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VAT payment omitted: does force majeure save from crime?

by Marco Bargagli

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From a criminal tax point of view, [article 10-ter of Legislative Decree 74/2000](#), entitled "*Omitted payment of VAT*", sanctions anyone who does not pay from six months to two years with imprisonment within the deadline for the payment of the advance payment for the following tax period, the value added tax payable on the basis of the annual return, for an amount exceeding one hundred and fifty thousand euros for each tax period.

As clarified by the operating practice:

- the offense in question is considered instantaneous and takes place with the expiry of the term for "*payment of the advance payment relating to the next tax period*". Therefore, it is necessary to refer to the deadline of December 27 following the presentation of the annual return which shows the tax due and not paid over the threshold;
- in order for the offense to be dealt with, the annual VAT return must have been validly presented, with the consequence that the competition between the case in question and the crime of omitted declaration is excluded (ex [article 5 of Legislative Decree 74 / 2000](#));
- the competition with the declarative crimes referred to in [articles 2, 3 and 4](#) of the same decree is conceivable.

Furthermore, it should be remembered that the offense in question exists with reference to the VAT indicated in the annual return: in the event of presentation of the return which sets out a lower than actual tax liability, for which, if the conditions are met, the offenses referred to in [Articles 2, 3 and 4 of Legislative Decree 74/2000](#), that provided for in [Article 10-ter of Legislative Decree 74/2000](#) is not integrated, if the declared debt tax has been paid (see Handbook on the fight against tax evasion and fraud, circular No. 1/2018 of the General Command of the Guardia di Finanza volume I - part II - chapter 1 "*The criminal tax system in the field of direct taxes and VAT. Substantive provisions*", page 175 and following).

Once the relevant regulatory framework has been outlined, it is important to assess whether a liquidity crisis that can potentially affect the company can or should not be considered a suitable circumstance to exclude the crime of failure to pay VAT.

In this respect, circular no. 12 issued on 2 April 2013 by the Center for Studies of the Union of Young Chartered Accountants and Accounting Experts (UNGDC), has fully analyzed the consequences related to the failure to pay VAT due by the company, with particular reference to the relevance of the generic fraud of evasion foreseen by the law.

In the aforementioned document we can revise some important principles that refer to the exclusion of fraud, being necessary for this purpose that:

- a situation of real insolvency is integrated (and not a temporary crisis);
- this situation originated at an earlier time or, at least, concomitant to the expiry of the term within which, according to the tax provisions, the VAT should have been paid and is still in existence at

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the expiry of the term sanctioned by [article 10- ter 74/2000](#) (ie on **December 27th** following the submission of the annual return which shows the tax due and not paid over the threshold);

- this insolvency situation **was not caused by the entrepreneur**;

Only under these conditions, **all "necessarily subject to an overall allegation"**, will it be possible to **exclude the existence of willful misconduct by the agent**, who does not pay the tax **not because he does not want to**, nor **because he accepted the risk of the impossibility of occurring to fulfill**, but because **he cannot pay for causes truly independent of his will**.

The supreme Court of Cassation, Section 3 criminal, recently intervened with regard to the **criminal relevance relating to the failure to pay the VAT due**, with [sentence no. 50007 filed on 11.12.2019](#), which has **upheld the conviction for the entrepreneur** who, during a financial crisis, to ensure **business continuity**, has **paid other creditors (eg. Employees and / or suppliers)** rather than **pay the taxes due**.

A **opinion of Ermellini**, according to the **constant orientation of the case-law**, the offense referred to '[Article 10- ter Legislative Decree no. 74/2000](#) is **omissive and instant nature** and is **punishable by way of general intent**, which consists in the **consciousness and will not to pay the sums due to VAT** for the period considered.

In this regard, the Supreme Legality Judges have stated that:

- the **proof of intent** is inherent, in general, **in the presentation of the annual declaration**, which shows **how much is due as tax**, which must **be welded or at least content is not more than the threshold**, within the prescribed period;
- for the existence of the offense in question, **the purpose of evasion is not required**, much less the **intimate adhesion of the subject to the will to violate the precept**.

The exemption of force majeure pursuant to [article 45 of the criminal code](#) exists in all cases in which the agent has **done everything in his power to comply with the Law** and that, for **reasons beyond his control**, there was **no possibility of preventing the event or unlawful conduct**.

Therefore, in the Court's opinion, *"force majeure can only refer to an imponderable event that cancels the lordship of the subject on their own behavior, preventing them from configuring a criminally relevant action due to a defect in the general requirement of conscience and voluntariness of conduct envisaged by the first paragraph of article 42 of the penal code"*.

On the specific point, the offense of **omitted VAT payment** is supplemented by the **conscious choice to omit the due payments**, noting the **fact that the company is going through a critical phase** and **destined financial resources to face the payment of debts deemed more urgent**, element which **falls within the ordinary business risk** and which certainly cannot lead to the failure of the tax obligation contracted with the tax authorities (see Court of Cassation, [sentence no. 12906 of 13.11.2018](#)).

Basically, from the elements examined in the course of the judgment, the Court of Appeal **found that the corporate crisis was not absolute**.

Therefore, the omitted payment of the VAT due **was only the result of the voluntary and discretionary choice of the entrepreneur** who, **despite having the resources** (having proved that the VAT to be paid had entered the company assets), had chosen to **pay other creditors**.

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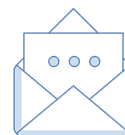
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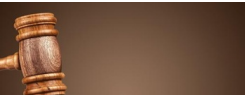
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