

## THE CRIME OF FRAUDULENT STATEMENT REFERRED TO IN ARTICLES 2 AND 3 OF D. LGS. March 10, 2000, N.74

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**Abstract:** *Tax Violations can result in the application of penalties. The tax penalties find their basis in the DL July 10, 1982, n. 429. Of great importance is the Legislative Decree No 74 of 2000 which introduced new crime called "crimes relating to statement". Among the crimes introduced by Legislative Decree No 74 of 2000 deserves special attention the crime of fraudulent statement. Article 2 provide for the fraudulent statement put in place by the use of invoices or other documents for nonexistent transactions. Article 3 provides for the fraudulent misrepresentation by other devices.*

*Many are the judgments of Cassation related to this crime. Remember the sentence 30176/ 2008 and the sentence 18765/2008.*

*Today in Italy the fraudulent statement is not punishable if it adheres to the tax shield, the new financial manoeuvre of amnesty.*

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**JEL Classification:** *K14, K 34.*

### **1. Introduction**

The implementation of the tax rule requires the fulfillment of a series of obligations. These obligations are levied on the taxable subject and they concern not only the payment of tribute, but especially on the transfer of information related to the fact of assessment available to him. Under a tax-based mass collaboration, the taxpayer is paramount to the sanctions regime designed to ensure the proper fulfillment of tax obligations.

Tax violations can result in the application of penalties. They are intended to punish the one who gives rise to serious offences, forcing associates to fulfil their tax obligations<sup>1</sup>. The tax penalties find their basis in the first DL July 10, 1982, n. 429, converted with amendments by Law August 7, 1982, n. 516 called "handcuffs evaders." This law repealed the notorious "pregiudiziale tributaria", which prevented the criminal court to intervene before the administration dispute was finished. The innovative idea of L. No 516/1982 was

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<sup>1</sup> On this issue, see TINELLI, "Istituzioni di diritto tributario".

to impose criminal penalties for the facts so-called "Prodromal" made to prepare and enable evasion.

Of great importance is the Legislative Decree No 74 of 2000 which introduced new crime called "crime of declaration"<sup>2</sup>. Added to this are offenses "collateral", however, of significant detrimental attitude<sup>3</sup>.

This decree abolished the principle of "Continuing" in which the criminal law of taxation, although repealed or amended in favour of the accused, shall apply to all of those cases made during the period in which it was in force.

Among the offenses introduced by Legislative Decree No 74 of 2000 deserves special attention the crime of fraudulent declarations under Articles 2 and 3.

## **2. The offense of fraudulent misrepresentation by the use of invoices or other documents for nonexistent transactions**

Art. 2 of Decree Law No 74 of 2000 governing the offense of fraudulent misrepresentation by the use of invoices or other documents for nonexistent transactions.

The case has been conventionally called, in doctrine, as "fraudulent misrepresentation qualified.<sup>4</sup> The use of invoices for nonexistent transactions or other false documentation, shows the willingness on the part of taxpayers to deceive the tax authorities in fact, the offense to the interest / fees direct "the collection of taxes due."<sup>5</sup>

In relation to the discipline of modern art. 2, we can say that the legislature of 2000, taking up the pattern already present in the law n.516/1982, identifies the players with the pronoun "anyone. However, it is evident that the present case constitutes a crime just because the crime can be committed only by persons who are required to submit annual statement of income and IVA<sup>6</sup>.

The author of the crime can also be a subject is not obliged to keep books of account, as shown indirectly by the second paragraph of Article 2 of legislative decree which provides for the possibility of imprisonment for testing purposes, referring to taxpayers other than self-employment income earners and independent. In order to prevent the occurrence of any doubt art. 1, lett. c) Legislative Decree n.74 of 2000, includes among active players even administrators, liquidators and representatives. No reference is required for the liquidator, the liquidator and the special commissioner<sup>7</sup>.

The conduct under the crime of fraudulent declaration by the use of false invoices, has a biphasic structure, then separated in two parts connected.

The first stage is the retrieval of invoices for nonexistent transactions and other false documentation, then the immediate registration of the application in the appropriate records to justify the contraction of the base by subtracting part of the wealth produced.

The second moment is the submission of false statement in which is supported by artificial accounting architecture already prepared. The presentation of the statement represents the final act which materializes the danger to the fiscal interests. It identifies the consummation of the crime, so the punishment event.

The crime under Article .2 of Legislative Decree n.74/2000, like other crimes under Articles 3, 4, 5, takes into account only the tax returns relating to income tax and value added which as we know are the taxes provide more revenue to the exchequer.

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<sup>2</sup> We remember the crimes of fraudulent misrepresentation by the use of invoices or other documents for nonexistent transactions (art. 2), statements by other fraudulent devices (art. 3), for misrepresentation (art. 4) and non-declaration (art. 5).

<sup>3</sup> We recall the issue of invoices or other documents for nonexistent transactions (art. 8), concealment or destruction of records (art. 10) and the misappropriation to the coercive collection of taxes (art. 11).

<sup>4</sup> See. NAPOLEONI, "I fondamenti del nuovo diritto tributario", pag. 48.

<sup>5</sup> Cass., Sez. un., 25 October 2000, n. 27, "In Guida al diritto", 43/2000, 59.

<sup>6</sup> The parties responsible for the submission of the annual statement of income are identified in art. 1 and 13 of D.P.R. n. 600/1973 and of the art. 2 del D.P.R. 917/1986.

<sup>7</sup> On this topic you can see MUSCO, "Diritto penale tributario".

Unlike under the old rules,<sup>8</sup> annual declarations only have penal value. Remain, therefore, the statements put out by the beginning statements, change and termination activities. Are also excluded, then the statements related to the extraordinary economic events details (ex: the merger or division) and the periodic declarations of IVA. Both categories are not annual statement because the first category are unpredictable, the other one have a frequency less time per year.

Moving from what is available to the article 2 of Law 516/1982, the reform of the tax offenses, no longer takes into account the declaration of the replacement tax.

The latter, although the holder of tax liability, is not the holder of ability to pay, so do not act with intent to defraud the revenue.<sup>9</sup>

The bills represent the most important tax document, being the statements of science and attest services and supplies of goods subject to tax.

In regard to "other documents" the legislator refers to all those documents, which equated to the invoice, can complement, replace or extend the functionality. Are undoubtedly documents that can replace the 'invoice the "fiscal bill"<sup>10</sup> and "receipted bill"<sup>11</sup>.

The "changing notes" have the integrative function which are issued to correct a material mistake or inaccuracy of calculation occurring after the grant or refusal of the invoice. In addition to the bill are the "fuel cards" with which you show the purchase of fuel by taxpayers employees who are the owners of the stations for fuel distribution, so called "Self Billed Credit Note" issued by the transferee or buyer in the event that the supplier has issued an invoice or simply irregular has not issued.

Art. 2 Leg. N.74/2000 requires that invoices and equivalent documents are issued in respect of transactions which don't exist in whole or in part. The legislature calls "operations" , any economic relationship that is relevant to the determination of income tax or value added.

In relation to Article .1 of this decree, we conclude that the adjective "non-existent " are documents "issued against transactions that are not actually carried out [...] or that indicate the fees or setting the value added measure larger than the real, or reporting the transaction to entities other than the actual. "The non-existent documents" may therefore be divided into two general categories: one objective and one subjective.

It is objective when:

a) the taxpayer certifies a transaction which has no touch with reality because he never made it (in that case it's an absolute non-existent);

b) when the taxpayer has partially documented the transaction certifying quantities greater than those actually traded. Another situation related on that category is the transaction in which the fees, or IVA, are in excess compared with the real one. This case is just a variation of over-invoicing.<sup>12</sup> (It is clear that in such cases the taxpayer is keen to reduce the taxable amount).

As regards non-existent subjective case, it is configured when the invoice or similar documents, for probative purpose, show different names than the actual parties to the transaction tax.

It is evident that the offense under Article 2, apply only to those who pre-established costs incurred in order to reduce the tax base and not to the transferor.

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<sup>8</sup> See Law no.516/1982 called "*manette agli evasori*".

<sup>9</sup> On this topic you can see MUSCO, "*Diritto penale tributario*".

<sup>10</sup> See. art. 1 of the Law no. 18/1983.

<sup>11</sup> See. art.8 of the Law no.249/1976.

<sup>12</sup> On this issue, see the Court of Cassation n.1996, 15 January 2008 "issue in the penalty specified in Article 2, of Legislative Decree 74/2000 and any kind of difference between commercial reality and its expression document, taking into account the special insidious factor that connects the use of false invoices". On this issue, see also GULLO, "*Falso in parte, reato per intero*" in the March 4, 2008 Today Taxes.

The transferor will answer the offense of "emission of invoices or other documents for non-existent transactions" ex art. 8 d.lgs.74/2000.<sup>13</sup>

Another moment of fraudulent conduct is an indication of passive fictitious elements in the notional annual declaration, supported by false tax documents already found out. For "passive fictitious elements" means "components, expressed in figures, that are competing in the negative, about the determination of income or tax bases relevant for the implementation of income tax or value added."<sup>14</sup>

The chosen definition leaves out, from the application of the law, all the components included on the calculation of taxable items. Article .2 therefore may not apply to violations involving tax deductions.

The offense in question requires that when the taxpayer having found the ideologically false documentation, he can use the passive elements in fictitious statement.

The second paragraph of Article .2 explains that "the fact is deemed committed by using invoices or other documents for non-existent transactions where such bills or documents are registered in the records required, or detained at the end evidence against the financial authorities. It will be relevant to criminal proceedings, recording of invoices and documents treated in the accounts, or possession as evidence against the tax authorities.

The offense at issue is punishable only by way of fraud. It is therefore necessary that the subject has the will and conscience of the typical fact. The offense of Article .2 and therefore specific intent as the result of evasion, is the goal which must tend the agent.

The offense of fraudulent declaration by the use of false invoices or other documents, is consumed with the presentation of the tax declaration. Art. 6 Leg. No 74/00, in fact, expressly repealing the ERT .56 cp for crimes under Articles 2, 3 and 4.

The base penalty of this crime is the imprisonment from one year and six months to six years, however, where the total amount of fictitious elements specified in the declaration is less than three hundred million lire (equal to Euro 154.937,07), Article. 2 paragraph 3 states the penalty of imprisonment from six months to two years.

### **3. Fraudulent declaration by other devices**

The second hypothesis of fraudulent misrepresentation is disciplined by article 3 Legislative Decree 74/00. This crime is distinguished from that provided by Article.2 for the prediction of a threshold of criminal relevance under which the fact is not punishable.

Tax evasion must therefore exceed that threshold intended to indicate the upper limit of tolerance beyond which the tax evasion becomes worthy of criminal sanction. This will apply, therefore, only to infringements of the most important. For the crime of fraudulent declaration by other artifices potential perpetrators of the crime are only those who are obliged to keep books of account. Fall into the category of active subjects of crime: individuals engaged in professional activities or business, administrators, representatives or liquidators of corporation, associations and entities subject to IRES and ultimately, the directors of company's people.<sup>15</sup>

The conduct of the crime in question has a complex structure. The first moment is the misrepresentation of the accounting and the use of fraudulent means likely to obstruct the investigation of forgery. From here follows a statement characterized by fictitious passive elements or active elements fictitious understated. Finally, as already anticipated, the result of tax evasion exceeds the threshold of criminal law.

By comparing the conduct of the crime of Article .2 and the conduct of the offence in question, we realize that the similarities are less than the differences. What unites the two

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<sup>13</sup> On the theme CORSO, "Emittente di false fatture e cause di non punibilità penale" in "Corriere Tributario"26/2004.

<sup>14</sup> See. art.1 Law. no. 74/200.

<sup>15</sup> The doctrine believes that the directors of partnerships should not be included among the stakeholders of the offenses statements regarding income tax and, in particular, of the crime in question.

behaviours is only a false accounting records and a false tax declaration. However, the fraudulence is defined by the use of means other than invoices or tax documents ideologically false.<sup>16</sup> The concept of fictitious passive elements has already been widely discussed in relation to art. 2 of Legislative Decree 74/2000. The crime is characterizes and in same time is distinguishes by active elements less than the actual amount. Between the active elements we can include revenues, the capital gains and windfall profits<sup>17</sup>, among the passive elements we can included the capital loss, windfall loss.<sup>18</sup> Also in this offence, are irrelevant the components that affect the tax payable, so-called "tax deductions".

The first element of the false document described by the article in question is the false representation of accounting records. It must follow the corresponding false declaration. For setting up the offence in question requires the combination of the two false documents. If the taxpayer is limited to indicate the false quantitative elements only in the tax return without indicate them in the accounting records, he will respond only for art. 4 Leg. No 74 / '00 on the crime of misrepresentation.

We can divide the category of fraudulent means in article 3 in documentary means and fraudulent means whit other nature. As regards the firsts they are documents different from the invoices or other document equivalent, for nonexistent operation in Article .2 Leg. No 74/00. Among the documents equipollent is excluded accounting record. They are already the subject of the first forgery relating to the conduct described in art. 3 Leg. No 74/00.

Particular are the fraudulent means whit other nature. Despite the doctrine deems the contrary, tax avoidance can not give rise to any fraudulent means. It is clear that the crime under Article .3 necessarily imply a false representation of the taxpayer's accounting records. This condition does not exist in the tax avoidance.<sup>19</sup>

The crime of fraudulent misrepresentation by other devices is consumed by the submission of the annual declaration in the form prescribed by law. For the crime in question, as for the crime under Article n.2, the legislator of the reform with Article 6 of the Legislative Decree n.74/2000 derogates the Article 56 of penal code to avoid the criminalization of attempted evasion.

The limitation period, running from the consummation, in accordance with art. 157 cp is ten years, extendable up to fifteen years in the case of acts which interrupt.

#### **4. Rulings of the Court of Cassation**

There are several rulings by the Court of Cassation on the crime of fraudulent misrepresentation.

Of significant importance is the ruling of the Sec. III pen. May 8, 2008 n. 18765 (Pres. Altieri). With this ruling, the Supreme Court reiterated that the offense of fraudulent misrepresentation, by the use of invoices or other documents exist, can be "simple" or "continue". The offense should be considered "simple" if the indication of fictitious passive elements is contained in a single statement or declaration provided for the unified income tax and IVA, for the same tax year; instead the offense is "continued" if the indication of fictitious passive elements is contained in two separated statements that are presented for the income tax and IVA for the same year.<sup>20</sup> The concept expressed by the sentence n.18765/2008 is picked up again by the Third Criminal Chamber of the Court of Cassation in Sent. No 626/2009, which stated that we apply a stronger penalty for the taxpayer that has filed a fraudulent declaration because he issued several false invoices in a single

<sup>16</sup> TRAVERSI; GENNAI, "I nuovi delitti tributari".

<sup>17</sup> See art 53, 54, 55 d.P.R. n. 917/1986.

<sup>18</sup> See. art. 66 d.P.R. n. 74/1986.

<sup>19</sup> See. PALMIERI, in "Elusione e frode fiscale".

<sup>20</sup> See the text CORSO, "La dichiarazione fraudolenta tra oneri probatori e obblighi di motivazione" in "Corriere tributario" 34/2008 cit. pag. 2757.

period. According to the Court, the number of bills is not important because the offense is unique and there is no continuity between different criminal cases. In particular, the judges of legitimacy stated that "the diversity of the documents used to raise the costs, when the declaration is single and on the same tax year does not justify the claim of responsibility for two different offenses."

"Article 2 of Decree Law No 74, 2000 - the Court continued - allows a single prosecution for the person who brings into being a fraudulent declaration, whether it uses a single document, is to use a plurality of invoices or other documents, noting that nothing in the bills or other documents are different and have different target audiences, and this is because the crime does not occur with the simple registration document which will be used but with the statement, referring to that specific interactions annuities, stating, under that declaration of passive elements included in the notional accounts. So the number of irrelevant documents, invoices or documents used to lower the costs for the registration of such documents is only foreshadow the creation of an offense that is consumed when it presents a fraudulent declaration with the use of invoices or other documents for nonexistent transactions and not when recording in the accounts on the single document that it will be used to cut costs "and, finally," any number of offenses does not depend on plurality of documents used, but from multiplicity of claims of different tax years. If the declaration is one, one is the offense committed with that statement even if the documents used are different."

Among the various judgments of the Court of legitimacy, the ruling also deserves attention n.39176 2009. In this case the taxpayer strove invoices for nonexistent passive operations, corresponding to a cost (fictitious) split, and so influential on the determination of taxable income over several years, and the declaration of several years. The Supreme Court held that each statement is an "attack" to the public tax, so if you are declared the attack is repeated. The legislature, in fact, identified in the submission of the annual conduct typical of criminal law and the time of the case.<sup>21</sup>

We also remember, in many cases before the Supreme Court, the above-mentioned decision No. 1996 of 15 January 2008 (see footnote 12) in relation to criminal law the use of bills plus the amount even on actual operations. In the application submitted by the taxpayer, it took over some of the considerations of the doctrine, regarding the definition of invoices for nonexistent transactions, provided directly by the legislature in Article 1 of Legislative Decree 74/2000, this states that for bills or other documents for non-existent transactions "means invoices or other documents of proof similar relief under the tax rules, issued in respect of transactions not actually done [...]".

This thesis, however, is not subject to strict review of the rule just cited, which continues: "[...] issued against transactions that are not actually made in whole or in part, or that indicate the fees or the value added measure higher than real. "For these reasons, the judges of legitimacy, "the subject of the sentence in Article 2, of Legislative Decree 74/2000, and any kind of difference between commercial reality and its documentary expression, given the special factor insidious that connects the use of false invoices.

The offense is expected to prevent the dangerous behavior of those who, for any act evasive, he resorted to invoices covering the transactions actually carried out, but with fees higher than the actual value. The falsity of the document makes monitoring and recovery evasion more difficult and uncertain than in cases where this omission resulting bill is, the non-payment of taxes duly declared. With these objectives in the event of use or issuance of false invoices, the legislature has provided for the recurrence of the infringement penalty regardless of the amounts evaded.

## **5. The tax shield**

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<sup>21</sup> MARCHESELLI, see the topic *"Effects of the instantaneous nature of the fraudulent misrepresentation in the case of recurrence of crime"* in *Corriere Tributario* 46/2008.

Today, a special criminal law protection for the offence in question is made by Decree Law 103 of 2009, which introduces the third "tax shield".

This decree aims to regulate the return of Italy of capitals made with activities abroad in violation of tax laws and / or monetary norms<sup>22</sup>. It allows to extinguish a series of violations of tax law by paying a 'special tax equal to 5% of the value of assets subject to emersion, on a special statement "confidential" to be presented to a bank or other intermediary identified in the legislation, with a guarantee of confidentiality.

For the purposes of tax assessments, the tax authorities can not get news and information related to activities that have emerged, except in cases where the taxpayer is the same as directly concerned to report such information to the Administration. It is, therefore, protect the anonymity of those who wish to avail themselves of this law. The regularization is only possible for individuals resident in Italy that fall into these categories: individuals, non-commercial entities, simple societies and associations of artists. The partnership, limited partnership and stock company are excluded.<sup>23</sup>

This financial manoeuvre pursues a dual purpose. It represents the opportunity for those who have invested abroad or who have established operations in violation of the legislation on fiscal monitoring, to regularize their position with the Revenue. However, the objective is not only that but mainly be to cover all financial resources, which have been established abroad in contravention of the provisions of DL 167/1990.

The proceeds from the shield will be used to implement the budget proposals for the years 2010 and following. As already mentioned, the tax shield offer protection to certain criminal offences. The coverage, which before the amendments affect only the infidel or non-declaration of tax<sup>24</sup> is extended to a series of tax offenses, among them the fraudulent misrepresentation committed either by the insertion of false invoices or by artifice<sup>25</sup>.

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<sup>22</sup> MIELE "Un'occasione per sanare i capitali detenuti all'estero" in "Scudo fiscale" edito da "Il sole 24ore"

<sup>23</sup> On this issue, see FICOLA, SANTACROCE "Chance alle persone fisiche ma non alle società di capitali" in "Scudo fiscale" edito da "Il sole 24ore"

<sup>24</sup> See PAGANI "Modifiche allo scudo fiscale" in [www.lacontabilitaonline.net](http://www.lacontabilitaonline.net)

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