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Collecting works of art: Are they taxable? An Italian perspective

1. Introduction

The art market has undergone a tremendous increase in recent years. In fact, nowadays, owning work of arts is not only possible by the so called "luxury market" aimed at the purchase of works of the highest artistic and monetary value, but, even the small collectors have expanded their audience due to the popularity of flea markets and of websites on which it is possible to purchase goods no longer in use. At the same time, commerce has also developed and many individuals, starting a collection, often not only can be qualified in the eyes of the market as buyers but also as sellers by placing themselves in that *limen* that divides collecting from speculation. In addition, art represents an asset that is becoming increasingly part of a family's identity, as well as an investment opportunity that offers returns and diversification. Recent developments have shown that there is a significant opportunity to integrate art into wealth management as a way of preserving and growing a family's wealth.[1]

However, investing in art has tax implications one should be aware of. As it often happens, the law does not stand on the same track as economic evolution and if the last one is innovated and varied, the chameleon-adaptive capacity of the rules is very precarious and inadequate. Thus, problems arise where, on the one hand, there is an outdated rule that does not provide for current phenomena and, on the other, a Financial Authority that interprets it in the most restrictive way. Even jurisprudence, which generally helps professionals by imprinting a general interpretative line – despite the civil law system does not assign a strong value to it – in the case in question, has only

[1] KPMG *Guide on Taxation of art*, https://assets.kpmg/content/dam/kpmg/ro/pdf/part-1-web.pdf (accessed: 2.03.2020).

analysed the distinction between the collector and the art dealer leaving out the figure of the speculative investor.

Lack of attention by institutions to the dynamics and interests of the art market and the difficulties generated by unclear legislation that causes uncertainty among operators, where the tax treatment of the circulation of works of art is characterised by application uncertainty, do not favour economic activity. Fair and timely taxation, on the other hand, can represent an effective tool for developing the sector. There are several aspects of tax legislation that have an impact on the market for works of art and may be strategic in the context of a policy that aims to promote the growth of the entire cultural sector. The latter is the purpose of this work: to outline the existing tax aspects inherent to the art sector and to give voice to a sector which, although often placed in the background, could always have significant developments since investing in artistic works, usually, results in low-risk investments designed to increase their value over time.[2]

2. European perspective on the tax regime of art

A question arises: are the proceeds from the sale of works of art subject to taxation? As often happens in the tax field, the answer to this type of question is neither simple nor univocal for all possible cases.

At the outset of any further consideration, the various "categories" of collectors must be distinguished. It is believed that it is possible to identify three different types of collectors. First, a so-called "amateur" or collector *sensu stricto* can be identified, to be classified as a mere enthusiast, a person who collects exclusively for passion and love for art in general or for a specific artistic period or for a particular author and who – starting from the moment of purchase – does not harbour any speculative intention of resale. Then, there is the category of the so-called "collectors merchants" who collect, buy and resell works on an occasional basis, aiming, however, from the moment of purchase of the work (understood as a mere speculative investment) to resale it to make a profit. Finally, the category of "professional" collectors – those who, with habit and professionalism, buys and sells works in order to make a profit, generating a real business income deriving from the conduct of a commercial activity.

The sale of artistic goods, as producers of wealth, can lead to tax implications depending on the way in which the subject carries out his conduct. The collector can purchase works of art in the gallery, at auction, directly from the artist, from a private

[2] F. Solfaroli Camillocci, "Taxation, a driver for the Art Market", *Tafter Journal*, February 2018.

person who by habitual profession does not trade in works of art. Depending on the purchase method, the VAT treatment varies, and, even within the same method, the VAT treatment may vary. The application of VAT varies according to the country in which the purchase takes place.

The European Directive 94/5/EC provides that, since 1 January 1995, "the harmonized VAT arrangements adopted by the ECOFIN Council in February 1994 (Seventh VAT Directive) have applied to all transactions in the European Union involving works of art and antiques".[3] This Directive, firstly, eliminates all forms of double taxation which previously stemmed from the application of two different systems by Member States to sales of works of art and antiques and the introduction of the "margin system" as the general rule. According to this system, tax is paid on the vendor's profit margin with no deduction of VAT. Secondly, the Directive applies the country-of-origin principle to all those dealing professionally in works of art and antiques, thereby enabling them to enjoy the same ease and simplicity of operation as private individuals: purchase of goods without tax formalities anywhere in the European Community, followed by a total freedom of movement. In addition, in order to help the art and antiques market to develop, the Directive contemplates the extension – from six month to two years – for the temporary admission of works of art intended for re-export to circulate throughout Europe without payment of customs duty or charges.

3. VAT regime in Italy

As far as Italy is concerned, the purchase and sale in the art gallery can take place with either the application of the "ordinary VAT regime" or the special regime, the so-called "margin system".[4] The ordinary VAT regime, regulated by the Decree of the President of the Republic (hereinafter: D.P.R.) no. 633/1972,[5] provides for the application of VAT at the ordinary rate, currently 22% on the sale price. The margin regime, governed by

[3] Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC – Special arrangements applicable to second-hand goods, works of art, collectors' item and antiques.

[4] P. Farina, "La fiscalità nella compravendita di opere d'arte", *Parte prima: le imposte nell'acquisto*, 3 January 2019, https://farinastudiolegale.com/2019/01/03/la-fiscalita-nella-compravendita-di-pere-darte-parte-prima-le-imposte-nellacquisto-di-pierluigi-farina-avvocato-farina-studio-legale/ (accessed: 2.03.201).

[5] Decree of the President of the Republic, 26 October 1972, no. 633, Establishment and regulation of value added tax, *Official Italian Gazette*, General Series of 11 November 1972 – Ordinary Supplement no. 1.

the Law Decree (hereinafter: D.L.) no. 41/1995[6] (which transposed the European Directive 94/5/EC) provides, as mentioned above, the application of VAT on the difference between the sale price and the purchase cost plus repair and accessory costs. It follows that the tax base on which VAT is applied is not constituted, as for the sales under the ordinary regime, by the sale price, but by the margin realised by the retailer.

The conditions required for the application of the margin regime, pursuant to Article 36 of the D.L. no. 41/1995 are the following:

a) the transfer must relate to the art objects indicated in the Table attached to the D.L. no. 41/1995 (paintings, prints, engravings, sculptures, tapestries, enamels, artistic photographs, postage stamps);
b) the above mentioned items must have been purchased from:
   i) private collectors residing in Italy or in another EU state;
   ii) companies or professionals who have not been able to deduct the VAT relating to the purchase or import;
   iii) operators resident in another European country who benefit in their country from the exemption granted to small businesses;
   iv) VAT subjects who operate under the margin regime and have subjected the transfer to the margin regime.

Even the sales of art objects made through auction sales agencies are subject to the margin regime, pursuant to Article 40-*bis* of the D.L. no. 41/1995, when the agencies act in their own name and on behalf of private individuals, on the basis of a commission contract. In this case, VAT is due on the difference between the consideration paid by the successful bidder, equal to the hammer price of the work plus the buyer's premium and the amount that the organiser of the auction corresponds to the client, equal to the hammer price net of the commission due to the auction organiser (the so called seller's commission).

Finally, the collector can also purchase the works from private individuals, who do not carry out the business of buying and selling works of art in a professional manner. In this case, as the requirements for the application of VAT are not met, the purchase is not subject to tax.

It should be noted that if the artist himself – or his heirs – makes the sale to a third party, the VAT rate is reduced to 10%. However, this method of purchase is scarcely practiced, since most of the sales take place through galleries, without establishing a direct relationship between artist and collector.

[6] Law Decree, 23 February 1995, Urgent measures for the reorganization of public finances and for employment in depressed areas, *Official Italian Gazette*, General Series of 23 February 1995, no. 45.

A very recent clarification from the Italian Revenue Agency specified that if the works are not made in the entirety of the artist-taxable person, they cannot benefit from the reduced rate of 10%. The specific case concerns the response to question n. 303 of 2 September 2020 which had to clarify whether an artist who designs, with the use of the computer and using three-dimensional software, original figurative sculptures that subsequently prints with special 3D printers, fell within the field of application of the reduction. According to the Revenue Agency, the operation cannot be facilitated as the Table attached to the D.L. no. 41/1995, as far as sculptures are concerned, refers to "original works of statutory art or sculptural art, of any material, as long as they are entirely made by the artist". Furthermore, it should be noted that for each project up to 200 per colour were printed, which contrasts with the "limited edition" envisaged by the D.L. no. 41/1995, which admits a number of sculptures limited to a maximum of eight copies.

Today 22% is the maximum rate set in Europe for the taxation of works of art sold by galleries, while the minimum is set in Switzerland (8%).

4. Capital gains regime in Italy

The sale of works of art by private individuals in Italy, in addition to not being a transaction subject to VAT, does not generate any taxation by way of tax on the capital gain generated by the sale itself.[7] The reference legislative text is the Consolidated Law on Income Taxes (hereinafter: TUIR),[8] as there is no specific legislation regarding the taxation of purchases and sales made by individuals. First, it is necessary to take into account Article 6 TUIR and assess whether the revenues generated from the sale of a work of art can fall into one of the expected income categories. The question is answered – in part – by Article 55 of the TUIR by examining the concept of business income, that is the income deriving from an "exercise as a habitual professional, even if not exclusive to the activities indicated in Article 2195, of the Italian Civil Code (…) even if not organized in the form of an enterprise".

The Court of Cassation believes that the requirement of habituality must be assessed on a case-by-case basis in relation to the economic significance of the economic transactions carried out and their complexity. If it is true that one who carries out isolated transactions cannot be defined as an entrepreneur, one cannot agree with an approach desired by the Supreme Court according to which even the completion of a single transaction

[7] M. Bodo, "Arte & Fisco: il collezionismo e la tassazione dei proventi derivanti dalla vendita di opere d'arte", *Collezione da Tiffany*, 10 January 2019.

[8] Decree of the President of the Republic, 22 December 1986 no. 917, Consolidated Law on Income Taxes (TUIR), *Official Italian Gazette*, no. 302 of 31 December 1986.

could constitute entrepreneurial activity in the event that it has a substantial economic significance and is accomplished through the existing position of a series of complex transactions. However, jurisprudence has identified a number of circumstances in the presence of which it can be considered that the purchase and sale of works of art carries out a commercial activity: continuous nature of the activity; relevance of the business; lack of other income; short period of time between the acquisition and sale of the asset; carrying out activities aimed at increasing the value of the asset.

Moreover, the taxpayer may submit a request for a ruling to the Financial Administration to be sure about the taxability of the transaction if there is objective uncertainty about the tax qualification of the case.[9]

As for the determination of taxable income, based on Article 71 of TUIR, the income deriving from occasional commercial activities consists of the difference between the amount received during the year and the expenses related to the production of income, with the clarification that the amount of expenses cannot exceed amount of income received.

According to the prevailing orientation, the indeterminacy of the discipline and the interpretative uncertainties could be overcome with the introduction of a regime similar to that envisaged for capital gains deriving from securities transactions or for real estate capital gains, providing for, for example, the taxation of the capital gain from the sale of works of art if the sale takes place within a certain period of time of the purchase and taking into account the expenses incurred. Alternatively, a flat-rate taxation of the sale price could be applied, with a progressive reduction of the tax base in relation to the years that have passed.

In the event that there is no business income, it will be necessary to check whether the proceeds from the sale are not subject to other regulations. On this point it should be remembered that prior to the issuance of TUIR, Article 73 of the D.P.R. 597/1973[10] of 29 September 1973, precisely in relation to the activity of buying and selling works of art placed outside the business activity, taxed any capital gains achieved by reason of transactions conducted with a speculative spirit even when they were not part of business income. The same Article then identified an objective criterion without the possibility of contrary proof aimed at defining the speculative intent: the case in which the sale followed the purchase of the work less than two years later.

The same case has not, however, been transposed within the TUIR and the only reference is made by Article 67(1)(i), according to which income deriving from non-habitual

[9] E.M. Bargarotto, "Regime tributario della cessione di opere d'arte", *Rassegna Tributaria* 2019, n. 2.

[10] Decree of the President of the Republic, 29 September 1973, no. 597, Establishment and regulation of personal income tax, *Official Italian Gazette*, General Series of 16 October 1973, no. 268, Ordinary Supplement no. 1.

commercial activities constitutes different income. The reason for this legislative choice has been identified by some in the *noluntas taxandi* towards tax regimes that could lead to tangible discrimination between the sale of any precious object and the alienation of one of these qualifying "work of art".

From this it follows that the legal structure of the TUIR imposes a general criterion capable of being applied to any different income and therefore to impose itself on the income generated by any commercial activity not exercised in a habitual way.

Ultimately, with regard to the different types of "collectors" exhibited in the first paragraph, the following can be summarised. As far as the merchant is concerned, we can reasonably speak of both business income pursuant to Articles 55 *et seq*., TUIR and liabilities for VAT purposes as required by Article 4 of the D.P.R. no. 633/1972. What we have identified as an occasional speculator may indeed generate the various incomes referred to in Article 67(c.1)(i), TUIR not finding, however, as seen above, subject to VAT due to lack of the habitual requirement. The collector, on the other hand, will not be subject to any taxation.[11]

The following remarks give an overview of the different capital gains taxes existing on works of art in the main European countries.[12]

In Austria, capital gains made from the sale of private assets held for more than one year are tax-exempt.

In Belgium, capital gains on the disposal of cultural property are not taxed if they are carried out as part of management of private assets.

In France, the rate is 5% on sales exceeding EUR 5,000 made by individuals. There is also the possibility to opt for the ordinary scheme of capital gains.

In Germany, generally, capital gains on the disposal of art assets are fully taxable, but capital gains on the disposal of private art assets by individuals are only taxable if the assets were held for a period of less than one year and if the collection is not considered as trade or business.

In Luxembourg, no tax on capital gains is applicable if the work of art is held for more than six months.

[11] F. Migliorini, "Vendita di opere d'arte: pianificazione fiscale", *Fiscomania.com*, 20 August 2018.

[12] Data from: Deloitte, *Fine Art – Direct and indirect taxation aspects, a masterwork of complexity*, https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artfinance-taxmatrix-16092013.pdf (accessed: 2.03.2020).

5. Inheritance tax applicable to the transfer of works of art by inheritance

Another critical profile is that relating to the inheritance tax applicable to the transfer of works of art by succession. The tax is applied on the net value of the inheritance according to different rates established in relation to the relationship between the deceased and the beneficiary of the transfer. They vary from 4 to 8%, but a deductible of one million euros is envisaged for spouses and relatives in a straight line (the deductible is equal to 100 thousand euros for brothers and sisters and 1.5 million euros for disabled beneficiaries).

Works of art declared "cultural heritage" according to the rules of the Code of cultural heritage and landscape[13] before the death of the owner, are excluded from the hereditary assets provided that they have been acquitted the conservation and protection obligations. On the other hand, a tax reduction of 50% of the value of the assets is due if they have not been subjected to a restriction prior to the opening of the succession.

For inherited works of art, a specific rule must be taken into account for which money, jewellery and furniture are considered included in the hereditary assets for an amount equal to 10% of the total net taxable value of the estate, even if not declared or declared for a lesser amount, unless an analytical inventory drawn up pursuant to the civil procedure code does not show the existence for a different amount. In this regard, "furniture" is considered to be the set of assets intended for the use or decoration of homes. This is the so-called presumption of belonging to the hereditary asset of money, jewellery and furniture to the extent of 10% of the asset itself. The law, in fact, in consideration of the easy concealment of this kind of assets, presumes their existence based on a percentage of the assets, although this is a presumption that can be won by the taxpayer by drawing up an inventory. This rule, however, entails an unequal treatment between works of art belonging to the deceased who were intended to decorate the home (which therefore benefit from the 10% presumption) and works of art located in galleries, museums, exhibitions or which are kept in bank vaults, to which the aforementioned presumption does not apply. It is clear that this obsolete discipline induces collectors to use works of art to decorate their homes and therefore discourages their free circulation.

[13] Legislative Decree, 22 January 2004, no. 42, Code of cultural heritage and landscape, *Official Italian Gazette* of 24 February 2004, no. 45.

6. Imports of works of art from non-European states

In case of purchases of works of art perfected in non-European countries, the introduction into Italy (technically "import") is subject to the reduced VAT rate of 10%, payable to customs, through the presentation of a specific customs declaration.

With regard to the importation of art objects, the Ministry of Finance with the Circular of 22 June 1995, no. 177 (*VAT – Special regime for resellers of used goods, art objects, antiques or collectibles)*, had provided that the application of the reduced rate of 10% was subject to the release by the Ministry of Cultural Heritage and Activities of a specific declaration certifying, prior to import, the character of an art object.

Taking into account that the Ministry of Cultural Heritage, pursuant to Article 72 of Code of cultural heritage and landscape, issues the certificate of cultural property only for objects that are by an author no longer living and whose creation dates back to over fifty years, given that, instead, they are objects of art even those made by living artists and whose creation dates back to less than fifty years, the Financial Administration, with Circular no. 24/E of 17 May 2010 (*Methods of applying the reduced VAT rate of 10% on imports of art, antiques or collectibles*), has rectified its previous provisions and specified that for the recognition of works of art it is necessary to refer to the Community provisions on customs matters, and, in particular, to the Combined Nomenclature of the Customs Tariff shown alongside of each asset indicated in the aforementioned Table attached to the D.L. no. 41/1995.

It is clear that the difference in VAT rate between purchases made in Italy (22%) and purchases made in non-European countries (10% VAT on imports into Italy) encourages collectors to buy abroad, penalising the art market in Italy. It should also be noted that the tax rate, although reduced by 10% on imports into Italy, is still higher than that envisaged by other European countries, such as the United Kingdom (5%), France (5.5%) and Germany (7%).

An exception from the above is when the works of art are held abroad by Italian taxpayers. The Circular no. 43/E/2009 (Emergence of assets held abroad) of the Italian Revenue Agency, has included works of art among foreign investments of a financial nature. These are investments that, regardless of the actual production of taxable income in Italy, are monitored in the tax return of resident individuals.

7. Taxation of artistic services performed in a different country than that of the artist's tax residence

An analysis of taxation of foreign artistic services must be prefaced by defining what "artist" means for tax purposes. In the Italian tax system we find a single definition in Article 53(1) of the TUIR. This provision includes income from self-employment also those produced through the exercise of arts and professions.[14] The concept of artist is also present in international law, in the OECD Model Tax Convention on Income and on Capital 2017 (hereinafter: OECD Convention). The definition that we find there differs from the Italian one: in fact, within this model the taxation of the income of artists and sportsmen is regulated by Article 17 which includes, for example, theatrical or cinematographic actors in the category of artists; television presenters; singers and musicians in general; photographers and painters.

The artist is fiscally resident in Italy, pursuant to Article 2 of TUIR, when, for most of the tax period, he maintained his domicile or residence in Italy for civil law purposes. Pursuant to Article 3(1) of the Decree, resident individuals are taxed in Italy for all their income, wherever they are received ("worldwide taxation"), while non-resident individuals are taxed exclusively on income produced in the territory of the state. Article 17 para. 1 of the OECD Convention, on the other hand, establishes that the income received by a theatre, cinema, radio or television artist or a musician, for his personal activity exercised in another state, can be subject to a taxation in this other state (income received status).

The artist who receives income for a service performed abroad is subject to taxation both in the country of execution of the work or service and in the country of tax residence. In fact, in Article 17 of the OECD Convention, the adverb "only" is missing, which would determine the taxing power in a Contracting State. This means that, for the artist, a situation of double taxation could arise. The latter can be eliminated through the application of an exemption criterion or a credit for foreign taxes.

Unlike other self-employed workers, whose taxation methods are defined in Article 5 of the Convention model, the taxation of the artist has some peculiarities. As far as self-employed workers are concerned, they can be subjected to taxation in the state in which they provide the service, only if, in that state, there is a permanent place of business (permanent establishment). Otherwise, their income received abroad is taxable only in their country of tax residence. As far as artists are concerned, however, a particular method of taxation has been envisaged: taxation can take place in a state

[14] J. Staines, *Tax and Social Security – a basic guide for artists and cultural operators in Europe*, IETM 2004–2007.

for the sole fact that it is made there. This, regardless of the existence of a permanent establishment.[15]

In order to avoid situations of double taxation of the same income, the OECD Convention has decided to apply a taxation on the income of the artist who performs foreign services on the basis of the territorial requirement. This mechanism, like the tax credit, allows to avoid double taxation of income and also allows to avoid situations of possible tax evasion. In fact, in the absence of a specific provision such as that contained in Article 17 of the OECD Convention, a successful artist could reside in a state with privileged taxation and occasionally perform in foreign states taking advantage of non-taxation due to the reduced stay.[16]

8. Conclusions

An overview of the Italian tax legislation on works of art leads to a conclusion that the system is more geared towards favouring the "static" position of the private collector rather than the interests of the operators of the art market (galleries, auction houses, etc.). The private art market is characterised by uncertain tax rules that confuse operators, generating a double negative effect on the sale of works of art. On one hand, some collectors could risk being the recipients of notices of assessment that can hardly be dismissed, and the main difficulty appears to be the problem of proof – after many years it might be difficult to find the necessary documentation to justify the original cultural and non-speculative intentions. On the other hand, some subjects, taking advantage of uncertainty of the law, could escape the tax authorities and mask their speculative intent, providing some proof of the collecting purpose of the transactions made. It is therefore evident that the fiscal regime as outlined is not satisfactory.

In conclusion, there is an absence, for the art market, of clear and consistent tax legislation. The Italian law has, in truth, shown signs of interest in the sector by providing for a reform on the circulation of works of art and by preparing a proposal for the revision of crimes against the artistic heritage. There is still a lot to be done to ensure that tax legislation is the driving force of the sector and not an obstacle, not only in Italy but also at the EU level. A coordinated reform is needed in order to give answers to common problems.

[15] J. Sullivan, "Taxation of artists", *Arts Law Centre of Australia*, 30 June 2016.

[16] F. Migliorini, "Tassazione dei redditi degli artisti per prestazioni all'estero", *Fiscomania.com*, 28 June 2020.

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Summary

Collecting works of art: Are they taxable? An Italian perspective

This article provides an overview of the tax treatment applicable to individuals, whether private individuals or galleries or auction houses, who buy, sell and exchange works of art. It outlines the existing situation on the matter with a specific focus on Italian legislation. The art sector, in fact, no longer considered niche and has all the prerequisites to acquire an ever greater importance, including in the investment sector as a portfolio diversifier.

Keywords: art, tax regime, Italian tax regime

Streszczenie

Kolekcjonowanie dzieł sztuki: czy podlega opodatkowaniu? Perspektywa Republiki Włoskiej

W artykule przybliżono reżimy podatkowe – ze szczególnym uwzględnieniem włoskiego – obowiązujące osoby fizyczne i prawne, zarówno indywidualnych kolekcjonerów, jak i galerie sztuki czy domy aukcyjne, jeżeli zawierają umowy sprzedaży oraz umowy zamiany dzieł sztuki. Sektor sztuki nie uchodzi obecnie za niszowy i jego znaczenie nadal rośnie, w tym również na rynku inwestycyjnym jako sposób dywersyfikacji portfela.

Słowa kluczowe: sztuka, reżim podatkowy, włoski reżim podatkowy