

How to Avoid Italian Criminal Charges in Transfer Pricing Litigation

by Piergiorgio Valente

Reprinted from *Tax Notes Int'l*, December 2, 2013, p. 839

PRACTITIONERS' CORNER

How to Avoid Italian Criminal Charges in Transfer Pricing Litigation

by Piergiorgio Valente

Piergiorgio Valente is managing partner of Valente Associati GEB Partners in Milan.

Practitioners should pay attention to the observations outlined below to avoid being criminally charged in cases involving transfer pricing litigation.

When Italy's *Guardia di Finanza* (Revenue Guard) performs tax audits, it seizes any relevant documentation. Therefore, taxpayers should submit a written request that such documentation be read in the presence of a defense attorney in order to explain what the documents mean. If the documents mention people, those people must be allowed to testify to explain any potentially incriminating passages.

Article 12(7) of the Italian Taxpayer's Statute states that criminal charges must be filed within 60 days. Note that Italy's double-track system¹ is interpreted by the courts to mean that the data collected for tax cases may not be disregarded for criminal cases and vice versa.

It is important that enterprises grant proxies to high-level managers in order to prevent them from possibly incurring criminal liabilities. In cooperation with CEOs, companies should involve CFOs in general questions to prevent tax variables from being disconnected from general guidelines provided by corporate policies.

When auditors do not deem the data provided to be sufficiently convincing from a transfer pricing perspec-

tive, the tax authorities may invoke the letters rogatory procedure to determine whether the necessary elements to show compliance with transfer pricing rules have actually been provided.

If the request is not upheld by the Italian tax authorities, the same petition may be re-proposed to the prosecuting attorney's office (article 5 of Leg. Dec. 74/2000).

Once the charge has been filed with the prosecuting attorney's office by either the tax authorities or the Revenue Guard, in order for the taxpayer to obtain updates on the criminal proceedings, a fiduciary defense attorney must be appointed for the party that might be subject to investigation. Only the fiduciary defense attorney may obtain from the secretary's office of the competent public prosecution new developments on the case, including the names of investigated parties, the relevant charges, and the name of the prosecuting attorney handling the case.

The fiduciary defense attorney can make its client available to the prosecuting attorney for any necessary clarifications.

In small or medium-size towns, the offices of the prosecuting attorney are not equipped with special tax crimes sections. In the case of a special tax crime case, written reports providing all the necessary details for the criminal issues involved should be submitted to the prosecuting attorney's office.

Because of Italy's double-track principle, it might be useful for the taxpayer to keep judges from being informed of the status of the tax court case; taxpayers

¹The double-track system is the Italian procedure by which criminal trials and tax litigations cannot interfere with each other. See article 20 of Leg. Dec. 74/2000.

should exhaust the appeal process in the tax court before proceeding to a criminal trial.

The only time that a criminal judge should be notified of the pending tax litigation is when a settlement has been reached with the tax authorities; in many cases, all criminal liability may be extinguished. In all other cases, the compensation for damages against the state's Revenue Office, even with recourse to tax litigation avoidance tools, merely results in a reduction (currently to one-third) of the relevant penalty (article 13 of Leg. Dec. 74/2000).

Hence, if a settlement is in progress, it would be more than reasonable to request (and obtain from) the judges a suspension of all investigations until the settlement is finalized.

During the prosecuting attorney's preliminary investigations, it is likely that if the taxpayer did not request any updates, no information might be obtained by the taxpayer regarding the investigations until the cases are closed. According to article 415-*bis* of the Italian Code of Criminal Procedure, a notice of the closing will be given providing a 20-day period in which to request a hearing or to submit any written memoranda or evidence with the concurrent petition to close the case.

When the closing of the case is not granted by the preliminary investigations judge, a preliminary hearing will be scheduled and afterwards a debate allowing for more simplified procedures.

Remember that in Italy, corporate tax crimes (as opposed to non-tax-related corporate law infringements) are judged by a single presiding judge (there is no panel of judges as is the case, for example, for corporate crimes), which can cause critical problems, particularly technical issues.

The issue arises whether it might be appropriate to submit a request to the prosecuting attorney first and to the tax court thereafter for a technical consultancy or an appraisal. In that respect, parties to the case should remember the following:

- prosecuting attorneys generally rely on trustworthy professionals, and thus their theories, even when challenged by eminent defense consultants, are taken into due consideration;
- in view of the costs involved by technical consultancies and the fact that court offices are known to lack funds, such consultancies are much less frequent than they were in the past; and
- although the prosecuting attorney's technical consultancy is not "transfused" (the consultancy is not fully included) in the debate dossier, it is possible to evoke those conclusions reached during the debate through the conclusion reached by technical consultants, in the course of which defense theories are often not duly appreciated. ◆