

Italy v. Dolce & Gabbana S.r.l. [2023, Italian Supreme Court]

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1. Facts

The business structure submitted to judgment involved three companies and two contracts. Dolce & Gabbana S.r.l. (DG S.r.l.) was the trademark licensee and sublicensed to its subsidiary Dolce & Gabbana Industria (DG Industria) the right to produce, distribute, and sell the products worldwide, undertaking, in return for the receipt of *royalties*, to carry out promotion and *marketing* activities. To carry them out in the North American territory, it engaged Dolce & Gabbana USA Inc. (USADG USA) by means of a *service agreement* entered into on March 16, 2005, whose annual remuneration corresponded to the costs attributable to the provision, plus a markup varying according to the amount of the cost, with analytical accounting. The three companies also entered into a *supply agreement*, whereby DG Industria appointed DG USA its distributor in mono-brand stores in the United States, DG USA undertook to bring the establishments into line with quality standards useful to the trademark's renown, and DG S.r.l. undertook to pay it a support contribution, calculated on the costs exceeding a certain percentage of the revenue of those stores.

The Italian tax authority made two disallowances. As to the *service agreement*, it denied the deductibility of part of the services for lack of inherence, on the grounds that these were generic services, inherent in the ordinary activity of the reseller and already remunerated by the resale margin. It also considered that the reimbursable costs were generically defined, without a cap, without accounting documentation or prior approval, so that only the costs incurred also in the interest of the parent company were admitted. It also rejected the pass-through of the *markup*, relying on Circular No. 32/1980¹, according to which the margin in favor of the provider is recognizable only when the services constitute its typical activity. As to the *supply agreement*, the disallowance was total, also for lack of inherence: the indefiniteness of the costs and the absence of accounting transferred to DG S.r.l. the risk of DG USA's inefficiencies, which no independent third party would assume, and the economic study presented relied on companies of multinational groups, and not on independent enterprises.

The Provincial Tax Commission of Milan and the Regional Tax Commission of Lombardy (CTR) dismissed the challenges. The CTR held that DG USA

¹ ITALY. Ministero delle Finanze. Circolare n. 32/9/2267, of September 22, 1980. Rome, 1980.

also performed activities related to the reseller DG Industria and that the costs of services aimed at increasing sales are proper to the reseller, and not to the licensee, to whom only the costs intended to raise the prestige of the trademark would be inherent. It considered that the expert report and the audit certification presented were mere opinions, without binding force, and that the markup would not be deductible because the services would have been rendered in the common interest of more than one party. On the *supply agreement*, it was added that, since DG S.r.l. was a mere licensee, any increase in the value of the trademark would only oblige it to pay a higher price to the owner.

The taxpayer raised five grounds, four of them with substantive questions of interest to this study. In grounds 3.7 and 3.8 of the appeal, it challenged the exclusion of the *mark up*, alleging nullity for merely apparent reasoning. The first rule did not exclude the inclusion of a profit margin on cost in services rendered to companies of the same group, and the second defined normal value as the average price charged under conditions of free competition, which also requires taking that profit margin into account. Circular No. 32/1980, in turn, would be outdated. In grounds 4.1 and 4.2, it argued that the assessment of inherence does not require a relationship between costs and revenues and pointed out the omission in examining the decisive fact that DG S.r.l. had assumed, related to DG Industria, the contractual obligation to develop the trademark's renown. The Public Prosecutor's Office opined in favor of granting third and fourth grounds.

2. Court decision

Initially, the Supreme Court dismissed the allegations of nullity directed at the chapter on the inherence of the costs of the *service agreement*. It reaffirmed the consolidated understanding that the principle of inherence is derived from the very notion of business income and reflects the need to relate costs to the exercise of the company's activity, excluding only those situated in a sphere foreign to it, without any assessment in terms of usefulness or advantage. The assessment of inherence is, therefore, merely qualitative, and is not to be confused with the congruity of the cost, even though uneconomical conduct may function as an indication of its defect.

It considered, however, that in intragroup transactions the existence of the cost, its inherence, usefulness, and determinability are distinct questions, all of which precede any adjustment based on normal value. It is up to the taxpayer to prove them, for which it is not enough to produce a contract and invoices, specific evidence of the elements necessary to determine the usefulness obtained by the associated recipient company is required. Since the CTR had concluded, as a matter of fact, that the correct allocation of the cost among the recipients of DG USA's services had not been demonstrated, those chapters escaped the control of legitimacy.

The ruling changes direction when addressing grounds 3.7 and 3.8. The Court observed that the CTR considered the profit margin inapplicable because it understood a *cost sharing agreement* to be present, a conclusion it drew from the fact that the costs were only partially passed on to DG S.r.l. This reasoning contradicts the premise, accepted by the CTR itself, that only the costs of services performed in the exclusive interest of the company are inherent, because, if the dispute concerns the *mark up* levied on costs already recognized as deductible, the partial pass-through cannot serve as an indication of cost sharing.

After going through the OECD guidelines on intragroup services and cost sharing agreements, the Court stressed that, in an *arm's length* transaction, an independent enterprise would generally charge for services so as to earn a profit, rather than provide them at cost, and that the economic alternatives available to the recipient must also be considered². Hence the conclusion that the CTR should first have qualified the contract in light of what was argued by the parties, only then to verify the occurrence of a ground for excluding the *mark up*, based on the nature of the provision and on its relationship with the activity of the providing company.

As to the *supply agreement*, the Court granted grounds 4.1 and 4.2, invoking precedents according to which the costs of promoting trademarks may also be inherent to the licensee's activity, which may likewise derive usefulness from that support for the increase of its own commercial activity, something that must be ascertained case by case. The CTR made three errors: it based its decision on the alleged lack of economicity of the costs, an aspect irrelevant to assessing inherence; it stated that the licensee would not obtain any benefit from the trademark's advertising, despite recognizing that it paid *royalties* precisely for the use of that trademark; and it ignored that DG S.r.l., although not the owner, had contractually assumed the obligation to promote its dissemination.

In the end, the Court stressed that the total exclusion of deductibility is only possible when it is concluded that the expense is not inherent to the company's activity, and not because its value would deviate from the market price.

In sum, grounds 3.7, 3.8, 4.1, and 4.2 were granted; grounds 4.3 to 4.6 and 5 were absorbed, as moot, and the others were rejected or declared inadmissible, with the annulment of the judgment and remand to the second-instance Tax Court of Justice of Lombardy.

3. Critical analysis

3.1. The logical precedence between inherence and normal value

The first merit of the precedent lies in organizing the stages of review: the existence of the cost, inherence, usefulness, and measurability are questions prior

² OECD. *Transfer pricing guidelines for multinational enterprises and tax administrations* 2022. Paris: OECD Publishing, 2022, p. 324, paragraph 7.35.

to and distinct from the adjustment according to normal value³. The practical consequence is that the violation of transfer pricing rules does not, by itself, authorize the total disallowance of the expense, but only its adjustment to the *arm's length* standard, and, in the opposite direction, total disallowance presupposes an assessment of non-inherence, and not an assessment of price. It was precisely the confusion between these two levels that vitiated the regional judgment, which at times spoke of inherence, at other times of reasonableness or economically irrational conduct.

The warning is also relevant to the Brazilian scenario. Under Brazilian Law No. 14,596/2023, the delineation of the controlled transaction and the comparability analysis are prior and autonomous stages in relation to the selection of the method and determination of the benchmark price, pursuant to Article 6. The deductibility test of Article 47 of Law No. 4,506/1964 and Article 311 of the Income Tax Regulation operates on a distinct level. The legislator itself recognized the unidirectional character of the adjustment by providing, in Article 18, Paragraph 4, of Law No. 14,596/2023, that adjustments intended to reduce the IRPJ and CSLL calculation bases or to increase the tax loss will not be admitted, a command that limits the fiscal adjustment to the amount of the deductible remuneration⁴.

The transposition of the thesis requires, however, a relevant reservation, and it is here that the Brazilian model departs from the Italian one. To state that the transfer pricing rule is a measurement rule, rather than a disregard rule, describes the general rule well, but does not exhaust the regime of Brazilian Law No. 14,596/2023. Article 8 authorizes the disregard or substitution of the controlled transaction when it is concluded that unrelated parties, acting in a commercially rational manner, would not have carried it out as delineated, prohibiting only that disregard rest exclusively on the absence of comparables. Article 23, Paragraph 5, points in a similar direction, which determines the adjustment of the calculation base when the activity does not result in a benefit to the recipient, Article 27, sole paragraph, which renders non-deductible the interest of a transaction delineated as a capital operation, and Article 34, Paragraph 1, which reallocates to the Brazilian entity functions, assets, and risks that are not proven. The logical precedence advocated by the Italian Supreme Court therefore survives as a rule for structuring the reasoning, not as an absolute prohibition on outcomes equivalent to disallowance.

³ LANG, Michael; PETRUZZI, Raffaele et al. (ed.). *Fundamentals of transfer pricing: a practical guide*. Ch. 9: Transfer pricing and intra-group services. Alphen aan den Rijn: Kluwer Law International, 2019, p. 341.

⁴ TOMAZELA, Ramon. *Manual dos preços de transferência: a adoção integral do padrão "arm's length"* no sistema tributário brasileiro pela Lei n. 14.596/2023. 2nd ed. rev., updated and expanded. São Paulo: Thomson Reuters Brasil, 2025, p. 385.

3.2. *The benefit test and the reasonable expectation of usefulness*

The second point of convergence lies in the way the Court analyzed the usefulness of the service to the recipient. By requiring that the licensee's capacity to benefit from the promotion of the trademark be verified in the specific case, and by rejecting the CTR's generic denial, the precedent approaches what Brazilian Law No. 14,596/2023 enshrined, in Article 23, Paragraphs 1 and 2, as the benefit test. The relevant inquiry is whether the activity provides a reasonable expectation of economic or commercial value for the other party, to improve or maintain its commercial position. The question, at bottom, is whether unrelated parties would be willing to pay for that activity or to carry it out on their own account.

The reference to reasonable expectation is decisive, since it is not required that the pursued end be achieved. The engagement of *marketing* services may fail to increase the sales volume without this recharacterizing the service, since failure is a contingency inherent to economic activities⁵.

CTR's reasoning erred in converting an assessment of expectation into an assessment of result, deducing the absence of benefit from the circumstance that the licensee was not the owner of the trademark and, therefore, did not capitalize on the increase in its value.

The Italian Supreme Court corrected course by giving weight to two concrete facts: the receipt of *royalties* linked to the dissemination of the trademark and the contractual assumption, by the licensee, of the duty to promote it.

3.3. *Multiple beneficiaries and allocation criteria*

The tax authority's strongest argument was that DG USA's services also benefited the reseller DG Industria, which is why only the costs of exclusive interest to DG S.r.l. would be deductible. It is necessary, however, to distinguish between two situations that the CTR merged. The first is duplication, in which the recipient already has the activity internally, as in the cases *Romania vs. A.S.A.* and *France vs. Rayonnages de France*, in which local directors performed functions equivalent to those of the imported services, which led to the upholding of the assessments⁶. The second is plural benefit, in which the same activity simultaneously benefits

⁵ TOMAZELA, Ramon. *Manual dos preços de transferência: a adoção integral do padrão "arm's length" no sistema tributário brasileiro* pela Lei n. 14.596/2023. 2nd ed. rev., updated and expanded. São Paulo: Thomson Reuters Brasil, 2025, p. 359-360. OECD. *Transfer pricing guidelines for multinational enterprises and tax administrations 2022*. Paris: OECD Publishing, 2022, p. 323, paragraph 7.32.

⁶ FRANCE. Cour administrative d'appel de Douai. *Rayonnages de France*, 4e chambre, n. 19DA01682, Feb. 10, 2022. Available at: <https://tpcases.com/france-vs-rayonnages-de-france-february-2022-caa-of-douai-no-19da01682/>. Accessed on: July 31, 2026. The Romanian precedent is reported by TOMAZELA, Ramon. *Manual dos preços de transferência: a adoção integral do padrão "arm's length" no sistema tributário brasileiro* pela Lei n. 14.596/2023. 2nd ed. rev., updated and expanded. São Paulo: Thomson Reuters Brasil, 2025, p. 364-365.

several entities without overlap, as in the global *marketing* campaign conducted by a shared services center and remunerated by several companies in proportion to the benefits, alongside local campaigns of the subsidiary⁷. The distinction has express footing in Brazilian law, since Article 23, Paragraph 3, II, of Law No. 14,596/2023, only denies benefit to an activity that represents a duplication of a service already provided to the taxpayer or that it has the capacity to perform.

The Dolce & Gabbana case appears closer to a situation of plural benefit, although that qualification depends on the functional delimitation of the activities performed by DG USA and on the identification of which economic benefits were attributable to each entity.

The technically correct solution would not be to exclude the cost, but to define an apportionment criterion. This is the logic of Article 24, Paragraphs 1 to 3, of Law No. 14,596/2023, by determining direct charging whenever it is possible to individualize the costs by recipient, by admitting indirect charging methods in the other cases and by requiring that the allocation criteria reflect the nature and use of the services and produce remuneration compatible with the benefits reasonably expected⁸.

The requirement is not foreign to Brazilian experience. In judging the apportionment of advertising expenses in a national group, for example, the Administrative Council of Tax Appeals (CARF) rejected the revenue criterion because it did not reflect the correlation between the expenses incurred and the benefits effectively received by each company⁹.

On this point, however, the appellant's challenge did not prevail, and the lesson of the decision is relevant. The Italian Court upheld the factual conclusion that the congruity of the cost allocation had not been demonstrated, giving no weight to the expert report and the audit certification presented, which demonstrates the documentary weakness. In a system such as the Brazilian one, in which RFB Normative Instruction No. 2,161/2023 imposes robust supporting documentation, the precedent signals that opinions produced *a posteriori* can hardly replace periodic and contemporaneous statements of the cost base, of the allocation criterion and of the amounts attributed to each entity. The consequence in Brazil

⁷ TOMAZELA, Ramon. *Manual dos preços de transferência: a adoção integral do padrão “arm’s length” no sistema tributário brasileiro* pela Lei n. 14.596/2023. 2nd ed. rev., updated and expanded. São Paulo: Thomson Reuters Brasil, 2025, p. 364-365. OECD. *Transfer pricing guidelines for multinational enterprises and tax administrations 2022*. Paris: OECD Publishing, 2022, p. 317, paragraph 7.11.

⁸ OECD. *Transfer pricing guidelines for multinational enterprises and tax administrations 2022*. Paris: OECD Publishing, 2022, p. 321, paragraphs 7.24 and 7.25: centralized advertising campaigns are the typical example of a cost attributable only by approximation, and the apportionment criterion must measure the use of the service and be simple to verify.

⁹ BRAZIL. Administrative Council of Tax Appeals. *Decision No. 1402-007.205*. 1st Section, 4th Chamber, 2nd Ordinary Panel. Case No. 10980.721607/2020-46. Session of December 11, 2024.

may be even more severe than in Italy, because Article 34, Paragraph 1, of Law No. 14,596/2023, authorizes the tax authority, in the face of the lack of reliable information, to allocate to the Brazilian entity the functions, assets, and risks attributed to the other party and to adopt its own estimates.

3.4. *From the prior veto of the margin to the functional analysis of the provider*

The most important chapter of the ruling is the one relating to the markup. The Italian administration relied on a 1980 circular¹⁰ that, in practice, inverted the logic of the *arm's length* standard, since it presumed the absence of a margin, unless it was demonstrated that the services constituted the main object of the provider's activity. The Court did not declare the circular illegitimate, but removed its force as a presumption, by requiring that the exclusion of the margin be grounded on the nature of the provision and on its relationship with the activity of the provider, in light of the conditions that would have been agreed between independent parties. The starting point ceases to be a prohibition and becomes the functional analysis¹¹.

Law No. 14,596/2023 adopts a similar structure, under which the rule is the application of the margin ascertained by a comparability study on the cost base, and the exception is the prohibition of a margin on the so-called *pass-through costs*, provided for in Article 24, Paragraph 4. This prohibition reaches the pass-through of amounts relating to activities performed or acquisitions made from other parties in respect of which the provider does not perform significant functions. Paragraph 5, however, admits the charging of a margin on the costs incurred by the provider to perform such functions.

Both paragraph 7.47 of the OECD guidelines and Article 53, Paragraph 2, of RFB Normative Instruction No. 2,161/2023, exclude sales, *marketing*, and distribution activities from the list of low value-adding services. A structure such as the one examined would therefore not benefit from the simplified 5% margin of Article 53 and would require a *benchmarking* study¹².

A criticism of the ruling itself is, however, warranted. The Court upheld, since it was a factual assessment not subject to review, the conclusion that the allocation of the costs of the *service agreement* had not been demonstrated and, in the same judgment, determined that the remand court reexamined the appropriateness of the margin on those costs. If the cost base attributable to DG S.r.l. remains undefined, it is difficult to specify to what amount the margin would apply,

¹⁰ ITALY. Ministero delle Finanze. Circolare n. 32/9/2267, of September 22, 1980. Rome, 1980.

¹¹ OECD. *Transfer pricing guidelines for multinational enterprises and tax administrations* 2022. Paris: OECD Publishing, 2022, p. 324, paragraph 7.36.

¹² TOMAZELA, Ramon. *Manual dos preços de transferência: a adoção integral do padrão "arm's length" no sistema tributário brasileiro* pela Lei n. 14.596/2023. 2nd ed. rev. updated and expanded. São Paulo: Thomson Reuters Brasil, 2025, p. 379.

so that the granting of grounds 3.7 and 3.8 runs the risk of producing only a nominal victory. Moreover, the Court did not set a criterion for excluding the margin, so that the precedent decides more on the order of the reasoning than on its result, which recommends caution in its application.

4. Conclusions

Judgment No. 2599/2023 did not resolve the merits of the controversy. It annulled the regional judgment and returned to the second instance court the task of qualifying the service agreement and of verifying, in concrete terms, the existence of a ground for excluding the profit margin and the inherence of the advertising support costs. Its importance, however, is methodological and transcends the outcome of the litigation.

The two chapters examined here share the same central question regarding the substitution of concrete analysis by presumptions. The prior denial of the markup, relying on a 1980 administrative circular and on a contractual qualification deduced from the partial pass-through of costs, and the categorical denial of inherence, relying on the premise that the licensee gains nothing from the appreciation of another's trademark, are manifestations of the same defect. Against them, the Court opposed the requirement of a factual assessment, case by case, of the usefulness obtained by the recipient.

For Brazil, which has recently inaugurated the full application of the *arm's length* standard, the ruling offers important guidance in delineating the transaction, qualifying the contract, applying the benefit test, defining the cost base and the allocation criterion, and only then discussing the margin and the method. The warning is that none of these steps dispenses with contemporaneous documentation, under penalty of a correct legal thesis failing for lack of proof.

It is finally worth mentioning that the annulment rested on a defect of reasoning, without setting a substantive criterion for the exclusion of the margin, and the chapter in which the taxpayer was unsuccessful, relating to the proof of the cost allocation, may in practice empty out what it obtained on the legal level. At least two questions remain open: whether Article 8 of Law No. 14,596/2023 authorizes the requalification of preexisting apportionment arrangements as the provision of services and defining what degree of documentary contemporaneity the Federal Revenue Service will require to validate allocation criteria in plural benefit structures.