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THE AGGRIEVED TAXPAYER

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PRESENTS



HOW TO ASK FOR COMPENSATION FROM THE TAX AUTHORITY?

taxpayers' rights
e-book no. 2

WHEN IS THE TAX AUTHORITY REQUIRED TO INDEMNIFY THE TAXPAYER?

As a result of the considerable interest expressed for the previous e-book entitled "THE RIGHTS OF TAXPAYERS" (available on the link: www.studiolegalesances.it/ebook-i-diritti-dei-contribuenti/), we focus this time our attention to a particularly important theme, namely the request of claims for any damages that the tax authority is causing to the tax payers in the exercise of its activity.

In order to provide our readers with information of the greatest interest relative to this delicate theme, we thought to indicate some of the most important decisions in this respect (quoted decisions are freely available on the website www.studiolegalesances.it in section "documents").

We begin by emphasising that the pretext of the fundamental aim of an overspill claim is unambiguously established by an injury of a right of the taxpayers through an unlawful act of the tax administration or, as the case may be, of the one privileged with the collection of the tax claims.

WHAT IS MEANT BY AN UNLAWFUL ACT?

The illegality of the tax act must be materialized through a violation of the minimum rules of impartiality, correctness and proper administration.

Recently, the Court has clarified the following questionable subject:

"Tax administration may not be called upon to answer for damages eventually caused to the TAXPAYER on the basis of the sole given objective of the unlawfulness shown in the course of carrying out its business, being at the same time necessary that, in the course of the adoption of an unlawful act, to be violated the rules of impartiality, correctness and of the proper administration, which constitute the different external rules of its action."

(Decision of the Italian Court of Cassation no. 19.458/2011 of 23 September 2011). Relevant in this respect is also the **Decision no. 500/99** of the **Italian Court of Cassation, in Reunited Sections.**

However, in order to obtain compensation is not sufficient for the tax act to be illegal, but it is also necessary that the behaviour of the Tax Authority to be serious and culpable, by delaying to remedy the errors it made.



THE OBLIGATION OF THE TAX AUTHORITY TO THE PAYMENT OF THE COURT COSTS (art. 91 and 92 of the Italian Code of Civil Procedure)

During the process there is the possibility that the tax authority admits the fact that it acted in an illegal manner, doing so at the extinguishment of the illegal act before its completion. In such a case, the Tax Office must be sentenced in continued to pay the costs of the judgment.

In fact, the recent judgment of the **Italian Court of Cassation no. 7273 of 13/04/2016** emphasized that in the assumption that the tax authority recognizes the illegality of one of its acts only during the process, it is not allowed anymore to request the cessation of the cause for "cessata materia del contendere" (**definition: cessazione della materia del contendere** in the administrative process is a way of ending the law process for the absence of its object; this is done extrajudicially and with full satisfaction of the substantial claims submitted by the recurrent, by abolishing with ex tunc effects the tax act challenged in Court). In reality, the judges shall be necessarily required to force the tax authorities to pay the court costs in favor of the taxpayer, who has been otherwise forced to do legal approaches in order to make known his own rights.

THE TAX AUTHORITY SHALL QUICKLY EXTINGUISH THE ILLEGAL ACT

If the tax assessment is illegal, the tax payer can request the cancellation of the tax act through a law action of full jurisdiction in the administrative court and he also has the right to be heard as soon as possible.

The decision of the Tax Commission of the Province of Campobasso is is suggestive in this context: "if the tax payer requests the cancellation of the tax act under litigation of full jurisdiction, the office of taxation has the obligation not only moral, but also legal to issue a final decision before the expiry of the time limit granted to any appeal..." (**decision of the Tax Commission of the Province of Campobasso no. 195/01/14**).

In the present case deduced from the discussion, the tax authority, acknowledging its error and thus invalidating the act, was sentenced to pay the court costs up to an amount of compensation for "**responsabilità aggravata**" (**art. 96 of the Italian Code of Civil Procedure**), the reason of this measure stems from the fact that the tax administration has acted late in the purpose of repairing its own errors, forcing so the taxpayers to take the necessary legal measures for protecting their interests.

“LITE TEMERARIA”* FROM THE TAX AUTHORITY AND THE CALCULATION OF CHARGES

Recently, the **Supreme Court of Italy** in **reunited sections**, by **decision no. 13899 of 3 June 2013**, stated that the tax judge (il giudice tributario in the Italian law doctrine) has jurisdiction to hear a claim brought by the taxpayer under the title of “**responsabilità processuale aggravata**” with reference to the **art. 96 of the Italian Code of Civil Procedure**, in the case where the claims of taxation of the Tax Office are manifested in bad faith or serious misconduct (for example, continuation of the process in spite of having considered rebuttal arguments claims -tax claims -, failure to cancel promptly an illegal act, abusive behavior etc.).

The judges had also stated that: *“The tax judge can both know the claim for damages brought by the taxpayer under art. 96 of the Italian Code of Civil Procedure, whilst also allowing to establish in favor of the latter, where prevails, compensation for the damage resulting from the exercise of the Tax Administration, which was materialized through a notice of assessment, characterized by bad faith and gross negligence ... ”.*

On this subject, we would like to bring to your attention a few decisions as well as that of the **Court of First Instance in Piacenza of 7 December 2010** or that of the **Court of First Instance in Rome – detached section of Ostia of 9 December 2010**, referring to the **judgment of the Italian Court of Cassation no. 17902 of 30 July 2010**.

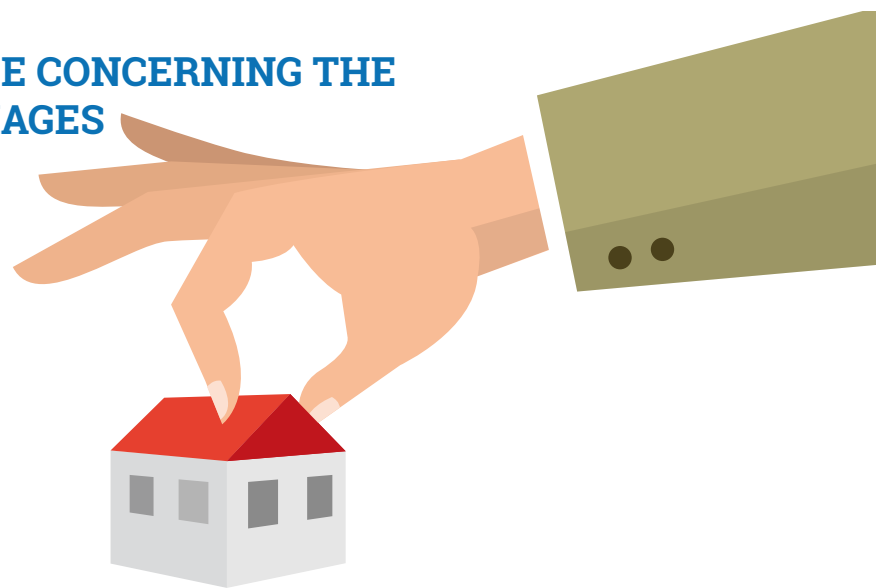
Therefore, in the present it is possible to require compensation for damages in front of the Administrative (Tax) Court, within the meaning of art. 96 of the Italian Fiscal Code, in cases where it is demonstrated that the tax authority has acted or was put on trial on charges of serious misconduct or dol.

* definition: legal action brought in bad faith or serious misconduct, namely with the awareness of someone's own mistakes or with dilatory or annoying intentions / consists in the behavior manifested during the trial by one of the parties, which denotes bad-faith or serious misconduct



THE COMPETENCE OF THE ORDINARY JUDGE CONCERNING THE PATRIMONIAL AND NON-PATRIMONIAL DAMAGES

There is a jurisprudential orientation sufficiently strengthened, guaranteeing maximum protection to the taxpayer who demonstrates that was unfairly harmed through the illegal behavior of the Tax Administration. In such a case, the taxpayer must claim from an ordinary court (ordinary judge).



On this point, the **Civil Cassation, Third Section of March 3, 2011, no. 5120**, clarified that *„The activity of the Public Administration (P.A.), even as regards the scope of a pure discretionary behavior, must be carried out within the limits imposed by the primary law and the principle of „**neminem laedere**“ provided in **art. 2043 of the Italian Civil Code**; thus allowing ordinary courts to ascertain whether there has been discovered, from the same public administrations, fraudulent or culpable conduct that by violating the norm and the indicated principle has caused the violation of a subjective right“.*



In fact, pursuant to the principles of legality, impartiality and of the proper administration referred to in art. 97 of the Constitution of Italy, Public Administration (and therefore the Financial Administration) is kept to bear the consequences established by **art. 2043 of the Italian Civil Code**, such principles being placed as external limits of its discretionary activity.

COMPENSATION FOR MORAL DAMAGES SUFFERED BY THE TAXPAYERS AS A RESULT OF THE ITALIAN AGENCY OF REVENUE ILLEGAL TAX COLLECTION

Recently, the **Italian Court of Cassation**, by **decision no.12413 from 16/06/2016**, has identified various hypotheses in the case of which it is possible to require the repair of the injury suffered by the taxpayer. In the present case mentioned above, according to the judges, Equitalia is obliged to compensate the taxpayer for the moral damage it had caused to him, if the latter proves the non-existence of the right which the fiscal agent responsible for collecting the tax debts had claimed.

The judges have also clarified that **„The claim for the damages caused to the taxpayer as a result of the precautionary measures illegally ordered by the Tax Authority/illegal collection of the tax receivables (on the basis of an illegal notice of assessment), referred to in article 86 of the Decree of the President of the Italian Republic no. 602 in 1973, may be advanced in pursuant to article 96 para. (2) of the Italian Code of Civil Procedure and it implies the request of the injured party, as well as the ascertainment of the inexistence of the right which justify the legality of the notice of assessment (through which is carried out the collection of the tax claims, independent of the will of the taxpayers) or of the lack of caution on the part of the agent entitled to collect the taxes. The obligation to pay the amount (as compensation) in an equitable manner determined as provided for in article 96 of the Italian Code of Civil Procedure...involves the determination of the bad faith or serious misconduct and even though it can be ordered ex officio by the Court of Appeal, the procedures relating to this aspect vary in compliance with the procedural behavior manifested by the losing party...”**.

In conclusion, the taxpayer may obtain compensation for both of the patrimonial or non-patrimonial damages caused by the tax authorities, so assuming the incidence of a serious injury (for example the loss of a place of employment as a consequence of a sequester established on the vehicle/an illegal confiscation of the machine at the expense; the inability to sell a building because of a mortgage or even the garnishment of the current account of a company, which leads to its bankruptcy), but also in terms/in case of **„responsabilità aggravata”** under the conditions of the **art. 96 of the Italian Code of Civil Procedure**.

In the presence of such hypotheses, the tax payer who has been prejudiced by the tax authorities can undoubtedly receive a fair compensation.

COMPENSATION FOR THE DAMAGES CAUSED BY ESTABLISHING AN ILLEGAL MORTGAGE

In equal measure, the establishment without a title of a real guarantee in the form of mortgage represents a breach of the principles of impartiality, correctness and of the proper administration. Therefore, it must be declared repairable both economic and non-patrimonial injury suffered by the taxpayers.

The lower courts have emphasized in this regard that *„it is likely to constitute infringement, with the consequent possibility for the taxpayer to obtain damages, the improper conduct of the tax administration, which records the formalities of a mortgage on a property owned by the debtor tax, in the case where the acts of taxation on which it is based the fiscal claim have been canceled by the tax court/ tax judge having the authority of a final decision”* (**Court of Latina - detached section of Terracina no. 74 of 27/04/2007**).

The judges, ruling in favor of the taxpayer, have recalled the principles already expressed in the **decision no. 500/1999 of the Italian Court of Cassation**, which has recognized the possibility of compensation for damages suffered by the tax payers under art. 2043 of the Italian Civil Code, as a result of a breach by the Italian Agency of Revenue and Equitalia of the rules enshrining fairness and good conduct of the administration.

THE QUANTIFICATION OF THE DAMAGES CAUSED BY „LITE TEMERARIA”

Regarding the theme dedicated to the quantification of the damages, judges have set various criteria to ensure the taxpayer, unfairly harmed by the official entitled to the collection of the tax claims or by the Tax Office, a fair monetary compensation.

A first criterion for determining the amount of compensation was traced by the **Court of Seine by the sentence of 9 June 2011**.

The judge has identified the value of the case as valid parameter for quantifying the damages in the event of **„lite temeraria”**.

The sentence says that *„the compensation must be proportionate to the amount of the dispute which the plaintiff had stated in the citation”*.

In motivating this choice, the sentence mentioned in the above lines is also specifying that: *„art. 96 para. (3) of the Italian Code of Civil Procedure consents to the imposition of a sanction proportionate when the*

procedural conduct, from the same side and viewed as a whole, is causing an augmentation, not entirely indifferent regarding a better management of the justice and when the applicant's action in the same case is detrimental to the constitutional sacredness of the right of action”.

A second criterion was fixed by the judges of the Courts of Piacenza and Varese (**Court of Piacenza december 7, 2010; Court of Varese february 23, 2012**). According to these two pronouncements, the parameter used for the repair of the injury/compensation for damages in the event that it is incident/engaged „**responsabilità aggravata**” is calculated through the use of a coefficient, although judges are still not sufficiently clear in relation to this issue.



Finally, the **Italian Court of Cassation, by decision no. 3993 of 18 February 2011**, claimed that the magnitude of the injury caused by a „lite temeraria” as referred to in article 96 of the Italian Code of Civil Procedure derive from popular notions in the same way as the principle, now constitutional, enshrining the reasonable duration of the trial (art. 111 par. (2) of the Italian Constitution). As argued by the judges of this Court, in most of the cases, the unjustified procedural conduct adopted by the Tax Administration causes „ex se”, besides patrimonial damages, also moral damages that result from the psychological injury suffered by the taxpayer and which can not be easily quantified, according to be granted in a fair appreciation in concreto of the elements deducted from the case (**Judgment of the Italian Court of Cassation no. 24645/2007**).



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