

“TRANSFER PRICING”

VALUE ESTIMATES AND CRIMINAL IRRELEVANCE

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Transfer Pricing Evaluations and New Aspects Introduced by Legislative Decree No. 158/2015

The reform of criminal tax penalties under Legislative Decree No. 158, of 24 September 2015, subsequent to the Delegated Tax Legislation provided by Law No. 23, (Article 8), of 11 March 2014, thoroughly revised the entire tax crimes system through a series of interventions aimed at enforcing the self-same Delegated Tax Law with the purpose of restricting the scope of criminally relevant issues to the advantage of administrative tax penalties. Such significant reform was clearly expected to have an impact on “transfer pricing” issues, even though – it might be worth observing – already within the purview of the prior system, any criminal relevance of the said institute was rather limited, and in any event, jurisprudential applications on the said matter were always rather circumscribed.

The reason for such limited intervention by criminal justice in the transfer pricing area should be searched in the substantially “valuational” nature of “transfer pricing” transactions, and in the existence of a rule (Article 7 of Legislative Decree No. 74/2000), which (original text) established that “no punishable facts arise pursuant to Articles 3 and 4 (...), if the criteria applied to the relevant entries and value estimates were in any case disclosed in the Financial Statements”.

As a rule, what generally happened was that the subject-matter of value estimates was reserved to tax litigation and that any complaint for criminal law purposes for “discrepant tax return” (Article 4) or, in more serious cases, for “fraudulent tax declaration through other artificial means” (Article 3) would always end up in the “closed case” files or were acquitted.

The criminal-tax reform which is currently effective had a notable impact on the afore-mentioned cases under various respects:

- firstly, in increasing considerably the quantitative punishability thresholds, but such latter aspect does not seem to be the main reason for reducing the scope of criminal relevance in connection with transfer pricing, always keeping in mind that such litigation cases generally involved large corporations;
- secondly, by introducing interpretative criteria intended to circumscribe the scope of criminal relevance strictly in the case of a true and proper “non-existence” of some given elements and not of a debatable “fictitiousness” (as previously done).

As a consequence of such thorough reform within the area of transfer pricing, the numerous interpretative-applicative issues are automatically excluded from the scope of criminal-tax relevance. Therefore, transfer pricing may no longer be subject to any charges with the Public Prosecution; should any charges be filed, while waiting for the new rules and regulations, a Court ruling must – in any case be issued – to halt any and all proceedings.

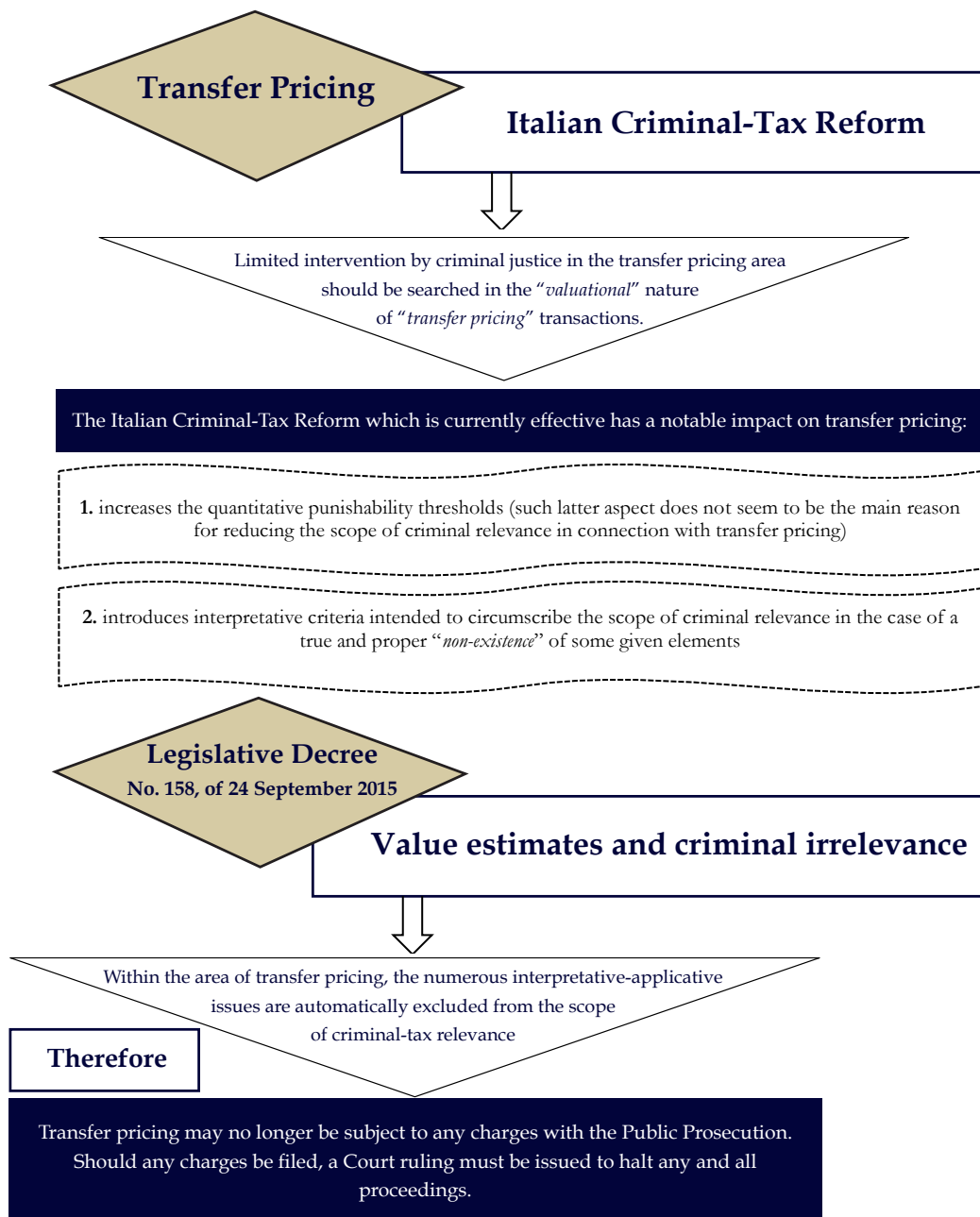
Transfer pricing, as all techniques based on uncertain or unpredictable elements and subjective evaluations, is not a topic that may be addressed either lightly or effortlessly, in view of the innumerable (strategic and operating) factors—generally affecting the determination of the single cases – that are likely to arise.

Both, formulation and rationale of Article 110, paragraph 7 of the TUIR (i.e., Italian Income Tax Code, hereinafter, “TUIR”) contain a considerable margin of subjectivity in the evaluations, where reference is made to “normal” value, in view of the fact that “normality” represents, in turn, an element that is based on calculation criteria (rectius, of determination) of the normal value established by Article 9, paragraph 3 of the TUIR.

The criteria set forth by the afore-mentioned Article 9 of the TUIR require, in turn, the identification of the price applied within the context of the “arm’s length” regime, namely, the price that would have been applied to similar transactions by independent enterprises (not bound by any controlling links or connections in a broad sense).

The fact that transfer pricing has an essentially evaluative nature, has limited over the years the intervention of criminal justice.

Table – Transfer Pricing: value estimates and criminal irrelevance



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