup> For their analysis see the contributions referred in notes 1 and 5 and notes 69 and 73.

<sup>8</sup> It is the 2014 stability law, under the heading «Provisions for the annual and multi-year State budget (2014 stability law)».

<sup>9</sup> See paragraph 641, which adds that «open land attached or ancillary to private dwellings, non-operative, and communal areas according to article 1117 of the civil code that are not occupied or possessed by a single individual are excluded from owing TARI».

open land whatever their use, prone to producing urban waste»<sup>10</sup>.

The decision to focus on the TARI results undoubtedly from the fact that: tax on waste is a levy with deep roots (it has been in use for around a century and precedes European regulations, to which it has been harmonised in time) and is widespread (in fact it is probably the most utilised environmental levy, when observing the parties directly affected); many reforms have interested it in the recent decades, which have modified its characteristics, regulations and also designations (most recently, the legislator removed the (controversial) attribution of the TARI to the unique municipal charge, known as IUC, according to art.1, paragraph 639, of Law No. 147/2013<sup>11</sup>).

*1.2. The troubled introduction of the TARI* – A great number of regulatory interventions of various sorts and levels, not only concerning taxes, have occurred in succession. They were European interventions (including for example the directive of the Council No. 851/2018/UE and 852/2018/UE of 30 May 2018<sup>12</sup>), although most of all were national (in particular laws and

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<sup>10</sup> See paragraph 642, which adds that «in case of multiple occupiers or possessors, they are held to the fulfilment in full of the single charge».

<sup>11</sup> The reference is to art.1: paragraph 738, of Law 27 December 2019, No. 160, according to which «effective as of the year 2020, the unique municipal tax under article 1, paragraph 639, of Law 27 December 2013, No. 147, is abolished, with the exception of provisions concerning the tax on waste (TARI); the municipal property tax (IMU) is regulated by the provisions under paragraphs 739 to 783»; paragraph 780, of the same law, according to which «effective as of 1 January 2020 the following are repealed: ... paragraph 639 and the following paragraphs of article 1 of Law 27 December 2013, No. 147, concerning the institution and regulation of the unique municipal tax (IUC), limited to provisions on the regulation of IMU and TASI. Provisions regulating the TARI remain withstanding...».

The same paragraph 639 states: «The unique municipal tax (IUC) is introduced. It is based on two tax requirements, one constituted by the possession of property and linked to their nature and value, the other to the provision and utilisation of municipal services. The ICU is made up of the municipal property tax (IMU), of capital nature, owed by possessors of properties, excluding primary residences, and of a component due for services, divided between the tax on inseparable services (TASI), due by both the possessor and occupier of the property, excluding those intended as primary residence of the possessor as well as the occupier and their family, with the exception of those properties registered as luxury properties on the records, categories A/1, A/8 and A/9, and the tax on waste (TARI), intended to finance the waste collection and disposal service costs, due by the occupier».

<sup>12</sup> The first amended the directive of the European Parliament and of the Council No. 98/2008/CE of 19 November 2008 on waste; the second amended the directive of the European Parliament and of the Council No. 94/62/CE of 24 December 2014 on packaging and packaging waste.

regulations, which will be dealt with *infra*<sup>13</sup>) and local (numerous regulations enacted – and that should have been enacted – in compliance with art. 52, paragraph 5, Legislative Decree No. 446 of 15 December 1997). And in many cases there have been interventions expressive of questionable choices, done in haste or poorly thought out, difficult to enact or cause of (even gross) errors in the point of application, ephemeral or in any case destined to be of short duration. We recall the substitution of the detailed and sufficiently consolidated regulations of the TARSU (tax on solid urban waste disposal), referred to in articles 58-81 of Legislative Decree 15 November 1993, No. 507, with the limited and lacking Environmental Hygiene Charge, known as TIA or TIA 1 introduced by art. 49 of Legislative Decree 5 February 1997, No. 22.

And of course such interventions led to the creation and fuelling of a remarkable litigations, for the number of disputes, but also for the type, entity and duration of the same, some of which were inconclusive or unsatisfactory, which in turn: involved almost all the existing judges (with repeated interventions of the Constitutional Court and the United Sections of the Court of Cassation<sup>14</sup>); strongly compromised the action of the municipalities and even their financial stability, especially in the presence of deliberations not made by the competent bodies (on the assumption of the non-fiscal nature, originally alleged, of the tax in question); engulfed or risked engulfing the action of some judges (mainly of the tax commissions, most involved in the cases) due to the, often trifling, disputes; also concerned bodies other than the municipalities on the active side, among which even the Agenzia delle entrate [TN: Revenue Agency] (on the commitment of VAT on the levy in question, when it was claimed to be of private nature, and the consequent refunds, when its fiscal nature had been established).

In 2013, precisely with the introduction of the TARI, the regulations seem to have reached a relative stability and probably allow a flatter consideration remark, even if the attention of scholars, though heightened over time, continues to be scarce.<sup>15</sup> The focus of this article is on the nature of the TARI.

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<sup>13</sup> See art.1, paragraphs 738 and 780, of Law 27 December 2019, No. 160.

<sup>14</sup> We recall that according to rulings No. 238 of 24 July 2009 of the Constitutional Court (with comment by M. LOVISETTI, *Per la Corte costituzionale la TIA è un tributo. Ma le SS.UU. della Corte di cassazione la pensano diversamente*, in *Rivista di Giurisprudenza Tributaria*, 2009, p. 861 ff.) and No. 8313 of 8 April 2010 of the United Sections of the Court of Cassation (in *Corriere Tributario*, 2010, p. 1587 ff.).

<sup>15</sup> Among the more mature reflections we note recently G. SELICATO, A. SORRISO CHIECO, *La Tassa sui rifiuti*, in A. URICCHIO, P. GALEONE, M. AULENTA, A. FERRI (eds), *I*

And it is so because, if in the first place its levying nature is not or should not be in question, the *litterae legis* have fuelled many doubts in this regard (even reaching to an interpretive law in the opposite direction), which the jurisprudence has not always dispelled. The starting point, in fact, is given by a recent ruling by the United Sections of the Court of Cassation, No. 11290 of 29 April 2021, which: on the one hand shares a previous decision of the United Sections of the same court, ruling No. 8631 of 7 May 2020<sup>16</sup>, which, through the application of a questionable rule of authentic interpretation, affirms the private nature of the TIA 2; on the other hand, it identifies within the TARI, whose levying nature is not brought into question (even if it is an evolution of the TIA 2), a private component, as long as the municipality realises a system of accurate measurement of waste and opts for a corresponding fee (pursuant to art.1, paragraph 668, of Law 147/2013). However, there are no real reasons beyond a substantial enhancement of the *nomina iuris*; and similarly, it can be said for the aforementioned precedent of 2020 (in relation to which at least there was at least the impact of an interpretive rule)<sup>17</sup>.

## **2. The taxable base of the tax on waste**

### *2.1. The taxable event and liable subjects*

Tracing back the evolution of the waste taxation regulation<sup>18</sup>, it is noted that there is continuity in the regulation of the tax event and the liable subjects.

Paragraph 641 of art.1 of 147/2013 states that «the taxable event for the TARI is the possession or occupation of premises and open land, for any reason, likely to produce urban waste»; according to art.1, paragraph 642, liable subjects are those who «possess or occupy any premises and open land whatever their use, likely to produce urban waste».

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*tributi comunali dentro e oltre la crisi*, Cacucci, Bari 2021, p. 173 ff. For a systematic classification, in the same volume see A. URICCHIO, *La riforma dei tributi comunali*, p. 3 ff.

<sup>16</sup> Also see the identical Cassation No. 8632 of 7 May 2020.

<sup>17</sup> In this regard, please refer to what will be better said in the following paragraphs 3 and 4.

<sup>18</sup> To that end, refer for example to: M. LOVISETTI, *La TARSU: tassa e tariffa per la gestione dei rifiuti urbani*, Sistemi editoriali, Napoli 2010; G. DEBENEDETTO, L. LOVECCHIO, *Dalla Tarsu alla TARES. Guida all'applicazione della nuova Tassa rifiuti e servizi dopo il D.L. 8 Aprile 2013, n. 35*, Maggioli, Santarcangelo di Romagna 2013; G. SELICATO, A. SORRISO CHIECO, *La Tassa sui rifiuti*, cit., p. 174 ff. May it be allowed to refer also to the broader work of the author A. GUIDARA, *Dalla TARSU alla TARIP tra diritto tributario e suggestioni privatistiche*, in *Ambientediritto*, 2022.

The corresponding regulation of the municipal tax on waste and services, known as TARES, is proposed under better formulation, ex-art.14 of Legislative Decree 6 December 2011, No. 201 (as converted by law 22 December 2011, No. 214) and in substance similar considerations can be made for the precedents of the TARES, which were mentioned earlier.

### *2.2. Diachronic analysis of the taxable base's regulation*

The matter complicates when we look to the regulations for the taxable base. To this end it is necessary to look at the different rules dedicated to the tax base in their succession and proceed to a more functional diachronic exposition (from TARSU to TARI): of course, we proceed in broad terms.

Thus, TARSU refers to ordinary average quantity and quality of waste liable to be generated in the premises and areas taxed according to the use to which they are intended, as well as the cost of waste disposal; with the possibility – added at a later time – for municipalities, not of large size, to choose quantity and quality of waste effectively produced<sup>19</sup>. It is also expected that local authorities adopt rates for homogeneous categories and subcategories of waste and following the parameters of the law<sup>20</sup>. As are reductions provided for, decided expressly by the municipalities, that better adapt the tax to the underlying taxable capacity, such as those that distinguish homes with a single occupant or of which a seasonal or limited and discontinuous use is made<sup>21</sup>.

With the introduction of the TIA 1, the need for full coverage of service costs is affirmed, as required by European standards and by the principle

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<sup>19</sup> Art. 65, paragraph 1, Legislative Decree 507/1993, as replaced by art. 3, paragraph 68, lett. E), of 28 December 1995, No. 549, states: «the tax may be proportional in that it is calculated on the basis of the ordinary average quantity and quality, per unit of taxable surface area, of solid urban waste, and waste regarded as such, liable to be generated in the premises and areas through the type of use for which they are intended and on the basis of the cost of disposal, or for municipalities with population of 35000 citizens or lower, on the basis of the quality and quantity effectively generated of solid urban waste and the cost of disposal».

<sup>20</sup> See art. 65, paragraph 2, Legislative Decree 507/1993, «The municipalities are to lay down the rates for each standard category or sub-category, in accordance with the cost coverage ratio chosen within the statutory limits, by multiplying the cost, estimated for the forthcoming year, of disposal per verified unit of taxable surface area by one or more quantitative and qualitative waste production coefficients».

<sup>21</sup> See art. 66 and 67 Legislative Decree 507/1993.

that «the polluter pays» codified in them<sup>22</sup>. This leads to an increase in taxation, but also and inevitably a greater focus on the underlying taxable capacity. Also, narrowing the focus to art. 49 Legislative Decree 22/1997, this translates as: basically, in the distinction of the rate in a fixed quota, «determined in relation to the essential components of the cost of the service» («referring in particular to the investments for the works and the related amortisation [depreciation]»), and in a variable quota, «related to the amount of waste collected, the service provided, and the amount of operating costs, so that the full coverage of investment and operating costs is ensured»; but also in an articulated expression of the tariff, in reference to a normalised method for calculating its items and to a financial plan about measures relating to the service, in the possibility of reductions (such as those related to separate collection or waste recovery), in the provision of objectives to improve productivity and the quality of the service provided.

In the space left by the TIA 1 stands TIA 2, which, even in its short life, better finalises the existing regulations<sup>23</sup>, providing, for example, that: «the waste management tax is proportional in that it is calculated on the basis of the ordinary average quantity and quality of waste generated per surface unit, in relation to the uses and type of activities carried out, on the basis of parameters, determined by the rules referred to in paragraph 6, which also consider income indices sorted by user and territorial bands» (the applying rules, as we know, are never issued, negatively affecting the validity of TIA 2<sup>24</sup>); «in determining the tax, ancillary costs, related to the management of urban waste such as, for example, road sweeping costs, are also covered».

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<sup>22</sup> The “polluter pays” principle has its roots in the economics theory known as welfare economics (see A.C. PIGOU, *Welfare economics*, Italian translation by M. Einaudi, UTET, Torino 1968); on its origins, interpretation and evolution see M. MELI, *Il principio comunitario “chi inquina paga”*, Giuffré, Milano 1996. Among the tax law studies see for example: C. VERRIGNI, *La rilevanza del principio comunitario “chi inquina paga” nei tributi ambientali*, in *Rass. Trib.*, 2003, p. 1614 ff.; P. SELICATO, *Imposizione fiscale e principio “chi inquina paga”*, in *Rass. trib.*, 2005, p. 1160 ff.; R. ALFANO, *Tributi ambientali*, cit., p.12 ff.; P. MASTELLONE, *Il ruolo dell’Unione Europea nella creazione di un “diritto tributario ambientale” all’interno degli ordinamenti degli Stati membri* in S. DORIGO, P. MASTELLONE, *La fiscalità per l’ambiente*, cit., p. 92 ff.; S. CANNIZZARO, *La matrice solidaristica dei principi europei e internazionali in materia ambientale e il ruolo della fiscalità nel sistema interno*, in *Rivista di Diritto Tributario*, 2017, IV, p. 95 ff., especially p. 98 ff., 114 ff.; M.A. ICOLARI, *Per una dogmatica dei tributi ambientali*, Editoriale Scientifica, Napoli, 2018, p. 71 ff.

<sup>23</sup> See art. 238 Legislative Decree 152/2006.

<sup>24</sup> See *infra* note 27.

Similar considerations can be made for the TARES both due to its short life, and because it does not innovate much the precedents as to the determination of the taxable base; it even refers to the same rules provided for in the regulations of the TIA 1 (Presidential Decree 158/1999), except for: increases *ex lege*, the return of several reduction to the primary regulations, the delegation to the municipal Council of various specifications. And in the same place of the TARES stands the TARI, whose better completeness, for example, on the taxable surface areas can be appreciated in its regulations; it is worth noting the possibility that the municipality – as an alternative to the rules based on the TIA 1, Presidential Decree 158/1999, containing the so called normalised method, and pending its revision – proceeds on its own adjusting, on the example of what happened for the TARSU, but with more precise indications, «the tax on the ordinary average quantity and quality of waste generated per surface unit, in relation to the uses and type of activities carried out as well as the cost of the waste service»<sup>25</sup>.

From the above, even with the inevitable approximation that distinguishes it, it emerges that, in the regulations of the taxable base, a clear detachment is found in the transition from TARSU to TIA 1, and is given by the need for full coverage of the costs of the service, which implies an increase in taxation, but also a greater attention to the underlying taxable capacity; although it must be said that there had ultimately been interventions towards a greater or integral coverage of costs in the TARSU regulation<sup>26</sup>.

However, as much as we tend towards a situation of effectiveness (in spite of which at the moment it is difficult to imagine to reach on a large scale), the determination of the taxable base is still performed on ordinary-average criteria, in fact we continue to refer to the (so called) normalised method as per Presidential Decree 158/1999<sup>27</sup>: the gradual refinement and

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<sup>25</sup> The quotation is taken from paragraph 652 of art.1 of Law 147/2013. See more on this in paragraphs 651-654 bis of the same art. 1.

<sup>26</sup> See paragraph 3 bis of art. 61 Legislative Decree 507/1993 (added from art. 3, paragraph 68, lett. b), of Law 28 December 1995, No. 549) and paragraph 23 of Law 23 December 1998, No. 448.

<sup>27</sup> Indeed, an attempt was made to overcome the normalised method as per Presidential Decree 158/1999, providing for its maintenance on a transitional basis and its replacement by a new regulation. However, the latter - provided for TIA 2 (in paragraph 6 of art. 238 of Legislative Decree 152/2006), and then for the TARES (in the original version of paragraphs 9 and 12 of art.14 Legislative Decree 201/2011), has never been enacted, and for this the legislator: for TIA 2 authorises the municipalities to use the current regulations in a transitional way (i.e. Presidential Decree 158/1999) ex art. 2 quater of Legislative Decree 30

progressively greater adherence to reality of these criteria can only be appreciated, however this does not change its nature; moreover, the property component continues to have a decisive weight in the “presumptions” of waste production and use of the disposal service. Due to this, even with the corrective measures mentioned above, we obtain a reading of substantial continuity with the regulations of the TARSU, even concerning the determination of the taxable base (and more so when considering the interventions last brought to the TARSU<sup>28</sup>). But it could not be otherwise since, as we have seen, the taxable event of the tax remains the same and, as is known, the taxable base of a levy is closely linked to its taxable event: the taxable base, in fact, allows it to be measured, expressing the value on which to apply the rate (and thus calculate the tax); it is said, for this reason, that a «tax event is what causes the applicability of a tax (the *an debeatur*); taxable base is what determines its measure (the *quantum debeatur*)»<sup>29</sup>.

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December 2008, No. 208 (as converted from Law 27 February 2009, No. 13); for the TARES consolidates the transitional regulation (with the amendments to paragraph 9 quoted and with the repeal of paragraph 12 quoted as per art. 1, paragraph 387, lett. b, of Law 24 December 2012, No. 228 and art. 1, paragraph 387, lett. d, of the same Law 228/2012).

For the TARI, the regulation to be enacted is no longer mentioned, there is only a reference to Presidential Decree 158/1999 (art., paragraph 651, of Law 147/2013 states «The municipality takes into account the criteria determined by the regulation referred to in the Presidential Decree 27 April 1999, No. 158 in the calculation of the tax»). This: saves the possibility for the municipality – already provided for the TARSU, but still based on ordinary-average criteria, referred to in the following paragraph 652 (see what was said earlier and to note 25) – «alternatively ... and in compliance with the "polluter pays" principle, established in article 14 of Directive 2008/98/EC of the European Parliament and of the Council, of 19 November 2008, concerning waste» to «adapt the tariff with the ordinary average quantity and quality of waste generated per surface unit, in relation to the uses and type of activities carried out as well as the cost of the waste service»; with simplifications (indicated by the same paragraph 652 quoted pending the revision of the quoted Presidential Decree 158/1999) and with the specifications referred to in the following paragraphs.

On the difficulties of abandoning the normalised method see for example and recently G. SELICATO, A. SORRISO CHIECO, *La Tassa sui rifiuti*, cit., p. 180 ff.

<sup>28</sup> See *supra* note 26.

<sup>29</sup> For the sake of conciseness and clarity, the words expressed by F. TESAURO, *Manuale di diritto tributario. Parte generale*, UTET Giuridica, Milano 2017, p. 109 have been (translated and) repeated. However, similar clarity is already found in A.D. GIANNINI, *Il rapporto giuridico d'imposta*, Giuffrè, Milano 1937, p. 189 ff. (and, for a summary, see from the same Author, *I concetti fondamentali del diritto tributario*, UTET, Torino 1956, p. 168).

### *2.3. The discontinuities introduced by TARES and TARI*

With the introduction of the TARES, there is a decisive novelty, admittedly little regulated, that is the possibility for municipalities that have set up «systems for accurate measurement of the quantity of waste collected by the public service», to «provide for the application of a tariff of proportional nature instead of the tax», which would be «applied and collected by the entity entrusted with the urban waste management service». This: following a precise choice by the authority, to be made by means of its own regulation, and also on the basis of ministerial criteria; and without prejudice to the fact that the tax is «limited to the component aimed at covering the costs relating to the indivisible services of the municipalities»<sup>30</sup>.

In the same way the TARI also provides for an accurate tariff, the so known TARIP, to which a poorer regulation is applied – paragraph 668 of art. 1 of Law 147/2013<sup>31</sup>– compared to that of the TARES and which inevitably might generate, (major) problems: for example in the determination of the TARIP, the local authority seems to be able to set its own criteria that are complementary and/or alternative to the ministerial ones<sup>32</sup>.

## **3. The fiscal nature of the current tax on waste**

### *3.1. The tax characteristics of the TARI*

The foregoing description is intended to clarify the fiscal nature of the waste tax: in itself and in its tormented legislative evolution. This is an anticipation of the conclusion of the reasoning being developed, but the outcome could not be another [could not be different]: the fiscal characteristics are obvious, as are the continuities from TARSU to TARI, mostly on fundamental aspects. Rather, the dissenting voices should be analysed and final attention should be paid to discontinuity.

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<sup>30</sup> See *amplius* art. 14, paragraphs 29-32, Legislative Decree 201/2011.

<sup>31</sup> It provides that: «Municipalities that have implemented systems for the accurate measurement of the amount of waste collected by the public service may, by regulation referred to in article 52 of Legislative Decree No. 446 of 1997, provide for the application of a tariff having a proportional nature, instead of the TARI. In calculating the tariff, the municipality may take account of the criteria determined by the regulation laid down in Presidential Decree 27 April 1999, No. 158. The corresponding tariff is applied and collected by the entity entrusted with the urban waste management service. In calculating the tariff, the municipality may take account of the criteria determined by the regulation laid down in Presidential Decree 27 April 1999, No. 158».

<sup>32</sup> See previous note.

Taxes are characterised by «the duty to provide a service, in the absence of a synallagmatic relationship between the parties, as well as the connection of this service with public expenditure, in relation to an economically relevant premise»<sup>33</sup>: this is what the Constitutional Court has said on several occasions, in line with the commonly accepted notions (in our system there are no normative definitions of the tax)<sup>34</sup> and with the definitions found in other systems<sup>35</sup>.

These characteristics are undoubtedly to be found in the TARI: it is due on (uniquely) the occurrence of a taxable event, which expresses a precise economic relevance (i.e. taxable capacity), and regardless of the use (and the intensity of the use) of the waste management service; the public purpose is evident in the allocation to an essential public service (that of waste management), the costs of which are intended to be covered in full (i.e. to share the full costs among members of the community).

The rules governing TARI are very clear on these characteristics. The same can be said for its predecessors, starting with the TARSU: given the

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<sup>33</sup> The quotation is taken from C. Cost. 11 October 2012, No. 223, however the same words were used by C. Cost. 28 October 2011, No. 280. These statements in turn refer to various precedents expressly referred to in them.

<sup>34</sup> The notion of tax, as is well known, although recurring in numerous legal provisions, even adjectivised, is not provided by them. It is agreed, however, to attribute to it an extra-legal genesis, essentially economic and sociological, to which reference should be made, which, in a nutshell, can be summarised as the compulsory pecuniary payment in favour of a tax authority and for the financing of its institutional activities, it being understood that the notion must adhere as closely as possible to the contexts in which it occurs and may also assume a variable breadth. See for example S. LA ROSA, *Principi di diritto tributario*, Giappichelli, Torino 2020, p. 1 ff., however already *similiter* to A.D. GIANNINI, *I concetti fondamentali del diritto tributario*, cit., p. 58: «Taxes have the threefold characteristic that they are due to a public body, that they have their legal basis in the State's governing power, and that they are imposed for the purpose of providing the means for the financial needs of the State».

<sup>35</sup> The definition given in Article 2 of the Spanish *Ley general tributaria* of 2003 stands out: «*Los tributos son los ingresos públicos que consisten en prestaciones pecuniarias exigidas por una Administración pública como consecuencia de la realización del supuesto de hecho al que la ley vincula el deber de contribuir, con el fin primordial de obtener los ingresos necesarios para el sostenimiento de los gastos públicos*». Or, on the other side of the Atlantic, one might recall the definition in art. 2 of *Model Tax Procedure Code* of 2015 of Latin American countries: «*Taxes are the pecuniary considerations that the State demands by virtue of its tax enforcement power, which arises from the occurrence of the taxable event as set forth by law, and such law binds said taxable event to the duty of paying taxes aimed at meeting public needs*».

continuity of the taxable event, liable persons and taxable base, as mentioned above, there are or should be no doubts in qualifying them as taxes, without the different designations or regulatory deficiencies of TIA 1 and TIA 2 being able to hinder a preferable reconstruction of the system.

The Constitutional Court has had opportunity to say and reiterate this. It did so with reference to TIA 1 in the significant judgement 238 of 2009<sup>36</sup>, where: it rightly devalues the *nomen iuris* («taxes are to be identified independently of the *nomen iuris* ... Moreover, the term “tariff” – in the tradition of tax legislation – has a neutral semantic value, in the sense that it is not necessarily opposed to terms such as “tax” and “levy”, so much so that even art. 58 of Legislative Decree No. 507/1993 provides verbatim that TARSU (i.e. a “tax” and, therefore, a “levy”) is applied “on the basis of a tariff»), like other external aspects; the continuity between TARSU and TIA is highlighted, especially with regard to the identity of the «generator of the obligation to pay» and of the «obligated parties», to the «same authoritative and non-syllanagmatic structure», to the overlapping of the taxable bases («the commensuration criteria of the two levies are analogous ... the aforementioned «standardised method» for determining the TIA is fully consistent with the criteria established by law for the commensuration of the TARSU») also in relation to the costs to be covered («also cover the public expenses relating to an indivisible service, rendered in favour of the community and, therefore, not linked to a synallagmatic relationship with the individual user», «the only substantial difference between the two levies is that, while for the TARSU the revenue must correspond to an amount between the entire cost of the service and a minimum cost consisting of a percentage of that cost determined on the basis of the financial situation of the municipality... In the case of the TIA, the tax levy must, on the other hand, always ensure full coverage of the cost of the services»); it concludes that «the ... structural and functional characteristics of the TIA ... make it clear that this levy has all the characteristics of a tax ... and that ... it constitutes a mere variant of the TARSU ..., retaining the tax label proper to the latter». This, then, is in line with other rulings of the same Court, always with reference to TIA 1 (and in the wake of the aforementioned judgement), but also with reference to other taxes<sup>37</sup>; and the case

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<sup>36</sup> See *supra* note 14.

<sup>37</sup> See orders No. 64 of 24 February 2010 and 300 of 20 November 2009.

More often, as in the case decided by judgement 238/2009, the Constitutional Court was called upon to make a statement on the notion of the tax in question or even to identify the jurisdiction to which the relevant disputes should be referred; we recall, for example,

law of the Court of Cassation is consolidated in the sense of the fiscal nature of TIA 1<sup>38</sup>.

In this context, one should rather ask what type of tax it is. In fact, notwithstanding the label of tax or tariff, one can reasonably think that they are in the presence of a charge. It is worth noting that: the TARI is due simply based on the occurrence of the taxable event ("the possession or occupation for any reason of premises or open land, whatever their use, liable to produce urban waste") with no way of avoiding it; the correlation between the tax and the waste disposal service expresses a situation of normality, not also of reality, so much so that the tax is due even when the disposal service is not provided (this is acknowledged by paragraphs 656 and 657 of art.1 of Law 147/2013, providing for appropriate reductions) and that those who do not meet the requirement and do not pay the tax also benefit from the service; the taxable event is still measured by criteria of normality (which, however refined, disregard the use or extent of the use of the service) and according to a presumed underlying taxable capacity, likely to be contaminated by elements that have nothing to do with the service itself (such as the taxable capacity of the family or the ISEE (equivalent economic situation indicator), referred to in paragraph 682 of art.1 of Law 147/2013). And for the purposes of classifying the levy in question as a tax, the consideration that it would cover the costs of divisible public services is certainly not helpful, since it also covers indivisible services (such as the sweeping and cleaning of public spaces and areas or the disposal of waste found therein), even if the distinction between indivisible public services and divisible public services, which is typical of public economics, could be imported *sic et simpliciter* into tax law.

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rulings: No. 64 of 14 March 2008, No. 130 of 14 May 2008, No. 34 of 1 February 2006, No. 141 of 8 May 2009. But, of course, the Court has been called upon to pronounce on the fiscal nature or otherwise of various revenues irrespective of jurisdictional issues, such as for example in rulings: No. 256 of 20 June 2007; No. 335 of 10 October 2008.

A. FEDELE, *La definizione di tributo nella giurisprudenza costituzionale*, in *Rivista di Diritto Tributario*, 2018, I, p. 1 ff. reviews the case law of the Court on the notion of the tax.

<sup>38</sup> Cass. SS. UU. 8313/2010 was cited previously (*supra* note 14), but there are indeed numerous pronouncements of the Court of Cassation in the same direction (recently see, for example, No. 7187 of 15 March 2021; No. 22901 of 21 October 2020; No. 16994 of 13 August 2020; No. 6149 of 5 March 2020), even if there is no lack of isolated voices to the contrary (such as Cass. 27 January 2020, No. 1839, with a criticizing note by A. GIOLO, *Con un "corto circuito" la Cassazione crea la giurisdizione "a tempo" sulla Tia1*, in *Diritto e Pratica Tributaria*, 2021, II, p. 374 ff.).

### *3.2. The interpretative provision of 2010 and the position of the Court of Cassation on TIA 2*

In light of what was previously said, it is strange that in 2010 the legislator issued an interpretative provision: art.14, paragraph 33, of Legislative Decree 31 May 2010, No.78 (as converted into Law 30 July 2010, No. 122). It states: «The provisions of article 238 of Legislative Decree 3 April 2006, No. 152, shall be interpreted as meaning that the nature of the tariff provided for therein is not fiscal. Disputes relating to the above tariff, arising after the date of entry into force of this decree, shall fall within the jurisdiction of the ordinary courts».

This intervention is strange not only because in the light of what has been said, and in the same way as TIA 1, there should have been no doubt as to the fiscal nature of TIA 2, but also because the requirements of the interpretative law were lacking. In fact, we were not faced with an equivocal formulation of the text of the law, nor were there any doubts as to the interpretation to be attributed to it; moreover, TIA 2 had not yet entered into force (given that its adoption by the municipalities was conditional on the issuing of a specific regulation, which was never issued<sup>39</sup>) and the text that is introduced is – itself – equivocal (if TIA 2 is not a tax, there is no need to affirm the ordinary jurisdiction over the relevant disputes, and even less so from a specific date!)<sup>40</sup>.

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<sup>39</sup> The municipalities were given the possibility, introduced at a later date, of adopting the TIA 2 on the basis of existing regulations: see paragraph 2 quater of art. 5 of Legislative Decree 30 December 2008, No. 208 (added by conversion law 27 February 2009, No. 13), as well – for the postponement of the deadlines – as paragraph 21 of art.23 of Legislative Decree of 1 July 2009, No. 78 (as converted by Law August 2009, No. 102) and paragraph 3 of art.8, paragraph 3, of Legislative Decree 30 December 2009, No. 194 (s converted by Law 26 February 2010, No. 25).

<sup>40</sup> The sense of the legislative intervention can probably be seen in the attempt to subject TIA 1 to VAT, as emerges from circular No. 3/DF of 11 November 2010 of the Ministry of Economy and Finance (see in particular the following passage: «it is expressed ... the opinion that TIA1 should continue to be subject to VAT, as already asserted by the financial Authorities in the various interventions that have taken place over time ... The circumstance that TIA2 may ultimately be regulated by the provisions relating to TIA1 leads to the conclusion that the levies have similar characteristics and that the legislator's intention was, with art. 14, paragraph 33, also to give TIA1 a new guise, pending the issue of the regulations referred to in article 238, paragraph 6. Therefore, if in the light of the new provisions the two levies are now governed by the same regulatory sources, it does not appear rational to attribute to TIA1 a different legal status from that of TIA2. Consequently, if TIA2 is in the nature of a fee, and as such is subject to VAT, the same cannot be said for the TIA1»). The attempt,

The jurisprudence of legitimacy, even if not obliged, reacts decisively, criticising such intervention and qualifying the provision as not interpretative, but innovative, i.e. with *ex nunc* and not *ex tunc* effects: we recall the *obiter dicta* in Cass. No. 3293 and 3294 of 2 March 2012.<sup>41</sup> However, with reference to TIA 2, the civil courts are once again faced with disputes as to whether or not the TIA 2 is subject to VAT, leading the Court of Cassation to affirm its nature as a mere fee: this is resolved by the judgement of the United Sections 8631/2020 cited at the beginning, which is in line with a criticised precedent of the same Court, judgement No. 16332 of 21 June 2018<sup>42</sup>, departing from (what was ruled by the court of appeal, but also from) what was set forth in the order of referral<sup>43</sup>.

The ruling is not at all acceptable, since it glosses over the doubts raised by the order of referral to the United Sections (which does not even follow the argumentative process) and bases the affirmation of the private nature of TIA 2 only on literal arguments<sup>44</sup>. On the one hand, it refers to the

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however, was unsuccessful, since case law has reacted decisively to it: in addition to the rulings referred to in the text and in the following note, see for example Court of Cassation No. 3756 of 9 March 2012 and No. 5831 of 13 April 2012. On the genesis of art. 14, paragraph 33, Legislative Decree 78/2010 see also A. GIOLO, *Con un "corto circuito" la Cassazione crea la giurisdizione "a tempo" sulla Tia1*, cit., p. 384 ff.

<sup>41</sup> The judgements state: that the «provision appears rather convoluted and intimately contradictory: if the "tariff" "is not fiscal" the jurisdiction seems not to be assigned to the tax court even for disputes arising prior to the entry into force of decree 78»; «it is possible that through the cited rule, the Administration, which drafted the measure, previously intended to subject the payment to VAT under the TIA ... It must be noted, however, that if this was the intention, the *intentio legislatoris* did not translate into a *voluntas legis*, i.e. an adequate regulatory content»; that «the case law of the Constitutional Court and of this Court was ... unequivocally oriented in the sense of considering the TIA 1 to have fiscal nature and not to be a fee. Therefore, the provision on TIA 2 is innovative in nature, or – rather – establishes a tariff that the legislator intended to be ontologically different from the "first TIA"». See also the previous note.

<sup>42</sup> The judgement has been criticised by several parties: see C. SCALINCI, *La Tariffa integrata ambientale, la cd. TIA 2, non sarebbe un tributo ma un corrispettivo soggetto a IVA*, in *Rivista di Diritto Tributario online*, 26 July 2018; A. GIOLO, *TIA1 e TIA2: gemelli diversi sotto il profilo dell'iva*, in *Dir. Prat. Trib.*, 2019, II, p. 2593 ff. See also *infra* nota 44.

<sup>43</sup> It is Court order No. 23949 of 25 September 2019.

In line with the pronouncements of the United Sections 8631 and 8632 of 2020 the most recent decisions of the Court of Cassation are: 28 August 2020, No. 18013; 1<sup>st</sup> June 2021, No. 15284.

<sup>44</sup> Among the critics we note F. FICHERA, *La c.d. TIA-2, natura giuridica e associabilità all'IVA*, in *Rassegna Tributaria*, 2020, p. 838 ff., to be read along with ID., *Giurisdizione tributaria e nozione di tributo. Il caso della c.d. TIA-2*, in *Rassegna Tributaria*,

interpretative provision of art.43, paragraph 33, DL 78/2010, badly flawed and criticized by other pronouncements of the same Court, which (now) is defended with “balancing acts”, going so far as to affirm «*pro futuro* temporal effects» (which, however, would undermine the meaning of the authentic interpretation). On the other hand, reference is made to certain passages of art.238 of Legislative Decree 152/2006 – the references to the «production of waste», the qualification of the tariff as a «fee for the provision of the service», the setting of the tariff at the «quantity and quality of the waste produced» – which, however, are read in isolation and overlooking other related/complementary passages, which complete the meaning: in fact, it is clear that art. 238 refers to waste that might be produced and not to waste that is produced; however, there is no mention of this in the judgement and even decisive words are omitted from the references to the rules (indeed, the tariff is not based on «the quantity and quality of waste produced», but on «the *ordinary average* quantity and quality of waste generated *per surface unit, in relation to the uses and type of activities carried out, on the basis of parameters, determined by the rules ... which also consider income indices sorted by user and territorial bands*», as stated by the cited paragraph 2 of art.238). And the weakness of the literal arguments is all the more evident, since (besides their questionable use and the conduct of the reasoning) it is in contrast with the devaluation of the *nomina iuris* affirmed precisely in the matter of taxation of waste, but not exclusively, by almost all the judges involved<sup>45</sup>, as well as by the referral order.

For the sake of completeness, it should be added that the judgement refers to other precedents of the Court of Cassation. However, it cannot be said that there are particularly significant precedents, because: there are also

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2020, p. 72 ff., where Cass. 16332/2018 is criticised, as well as the more recent and briefer Cass. SS. UU. 27 January 2020, No. 1839. It should be added that the doctrine, by way of experiment, shows that the reasons put forward by the Constitutional Court (in judgement No. 238/2009) with reference to TIA 1 can be referred to TIA 2 in order to demonstrate its tax nature: see A. GIOLO, *TIA1 e TIA2: gemelli diversi sotto il profilo dell’iva*, cit. , p. 2594 ff.

<sup>45</sup> See *in primis* Constitutional Court 238/2009 and Cass. SS. UU. 8313/2010, mentioned previously. More recently, see for example: C. Cost. 14 December 2017, No. 269; Cass. SS. UU. 4 June 2020, No. 10577. Also, in EU law, labels are disregarded and the substance is looked at for the purpose of qualifying a revenue as a tax: see for example, and recently, C. JEU 18 January 2017, Case C-189/15, *Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS)*.

rulings that express a different approach<sup>46</sup>; the precedents referred to mostly come from non-fiscal sections and essentially adhere to the only judgement that deals *funditus* with the problem of the nature of TIA 2, i.e. No.16332/2018 cited above; the latter, which also comes from a non-fiscal section, ultimately limits itself to using literal arguments, so much so that it has been criticised by several parties<sup>47</sup>.

#### **4. Perplexities about TARIP**

##### *4.1. The recent sentence of the Court of Cassation in 2021*

It is important to have lingered on the criticism of the private qualification of TIA 2 because *mutatis mutandis* there is a risk of repetition with reference to TARIP<sup>48</sup>, so much so that there has been a recent important ruling in this direction: Cass. SS. UU. No. 11290/2021, referred to at the beginning, which contributed to the author's thoughts.

The judgement resolves in favour of the ordinary courts a regulation of jurisdiction in a dispute which had arisen before the tax courts (although) following a challenge to a TARIP invoice, which the Court of Cassation qualified as a private law fee: hence the affirmation of ordinary jurisdiction.

##### *4.2. Critical analysis*

The ruling: builds on the precedent on TIA 2, judgement 8631/2020, which it refers to and whose approach and content it shares; it is based on the

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<sup>46</sup> See Cass. SS. UU. No. 17113 of 11 July 2017, intervened on the additional charge to TIA 2, whose tax nature is declared.

<sup>47</sup> See *supra* note 42.

<sup>48</sup> The relevance for the purposes of the TARIP is grasped by the Court of Cassation order 23949/2019 cited above, which refers the question of the nature of the TIA 2 to the United Sections (but it doesn't develop the ruling of the United Sections 8631/2020, which follows). The order, thus, concludes: «the Court considers that the question relating to the legal nature of the integrated environmental tariff, known as T.I.A. 2 and its subjectation to VAT, requires a ruling by the Court in its most typical expression of nomofilachy: indeed, this is a question of principle of particular importance, because of the very significant (and immediately perceivable) practical-applicative effects arising from it, both with reference to the aforementioned integrated environmental tariff, and with regard to the establishment of the (subsequent) TARI, regulated by L. No. 147 of 2013, Article 1, paragraphs 641 et seq. which provides that municipalities, where a system of punctual measurement of waste is in place, may apply a fee as an alternative to the traditional Tari. The new legislation – as precised in the introduction – is structured in such a way that the same problems will arise as those faced with regard to the T.I.A.2 concerning its fiscal or private nature.

awareness of the fiscal nature of TARI, from which TARIP differs; it bases the decision on four types of reasons, which it is worth considering here.

Two issues immediately appear to be irrelevant: the compatibility of VAT with compulsory payments *ex lege* (which may be included in the concept of the provision of services under art.3 of Presidential Decree of 26 October 1972, No. 633); and the provision, in the municipal regulations for adopting the TARIP, for the devolution of the relevant disputes to the ordinary courts. It goes without saying, in fact, that: whether or not VAT is due and the identification of the competent authority, whether ordinary or tax court, should follow from the affirmation of the private or fiscal nature of the claim; the authoritative nature of the latter is sufficient to exclude the subjective profile of the VAT requirement, calling into question the notion of entrepreneur under art.4 of Presidential Decree 633/1972 (and the related notion of liable subject set out in European Directive No. 2006/112 of 28 November 2006, as specified in art.13)<sup>49</sup>, not that for the provision of services or of financial activities (in the order of national and EU law); certainly, a secondary source, and for that matter a local one, such as the municipal regulation, cannot affect the division of jurisdiction, that is to say, a matter which the Constitution reserves to the law, and moreover to the State under ex art. 117, paragraph 1, of the Constitution.

The other two orders of reasons seem to have greater importance. On the one hand, we highlight the legislative qualification of the tariff as a fee and the provision, once again legislative, of an alternative to the TARI (in art.1, paragraph 668, Law 147/2013)<sup>50</sup>. On the other hand, and in continuity

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<sup>49</sup> A significant example is the judgement of the United Sections of the Court of Cassation no. 5076 of 15 March 2016, which, with reference to TIA 1, excludes the subjective profile of the VAT taxable event pursuant to Article 13 of Directive 2006/112 and refers to some precedents of the Court of Justice (indeed, the judgement also excludes the objective profile of the VAT taxable event: it excludes that there is a provision of services, reasoning on the absence of a synallagmatic relationship between the service and the service in return). The considerations expressed are much more in-depth, especially with reference to EU law and the case law of the Court of Justice, in A. GIOLO, *TIA1 e TIA2: gemelli diversi sotto il profilo dell'iva*, cit., p. 2611 ff.

<sup>50</sup> See the following passage: «Nevertheless, irrespective of the *nomen iuris* assigned to that service by the paragraph in question (a tariff of proportional nature), it appears incontrovertible that the primary provision in question, in establishing that “(the) municipalities which have implemented systems for the accurate measurement of the quantity of waste delivered to the public service may, by regulation pursuant to Article 52 of Legislative Decree 446 of 1997, provide for the application of a tariff of proportional nature instead of the

with these statements, reference is made to: the provision that entrusts to a Ministerial Decree the establishment of «criteria for the implementation by municipalities of systems for accurate measurement of the quantity of waste delivered to the public service or management systems characterised by the use of corrective measures to the criteria for the allocation of the cost of the service» (as per paragraph 667 of Law 147/2013); the Ministerial Decree implementing it, 20 April 2017, where it is established that «the accurate measurement of the quantity of waste collected is obtained by determining, as a minimum requirement, the weight or volume of the quantity of RUR collected from each user by the public waste management service» (RUR stands for «residual urban waste»).

However, the first argument is a literal one: it does not stand up to the devaluation of the *nomina iuris* affirmed by the judgement in question, as well as in the field of waste taxation (but not only) by almost all the judges who intervened (several judgements are referred to by the same judgement); rather, it goes against the substantialist approach that, where there is any argument about the jurisdiction (such as, for example, in the matter decided in Cass. 11290/2021 cited above), is expressly established by the legislator, which devolves «to the tax jurisdiction all disputes concerning taxes of every kind and species, whatever their designation» (thus art.2 Legislative Decree 546/1992, which reiterates the irrelevance of the label). Nor is it worth noting that TARIP is provided for by law «in place of the TARI», since the former does not replace the latter, it only replaces a part of it, the variable part; but it could not be otherwise, so much so that the secondary sources, national and local, express themselves in this sense, and so did the TARES regulation, which, as mentioned above, introduced the accurate tariff into the system.<sup>51</sup>

But the second order of reasons is also literal. However, they are taken into account *litterae legis*, as they relate to the accurate measurement, the quantity of waste collected, the type of waste (known as RUR), and its weight and volume. And beyond the criticisms that can be reiterated regarding the meaning of the literal data, as mentioned above, it is surprising that the ruling in question looks only at certain passages of the law and reads them in isola-

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TARI”, must be understood as delineating the scope of that tariff in alternative terms to the waste tax, whose tax nature, as has been seen, is not disputed».

<sup>51</sup> In fact, in the hypothesis of the introduction of the accurate tariff, art.14 paragraph 33, Legislative Decree 201/2011, provided for the persistence of the tax limited to the component aimed at covering the costs of indivisible services.

tion, neglecting or omitting other related/complementary passages that complete the meaning: in other words, it is surprising that the judgement in question persists in the error found in judgement 8631/2020 cited above.

To dismantle this reasoning it is worth noting that according to Ministerial Decree 20 April 2017, ex art.1, paragraph 667, of Law 147/2013 already is the basis of TARIP: the accurate measurement concerns only a part of the collected waste, the residual urban waste or RUR, which is what remains from the waste subject to separate collection and which does not even constitute the majority of urban waste (so much so that the municipalities may *ex lege* continue to use the normalised method referred to in Presidential Decree 158/1999<sup>52</sup>);<sup>53</sup> the measurement of waste is hardly effective, since indirect weighing of waste is intended as an alternative to direct weighing (even concurrently and for the same waste) and since aggregate users (such as condominiums) are possible, where quantities and volumes are attributed on a *per capita* basis (based on the number of members of the household referred to each user) or according to parameters (as per Presidential Decree 158/1999)<sup>54</sup>; the amount of the TARIP may be proportional (also) with the number of services provided and their quality, regardless of their use<sup>55</sup>; the approval of the tariffs by the Municipality is not affected.

It should be added that the implementation of accurate waste measurement systems does not imply the transition to the tariff of a proportional nature, as per art.1, paragraph 668, cited above, since, as the latter article states, «municipalities may provide for» such a transition; but they may also maintain – as is likely to happen and practice seems to confirm – the *status*

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<sup>52</sup> Indeed, it is recalled that ex art.1, paragraph 668, of Law 147/2013 «the municipality, in the commensuration of the tariff, may consider the criteria determined by the regulation of the Presidential Decree 27 April 1999, No. 158».

<sup>53</sup> See art. 4 of Ministerial Decree 20 April 2017. Quantities of other separately collected fractions or waste streams may be measured, but the choice is left to the municipalities and the measurement is, in any case, simplified.

<sup>54</sup> Indirect weighing is based on the volumes of waste, which are however those of the containers, whose weight is estimated. In any case, it concerns waste other than residual municipal waste (for which the differences in weight are considerable), if the municipalities so decide (see *supra* previous footnote).

Aggregate users (as per articles 7 and 8 of the Ministerial Decree of 20 April 2017) are those for which it is not possible or convenient to directly measure the quantity presented by each user. They are domestic users, but non-domestic users may be included: in this case, their waste must be delivered separately or determined according to parameters (as per Presidential Decree 158/1999).

<sup>55</sup> See art. 9 of Ministerial Decree 20 April 2017.

quo, thus remaining under the tax regime. Of course, it cannot be ignored that, regardless of any municipal decision to convert, TARIP cannot be avoided; nor can it be overlooked that among the costs that it too is called upon to cover are those of irrecoverable credits relating to previous years and even to previous taxes<sup>56</sup>.

Therefore, the assertion of the private nature of TARIP, as set out in judgement No. 11290/2021, is not at all convincing.

#### 4.3. *Preferable conclusion on TARIP*

Indeed, literal arguments can be found *aliunde*. Thus, in the language of the law, as in practice, a distinction is made and/or tends to be made between the tariff-tax and the tariff-fee<sup>57</sup>, thereby endorsing or wishing to endorse the qualification of the latter as revenue under private law. This, however, raises a number of perplexities: we are still in the presence of a few expressions, ambiguous or in any case susceptible to different interpretations; the regulatory framework in which they are located is meagre and does not justify the transition from public law to private law, especially if we consider

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<sup>56</sup> TARIP is also subject to the provisions of art. 654 bis of Law 147/2013 («among the cost components, any shortfall in revenues relating to incoverable credits with reference to the environmental hygiene tariff, the integrated environmental tariff, as well as to the municipal tax on waste and services (TARES)»), as noted, for example, in: *Risposte a quesiti, Telefisco 2019*, 8 February 2019, Ministero dell’Economia e delle Finanze, § 3 ([https://www.finanze.it/export/sites/finanze/.galleries/Documenti/Varie/RIV\\_Telefisco\\_2019\\_quesiti\\_Mef\\_tributi\\_locali.pdf](https://www.finanze.it/export/sites/finanze/.galleries/Documenti/Varie/RIV_Telefisco_2019_quesiti_Mef_tributi_locali.pdf)); G. SELICATO, A. SORRISO CHIECO, *La Tassa sui rifiuti*, cit., p. 191 ff. On the subject see also M. AULENTA, *Ambiente: piccoli tributi crescono in Rivista di Diritto Finanziario e Scienza delle Finanze*, 2020, I, p. 99 ff.

<sup>57</sup> Recently, see, for example, art. 1, paragraph 48, of Law 30 December 2020 No. 178, where it is provided that: «Starting from the year 2021, for a single real estate unit for residential use, not rented or given in commodate use, owned in Italy by way of ownership or usufruct by persons not resident in the territory of the State who are holders of pensions accrued under the regime of an international convention with Italy, residing in a State of insurance other than Italy, the proper municipal tax referred to in article 1, paragraphs 739 to 783, of Law 27 December 2019 No. 160, shall be levied at the rate of one half and the waste tax having the nature of a tax or the waste tariff having the nature of a fee, referred to, respectively, in paragraph 639 and paragraph 668 of article 1 of Law 27 December 2013, No. 147, shall be due at a reduced rate of two thirds».

Also, recently and purely by way of example, see also: the ARERA resolution No. 443 of 31 October 2019; the IFEL (Istituto per la Finanza e l’Economia Locale) (TN: Institute for Local Finance and Economy) note of 2 March 2020 commenting on the aforementioned ARERA resolution; the circular No. 37259 of 12 April 2021 of the Ministry of Ecological Transition.

that the matter is covered by the reservation of law ex art.23 of the Constitution; even if such a transition were possible, it would not offer guarantees of adequate protection of the public interests involved in waste management; no real reasons to go to such length are found (nor adduced).

Rather, it is noted, *de iure condito* and beyond the labels used, that the TARIP is nothing more than a component of the TARI, which is characterised by a different determination of the taxable base (more precisely, of a part thereof) with criteria that tend towards greater effectiveness, which are, however, still permeated by partial measurements, flat rates, parameters and taxable events. In other words, we are still moving – albeit with the necessary adjustments and appreciable improvements – in the wake of what had begun for the TARSU through art.65, paragraph 1, Legislative Decree 507/1993<sup>58</sup>. In addition, the genesis of the relationship already lacks the characteristics of the synallagmatic contract, which binds service and service in return and represents the essence of the contract, while the authoritative characteristics of the tax remain (since we are still in the presence of a coercive pecuniary performance in favour of a taxing authority), in accordance with what has been affirmed several times by the Constitutional Court<sup>59</sup>: with reference to the taxation of waste, we recall judgement 238/2009 on TIA 1<sup>60</sup>.

This is not to exclude outright the possibility that TARIP might be private in nature, it only means that at the moment the conditions do not seem to be in place to achieve this. Rather, there seems to be a goal towards which we are striving, but which we have not yet reached. The future will probably be one in which everyone decides on their own waste (how to dispose of it, who to entrust it to, do it themselves, sell any that is valuable, etc.) and acts in accordance with the logic and instruments of private law: this is the direction in which the legislator seems to be moving, but it cannot be denied that important steps still need to be taken, despite the emphasis that may be expressed in many quarters; moreover, we cannot underestimate a series of concrete problems which are not easy to solve and that go beyond the accurate measurement of waste (and which are linked, for example, to the creation of adequate and suitably distributed waste collection points, the organisation of

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<sup>58</sup> In fact, art. 65, paragraph 1, of Legislative Decree 507/1993 allowed municipalities, other than large ones, to choose the quality and quantity of waste actually produced. See *supra* paragraph 2 and note 19.

<sup>59</sup> See *amplius* what is reported *supra* in paragraph 4.1.

<sup>60</sup> And some of the considerations made by Cass. 23949/2019 cited above with reference to TIA 2 can be taken up: see *supra* note 48.

door-to-door collection, payment times and methods, and the various technologies that can be employed). The situation does not change if one goes to the distinction between presumptive TARI, accurate TARI (tax) and proportional Tariff, present in some local regulations and endorsed by resolution No.443/2019 of ARERA (Autorità di Regolazione per Energia Reti e Ambiente) (TN: Regulatory Authority for Energy, Networks and the Environment), depending on the charging methods used<sup>61</sup>; if anything, this distinction may confirm the different ways in which the “polluter pays” principle is interpreted, the compatibility of accurate taxes with the fiscal nature of the claim, and the difficulties in reaching a private law tariff.

## **5. Reference principles**

### *5.1. Possible differences in the regulations*

The considerations made, even with the perplexities raised, allow us to draw some conclusions about the possible differences in the regulations depending on whether the “TARI tax” is “presumptive” or “accurate”, or whether the TARI becomes a “proportional tariff”.

The aim is to clarify the principles of reference in order to allow the beginning of broader evaluations regarding the viability of possible alternatives for local authorities, alternatives: that do not limit themselves on the *nomina iuris*, as happened with TIA 2, but also with reference to TARIP in the criticised ruling of the Court of Cassation No. 11290/2021 cited above; which, until guidelines are established (as happened with TIA 2), can lead to the emergence of critical positions in jurisprudence (with respect to the few precedents) following the example of what happened in the aforementioned order of the Court of Cassation No. 23949/2019 cited above. (and what has already happened with the affirmation of the tax nature of TIA 1: definitively established with the cited Constitutional Court 238/2009 and Cass. SS. UU. 8313/2010).

Obviously, this work has not the aim to deepen the theme, in the following paragraphs only the main aspects will be mentioned.

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<sup>61</sup> ARERA's intervention – of which resolution No.443/2019, previously referred to in the text (see *supra* note 57) – derives from the attribution to the same Authority, by paragraph 527 of art. 1 of Law 27 December 2017, of the functions of regulation and control of the cycle of urban and assimilated waste as provided therein.

### 5.2. *The principles of the Italian Constitution*

Thus, there is no doubt that the “TARI tax” is subject to the reservation of the law pursuant to ex art.23 of the Italian Constitution («No obligation of a personal or financial nature may be imposed on any person except by law»), which requires that the choices regarding taxes be made by the legislator. More precisely: since this is a relative reserve, the law is responsible for regulating the essential aspects of the services imposed, with further aspects being regulated by secondary sources (as happens in the subject *de quo*, where municipal regulations supplement/specify the legislative discipline); the administration has no margin of choice (identification, weighing and composition of the interests involved) on the *an* and *quantum debeat*, while there are margins of choice (on the collection and) on aspects relating to the *quomodo* and the *quando debeat*. Things should not change much with the “proportional tariff”, which still falls within the group of imposed patrimonial services (subject to the reservation ex art.23 of the Italian Constitution.), unless we assume future scenarios in which everyone is free to choose whether to recycle waste or dispose of it themselves, to whom to entrust it, under what conditions to do so, or utopian scenarios in which no waste is produced.

Similarly, the “TARI tax” is subject to the duty to contribute in accordance with the taxable capacity pursuant to ex. art.53 of the Italian Constitution («all shall contribute to public expenditure in accordance with their taxable capacity»): all the more so if it tends to be classified as a levy, rather than as a tax, as discussed above<sup>62</sup>. While the transition to the “proportional tariff” would mark the abandonment of the principle in question, which is proper to taxes, in favour of fees for the services received, essentially based on the quantity and quality of the waste collected. However, the current regulations are firmly anchored to indices of taxable capacity, such as the occupation or possession of premises and areas, the size of their surfaces, their uses, the activities carried out in them, and the number of users of the service; and these indices are likely to be contaminated by elements that have nothing to do with waste management (such as a family's taxable capacity or their ISEE, as per paragraph 682 of art.1 of Law 147/2013). The result is a complex regulatory framework that is difficult to overcome *sic et simpliciter* with a resolution of the Municipal Council<sup>63</sup>: further legislative interventions are

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<sup>62</sup> See *supra* paragraph 4.

<sup>63</sup> In fact, it is necessary to identify the mandatory and special legislative provisions that cannot be derogated from; in compliance with these provisions and as far as they are not regulated by them, the municipalities can legitimately make choices in the exercise of their

probably necessary and certainly more attempts and application feedback than those recorded so far<sup>64</sup>.

### 5.3. *References to EU law*

Looking at the principles of European law, the distinction between a “tax” and a “proportional tariff” itself is of little importance, since the European principle of “the polluter pays”, as set per art.191, paragraph 2, TFEU (but not only therein<sup>65</sup>), referred to several times by the rules on waste taxation<sup>66</sup>, is compatible with both classifications of the TARI<sup>67</sup>; rather, in order to appreciate its compatibility, one should look at the overall structure of the interests involved and guaranteed by both the public and private solutions. The same can be said if we look more generally at the provisions of Title XX of the TFEU, dedicated to the environment, to which art.191 is ascribed: in fact, taxes are one of the instruments to achieve the objectives of environmental policy as set out in art.191<sup>68</sup>.

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regulatory powers; the latter must then be compatible with the former and, more generally, a coherent and systematic framework must be the result.

<sup>64</sup> Among the special provisions, specifically impacting on the discipline of the “proportional tariff”, we point out: art. 1, paragraph 838, of Law 27 December 2019, No.160; art. 1, paragraph 48, of Law 30 December 2020, No. 178 (referred to *supra* in note 57).

<sup>65</sup> Among the European provisions that expressly mention said principle we recall art.14 of the previously mentioned (see *supra* notes 12 and 27) directive No. 98/2008 (as replaced by art. 1, paragraph 1, point 15 of directive No. 851/2018 cit.). Also see *supra* note 22.

<sup>66</sup> Thus, in Law 147/2013, the principle is expressly referred to in paragraphs 652 and 667 of art.1.

<sup>67</sup> See following note.

<sup>68</sup> See, for example, the Commission Communication “Environmental taxes and charges in the single market” 97/C 224/04, published on 23 July 1997, which states that: «In order to reach environmental objectives, which are increasingly set in the context of framework legislation at EU level, Member States have, apart from measures harmonized at Community level, a multitude of economic, technical and voluntary instruments at their disposal. Environmental taxes and charges form part of the range of environmental instruments and can be an appropriate way of implementing the ‘polluter pays’ principle, by including the environmental costs in the price of a good or service. These instruments can thereby induce consumers and producers into environmentally more sustainable behaviour».

It should also be recalled, by way of example, that the Court of Justice in its decision C-254/08 of 16 July 2009 (proceedings) found the TARSU to be compatible with the “polluter pays” principle and more generally with European legislation («48. ... *as Community law currently stands, there is no legislation adopted on the basis of Article 175 EC imposing a specific method upon the Member States for financing the cost of the disposal of urban*

It is useful to ask whether the TARI is an environmental tax, meaning a tax directly affecting pollutants<sup>69</sup>. Environmental taxes are a category of European construction, which is relatively recent and still unrefined: its origins can be found in a European Commission Communication of 1997, which states that «in order to be considered “environmental”, a tax should have a taxable base that has clear negative effects on the environment», but also that «a tax whose positive effects on the environment are less evident, but still

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*waste, so that the cost may, in accordance with the choice of the Member State concerned, equally well be financed by means of a tax or of a charge or in any other manner»).*

<sup>69</sup> Reference is made to environmental taxes in the strict sense, if the category of environmental taxes also includes taxes “with an environmental purpose” or “with an environmental function”, which can conversely be defined as environmental taxes in the broad sense. However, the fact that the tax may have or has an environmental purpose, i.e. to discourage/incentivise activities, uses and production that affect the environment, is not particularly important, since the taxes can be used for purposes other than raising resources to meet public expenditure: in fact, the purposes denoting the tax are characterised by the broadness of their contents, except for special cases such as purpose taxes. For some time now, the doctrine has shown how the public body introduces taxes «with the aim of providing the means for its financial needs» (see A.D. GIANNINI, *I concetti fondamentali del diritto tributario*, cit., p. 58); so much so that in those legal systems in which there has been a codification of taxes, such as the Spanish *Ley General Tributaria*, the following is expressly stated: «*Los tributos, además de ser medios para obtener los recursos necesarios para el sostenimiento de los gastos públicos, podrán servir como instrumentos de la política económica general y atender a la realización de los principios y fines contenidos en la Constitución*» (see *supra* note 35). Therefore, it is not very useful to distinguish, as it is done (see, for example, and recently, M.A. ICOLARI, *Per una dogmatica dei tributi ambientali*, cit., p. 68 ff.), between taxes “with environmental purpose” or “with environmental function”, which in substance are still traditional taxes.

On environmental taxes there are several contributions, among which, by way of example and more recently, we mention, also for references: F. GALLO, *Profili critici della tassazione ambientale*, in *Rassegna Tributaria*, 2010, p. 303 s.; R. ALFANO, *I tributi ambientali*, cit.; S. DORIGO, P. MASTELLONE, *La fiscalità per l'ambiente*, cit.; L. PEVERINI, *I tributi ambientali*, in L. SALVINI, G. MELIS, *L'evoluzione del sistema fiscale e il principio di capacità contributiva*, Cedam, Padova 2014, p. 719 ff.; F. PITRONE, *Would environmental taxes by any other name smell as sweet?*, in L. SALVINI, G. MELIS, *L'evoluzione del sistema fiscale e il principio di capacità contributiva*, cit., p. 763 ff.; A. BUCCISANO, *Fiscalità ambientale tra principi europei e costituzionali*, in *Diritto e Pratica Tributaria*, 2016, I, p. 590 ff.; V. FICARI (ed), *I nuovi elementi di capacità contributiva. L'ambiente*, Aracne, Roma, 2016; A. URICCHIO, *I tributi ambientali e la fiscalità circolare*, in *Diritto e Pratica Tributaria*, 2017, I, p. 1849 ff.; M.A. ICOLARI, *Per una dogmatica dei tributi ambientali*, cit.; M. AULENTA, *Ambiente: piccoli tributi crescono*, cit., p. 71 ff.

clearly identifiable, could also be considered environmental»<sup>70</sup>; its introduction is found in a 2011 Regulation of the European Parliament and of the Council, which defines an environmental tax as «a tax whose taxable base is a physical unit (or a proxy of a physical unit) of something that has a proven, specific negative impact on the environment»<sup>71</sup>. This means that: the taxable event of the environmental tax is the polluting act or activity, upon the occurrence of which the tax liability arises (referring to the above-mentioned European sources, one could say “manifesting negative effects on the environment” or “producing a specific and proven negative impact on the environment”); the liable subjects are those who actualise the above-mentioned taxable event, i.e. pollute (meaning, again referring to the European sources, “manifesting negative effects on the environment”, “producing a specific and proven negative impact on the environment”); the taxable base of the environmental tax is a pollutant, the measurement of which makes it possible to quantify the tax (the taxable base is expressly defined in the EU regulation as the «physical unit (or a proxy of a physical unit) of something that produces a specific and proven negative impact on the environment»<sup>72</sup>).

It is undoubted that waste “has negative effects on the environment” and/or “produces a specific and proven negative impact on the environment”. Moreover, they: constitute the taxable event and the liable subjects for the TARI, albeit potentially (premises and open areas are taxed as they are «likely to produce urban waste» pursuant to ex art.1, paragraph 641, of Law 147/2013 and those who occupy or possess them are required to pay); they constitute the taxable base, as the costs relating to the waste management service are shared, even if the measurement is based on criteria which, although refined over time, are still present and largely normal. It is true that situations of potentiality and/or normality are taxed, but this should not come as much of a surprise, given that: this is also the case for other taxes, such as, for example, property income or IRAP (regional tax on productive activities); under EU law, the environmental effects of taxes (which are classified as environmental) can also be estimated; there are specific features of waste production and management that are difficult to regulate in any other way at present; a vision is expressed that is probably still *in itinere*, but which tends towards fairly

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<sup>70</sup> See the Commission Communication “Environmental taxes and charges in the single market” 97/C 224/04, referred to *supra* in note 68.

<sup>71</sup> See art. 2 of Regulation No. 691/2011 of the European Parliament and of the Council of 6 July 2011.

<sup>72</sup> The italic is added by the author.

clear (waste tax) objectives. So there should be no doubt that the TARI is an environmental tax and, like the latter, is a fiscal levy (and not a price linked to a public service)<sup>73</sup>. This, together with the absence or the difficulty of configuring a synallagmatic relationship, should (contribute to) exclude or marginalise the “proportional tariff”.

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<sup>73</sup> There can be no doubt that environmental taxes belong to the category of taxes, rather than to that of fees, since, as rightly observed by many, their purpose is to prevent and/or reduce damage to the environment and certainly not to restore it, in line with the European principles of environmental protection under ex art.91 TFEU (where the second paragraph states: «Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that “the polluter should pay”»). See, for example, F. GALLO, *Profili critici della tassazione ambientale*, cit., p. 304 ff., where the following is also effectively noted: «the function of restoring environmental damage undoubtedly exists, but it is a fundamental task of the state and of the regional or local bodies responsible for environmental protection, to be financed through general taxation, and cannot be reduced to a specific service rendered by these bodies in return for the payment of a tax. ... the construction of a tax as a fee, that is, as an instrument for financing the environmental restoration service, would have the effect, unacceptable to the legal system, of “authorising” the polluter to pollute, except in so far as he would then have to bear the costs of the restoration activity» (see *amplius* p. 303 ff.). Already, however, for example: F. GALLO, F. MARCHETTI, *I presupposti della tassazione ambientale* in *Rassegna Tributaria 1999*, p. 137 ff.; C. VERRIGNI, *La rilevanza del principio comunitario “chi inquina paga” nei tributi ambientali*, cit., p. 1626 ff.

Thus, the “polluter pays” principle, as set out in the above-mentioned article of the TFEU, certainly does not translate into an onerous licence to pollute (in return for the payment of a tax), but should rather be read in close connection with the preventive purposes of the precautionary principle, the principle of preventive action, and the principle that environmental damage should as a priority be rectified at source, which precede it in the list contained in art. 191, paragraph 2, cit.; moreover, if it were referred to taxes, it would not be applicable in the absence of a public environmental restoration service, which would be the probable premise of environmental taxes. And it is inevitable that, where it assumes a compensatory (or restorative) content, albeit always possible, though in a residual manner by virtue of the “principles that preventive action should be taken, that environmental damage should as a priority be rectified at source”, which precede it in art. 192, paragraph 2, TFEU, it does not at all follow the path of taxes, to which such content is extraneous.

