

CLARIFICATIONS REGARDING THE TAXATION OF UNPERMITTED CONSTRUCTION

The Plenary Meeting of the Council of State recently decided on the topic of taxation of unpermitted construction, offering new clarifications on the complex legal mechanism established by the Presidential Decree no. 380/2001 (the Building Act). Specifically, three symmetrical rulings with identical content will be commented here: the sentences of 8 March 2024 no. 1, 2 and 3.

The questions

These are three appeals against as many sentences of the Milan TAR, which had confirmed three sanctions imposed by the Municipality of Bormio in acceptance of requests for taxation of unpermitted construction. In particular, the town management quantified the penalty: *(i)* firstly, identifying the conventional surface area pursuant to law no. 392/1978; *(ii)* determining, pursuant to art. 33 paragraph 2 of the Building Law¹, the unit production cost at the time of the taxation of the violation; *(iii)* enhancing the amount based on ISTAT parameters, and then doubling it, as established by the aforementioned regulation.

Therefore, the TAR and then the Council of State are asked to examine the sanctions, which are considered by the claimants to be in violation of the mechanism for updating the production cost envisaged by the law. Indeed, the appellants maintain that the legislator sets the value of the production cost at the time of the violation, which in the present cases dates back to 1993.

The Second Section of the Council of State, noting the lack of precedents and the potential conflict in case law, remitted the case to the Plenary Meeting, asking two questions. In the first place, it asks what precise moment should be understood by the expression "*date of execution of the violation*" referred to in the aforementioned art. 33 paragraph 2. Consequently, in the absence of new ministerial decrees on the determination of the cost of production, it asks whether it's necessary to proceed with the updating according to the ISTAT indices at the time of the imposition of the sanction with reference to the values resulting from the latest decrees (30 January 1997 and 18 December 1998); or whether it is necessary to proceed with reference to the time of discovery/complaint/application for amnesty of the violations.

The chosen interpretation

First of all, the Plenary Meeting clarifies that the amount to be updated is not the one indicated in the ministerial decree, but rather the one updated on the date of execution of the violation. As far as the latter expression is concerned, the four possible interpretations are illustrated: the completion of the work; the ascertainment of the violation; the self-declaration of the violation; the imposition of the sanction.

On the basis of a literal and systematic interpretation, through reference to the previous regulations on the matter and to the legislation regulating less serious conducts, it is stated that *"the interpretation of the article 33 paragraph 2 according to which the relevant value is the one of the asset at the time of the realization of the works is unreasonable"*. Therefore, it concludes by rejecting the appeal and confirming the first decision, according to which the locution must be understood as the moment in which the violation is taxed. In addition, it's also confirmed the mechanism followed by the administration, consisting in the *"determination of the conventional area pursuant to art. 13 of Law no. 392/1978 and the determination of the unit cost of production, on the basis of the decree updated on the date of the execution of the violations. The total cost of production, given by the multiplication of the conventional area with the unit cost of production, must be updated according to the ISTAT index of the cost of construction"*, and finally doubled.

¹*"If, on the basis of a reasoned assessment by the municipal technical office, the restoration of the status of the place is not possible, the manager or the head of the office impose a sanction equal to twice the increase in the value of the property, resulting from the completion of the works, determined, with reference to the date of completion of the violations, on the basis of the criteria provided for by the law of 27 July 1978 no. 392, and with reference to the last production cost determined by ministerial decree, updated on the date of execution of the violation, on the basis of the ISTAT index of the cost of construction, with the exclusion, for municipalities not required to apply the same law, of the parameter relating to location and with the equivalence to category A/1 of the categories not included in Article 16 of the same law"*.

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