

Italy

TP liabilities on criminal tax in Italy: Assessing, adopting and avoiding

Cristina Caraccioli and Alessandro Valente of Crowe Valente/Valente Associati GEB Partners explain how amendments to a legal provision in the field of criminal law present an attractive opportunity for MNEs carrying out inter-company transactions.



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During the course of tax audits, Italian tax authorities often challenge the value of the goods or services subject to intra-group relationships.

These disputes are particularly relevant for the Italian entity/company that carries out such inter-company transactions.

Should there be no coincidence between the declared assessments and the assessments made - based on Article 9 *Testo unico delle imposte sui redditi* (TUIR) - potential liability scenarios related to the crime of unfaithful declaration could open up.

The recent regulatory amendments made to Article 4 Legislative Decree No. 74/2000 in the field of criminal law and administrative liability of entities (amendments implemented under Article 39(1)(g) of Legislative Decree No. 124/2019) shed some light in this regard.

It should be noted that the new rules set forth suggest:

- i) An increase of the statutory penalty limits from a minimum basis of two years to a maximum of four years and six months of imprisonment; and
 - ii) Lowering of the relevance threshold of the evaded tax to €100,000 (\$109,230), than the previous threshold equal to the amount of €105,000; and
 - iii) Lowering of the assets deducted from tax imposition to €2 million, than the previous threshold equal to the amount of €3 million.
- i) The assessments that, all considered, differ from correct ones to a lesser extent than 10% are not punishable; and
 - ii) The amounts included to a lesser extent than 10% are not relevant, for the purpose of verifying the overcoming of the punishment's thresholds.

Furthermore, the amendment replaces the word "individually" (which was contained in the previous regulatory text) with the term "overall considered".

This way, the norm, asks for an overall assessment of the individual assessments to be deemed incorrect. Therefore, the amendments do not go against the rule of common sense, as introduced by Legislative Decree No. 158/2015 in the matter of unfaithful declaration, according to which during assessments, often related to particularly complex issues, slight deviations are physiological (if lesser extent than 10%), and shall not constitute offence.

Noteworthy is paragraph 1-bis of the Article 4 of the Legislative Decree No. 74/2000, which provides for the non-punishment for the crime of unfaithful declaration in the event the assessment criteria actually applied, are indicated in the financial statements, or emerge from other documents relevant for tax purposes.

This legal provision could subsequently represent an attractive opportunity for multinational enterprises (MNEs) carrying out inter-company transactions.

In this regard, in Italy since 2010, pursuant to Article 26 of Legislative Decree No. 78/2010, the transfer pricing (TP) documentation is deemed tax-relevant. However, it will be deemed relevant only for those cases in which tax authorities are able to understand the TP methodology actually applied by MNEs, and whenever they are compliant with the OECD Transfer Pricing Guidelines and with the EU Code of Conduct.

As such, a sound TP documentation assumes greater importance in Italy. If specific indications on the TP methodology used by the company are inserted in the financial statements or within TP documentation, the taxpayer could be able to exclude potential liability scenarios in connection with the crime of unfaithful declaration. In particular, whenever the threshold set by law is exceeded (€100,000).

Finally, it should be noted that:

- Given that the offence of unfaithful declaration is committed at the moment of the presentation of the annual financial statement, the new rules will apply from the tax period subsequent to the entry into force of the Law No. 157/2019 (i.e., the 2019 annual financial statement).
- Amendments do not provide for pre-trial detention and, in case of conviction, do not provide for the confiscations of assets.

In light of the above, TP documentation assumes an increased opportunity and is most advisable (not only for penalty protection).

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