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Prior Adversarial Hearing and the Resistance Test in Tax Assessment Proceedings

Breach of participatory safeguards in harmonised taxes across desk audits, the burden of factual allegation, and ex ante prognostic review under Order no. 22441/2026

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Current Legal Framework as of 2 November 2026: Order no. 22441/2026 of the Italian Supreme Court of Cassation, Civil Division, consolidates the standards governing the resistance test in prior adversarial proceedings concerning harmonised taxes, binding the court of merit to conduct an *ex ante* probabilistic assessment that remains strictly autonomous from the substantive adjudication of the tax claim.

ABSTRACT

With Order no. 22441/2026, the Italian Supreme Court of Cassation, Civil Division, clarifies the operational scope of **prior adversarial hearing and the resistance test** in European harmonised tax matters arising from desk audits. Under this settled principle of uniform interpretation, a breach of pre-litigation participatory safeguards triggers the **invalidity of the tax assessment notice** solely where the taxpayer discharges the burden of alleging specific, non-pretextual factual circumstances capable of demonstrating, on a probabilistic basis, that the administrative proceedings might have resulted in a less burdensome tax outcome. The tax court of merit is entrusted with an ***ex ante* prognostic assessment** that must not be conflated with full judicial proof on the merits, thereby precluding the downgrading of defensive factual submissions to mere belated litigation pleas and preserving the **burden of specific factual allegation** within its proper procedural framework.

Key Takeaways

- **Harmonised taxes and desk audits:** failure to hold a prior adversarial hearing in Value Added Tax (VAT) assessments vitiates the notice only if the taxpayer puts forward factual elements capable of satisfying the resistance test.
- ***Ex ante* probabilistic review:** the court of merit must evaluate the potential impact of the taxpayer's submissions as at the time when the omitted administrative hearing should have taken place, without demanding judicial certainty of a different outcome.
- **Prohibition against substantive downgrading:** specific factual circumstances adduced by the taxpayer cannot be dismissed merely because they were subsequently reiterated or examined on the merits during judicial tax proceedings.
- **Burden of specific factual allegation:** abstract formal objections do not suffice; the taxpayer must identify concrete facts and documentary elements that could reasonably have steered the tax administration towards a milder assessment.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Tax Law

LEADING DECISION
Italian Supreme Court of Cassation, Civil Division, Order of 30 June 2026, no. 22441 — BNP Paribas Lease Group Leasing Solutions

Legal Principle / Editorial Headnote

In matters concerning European harmonised taxes and desk tax audits, a breach of the duty to conduct a prior administrative adversarial hearing results in the invalidity of the tax assessment notice provided that the taxpayer discharges the burden of stating in concrete terms the factual elements that could have been raised during the administrative phase, thereby advancing a non-pretextual and non-fictitious objection. It falls to the court of merit to verify, through a rigorous ex ante probabilistic evaluation strictly distinct from the substantive review of the merits of the tax claim, whether the omitted defensive submissions possessed a reasonable aptitude to guide the tax administration towards a different or quantitatively less burdensome assessment outcome.

01. ORIGINS AND LEGAL FRAMEWORK OF PRIOR ADVERSARIAL HEARINGS IN DESK TAX AUDITS

The conceptual pair formed by the **prior adversarial hearing and the resistance test** represents one of the most intricate and consequential developments in Italian and European tax adjudication over recent decades. Within the context of tax audit and inspection activities, the requirement to secure timely participation by the taxpayer before the issuance of a tax assessment notice serves a twofold systemic purpose: on the one hand, upholding **due administrative process** as an essential safeguard protecting the private party's patrimonial sphere; on the other hand, advancing the efficiency, economy, and accuracy of administrative tax enforcement by preventing serial litigation rooted in evidentiary or factual misunderstandings that could readily have been resolved at the pre-litigation stage.

This institutional dialectic has encountered systematic friction precisely in relation to **so-called desk audits**, namely administrative review activities carried out by the tax office exclusively on the basis of data, schedules, questionnaires, or documents already held by the Treasury or transmitted by the taxpayer, without any on-site entry, inspection, or verification conducted at the taxpayer's business premises. Whereas for on-site inspections the sixty-day standstill period set forth in Article 12(7) of Law no. 212 of 27 July 2000 long operated as an insurmountable statutory safeguard, the

absence of an equivalent general rule governing office-based audits generated a pronounced **fragmentation of procedural protections**.

Historically drawn by supreme court case law and endorsed by the Italian Constitutional Court prior to the enactment of the general participatory principle under Article 6-bis of the Taxpayer's Bill of Rights, the dividing line rested upon the dichotomy between **non-harmonised taxes** and **harmonised taxes**. With respect to domestic direct taxes, the absence of an express statutory mandate precluded the recognition of a generalised duty to invite the taxpayer to an adversarial hearing, confining the invalidity of the assessment notice solely to the specific hypotheses expressly enumerated by the tax legislature[D1].

Conversely, in matters concerning Value Added Tax (VAT) and customs duties, the direct applicability of European Union law principles enshrined in Article 41 of the **Charter of Fundamental Rights of the European Union** mandated the non-derogable recognition of the right to be heard prior to the adoption of an adversely affecting individual measure. Even so, lest the participatory safeguard degenerate into a purely dilatory or formalistic device, European Union law made the remedy of **annulment (voidability) of the tax assessment notice** conditional upon passing a stringent threshold filter: demonstrating that the administrative procedure, had the adversarial exchange been duly initiated, could reasonably have led to a different outcome or to a less onerous tax liability.

02. THE CASE DECIDED BY SUPREME COURT ORDER NO. 22441/2026: CHARACTERISATION OF FACTORING AND OMITTED SUBMISSIONS

2.1 — From VAT Reassessment to Contractual Recharacterisation: Factual Background

The dispute brought before the Italian Supreme Court of Cassation originated from a tax assessment notice served upon a leading financial institution in relation to **Value Added Tax** for the 2008 tax year. The tax office reassessed for taxation purposes the commissions paid under factoring agreements, disallowing the **VAT exemption regime** claimed by the company pursuant to Article 10(1)(1) of Presidential Decree no. 633 of 26 October 1972. According to the tax administration's reconstruction, the services rendered did not constitute a credit transaction or financial advance, but rather mere debt management and debt collection services, which are subject to VAT at the standard statutory rate.

The assessment stemmed entirely from a **desk audit**, conducted exclusively within the tax administration's offices without extending any formal invitation to a prior adversarial hearing before serving the assessment notice. Challenging the notice before the Provincial Tax Commission, the taxpayer company pleaded, alongside substantive objections contesting the tax liability on the merits, a fundamental **breach of the pre-assessment adversarial hearing obligation**, as well as an infringement of legitimate expectations engendered by established administrative practice within the financial sector. Following dismissal of the action at first instance, the Regional Tax Commission of Lombardy rejected the taxpayer's appeal, holding that participatory safeguards applied solely to on-site inspections carried out at business premises and that, even considering the harmonised nature of VAT, the taxpayer had failed to satisfy the resistance test adequately.

In upholding the tax adjustment, the appellate court examined the contractual framework governing the parties' relationship and inferred a predominant debt-recovery function on account of the absence of a systematic obligation to disburse advance payments prior to the ordinary maturity date of the assigned receivables. The second-instance judgment confined relief to the taxpayer's subsidiary plea concerning **administrative tax penalties**, setting them aside due to the existence of objective conditions of statutory uncertainty surrounding the VAT treatment applicable to factoring commissions[D2].

2.2 — The Challenge Concerning the Resistance Test and the Appellate Court's Error of Perspective

The taxpayer company lodged an appeal in cassation against the appellate decision, alleging first and foremost an infringement of Article 41 of the Charter of Fundamental Rights of the European Union and general principles of administrative and tax procedure. Counsel challenged the lawfulness of the ruling insofar as it had treated the omission of the **prior adversarial hearing** as cured or legally irrelevant merely because the taxpayer's defensive arguments had subsequently been examined and rejected on the merits in the course of judicial tax litigation. Throughout the appellate proceedings, the company had in fact documented concrete factual elements capable of shaping the legal characterisation of the transactions prior to the formal issuance of the assessment notice.

By Order no. 22441 of 30 June 2026, the Italian Supreme Court of Cassation, Civil Division, upheld this ground of appeal in full[1]. The Court identified a serious error of legal method in the reasoning of the regional appellate court, which had improperly conflated the **procedural resistance test** with the substantive adjudication of the merits of the tax claim. Specifically, the Lombardy appellate court had brushed aside the circumstances adduced by the company by labelling them mere previews of its litigation defences, focusing exclusively on their judicial venue while wholly omitting any *ex ante* prognostic inquiry into their concrete capacity to steer the tax administration towards a different administrative determination.

As emphasised in the Supreme Court's reasoning, the taxpayer had by no means confined itself to raising a sterile formal objection, but had put forward specific **factual and informational elements**: the actual operational mechanics of non-recourse (*pro soluto*) assignments of receivables, the effective financial advance of the receivables' consideration prior to collection from the assigned debtors, its regulatory status as a supervised financial intermediary, and the percentage-based calculation of its remuneration measured against nominal face value. Possessing immediate material substance, those circumstances required the court of merit to perform a threshold review of non-pretextual plausibility; the complete omission of that inquiry compelled the Supreme Court to quash the contested judgment and remand the case to the Tax Court of Second Instance (*Corte di Giustizia Tributaria*) of Lombardy.

03. PRIOR ADVERSARIAL HEARING AND THE RESISTANCE TEST: UNIFORM EVIDENTIARY STANDARDS FOR *EX ANTE* REVIEW

3.1 — Concrete Factual Elements and Overcoming Pretextual Objections

The detailed reasoning set out in Order no. 22441/2026 delineates with analytical precision the evidentiary standards governing the pre-litigation phase in harmonised tax assessments. Its core doctrinal premise rests on the recognition that the taxpayer's right of defence does not operate according to an abstract or purely formalistic logic: for its omission to warrant the **annulment (voidability) of the tax assessment notice**, it must be established that administrative participation would have fulfilled a genuine fact-finding and cognitive function for the tax administration.

The Italian Supreme Court of Cassation reaffirms that the taxpayer bears the burden of alleging specific factual circumstances in concrete terms, sufficient to rule out the possibility that the procedural objection amounts to a pretextual, fictitious, or purely instrumental ploy. Viewed from this angle, the ***ex ante* probabilistic evaluation** entrusted to the court of merit by no means equates to attaining full judicial certainty on the merits, but rests instead upon a prognostic judgment: the court must determine whether the omitted elements possessed, at the exact point in time when the tax office drafted the assessment notice, a reasonable plausibility capable of inducing the administration

either to refrain from pursuing the claim or to recalculate the taxable base on objectively or subjectively more favourable terms.

A foundational doctrinal corollary follows directly from this distinction: the factual elements that may usefully be submitted during the administrative procedure do not necessarily coincide with the facts ultimately proven in contentious judicial proceedings. Consequently, the circumstance that the court of merit deems the taxpayer's substantive objections unfounded following adversarial judicial fact-finding in no way deprives the **procedural invalidity challenge** of legal merit, inasmuch as judicial review of the resistance test must remain temporally anchored to the omitted administrative stage and to its original capacity to inform administrative discretion and technical evaluation.

3.2 — Discharging the Burden of Proof: Specificity and Timeliness of Factual Allegations

On a practical and procedural plane, tax litigation counsel instructed to challenge an assessment notice issued following a desk audit cannot merely advance an abstract plea alleging failure to hold a prior hearing. Discharging the **tax resistance test** requires setting out specifically, already within the introductory petition at first instance, which documentary, accounting, or factual elements would have been laid before the tax office had the invitation to appear been duly served.

Counsel must identify with precision the disregarded informational elements and articulate the logical and causal nexus capable of steering the taxing authority towards an alternative determination—such as the proper construction of complex contractual clauses, the production of supporting accounting vouchers, or the clarification of the financial flows executed between assignor and assignee. Timeliness of allegation operates as a strict threshold condition governing the **admissibility of the ground of challenge**, barring belated supplementation during ongoing litigation or generic reservations to produce evidence at a later stage.

> *The burden of the resistance test in pre-assessment adversarial proceedings does not demand judicial certainty of a favourable outcome, but rather a retrospective ex ante prognosis of reasonable aptitude to yield a less burdensome tax claim.*

Tax defence counsel must therefore steer clear of a twofold pitfall: reducing the procedural objection to a hollow boilerplate formula or, conversely, assuming that the resistance test requires proving full victory on the substantive merits of the dispute. Properly understood, it constitutes a **burden of substantiated factual allegation** designed to restore the procedural equilibrium disrupted by the tax administration, enabling the adjudicating panel to verify the genuine seriousness of the defensive grounds that went unheard prior to assessment.

3.3 — Comparative Case-Law Analysis: Supreme Court Orders nos. 15454/2026 and 11429/2026

The coherence of this interpretive framework finds direct corroboration when compared alongside two further significant rulings handed down by the Italian Supreme Court of Cassation, Civil Division, in the course of 2026. On the one hand, Order no. 15454 of 20 May 2026 provides a clear illustration of the procedural consequences triggered by a failure to discharge the burden of factual allegation[2]. In that dispute—concerning a desk audit disallowing non-business-related expenses for Corporate Income Tax (IRES), Regional Production Tax (IRAP), and VAT purposes against a commercial agent—the taxpayer's appeal was dismissed precisely because the claimant had failed altogether to

specify what factual elements would have been submitted at the administrative stage, omitting even any express reference to the VAT reassessment.

On the other hand, Order no. 11429 of 28 April 2026 quashed and remanded a judgment of the Campania appellate tax court that had demanded from the assessed company rigorous, conclusive proof that a prior hearing would unquestionably have altered the audit outcome[3]. The Supreme Court held that demanding conclusive proof of a different result distorts the underlying purpose of the participatory safeguard, confirming that judicial review must remain confined to a **retrospective prognosis of probable causal aptitude** calibrated against concrete, specific, and factual elements.

Case-Law Parameter	Supreme Court Order no. 22441/2026	Supreme Court Order no. 15454/2026	Supreme Court Order no. 11429/2026
Subject matter of audit	Factoring commissions (2008 VAT) via desk audit	Disallowed agent expenses (2008 IRES, IRAP, VAT)	Off-book records (2013 VAT, IRAP, Personal Income Tax)
Taxpayer's procedural conduct	Alleged concrete factual elements regarding financial advances	No factual allegation nor specific reference to VAT adjustment	Alleged file errors and computational anomalies
Error committed by court of merit	Downgraded factual submissions to mere litigation defences	Abstract exclusion of VAT prior hearing (upheld in outcome for lack of proof)	Demanded conclusive proof of a different assessment outcome
Legal principle applied	*Ex ante* probabilistic assessment of non-pretextual plausibility	Dismissal due to complete failure to satisfy resistance test	Retrospective prognosis of probable causal aptitude
Procedural outcome	Quashed and remanded for fresh *ex ante* review	Appeal dismissed with award of litigation costs	Quashed and remanded for prognostic verification

04. SYSTEMIC IMPLICATIONS, CASE-LAW DISTINGUISHING, AND LITIGATION STRATEGIES FOR DEFENCE COUNSEL

Properly grasping the criteria laid down by the Supreme Court requires careful **case-law distinguishing** vis-à-vis contiguous categories of tax assessment. First, the rule requiring satisfaction of the resistance test upon a breach of pre-assessment participatory rights **does not apply** automatically where the tax assessment follows on-site entries, inspections, or verifications conducted directly at the taxpayer's business premises. Unlike desk audits, in on-site inspections a breach of the sixty-day standstill period mandated by Article 12(7) of Law no. 212/2000 triggers the invalidity of the tax assessment notice irrespective of any evidentiary resistance filter, operating instead as an objective statutory safeguard protecting business privacy and the inviolability of commercial premises.

Second, with respect to tax periods preceding the entry into force of the reform of the Taxpayer's Bill of Rights, the invalidity of an assessment notice for failure to hold a prior hearing in desk audits **does not extend** to domestic non-harmonised direct taxes, save where specific sectoral provisions expressly mandate prior administrative consultation. The subsequent enactment of Article 6-bis of Law no. 212/2000, introduced by Legislative Decree no. 219 of 30 December 2023, generalised the framework of **prior adversarial hearing and the resistance test** across the domestic tax system with effect from 18 January 2024, expressly confirming under paragraph 3 that failure to initiate the participatory procedure vitiates the measure only if the taxpayer demonstrates in concrete terms the defensive grounds that could have been asserted, while carving out automated assessments and prompt-liquidation notices.

From an operational standpoint, these coordinates establish clear strategic guidelines for **tax defence counsel** litigating before the Tax Courts of First and Second Instance (*Corti di Giustizia Tributaria*). Whenever counsel pleads the annulment (voidability) of an assessment notice for failure to initiate a prior adversarial exchange, the **burden of proof** governing the resistance test must be discharged—on pain of inadmissibility or dismissal—right from the introductory petition initiating first-instance proceedings. Defence pleadings must build the ground of challenge around a detailed factual narrative: rather than invoking an abstract infringement of the right of defence, counsel must annex the accounting records, contracts, or technical clarifications that would have been lodged before the tax office, demonstrating their concrete aptitude to reduce or extinguish the tax claim[D3].

Practitioners must likewise pay close attention to the delicate interplay with the statutory regime governing evidentiary preclusions in tax litigation, verifying rigorously that the documents relied upon to substantiate the resistance test were not unlawfully withheld in response to specific administrative questionnaires previously served by the tax office. Only through a rigorous presentation of material, non-pretextual factual elements can defence counsel effectively call upon the court of merit to perform that **retrospective *ex ante* prognosis** which, under Supreme Court jurisprudence, stands as the sole effective safeguard curbing the unilateral exercise of taxing authority.

References & Authorities Cited

Statutory Provisions

- Articles 6-bis (Principle of prior adversarial hearing) and 12 (Rights and safeguards of the taxpayer subjected to tax inspections) of Law no. 212 of 27 July 2000 (Taxpayer's Bill of Rights).
- Article 10 (Transactions exempt from Value Added Tax) of Presidential Decree no. 633 of 26 October 1972.
- Article 7(5-bis) (Burden of proof in tax litigation) of Legislative Decree no. 546 of 31 December 1992.
- Legislative Decree no. 219 of 30 December 2023 (Amendments to the Taxpayer's Bill of Rights).
- Article 41 (Right to good administration) of the Charter of Fundamental Rights of the European Union.

Case Law Cited

1. **Italian Supreme Court of Cassation, Civil Division, Order of 30 June 2026, no. 22441** — BNP Paribas Lease Group Leasing Solutions S.p.A. v. Italian Revenue Agency (*Agenzia delle Entrate*). Outcome: upheld in part the principal appeal, declared the remaining grounds and cross-appeal absorbed, and quashed and remanded to the Tax Court of Second Instance (*Corte di Giustizia Tributaria*) of Lombardy. Para.: grounds, § 1, and operative part.

2. **Italian Supreme Court of Cassation, Civil Division, Order of 20 May 2026, no. 15454** — Bolletta v. Italian Revenue Agency (*Agenzia delle Entrate*). Outcome: dismissed the appeal and ordered the appellant to pay litigation costs. Para.: grounds, § 2.4, and operative part.

3. **Italian Supreme Court of Cassation, Civil Division, Order of 28 April 2026, no. 11429** — Ri.Sa. Sas di Lo.Ge. e C. and partners v. Italian Revenue Agency (*Agenzia delle Entrate*). Outcome: upheld in part the appeal and quashed and remanded to the Tax Court of Second Instance (*Corte di Giustizia Tributaria*) of Campania. Para.: grounds, § 3.1, and operative part.

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