JUDGMENT No. 262 YEAR 2020

In this judgment, the Constitutional Court declared unconstitutional the ineligibility for deduction from the amount liable to tax on business income (IRES and IRPEF) of the single municipal tax paid in relation to business income tax, also in relation to operating property "due to the violation of the principle of coherence, and thus the principle of reasonableness (Articles 3 and 53 of the Constitution)", as the single municipal tax (IMU) is an inherent tax cost, the deductibility of which cannot be precluded without compromising the coherence of the purpose of the tax once the legislator has, at its discretion, adopted the criterion of taxation of net income for tax on business activity. The Court accepted the questions raised by the Milan Provincial Tax Board concerning Article 14(1) of Legislative Decree No. 23 of 2011 (as in force in 2012), since it provided that the single municipal tax was entirely ineligible for deduction from business income taxes. The Court held that from 2012, the single municipal tax had become unduly burdensome on business undertakings. While in no way prohibiting the legislator from placing limits on the deductibility of costs, the Court stated that the lawmakers are bound to justify the requirement for raising revenue in accordance with the demands of transparency and to avoid inconsistent adjustments regarding deductibility, thus causing significant and discriminatory increases in taxation falling on only a small category of taxpayers. The Court did not, however, extend its ruling on unconstitutionality to provisions enacted in subsequent years as the legislator had shown awareness of the issue and, with time, had corrected its policy. Indeed, it has provided for total deductibility from 2022, a situation that "cannot be delayed any longer".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 14(1) of Legislative Decree No. 23 of 14 March 2011 (Provisions on municipal fiscal federalism), in the text prior to the amendments brought by Article 1(715), of Law No. 147 of 27 December 2013, containing "Provisions on the formation of the annual and multi-year State budget (Stability Law 2014)", initiated by the *Commissione tributaria provinciale di Milano* [Milan Provincial Tax Board] in the proceedings between Tecnogras srl and the *Agenzia delle Entrate, Direzione provinciale II di Milano* [Revenue Agency, Milan Provincial Office II] by an order of 2 July 2019, registered as No. 191 in the 2019 Register of Referral Orders and published in the *Official Journal* of the Republic No. 45, first special series 2019.

With regard to the entry of appearance filed by Tecnogras srl and the intervention of the President of the Council of Ministers;

after hearing Judge Rapporteur Luca Antonini in the public hearing of 18 November 2020,

after hearing Counsel Giulio Enea Vigevani for Tecnogras srl and State Counsel [*Avvocato dello Stato*] Gianni De Bellis for the President of the Council of Ministers, remotely, pursuant to point 1) of the Decree of the President of the Court of 30 October 2020;

having deliberated in chambers on 19 November 2020.

[omitted]

Conclusions on points of law

1.– By an order of 2 July 2019, the *Commissione tributaria provinciale* (CTP) of Milan [Milan Provincial Tax Board] raised questions, in relation to Articles 3, 41 and 53 of the Constitution, as to the constitutionality of Article 14(1) of Legislative Decree No. 23 of 14 March 2011 (Provisions on municipal fiscal federalism), in the text prior to the amendments brought by Article 1(715), of Law No. 147 of 27 December 2013, containing "Provisions on the formation of the annual and multi-year State budget (Stability Law 2014)", pursuant to which the single municipal tax (IMU) "is non-deductible from State taxes on income and from the regional tax on businesses"(IRAP).

1.1.– In the opinion of the referring court, the provision breaches:

a) Article 53 of the Constitution, from the point of view of the actuality of the ability to pay, since, in establishing the non-deductibility of the IMU from the business income tax (IRES), it would impose taxation on "a partly fictitious business income, contradicting the principle of the ability to pay"; this is on the assumption that: i) "total or partial non-deductibility is admissible only with regard to costs that present elements of uncertainty in terms of relevance or determination, or else when there is a well-founded danger that the deduction of these costs risks concealing tax avoidance or evasion"; ii) the expense for the payment of IMU relating to the operating properties of the undertaking itself must be considered to be a certain cost inherent in the production of income;

(b) Article 53 of the Constitution, from the point of view of the prohibition of double taxation, in view of the fact that, on the basis of its ownership of immovable property, the appellant undertaking in the referred proceedings would be "effectively obliged to pay tax twice on the same premise", which could, moreover, "lead to the exhaustion of the ability to pay or, in any event, may constitute an excessive burden superseding the maximum tolerable limit for taxation".

(c) Articles 3 and 53 of the Italian Constitution, with regard to the principle of reasonableness, since the challenged provisions on non-deductibility, in the absence of valid justification, are alleged not to be "consistent with the very structure of the taxable base" of IRES, a tax which, pursuant to Article 75(1) of Decree of the President of the Republic No. 917 of 22 December 1986, containing "Approval of the consolidated law on income tax" (hereafter also TUIR), "applies to total net income". It is in fact true that, in tax matters, the legislator "enjoys ample discretion in establishing the taxable amount; however, in identifying the individual factors which contribute to establishing the taxable base, this discretion is considerably reduced", since it is required to structure the tax in a manner consistent with the chosen taxable base;

d) Article 3 of the Constitution, with regard to the principle of formal equality, since the lack of deductibility would have "an impact on the level of so-called horizontal equity", unreasonably subjecting undertakings that use operating properties of their own to higher taxation than those that use operating properties not owned by themselves;

(e) Article 41 of the Constitution, having regard to the principle of freedom of private economic initiative, in that the contested provision unduly penalises the choice of an undertaking to invest its profits in the purchase of operating properties, without, moreover, there being any "appreciable qualitative difference between the cost in question and generally deductible costs" under the general rules on IRES.

1.2.– As a preliminary matter, it is necessary to demarcate the *thema decidendum*.

It is clear from the rationale and the wording of the referral order that the questions relate solely to the reimbursement of IRES to the extent of the amount of IMU paid in 2012 by the contributor – an undertaking "operating in the property sector" – with regard to "real estate owned by [...] the undertaking itself". It follows from all the arguments concerning the evident lack of foundation that, in fact, a ruling upholding the questions is requested only insofar as the contested provision provides, for the purposes of calculating IRES, that the IMU paid for operating properties is not deductible. On the other hand, the referring court does not challenge the non-deductibility of IMU from IRAP.

The possibility of "limiting the subject-matter of the proceedings concerning constitutionality to only a part of the contested provision, if this is suggested by the grounds of the referral order" has been consistently confirmed by the case law of this Court (among many, see Judgments No. 108 of 2019, No. 35 of 2017, No. 203 of 2016 and No. 244 of 2011).

1.3.– For the purposes of relevance, the referring court has sufficiently described the case from which the request for the refund of IRES originates, specifying that the amount requested corresponds to the disbursement of the IMU deriving "from the undertaking's own operating property" and, also, correctly specifying that, in the absence of a retroactive effect of the *ius superveniens*, the fate of the case under discussion continues to be governed by Article 14(1) of Legislative Decree No. 23 of 2011, in the wording in force for 2012 only, which is precisely the subject of today's censure.

In particular, it should be noted that the instrumental nature, ascertained by the referring court, of the properties on which the IMU was paid in 2012 is not incompatible with the purpose of the business activity of the taxpaying limited company stated in the referral order ("purchase, sale, rental, leasing, construction, renovation" in the real estate sector): hence the plausibility of the aforementioned qualification of the instrumental nature of the properties provided by the referring court, which was not contested either in the case at issue or in the proceedings concerning constitutionality.

1.4.– It follows from these considerations that the objection raised by the State Counsel's Office according to which the questions put forward are inadmissible "[i]n analogy" with this Court's ruling in Judgment No. 163 of 2019, also on the subject of the deductibility of IMU from IRES, as the referring court omitted (also in the referral order examined in that Judgment) "to refer to the rules relating to other tax periods which are just as relevant in the case in question" is unfounded.

Not only is it clear, in fact, from at least two points in the referral order that the CTP adequately, albeit briefly, examined the legislative development of the contested Article 14(1) in order to draw consistent and non-contradictory conclusions from it with regard to the questions raised, but, as stated above, the assessment to be made in these proceedings is limited solely to the wording of the article in force in 2012. Accordingly, in the present case, the grounds of inadmissibility, set out in relation to a different case in Judgment No. 163 of 2019, cannot be replicated.

2.– On the merits, the questions are well-founded in relation to Articles 3 and 53 of the Constitution from the point of view of consistency and therefore reasonableness.

2.1.– It should be pointed out, first, that the challenged non-deductibility of IMU from the taxable base for IRES is part of a complex legislative development which has led, well beyond the normal effect of a wealth tax, to the result of a particular increase in the tax burden on undertakings owning operating properties.

The tax, in fact, was originally envisaged within the framework of Legislative Decree No. 23 of 2011 on municipal fiscal federalism, implementing Law No. 42 of 5 May 2009 (Delegation to the Government on fiscal federalism, implementing Article 119 of the Constitution), and sought to shift the levying axis on the real estate sector from the State to the municipalities, in view of the objectives of increasing the degree of fiscal autonomy, emphasising the principle of correlation between taxation and functions, and simplifying the system of local financing.

To this end, in particular, two new forms of municipal taxation were to be introduced in the tax system starting from 2014: (a) a municipal tax proper; and (b) a secondary municipal tax.

The first, the so-called IMU, combined in a single new tax the previous municipal tax on real estate (ICI) (which had already significantly increased the level of autonomous taxation), and the (State) tax on personal income (IRPEF) – and related surcharges – due in relation to income from property (concerning non-rented property). In this way, a significant amount of State revenue was attributed to the municipalities, offset by a corresponding reduction in State transfers; thus limiting the degree of derived taxation.

The second tax – destined, however, to remain initially unimplemented and then repealed by Article 1(25) of Law No. 208 of 28 December 2015, containing "Provisions on the formation of the annual and multi-year State budget (2016 Stability Law)" – pursued the same simplificatory aim by combining other minor local taxes into a single form of tax.

As far as the present case is concerned, it should be noted that the municipalities, to which the entire IMU revenue was destined and which were allowed to increase or decrease the rate by up to 0.30 per cent, were authorised to reduce the rate by up to half "in cases regarding property that does not produce property income pursuant to Article 43 of the aforementioned Consolidated text of Decree of the President of the Republic No. 917 of 1986, or where it concerns property owned by persons subject to corporate income tax" (Article 8(7) of the aforementioned Legislative Decree No. 23 of 2011).

The purpose of this provision was to allow municipalities to prevent the new tax from increasing the tax burden on undertakings: in fact, IMU, calibrated in such a way as to be essentially nil return (at the standard rate of 0.76 per cent) for the individual taxpayer (who would pay the municipality the amount previously paid to the State by way of property income tax), would have been an additional burden for entities such as businesses (or the self-employed) that owned operating property and did not pay IRPEF property tax, without this reduction.

2.2.– The linearity of this design was however overturned by a series of immediately successive regulatory measures that radically transformed IMU as early as 2012.

In particular, as a result of the worsening of the serious financial crisis, IMU received the main burden in an emergency manoeuvre that has increased the level of property taxation, especially for businesses, and, moreover, has also strongly affected the degree of fiscal autonomy of municipalities.

In fact, with Decree-Law No. 201 of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted, with amendments, into Law No. 214 of 22 December 2011 – the so-called Save Italy Decree – the introduction of IMU was brought forward to 2012; multipliers of cadastral income were introduced, which significantly increased the incidence of the tax; half of the revenue from all properties, with the exception of the main residence and rural buildings for instrumental use, was attributed to the State, while maintaining the municipal nature of the tax; the tax was also applied to the main residence.

After a short time, with Article 1(380) of Law No. 228 of 24 December 2012, containing "Provisions on the formation of the annual and multi-year State budget (2013 Stability Law)", the framework was again modified, thus defining the main outlines of the current structure: a) the aforementioned reservation to the State, which mainly concerned IMU on second homes, was replaced with a reservation to the same of the entire IMU revenue due on properties for productive use classified in cadastral group D (namely industrial warehouses and factories); b) this revenue was established at the standard rate of 0.76 per cent, thus substantially preventing the possibility, previously granted to municipalities, of halving IMU tax on operating properties; c) the possibility for municipalities to increase the standard rate on operating properties by up to 0.3 percentage points, withholding the revenue in point, thus bringing said rate up to 1.06 per cent, was expressly reaffirmed (Article 1(380)(g), of Law No. 228 of 2012).

2.3.– Once this orientation had been established, the legislator immediately showed an awareness that it had become particularly burdensome and problematic for undertakings. Previously, the opening words of Article 1(1), of Decree Law No. 54 of 21 May 2013 (Urgent measures regarding the suspension of the single municipal tax, exceptional refinancing of social safety nets, the extension of fixed-term employment in the public service and the elimination of the salaries of Members of Parliament in the Government), converted, with modifications, into Law No. 85 of 18 July 2013, significantly states: "[p]ending a total reform of the rules on the taxation of real estate [...] aimed, in particular, at reconsidering the organisation of the power to impose taxes at State and local level, as well as deductibility for the purposes of determining the business income from the single municipal tax on real estate used for production activities".

Moreover, in August 2013 (just a few days after the conversion of the aforementioned Decree-Law) the Finance Department of the Ministry of Economy and Finance, in the document "Proposed revision of real estate tax", expressly examined the issue of "deductibility for the purposes of determining business income from the single municipal tax relating to real estate used for production activities". In particular, noting that "[w]ith the transition from ICI to IMU, real estate owned by businesses has been subject to an increase in taxation, due to both the increase in the rates and the multiplication coefficients applied to cadastral income and to the circumstance that IMU has not replaced the income tax levied on real estate used for production purposes (while it has replaced the IRPEF levied on the income of all other non-leased real estate)", it is underlined that "[t]he reference to the deductibility of the IMU relating to real estate used for production activities for the purposes of determining business income contained in Article 1 of Decree Law No. 54 of 2013, envisages a policy in line with those in the major European countries and, moreover, would overcome the problems of unconstitutionality that the currently established non-deductibility may pose in terms of the ability to pay".

However, while the aforementioned Decree-Law No. 54 of 2013, as converted into law, only suspended payment of the first instalment of the IMU for 2013 on the principal dwelling (a case that Law No. 147 of 2013 would definitively exclude from taxation in relation to property classified in categories other than A/1, A/8 and A/9), the measure concerning the law that is the subject of today's censure concretely came into being only with Article 1(715)(716) of Law No. 147 of 2013, which replaced it by establishing that "[t]he single municipal tax relating to operating properties is deductible for the purposes of determining business income and income from the exercise of arts and professions" in the amount of 30 per cent for the tax period in progress on 31 December 2013 and 20 per cent from 1 January 2014.

Further amendments then followed: Article 1(12) of Law No. 145 of 30 December 2018 (State budget for financial year 2019 and multi-year budget for the three-year period 2019-2021) raised the percentage of deductible IMU to 40 per cent as of 1 January 2019

(Article 19 of Law No. 145 of 2018). In reality, this provision has never actually been applied, as, first with Article 3(1) of Decree-Law No. 34 of 30 April 2019 (Urgent measures for economic growth and for the resolution of specific crisis situations), converted, with amendments, into Law No. 58 of 28 June 2019, and then with Article 1(4)(772)(773), of Law No. 160 of 27 December 2019 (State budget for financial year 2020 and multi-year budget for the three-year period 2020-2022), the percentages have been reshaped in the following terms:

- 50 per cent for the tax period following the one in progress on 31 December 2018;
- 60 per cent for the tax period following the one in progress on 31 December 2019;
- 60 per cent for the tax period following the one in progress on 31 December 2020;
- 100 per cent for the tax periods following the one in progress on 31 December 2021.

3.– The evolution described above, in denoting a regulatory framework that is not exactly linear or systematic, in any case allows a glimpse of how the total non-deductibility of IMU for the purposes of income tax, given its strong impact on the business system, was soon, by the legislator’s own admission, one of the critical issues and therefore to be reformed.

In effect, the deductibility in question, responding to purposes intrinsic to the levy, does not arise at all, contrary to the argument of the State Counsel’s Office, in terms of tax benefits in the strict sense of the word, which are dictated by aims unrelated to taxation and with respect to which the case law of this Court – which is therefore not relevant here – has recognised a wide discretion (provided that it does not transmute into blatant irrationality and arbitrariness) to the legislator (among many, see Judgments No. 264 and No. 177 of 2017).

The deductibility under consideration here relates, instead, to tax institutions in which “a mainly structural character can be discerned, since the avoidance of taxation (or its reduction) is made necessary by the consistent and systematic application of the taxable base” (Judgment No. 120 of 2020). In the same judgment, this Court specified that such provisions are not attributable to those in which “instead, their concessionary nature is specifically evident because, unlike those just described, they presuppose the existence of an ability to pay consistent with the structure of the tax, but, by way of exception (previously, in this connection, Judgment No. 159 of 1985) to the *dictum de omni* provided for by Article 53(1) of the Constitution, they establish, for non-fiscal reasons, forms of exemption, more favourable substitute taxation, or other measures aiming to make the tax burden less onerous or non-incisive in relation to certain situations”.

The deductibility of IMU from taxable income for IRES assumes a structural nature since, as will be elaborated on below, the legislator has expressly identified the prerequisite for IRES as the possession of a “total net income” (Article 75(1), TUIR); this is in contrast to what has been established for certain categories of income, such as, for example, income from employment, which is calculated gross, without the (individualised) deduction of production costs.

It is certainly true that the Consolidated Income Tax Law (TUIR) lays down specific rules for measuring the income of an undertaking, specifying, for certain positive or negative components resulting from the profit and loss account, the amount that can contribute to determining the overall income, that is, the taxable base for IRES purposes. However, an essential principle of the calculation of corporate income is that of the relevance of the cost to be deducted.

In its basic formulation, “[t]he principle of the relevance of deductible costs is derived from the notion of business income and expresses a correlation between costs and the business activity actually carried out, resulting in a qualitative judgment, which in itself disregards utilitarian or quantitative assessments” (Supreme Court of Cassation, Fifth Civil Division, Judgment No. 1290 of 22 January 2020); substantially in line, among many, with Supreme Court of Cassation, Fifth Civil Division, Judgment No. 450 of 11 January 2018): this principle on the one hand defines and, on the other, circumscribes the area of costs that contribute to taxable income by excluding costs that are placed in a sphere extraneous to the operation of the undertaking.

The legislator cannot arbitrarily disregard this principle: it in fact constitutes the safeguard for the verification of the reasonableness of derogation with respect to the identification of the total net income that the legislator itself has established as the basis for IRES.

3.1.– This principle is also reflected in tax costs.

It should be noted, in fact, that in relation to tax charges, Article 99(1) of the TUIR (under the heading “Tax and social security charges”) broadly establishes the principle of the deductibility of taxes from income, stating that '[t]he taxes on income and those for which the – also optional – right to recovery is envisaged, are not permitted as deductions. The other taxes are deductible in the year in which the payment is made”.

These rules therefore only expressly provide for two exclusions from the deductibility rule; they are entirely reasonable and confirm the principle of net taxation: a) one concerns taxes for which recovery is envisaged (the burden of which is not borne by the company, hence the logical reason for not deducting the charge in question); b) the other concerns income taxes (which, being derived from income, cannot logically be included among its causal antecedents).

As regards the “other taxes”, Article 99 of the TUIR, as mentioned above, establishes their deductibility, stating a criterion which may be derogated from by the legislator but not when cases such as the one in question are taken into consideration, relating to a tax (not proportionate to income and not subject to recovery) that is directly and fully relevant to the production of income.

A tax with these characteristics constitutes a relevant fiscal cost, the deductibility of which cannot be precluded without compromising the consistency of the design of the tax once the legislator has, at its discretion, established the net taxation criterion for business income.

In this respect, therefore, the observations of the referring court correctly focus the criticism on the non-deductibility of IMU relating to fixed assets, which represents a certain and relevant burden, constituting a necessary cost which presents itself in the same way as an ordinary factor of production, which the entrepreneur cannot avoid.

3.2.– The challenged provision is therefore contrary to Articles 3 and 53 of the Constitution, from the point of view of coherence and therefore reasonableness, with all other questions being absorbed.

The wide discretion enjoyed by the tax legislator in the choice of indicators of the ability to pay (among many, see Judgment No. 269 of 2017) does not translate into an equally wide discretion in identifying the individual factors that contribute to establishing the tax base once the prerequisite for taxation has been determined: the latter becomes, in fact, the limit and measure of the legislator’s subsequent choices.

It is a well-established principle in the case law of this Court that review “as to whether the principles set out in Article 53 of the Italian Constitution have been infringed, as a specification of the fundamental principle of equality laid down in Article 3 of the Constitution", comes down to a "judgment as to whether or not the legislator has made reasonable use of its discretionary powers in relation to taxation with the goal of verifying the internal coherence of the structure of taxation with the circumstance establishing liability to taxation" (Judgment No. 116 of 2013; but also, among others, see Judgments No. 10 of 2015, No. 223 of 2012, No. 111 of 1997, and, in a similar vein, Judgment No. 42 of 1980).

Therefore, with regard to IRES, once the legislator, at its discretion, has identified the prerequisite as the possession of "total net income", choosing to favour, among several options, that of the analytical determination of income, it cannot, without being incoherent, make non-deductible a tax cost which is clearly and entirely relevant.

The foregoing is amply sufficient to uphold the questions of constitutionality raised in relation to Articles 3 and 53 of the Constitution. However, it is not inappropriate to emphasise that a breach of the internal coherence constraint causes concrete effects of fiscal distortion, leading to numerous unreasonable consequences, some of which are indicated by the referring court itself in presenting other aspects of unconstitutionality.

In the case at hand, for example, non-recognition of deductibility is reflected in an increase in the income tax solely brought about by the introduction of IMU (which has become, as we have seen, particularly onerous for undertakings), which could effectively reduce the net income itself to zero or, paradoxically, could be exponentially increased by the legislator in accordance with the law, the sole limit being the ability to pay inferable from the non-deductible tax. Without giving rise to a phenomenon of legal double taxation (because the prerequisites for IMU and IRES are different), the fact remains that in this way the amount of IRES levied for each person is in reality unreasonably determined by an index of ability to pay referring to a parameter other than net income.

Another consequence of the breach of the principle of consistency is, in the case in question, the undue penalisation, as observed by the referring court, of businesses that have chosen (an option which is certainly not regrettable, being functional to the solidity of the undertaking) to invest their profits in the purchase of property for business purposes, as opposed to those which carry on their business using rented property: only the latter can in fact deduct all their costs (the pertinent rent), since they are not subject, as are the former, to (non-deductible) IMU.

3.3.– It should be pointed out that the above does not absolutely exclude the possibility that the legislator may envisage limits to the deductibility of costs, even if they are effectively incurred in the course of a business activity. However, forms of partial or lump-sum deductibility must be justified in terms of proportionality and reasonableness, such as, for example, in order to: a) avoid undue deductions of expenses of doubtful relevance; b) avoid significant investigation costs; and c) prevent evasion or avoidance.

These are exceptions that meet the need to protect the fiscal interest (not immediately identifiable in the case at hand, which concerns immovable property, namely so-called 'bricks and mortar presence', which is difficult to exploit for evasive, elusive or erosive manoeuvres) or that may also respond to non-fiscal purposes but is always referable to specific constitutional values, such as, for example, in the case of the non-deductibility of costs deriving from crime in order to penalise conduct disapproved of by the legal order.

Outside these situations, there is barely any adequate justification for any such derogation: in particular, the legislator is required to respond to the mere need for revenue in a transparent manner, increasing the rate of the principal tax and not through inconsistent manoeuvres on deductibility, which result in discriminatory, hidden and significant increases in the tax base to the detriment of only some taxpayers.

Referring to the value of the non-derogation of the duty to pay taxes, this Court has also stated that this "classification is only justified if and insofar as the tax system remains firmly anchored to the general body of principles and the related balancing operations provided for and permitted under the Constitution, including specifically respect for the principle of capacity to pay tax (Article 53 of the Constitution). [A]s a result, when the legislator fails to respect these conditions, it departs from the ultimate considerations of legal culture that operate as a foundation for the duty to pay tax: in such cases, the tax relationship is altered, which has serious consequences in terms of the disorientation not only within the development of the legal system itself, but also of its social context" (Judgment No. 288 of 2019).

3.4.– Nor is it possible to accept the justification of total non-deductibility established by the challenged provision claimed by State Counsel regarding the nature of an "exceptional and temporary measure, solely for the year 2012" that the tax measure is alleged to have, justified by the "serious economic crisis in which the country found itself" and that induced the legislator to anticipate the introduction of IMU in that year.

Not only has this Court already stated that, in itself, "temporary status is not a sufficient argument in order to justify any given tax, which might otherwise depart from constitutional principles" (Judgment No. 288 of 2019), but this characteristic – as the private party observes – cannot appropriately be attributed to the contested provision, in the structure of which full non-deductibility was envisaged as permanent, and was only fortuitously limited to the year 2012 as a result of discretionary and subsequent interventions by the legislator.

3.5. – The contested Article 14(1) of Legislative Decree No. 23 of 2011 must therefore be declared unconstitutional insofar as it provides for the non-deductibility of IMU on operating properties from the taxable income of undertakings.

The violation of the principle of consistency and therefore of reasonableness under Articles 3 and 53 of the Italian Constitution, observed with regard to the non-deductibility of IMU on operating properties from taxable income for IRES purposes, cannot in fact fail also to involve non-deductibility from business income for IRPEF purposes, since by virtue of the reference given in Article 56 TUIR – "[t]he income of an undertaking is determined in accordance with the provisions of Section I of Chapter II of Title II, subject to the provisions of this Chapter" – it is substantively determined in accordance with the IRES rules set out in Article 81 et seq. TUIR.

4.– Lastly, this Court has considered whether, as a consequence, to extend *ex officio*, pursuant to Article 27 of Law No. 87 of 11 March 1953 (Provisions on the constitution and functioning of the Constitutional Court), the aforementioned ruling of unconstitutionality to the provisions subsequent to the one being contested and which, over the years, have provided for the partial deductibility of IMU on operating properties in relation to business income, without, however, providing for full deductibility: Article 1(715)(716) of Law No. 147 of 2013; Article 3(1) of Decree-Law No. 34 of 2019, converted, with amendments, into Law No. 58 of 2019, Article 1(4)(773), of Law No. 160 of 2019, limited to the part in which it provides for the partial deductibility of IMU.

It held, however, that the prerequisites for such an extension were not met. In the process described above, in fact, the legislator (in substantial analogy with what occurred in the case decided with Judgment No. 187 of 2016) gradually corrected itself – taking note, little by little, of State budget balancing requirements (Article 81 of the Constitution)

– until it reached the virtuous projection, which certainly cannot be delayed any longer, of total deductibility starting from 2022 (as laid down today in Article 1(773), of Law No. 160 of 2019).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares Article 14(1) of Legislative Decree No. 23 of 14 March 2011 (Provisions on municipal fiscal federalism) unconstitutional, in the text prior to the amendments brought by Article 1(715) of Law No. 147 of 27 December 2013, containing “Provisions on the formation of the annual and multi-year State budget (Stability Law 2014)”, insofar as it establishes that the single municipal tax is non-deductible from business income tax also in relation to operating property.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, 19 November 2020.

Signed by:
Giancarlo CORAGGIO, President
Luca ANTONINI, Author of the Judgment