Confiscation by Equivalent in Italian Legislation

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I. Introduction

The extent of the phenomenon of tax evasion in Italy is now at such a level that,[1] unfortunately, the legislative tools for control and repression, which are limited to administrative sanctions, are inadequate to effectively contain or to tackle such a massive subtraction of resources. Tax evasion affects direct national taxation, VAT, and, consequently, the European Union budget. Thirteen years after its adoption,[2] the "new discipline of crimes relating to income and valued added taxes," having at the time replaced the previous legal provisions constituted by Law No. 516 of 1982, is showing signs of age. Renewed on several occasions with the addition of Arts. 10-bis in 2005 (omission to pay retention tax on employment income) and Arts. 10-ter and quater in 2006 (omission to deposit VAT and improper reimbursement), fiscal crimes are currently undergoing a new period of severity under the current wording, having been renewed by recent amendments implemented by the Legislative Decree of 13 August 2011, No. 138, converted by the Law of 14 September 2011, No. 148.[3]

Within the context described, as a supplement to the penal tools provided by the aforementioned legislative decree, the legal provision of Art. 1, paragraph 143 of Law No. 244 of 2007 was inserted, introducing into our legal system "confiscation by equivalent," governed by Art. 322-ter of the penal code. Moreover, it is already being used for other circumstances in relation to crimes against the public administration (embezzlement, corruption, bribery, etc.) and other entities (fraud, etc.). As such, with regard to the above-mentioned Art. 322-ter, "the confiscation of goods which constitute a profit or price is always ordered, unless they belong to a person who was totally unrelated to the crime, otherwise, when this is not possible, the confiscation of goods available to the offender is carried out, corresponding to the value of such a price." This compulsory confiscation was then extended to the tax offences foreseen by Legislative Decree No. 74/200, with the exception of Art. 10 (crime of concealment or destruction of accounting documentation), stating that "in cases foreseen by articles 2, 3, 4, 5, 8, 10-bis, 10-ter and 10-quater, the provisions of article 322-ter of the penal code are observed where applicable."

Confiscation by equivalent, or by value, represents a distinct circumstance with respect to that governed by Art. 240 of the penal code, the intention being to intervene directly as regards those goods that constitute the profit or proceeds of the crime: property of a value corresponding to the profit or proceeds which are in the material possession of the offender. The objective of the legislator is that of depriving the offender of the financial benefit obtained by committing the tax offence attributed to him. In the event, therefore, that the original good or financial benefit obtained by committing the offence is not retrievable from the property of the guilty party, the application of the new confiscation legislation allows goods or property of an equivalent value to that of the original goods or property to be taken.

One of the most singular characteristics of the provision under discussion is the fact that, for it to be applied, no link of pertinence is required or rather no direct, current, and instrumental connection between the offence and the goods being confiscated. The absence of such a link between the goods and the offence itself, initially subject to precautionary sequestration and, subsequently, to confiscation, confers to the institution a mainly preventive function. It attributes a sanctioning nature to confiscation by equivalent, as recognised moreover by the jurisprudence of the United Sections of the Court of Cassation No. 41936 of 2005. The Court affirmed that confiscation adheres to a logic of sanctions, as a form of prevention and as a strategic tool of criminal policy aimed at tackling the systemic phenomena of financial crime and organised crime, further adding that "constituting a form of public withdrawal as compensation for illegitimate withdrawals, confiscation by equivalent assumes a predominantly sanctioning nature." Considering this characteristic, it is the jurisprudence of legitimacy itself that enables the principle of non-retroactivity to be applicable to confiscation by equivalent. It is therefore applicable only to offences that took place after January 2008, in

respect of the well-known principle which can be found in Art. 2 of the penal code.[4] The provision can only be applied to the perpetrator directly responsible for the tax offence and someone who operated directly alongside him or her, as identified in Art. 110 of the penal code. Other individuals not directly involved in illegal conduct are therefore excluded.

It must be considered, on the basis of general principles, that the concept of *availability* is intended to bear a reference to all those juridical situations, even those concerning ownership, which permit the full enjoyment of the goods in question.[5] In practice, a number of critical elements regarding applicability have nevertheless been detected, which are mentioned neither in legal doctrine nor in jurisprudence. The reference is in relation to all those cases, occurring with significant frequency, in which the notice of precautionary sequestration with a view to confiscation issued by the judicial authority is addressed to a credit institute where the person under investigation for tax offences has deposited funds (e.g., current accounts, securities accounts, safety deposit boxes) directly connected to the confiscation notice in question. An unexpected event therefore occurs, showing cracks in a relationship of trust that links the bank with its client. It is not uncommon that bank overdrafts received by the person under investigation and, in turn, the lines of credit available to him are immediately proposed for renegotiation on the part of the credit institute. In these particular cases, the sanctioning nature of the provision is amplified, causing obvious business problems for the individual in question. An example of such a situation would be that in which there is only one account available, which is used for the management of a firm and in which the sum required by the provision is to be found.

II. The Orientation of Legitimacy of the Italian Court of Cassation

Four and a half years after the legislative provision in question came into force, there is no doubt as to how it has largely lived up to expectations. It seems clear that its introduction, made necessary by the extent of the tax evasion phenomenon – although unpopular with the business world –, has proven worthwhile from other points of view. This occurred despite the fact that the legislative provisions, with reference to paragraphs 1 and 2 of Art. 322-ter of the penal code, immediately presented problems of interpretation, both in terms of the correct definition of the "proceeds" and "profit" of the crime as well as with regard to the unequivocal criteria that must be conformed to in the event of criminal circumstances traceable to the individual rather than the company.

The Court of Cassation, in its function of upholding the law attributed to it by legislation, was called upon more than once to deliberate on the guarantee of the application of the law in concrete situations and to provide "uniform" interpretational guidelines to maintain, where possible, the unity of the juridical order. This approach was therefore followed, at the time, by a substantial production of jurisprudence that fixed fundamental principles of law. Without any pretence of exhaustiveness, a review of recent sentences by the Court of Cassation related to the subject of confiscation by equivalent will be undertaken in the following. In May 2013, the Court explained how, with the so-called plea bargain regarding the punishment,[6] the applicability of the confiscation is not excluded, given that the agreement does not restrict the judge, who is only legitimated to adhere to the decision regarding the instruction of the sequestration provision. In its comment on the sentence, the Court also considered the correspondence of the evaded tax with the "profit" subject to confiscation by equivalent, not upholding the necessity of a means test in the cross-examination between the parties with reference to its quantification.[7]

The orientation that it is impossible to sequestrate company assets for conduct constituting a tax offence attributable exclusively to the legal representative was already expressed in previous rulings.[8] This holds unless it is proven that the company structure is merely a fictitious screen serving only the commission of tax

offences.[9] The third penal section of the Court of Cassation declared legitimate the sequestration of the assets of an entrepreneur who has not paid the declared VAT, even if that VAT has not yet been received. The ruling further highlights the impossibility of circumscribing profit to merely the sum received, without considering the benefit inherent to the "financial saving" deriving from not paying the tax. Value was therefore placed on the assumption that the profit deriving from a tax offence can be identified as being in an undoubted patrimonial advantage directly originating from illicit conduct. Such a principle had previously been expressed in sentence No. 1199/2012.[10] The profit from the offence for which the regulation has intervened cannot be the subject of confiscation by equivalent. Removing the illicit circumstance makes the sequestration measure inapplicable. The judges specified that "the very nature of the sanction prevents the confiscation by equivalent from being able to find an application in relation to the proceeds or the profit deriving from an offence extinguished by prescription."[11]

The Court confirmed that sequestration with the aim of confiscation by equivalent has the nature of a sanction rather than that of a security measure, in as much as it reflects the intention of depriving the offender of a profit unjustly acquired through the commission of a crime.[12] In April 2013, the Court confirmed that, with regard to tax offences, precautionary sequestration with a view to confiscation by equivalent of the assets of an individual person does not require the precautionary exclusion of the assets of the entity. Therefore, when the responsibility of the legal representatives subsists or that of the person who acted on behalf of the legal entity that may be subject to precautionary sequestration, the sequestration can affect – at the same time as and without distinction – the assets of the entity that has drawn advantage from the said crime, but also those of the individual who actually committed the crime.[13]

The judge responsible for the precautionary sequestration, in view of confiscation by equivalent, has the burden, but not the obligation, of indicating the sum corresponding to which the measure can be executed. Only when he has evidence that can establish such a sum, must the said judge specifically indicate which assets are securable. In the event that such evidence does not exist, the identification of the assets is entrusted to the public prosecutor, as an entity empowered with the execution of the sequestration.[14] Sequestration in view of confiscation by equivalent of the assets of an entrepreneur accused of tax evasion is admissible, even if some companies attributable to the said entrepreneur are already involved in bankruptcy procedures. In substance, this confirms that the interests of credit protection override those, albeit legitimate, concerns of the creditors.[15] The Court ruled on the legitimacy of sequestration, in view of confiscation by equivalent, of the assets of the fiscal representative of the company having committed tax offences in the interests of the entity, even when the latter has been involved in bankruptcy procedures.[16]

In February 2013, the Court considered the sequestration in view of confiscation by equivalent issued by a criminal judge towards a taxpayer for omitting to pay VAT legitimately, even when the judge competent in tax matters has suspended the procedure regarding the payment.[17] Also in February 2013, the Court ruled against the sequestration of company assets for conduct attributable to the director of the company. The Court recalled that, for consolidated orientation, "despite not being able to exclude that the conduct" of the director "was to the advantage and in the interests" of the company, the said company "cannot be directly held responsible for such offences."[18] Confirming the orientation of the Supreme Court of Cassation, the Court specified that confiscation by equivalent can be ordered both in relation to the "proceeds" and the "profit" of the offence.[19] The judges underlined how, in doctrine and in jurisprudence, the provision of non-retroactivity of confiscation by equivalent has immediately led one to affirm that confiscating assets belonging to the offender in proportion to the enrichment following an illicit act constitutes a genuine sanction. This sanction is characterised as a consequence of the commission of an offence, as is the case with penal sanctions, regardless, however, of the preventive function that is inherent to security measures.[20] Given the fictitious nature of the companies involved, the Court permits sequestration in view of confiscation by equivalent towards assets registered in the company's name, confirming the decision of the judge for

preliminary investigations The judges, with regard to legitimacy, further recalled that it is legitimate to confiscate assets, regardless of the "dangers" and "period of acquisition," because what is relevant is that the assets are "available to the offender" and have "a value corresponding to the illegitimate profit obtained."[21]

The Court considers that sequestration is also legitimate regarding items conferred to the offender's patrimonial fund.[22] The reason, as stated by the judges, is that "the items constituting the said fund remain available to the owner; with the consequence that they continue to belong to the owner and that they can be, therefore, subject to sequestration or confiscation as a consequence of the offences ascribed to the said owner."[23] The Court established a principle of law regarding the impossibility of ordering a provision of sequestration in view of confiscation by equivalent towards the legal entity if this would occur in violation of the principle of legality.[24]

The Court permitted precautionary sequestration in view of confiscation by equivalent by confirming, essentially, that the assets of the company should be confiscated following a fraudulent declaration made by its representatives, even in the event that such fraud is substantiated in the use of "subjectively non-existent" invoices. The tax that was unlawfully deducted therefore constitutes the "profit" of the offence attributed to the offenders.[25] The court affirmed that "In the event of tax crimes confiscation is justified up to the moment in which the recovery of the evaded taxes is completed in favour of the financial administration body with the corresponding *'deminutio'* of the funds of the tax-payer. Once such a moment has passed, the precautionary sequestration no longer has any reason to exist".[26]

The Court approved the confiscation of the assets of an entrepreneur and tax evader to a value equal to the evaded tax plus the sanctions and interest arising from the tax inspection. This in as much as "it is observed that sequestration in view of confiscation by equivalent should refer, in fiscal offences, to the amount of tax evaded, which constitutes an undoubted financial advantage deriving directly from illicit conduct and, as such, attributable to the notion of 'profit.' constituted by financial saving from which the effective subtraction of the amounts evaded from their fiscal destination consequently follows, from which the person responsible for the offence certainly draws benefit".[27] The Court establishes how tax settlement[28] directly influences, by reducing it, the profit of the fiscal offence subject to sequestration and consequent confiscation by equivalent.[29]

The judicial guideline was reiterated according to which, with regard to offences committed in the interests of the legal entity, precautionary sequestration with a view to the confiscation of the assets of an individual does not require preventive exclusion from the assets of the entity for it to be legitimate."[30] Applying the principle expressed on several occasions with regard to the "penal sanctioning nature" of the confiscation, the Court deemed that such a sanction was not applicable "towards an individual other than the one responsible for the offence, regardless of, the so-called employment relationship between the offender and the legal entity of which, the said offender, assigned with various tasks and powers, is part."[31]

The Court confirmed the legitimacy of precautionary sequestration in view of confiscation even in the event of instalment payments of the evaded tax agreed upon with the financial administration body. This is in view of the fact that an agreement to pay in instalments does not imply that the offence is extinguished and that sequestration is legitimate until the payment of the final instalment.[32] The Court deemed sequestration ordered regarding the assets of the entrepreneur to be legitimate, regardless of the prior judgment concerning the company assets. This is due to the fact that, in the case of multiple offenders there is no criterion of time identifying the offender in relation to whom the measure should be carried out.[33] The Court affirmed that, in the context of an investigation into carousel fraud, it is legitimate to confiscate the credit claimed by the company under investigation from another company. With no relevant link of pertinence between the assets to be confiscated and the crimes attributed to the individual who has access to such assets, the

scope of the type of assets that can be the subject of confiscation is confirmed.[34] The Court declared admissible the sequestration in view of the confiscation of the entire amount of the invoice in the event of non-existent operations, in so far as it coincides with the profit of the offence.[35]

In February 2012, the Court confirmed two principles: First, confiscation by equivalent is legitimate regarding the assets of the entrepreneur, even if these assets are only jointly in his/her name, for an amount equal to the VAT evaded by the company. Second, the adoption of the measure does not assume the demonstration of a relevant link between the offence and the amount sequestered.[36]

III. Conclusions

For the punishments outlined above, one can infer principles of law of a general scope that are applicable in the area of precautionary sequestration with a view to confiscation by equivalent. The recipient of the real precautionary measure must be investigated for one of the crimes for which confiscation by equivalent is permitted as per article 322-ter Criminal Code No. (relevant link is necessary between the offence and the assets which are sequestered). Moreover, precautionary sequestration is not retroactive, as such measures are designed as penal sanctions;

The proceeds or profits of the offence for which the proceedings are ongoing does not have to be found on/among the property of the person under investigation, but its existence must be certain. The assets to be sequestrated need not belong to a person who is not connected to the offence, i.e., a person who not only did not participate in the event and did not commit criminal acts related to it, but who has also gained no advantage from the illicit act. Finally, company assets can only be sequestered in cases in which it is proven that the company structure is only a smoke screen for committing fraud.

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1. The statistics indicate that this phenomenon is at least 5% of annual gross domestic product of our country.↩
2. Legislative Decree No. 74/2000 entered into force 15 April 2000, in implementation of Art. 9 Act No. 205 of 25 June 1999.↩
3. In summary, remember the amendments to Articles. 2, 3, 4, 5, 8, 12, 13, 17 with the elimination of the less severe cases, significant lowering of thresholds of criminal law, the circumstances of the application of additional penalties with the addition of paragraph 2-bis, 'article 12, the application of the mitigating circumstances, the lengthening of prescription of offenses.↩
4. See in the same sense the rulings of the Supreme Court of 28 May 2008 and No. 21566 No. 943 of 24 September 2008↩
5. Prof. Avv. Ivo Caraccioli, in review “Guide to fiscal controls” No. 3, 2008.↩
6. Art.444 of the Code of Criminal Procedure, in the section “Application of the penalty on the request of the parties”.↩
7. Sentence No. 22975 of 28 May 2013.↩
8. Sentences No.1256/2013, No. 33371/2013 and No. 25774/2012.↩
9. Sentence No. 22980 28 May 2013.↩
10. Sentence No. 19099 of 3 May 2013.↩
11. Sentence No. 18799 of 29 April 2013.↩
12. Sentence No. 17610 of 17 April 2013.↩
13. Sentence No. 15050 of 2 April 2013.↩
14. Sentence No. 12643 of 18 April 2013.↩
15. Sentence No. 12639 of 18 March 2013.↩
16. Sentence No. 10782 of 7 March 2013.↩
17. Sentence No. 9578 of 28 February 2013.↩
18. Sentence No. 9576 of 28 February 2013.↩
19. Sentence No. 6309 of 08 February 2013.↩
20. Sentence No. 5506 of 4 February 2013.↩
21. Sentence No. 3407 of 23 January 2013.↩
22. In Italian civil law, the patrimonial fund is a complex grouping of assets (buildings, registered moveable goods, bills of credit) constituted in order to satisfy the needs of the family. It can be constituted by spouses, possibly during the wedding, or it may be constituted by a third party. It is currently regulated by Art. 167 ff, Civil Code.↩
23. Sentence No. 1709 of 14 January 2013.↩
24. Sentence No. 1256 of 10 January 2013.↩
25. Sentence No. 204 of 7 January 2013.↩

26. Sentence No. 46726 of 3 December 2012.↩
27. Sentence No. 45849 of 23 November 2012.↩
28. Tax settlement allows the taxpayer to define the taxes owed and thus to avoid the emergence of a tax dispute. It is foreseen by Legislative Decree No. 218 of 1997.↩
29. Sentence No. 45847 of 23 November 2012.↩
30. Sentence No. 36050 of 20 September 2012↩
31. Sentence No. 33371 of 29 August 2012.↩
32. Sentence No. 31040 of 24 July 2012.↩
33. Sentence No. 17485 of 10 May 2012.↩
34. Sentence No. 15156 of 19 April 2012.↩
35. Sentence No. 14066 of 13 April 2012.↩
36. Sentence No. 4956 of 8 February 2012↩

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