

## TAX OFFENCES AND DECREE 231.

### FRAUDULENT TAX RETURN REPORTING NON-EXISTENT TRANSACTIONS BECOMES A 231 CRIME AND VAT FRAUD WILL SHORTLY DO THE SAME.

#### 1. Fraudulent tax return is added to the list offences relevant for Legislative Decree 231/2001

Law Decree no. 124 of 26 October 2019 ("Urgent provisions on tax matters") (the "**Tax Decree**"), published in the Official Gazette no. 252 of 26 October 2019, provides that the crime of submitting fraudulent tax returns through invoices or other documents for non-existent transactions (the "**Offence of Fraudulent Tax Return**") falls within the list of offences relevant for Legislative Decree no. 231/2001 (the "**Decree 231**") and, therefore, on top of the direct criminal responsibility of the natural person committing the crime, also triggers the quasi-criminal liability of the legal persons that has taken advantage of it or on whose interest the crime has been committed.

Article 39, paragraph 2, of the Tax Decree in fact introduces the new article 25-*quinquiesdecies* into Decree 231, which provides that: "*With respect to the commission of the offence of fraudulent tax return through the use of invoices or other documents for non-existent transactions, as set forth in Article 2 of Legislative Decree no. 74/2000, a pecuniary sanction of up to five hundred shares is applied to the legal person*"<sup>1</sup>.

The new provision will enter into force on the date of publication on the Official Gazette of the law confirming the Tax Decree.

The Offence of Fraudulent Tax Return is set forth in art. 2 of Legislative Decree no. 74/2000, pursuant to which "*Anyone who, to evade tax on income or value added tax, using invoices or other documents for non-existent transactions, indicates fictitious liabilities in one of the annual tax returns relating to said taxes, shall be punished with imprisonment from four to eight years. The offence shall be considered committed using invoices or other documents for non-existent transactions when such invoices or documents are recorded in the mandatory accounting records or are held for the purposes of evidence against the tax authorities*". The Offence of Fraudulent Tax Return occurs at the time when the tax return is submitted. The offence is punishable when there is the offender's specific intent of evading tax on income or VAT (including when the purpose is that of obtaining an undue refund or recognition of a non-existent tax credit).

Pursuant to the definition set forth in art. 1 of Legislative Decree no. 74/2000, "*invoices for non-existent transactions*" means "*invoices or other documents having similar probative value on the basis of tax laws, issued for transactions not actually carried out (in whole or in part) or which indicate higher remunerations or VAT than the real ones, or which refer the transaction to parties other than the actual ones*".

#### 2. VAT fraud soon among the offences set forth in Legislative Decree 231/2001

Law no. 117 of 4 October 2019 (the "**European Delegation Law 2018**"), in force since 2 November, last, was published on the Official Gazette no. 245 of 18 October 2019 and delegates the Italian Government to implement Directive (EU) 2017/1371 "*on the fight against fraud affecting financial interests of the Union through criminal law*" (the "**PIF Directive**"). [See our Newsletter in point dated December 2018].

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<sup>1</sup> The amount of a share is set between a minimum value of 258 euro and a maximum of 1,549 euro, which is established, among other things, on the basis of the economic and financial conditions of the company, to ensure the effectiveness of the sanction.

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Pursuant to art. 3, paragraph 1, letter e), of the European Delegation Law 2018, the Government Italian shall supplement the provisions of Decree 231 by expressly providing for the quasi-criminal responsibility of legal persons in case of "serious" VAT frauds, where the concept of seriousness is defined by the PIF Directive itself having regard to the cross-border nature of the unlawful conduct ("*connected to two or more Member States*") and the high amount of the total damage ("*at least equal to ten million euro*").

In addition, the Italian Government is required to introduce also sanctions set out in Article 9 of the PIF Directive, which include: exclusion from public benefits or aids, temporary or permanent exclusion from public tender procedures, temporary or permanent disqualification from business, judicial supervision, judicial winding-up and the temporary or permanent shut down of premises used for committing the criminal offence, it being expressly required that all the sanctions must be "*effective, proportionate and dissuasive*".

### 3. Some general considerations

Step by step, the quasi-criminal responsibility of legal persons pursuant to Decree 231 is expanding to cover also tax offences committed in the interest or to the advantage of the legal persons. For quite a significant amount of time tax offences seemed to entail only the responsibility of the offender (the natural person committing the crime), but it becomes more and more evident that this traditional view is put at stake.

- The process started some years ago, when the 231 responsibility of legal persons was extended to associative crimes and conjures (including, potentially, criminal associations for the purpose of committing tax offences).
- Afterwards, auto money-laundering also became an offence relevant under Decree 231 (including when profits or tax savings generated by a tax offence are re-invested by the legal person).
- Recently, the PIF Directive directly addresses punishment of legal persons for serious VAT frauds.
- Now, also the Offence of Fraudulent Tax Return is explicitly included among the 231 crimes.

This evolution seems to herald new enlargements in the near future, so that it seems appropriate that companies start to equip themselves with Organizational and Management Compliance Shields finalized to prevent tax offences. By the way, the orderly management of corporate taxation as well as of all financial and treasury flows (and of the relevant documentation) appear as pivotal (i) to prevent many traditional "231 crimes" (corruption, public and private; money laundering; corporate crimes; etc.) and (ii) to pre-tackle and address situations of crisis and loss of going-concern continuity (Art. 2086 of the Civil Code).

In practical terms, companies will have to

- marshal and organise rules and procedures for the management of tax returns and payments (definition of corporate roles all along the chain of authorities, proxies and delegation of powers, accounting and preparation of budgets and reports), and also
- provide procedures to regularly update budgets, organise reporting (including reports that the Chief Executive Officer must provide to the Board of Directors pursuant to art. 2381 of the Italian Civil Code), and management of the companies' financial statements.

The Board of Directors will also have to identify and periodically check alerts and warnings of irregularities at all stages from the outset of the relationships with suppliers (reconciliation of invoices and purchase orders, limitations to the use of cash, verification of the suppliers' registration with chambers of commerce, control of the suppliers residence in tax havens, filing and archiving contractual documentation and relevant business correspondence, etc.).

Specifically, with regard to invoices for non-existent operations, the merely formal correctness of the documentation and the existence of formal checks on the existence of a certain supplier will

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not be enough, and it will be necessary to identify "red flags" on the basis of best practices, looking at the essence.

Existing controls and procedures for financial statements, treasury and expense management (very often contemplated in Models 231 for the prevention of corporate offences, e.g. false accounting) may prove useful.

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The impact that these new provisions of law will have on the 231 organizational models is significant. Companies will be required to update their organizational structure by identifying and analysing all the tax risks associated with their activities to set up adequate management systems.

The Compliance, Tax Law and Dispute Resolution Departments of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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