https://doi.org/10.46941/2023.e2.6

VINCENZO CARBONE[*]

The role of the public prosecutors in the repression of tax crimes[**]

ABSTRACT: The investigation and prosecution of tax crimes is characterized by the coexistence of administrative and criminal proceedings, which can lead to the imposition of multiple penalties. This paper therefore analyses the role of the public prosecutor's office in the prevention and prosecution of tax crimes.

KEYWORDS: Investigations, tax crimes, administrative proceedings, criminal proceedings, public prosecutor, tax administration.

1. Introduction

The Italian system, as we know, adopt the so-called Double Track. This means that the investigation and the repression of tax crimes is characterized by the coexistence of administrative and criminal proceedings which may lead the infliction of multiple penalties.[1]

During the investigation phase, therefore, the figures responsible for carrying them out are many. Without a shadow of a doubt, an important role is played by the public prosecutor, however, the tax administration and the financial police are also responsible for carrying them out for the administrative procedure. In this work, therefore, we will analyse the role of the Italian public prosecutor in the prevention and prosecution of tax crimes.

2. Public Prosecutor's Office in Italy

Although tax crimes are governed by a specific regulation, and do not reside in the penal code, the procedural rules are, of course, the same for all types of crime. For this reason, it is worthwhile to dwell on the structure of the public prosecutor's office in Italy.
In Italy, a prosecutor's office consists of a chief prosecutor (procuratore capo) assisted by deputies (procuratori aggiunti) and assistants (sostituti procuratori).

Prosecutors in Italy are judicial officers like judges and are ceremonially called Pubblico Ministero or PM. As custos legis, Italian prosecutors are responsible for ensuring that the law is actually enforced. Under the Constitution[2], they are required to initiate preliminary investigations as soon as they become aware of or personally take cognizance of a criminal offence - notitia criminis - or receive a criminal complaint. They may direct the investigation or carry it out by issuing orders and instructions to (judicial police) criminal investigators, who may conduct their own parallel investigations in coordination with the public prosecutor's office. The PPO has very broad investigation and enforcement powers. The most relevant could be identified as follows:

- Powers of interview. The PPO is authorized to summon and question the suspect and potential witnesses or delegate these tasks to the police.
- Powers of search/to compel disclosure. If the PPO has gathered enough evidence, it must serve notice to the defendant, informing him/her of the accusation.

[*] PhD, Adjunct Professor of International Tax Law and Customs Regulation at University of International Studies or Rome – UNINT, Italy, vincenzo.carbone@unint.eu.
[**] This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).
[1] Condello, 2008, p. 332; Musco, 2012, p. 923.
[2] Art. 112.

- Power of arrest. The PPO may request the judge to issue an arrest warrant or to validate an arrest within 48 hours, where the suspect has been caught in flagrante delicto (in the very act of committing the misdeed).
- Powers to enforce court orders. The PPO can only request the judge to issue precautionary measures (such as pre-trial detention, house arrest) where there is a serious likelihood that the suspect has committed a crime and it is necessary in order to prevent the suspect from fleeing, committing another crime and destroying or falsifying evidence.[3]

The prosecutor's office is the only authority empowered to bring charges in criminal proceedings. When the prosecution has gathered sufficient evidence, it submits a request to the judge of the Preliminary Hearing (Giudice per l'udienza preliminare - GUP) to bring charges against the offender. If the evidence collected is not sufficient to prosecute the offender, the prosecution shall file a motion with the judge of the preliminary investigation to dismiss the case (Giudice per le indagini preliminari).

If the evidence collected is sufficient to continue the proceedings, the prosecutor is obliged to continue the proceedings from the preliminary investigation to the initiation of the trial, with the prosecutor being responsible for bringing the charges, but having the overriding duty to promote justice. In practice, this duty means that the prosecutor is prohibited from withholding exculpatory evidence and must seek an acquittal if, during the course of the trial, he or she becomes convinced of the defendant's innocence or concludes that there is no evidence to prove his or her guilt beyond a reasonable doubt.

In appellate courts, the Office of the Prosecutor is called Procura Generale and the Chief Prosecutor the Procuratore Generale.

2.1. The General Prosecution Office at the Italian Supreme Court

In Italy there is only one Supreme Court for criminal and civil cases (Corte di Cassazione). The Court does not (in principle) pronounce judgments on the merits but decides on the correct application of the law by the courts of appeal or the courts of first instance.

In addition to the Court, there is a Prosecutor General's Office, whose members have the task of communicating their opinion in the mere interest of the law to the Supreme Court in every case that comes before it.

There is no hierarchical link between the various prosecution offices in the country and the General Prosecutor's Office at the Supreme Court, but the latter is the supreme institution of law enforcement, just as the Supreme Court is the supreme institution of the judiciary.

The Prosecutor General's Office must act and present its conclusions in every appeal before the Supreme Court. The Prosecutor General is not bound by the conclusions presented by the representatives of the Prosecutor's Office at earlier stages of the proceedings, even if they have appealed to the Court.

By law, the General Prosecutor has the power to control the so-called Direzione Nazionale Anti-Mafia (a nationwide prosecutor's office charged with coordinating investigations against organized crime).

In addition, the Prosecutor's Office is the only body responsible for resolving positive or negative conflicts of jurisdiction between two or more district prosecutors' offices.

Prosecutors are allowed to act in place of another prosecutor during their careers, but a recent ruling by the Italian Constitutional Court states that prosecutors who wish to become judges must move to another region and may not participate in proceedings that they themselves have initiated.[4]

2.2. The National Anti-Mafia Office

---

[3] Ricasoli, 2021, p. 92.

[4] Tonini and Conti, 2022, p. 15

The National Antimafia Directorate (Direzione Nazionale Antimafia, DNA), established in 1991, is the legal coordinating body for the enforcement of antimafia laws. It consists of the National Antimafia Prosecutor (Procuratore Nazionale Anti-mafia) and 20 deputy prosecutors. The DNA works closely with the Antimafia Investigation Agency (Direzione Investigativa Antimafia, DIA), which is part of the Ministry of Public Security and is composed of specialized personnel in charge of intelligence and pretrial investigations. The establishment of the DNA and DIA was intended to promote coordination among the various judicial authorities in Italy while respecting two fundamental constitutional principles. Under Article 112 of the Constitution, the Public Prosecutor's Office is required to initiate criminal proceedings in all cases in which criminal law is violated. Second, under Article 101 of the Constitution, judicial authorities, including prosecutors, are independent in their activities.

The head of DNA suggested in a statement to the committee CRIM that this model of administrative coordination could inspire similar practices in other EU countries as well as at the EU level, for example, building on similar activities of Eurojust and OLAF.[5]

3. Territorial Jurisdiction for Tax Crimes

The discipline of territorial jurisdiction for tax crimes has always been characterized by different rules from those adopted by the code of criminal procedure for the generality of crimes. In fact, with reference to the identification of territorial jurisdiction for crimes relating to direct taxes and VAT, already art. 21 of Law 7 January 1929, n. 4 determined territorial jurisdiction based on the exclusive criterion of the “place where the crime was ascertained”, instead of the general rules dictated by the code of procedure.

The criterion of territorial jurisdiction over the place where the crime was ascertained was subsequently confirmed by art. 11 of Law 7 August 1982, n. 516. However, the provision was at the centre of heated doctrinal criticism, on the assumption that the criterion lent itself, on the one hand, to the instrumental location of the investigative activities in order to hinge the criminal proceedings on judges “chosen” by the administrative authority and investigator and, on the other hand, could be the cause of a conflict with the principle of the natural judge pre-established by law pursuant to art. 25 of the Constitution, as it did not allow for the preventive identification of the territorially competent judicial authority. The reform of the criminal tax law implemented with Legislative Decree 10 March 2000, n. 74, providing for a tendential coordination of the discipline concerning tax crimes with the ordinary one, eliminated the peculiar provision of the single criterion, simultaneously introducing new criteria aimed at determining the territorial jurisdiction for tax crimes.

In derogation of the general principles of the Code of Criminal Procedure on jurisdiction, the local judge with jurisdiction over fiscal offenses is determined by special rules established in Article 18 of Legislative Decree No. 74/2000, according to which it is determined at the place of commission of the offense and, subsidiarily, at the place of assessment of the offense.[6]

The aforementioned art. 18, paragraph 1, without prejudice to the hypotheses outlined by paragraphs 2 and 3, autonomously regulated, identifies, on a subsidiary basis, in the Judge of the "place of ascertainment of the crime" the one with territorial jurisdiction.

Chapter I of Title II, explicitly mentioned by the second paragraph of the art. 18, refers to declaratory crimes which are always considered to be committed in the place where the taxpayer has his tax domicile. The Legislator’s choice to exclude the most important category of criminal offenses from the general rule of the criminal procedure code, dictating a derogatory and characterizing discipline for it, is centred on the data (which should be objectively verifiable) of the tax domicile of the offender.

---

[5] Tonini and Conti, 2022, p.55

[6] Torzi, 2015, p. 527.

In relation to cases of omitted declaration, pursuant to art. 5 of Legislative Decree 74/2000, the III Section of the Court of Cassation with sentence of 14 September 2020, n. 27606 stated that, as a rule, “the tax domicile coincides with that of the registered office, but that, if this is of a purely fictitious nature, it corresponds to the place where the actual headquarters of the entity are located”. The same Board, with subsequent ruling of 25 November 2021, n. 43331, considered, in consideration of the telematic method of presentation of the declaration, whose place of perpetration of the crime is not identifiable, that in identifying the competent judge "it must be denied that a different rule of attribution of competence is relevant" with respect to the one under consideration.
In the hypothesis of tax fraud, on the other hand, the Supreme Court with sentence number 4461.2022, filed on February 09, 2022, affirmed that the territorial jurisdiction of the Public Prosecutor competent to hear the investigation - and therefore of the Judicial Authority called to judge following indictment - must be identified with reference to the place where the registered office of the company is established, provided that the same is effective and not fictitious.

4. Agreements between the Public Prosecutor's Office and Tax Authorities

The relationship between tax proceedings and criminal proceedings is complex. In order to better regulate the information flows and communications between the various subjects, it is interesting to highlight that some “collaboration agreements” have been signed between the Revenue Agency, the Public Prosecutor's Office and the Guardia di Finanza.

As stated in the introduction to the collaboration agreement between the Revenue Agency - Valle d’Aosta Regional Directorate, Guardia di Finanza - Regional Command and the Public Prosecutor's Office at the Court of Aosta, signed on 30 March 2018, “The autonomy, the diversity of the evidentiary regime and the aims of the criminal and tax proceedings do not exclude the importance of identifying directives and operating instructions aimed at the most effective cooperation between the Revenue Agency, the Guardia di Finanza and the Judicial Authorities, in order to optimize the connection between the tax audit procedures, the subsequent assessment of taxes – including the possible activation of accession or conciliation procedures – and criminal investigations concerning tax crimes”.

A further recent agreement between the Public Prosecutor's Office and the tax administration of Oristano, signed in the 27 September 2022, states that the memorandum of understanding aims to improve the overall effectiveness and timeliness of the action to combat tax evasion and tax crimes in the field of income taxes and VAT envisaged by Legislative Decree no. 74/2000, as well as guaranteeing knowledge of significant debt situations following omissions to make declarations.
There are many agreements signed between the various prosecutors and tax administrations. Among the various we recall the agreement signed on 26 March 2015 between the Catania Public Prosecutor's Office, the Sicily Regional Directorate, and the Guardia di Finanza of the Province of Catania and the most recent Memorandum of Understanding for the fight against financial and tax violations in the Province of Chieti of 19 July 2018.

These documents are aimed at promoting an effective link between the entities involved, to facilitate criminal investigations concerning crimes in tax matters.

5. Concluding remarks

The analysis carried out so far focuses on the role of the public prosecutor in the prosecution of tax crimes. Although tax crimes are governed by a specific regulation, and do not reside in the penal code, the procedural rules are, of course, the same for all types of crime. The rule concerning territorial jurisdiction is particularly important. As anticipated, it follows a different principle, expressly regulated by article 18 of Legislative Decree No. 74/2000 and enriched by the recent sentences of the Supreme Court.

The intense work of the tax administration, ready to collaborate with the public prosecutor's office, is undoubtedly appreciable. This is demonstrated by the numerous agreements signed over the years.

Bibliography

Condello D. (2008) ‘Rapporto tra procedimento penale e processo tributario: problematiche sull'efficacia probatoria della sentenza penale nel processo tributario alla luce dell'art’ 25 del d.lgs. n. 74/2000, *Nuovo dir.*, p. 322.

Gallo S. (2009) ‘Limiti all’efficacia del giudicato penale nel processo tributario’ *Il Fisco*, p. 2748.

Musco E. (2012) ‘Processo penale e accertamento tributario’ *Riv. pen.*, p. 923.

Tundo F. (2012) ‘Indeducibilità dei costi da reato: i difficili rapporti tra processo penale e tributario’ *Corr. trib.*, p. 1682.

Iannaccone A (2008) ‘I rapporti tra processo penale e procedimento tributario alla luce della recente giurisprudenza di legittimità’ *Il Fisco*, p. 7376.

Torzi L. (2015) ‘Il giudice territorialmente competente per i reati tributari’ *Riv. Trim. Dir. Trib.*, p. 527.

Laganà G. (2022) I criteri di determinazione della competenza territoriale nei reati tributari alla luce delle recenti pronunce della Suprema Corte. *La Piazza d’Italia* [Online]. Available at: https://lapiazzaditalia.it/i-criteri-di-determinazione-della-competenza-territoriale-nei-reati-tributari-alla-luce-delle-recenti-pronunce-della-suprema-corte/, (Accessed: 22 December 2023).

Ricasoli R. (2021) ‘Struttura organizzativa e funzioni della Procura. Uno studio sulla Procura della Repubblica presso il Tribunale di Velletri’ Roma: Stamen.

Tonini P., Conti C. (2022) *Lineamenti di diritto processuale penale*. Torino: Giuffrè.