Complicity in Administrative Tax Offences in Italy

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ABSTRACT: The principles of the system of criminal penalties inspire the legal construct of complicity in the administrative tax offence. However, the latter has relevant specifities that are particularly evident in two cases. First, when the violation ascribable to the taxpayer is also a consequence of the contribution of a tax advisor through his expertise. Second, when the tax offence is physically committed by an individual but in the interest of another natural or legal person. Furthermore, this paper underlines that the tax penalty system should be even more focused on the beneficiary of the tax offence rather on than its perpetrator, and in order to gain this aim, it is suggested to modify some rules today in force.

KEYWORDS: Tax offence, penalty, complicity, tax advisor, legal person.

SUMMARY: 1 Complicity; 2 The specificity of the tax penalty system in the area of complicity; 3 Complicity of tax advisors; 4 The commission of the tax offence by an individual in the interest of a legal person.

1 COMPLICITY

The Legislative Decree nº 472 of November 18, 1997, governing the fundamental enforcement criteria of administrative sanctions for breach of tax rules, outlines a system inspired by the principles of the system of criminal penalties. This choice would originate from settled case-law and doctrinal development regarding tax administrative penalties as punitive sanctions for breach of a principle, and not as enforcement sanctions for the breached principle, as are civil penalties. So, as a consequence, it is allowed to employ – as far as possible – principles already established in criminal law so as to facilitate the implementation process[1]. It is well-known that this system is primarily

1 For an in-depth look at the general theme of administrative tax penalties, also with respect to legislative developments, see DEL FEDERICO, Lorenzo, *Le sanzioni amministrative nel diritto tributario,* Milano, 1993; CORDEIRO GUERRA, Roberto, *Illecito tributario e sanzioni amministrative*, Milano, 1996; FAVA, Claudia, *Sanzioni tributarie e persone giuridiche tra modelli penalistici e specificità di settore,* Milano, 2006; COPPA, Daria and SAMMARTINO, Salvatore, *Sanzioni tributarie*, in *Enc. dir.*, Milano, 1989, vol. XLI, 438; Various Athors, *La riforma delle sanzioni amministrative tributarie,* edited by G. Tabet, Torino, 2000; Various Authors, *Commentario alle disposizioni generali sulle sanzioni amministrative in materia tributaria,* edited by F. Moschetti, L. Tosi, Padova, 2000; BATISTONI FERRARA, Franco, *La riforma del sistema sanzionatorio non penale in materia tributaria,* in *Riv. Guard. Fin.,* 1997, 1429; LUPI, Raffaello, *Prime osservazioni sul nuovo sistema delle sanzioni amministrative tributarie,* in *Rass. trib.,* 1998, 329; MARONGIU, Gianni, *La nuova disciplina delle sanzioni amministrative tributarie*, in *Dir. prat. trib.*, 1998, I, 283; DEL FEDERICO, Lorenzo, *Disposizioni generali in materia di sanzioni amministrative per le violazioni di norme tributarie,* in *Commento agli interventi di riforma tributaria,* edited by M. Miccinesi, Padova, 1999, 1065; VINCIGUERRA,

characterized by the principle of personal liability of the primary actor. Article 9, paragraph 1, of Legislative Decree nº 472 of 1997 – provision concerning complicity – fits into this scheme, since it is aimed at sanctioning any person who, in various capacities, participates in the commission of a tax offence[2]. The intention was, in this way, to emphasize the deterrent and punitive character of the financial penalty (and of the supplementary penalty), thus making it more effective as compared to a single sanction to which all the parties to the offence are jointly and severally liable. The above provision sets forth a mechanism of extent of personal liability of the primary actor, apparently similar to the one existing in criminal law, pursuant to art. 110 of the Criminal Code, and in administrative law, referred to in art. 5 of Law nº 689 of November 24, 1981[3]. In order for complicity of all actors to occur in committing the tax offence, the above mentioned rule mandates the coexistence of four specific costitutive elements, i.e. a) a plurality of subjects; b) the commission of an offence; c) the contribution of each actor to the accomplishment of the offence; d) the existence of the psychological element in each contributor, i.e. their will to cooperate in the unlawful conduct.

The legal construct of complicity is, however, explicitly excluded in art. 9, para. 2, of Legislative Decree nº 472/1997, in cases where the infringement derives either from an omission involving the obligation of multiple persons, such as failure to file an estate income tax return, as is the case for coheirs, or the submission of an irregular value declaration by parties to a transaction subject to registration tax. The application of the principle *quot capita, tot poenae*, proper to the legal construct of complicity in tax offences is, therefore, confined only to cases of intentional or negligent causal complicity of third parties in infringing obligations of one person.

2 THE SPECIFITY OF THE SYSTEM OF TAX PENALTIES IN THE AREA OF COMPLICITY

Although on cursory reading it might seem that complicity, referred to in art. 9, para.1, of Legislative Decree nº 472/1997, follows the regulatory framework of the same legal construct codified in criminal law under art. 110 of the Criminal Code, the identification of the costitutive elements of such legal

Sergio, *Considerazioni sui principi generali di diritto sostanziale delle infrazioni amministrative tributarie,* in *I "Venerdì di Diritto e Pratica Tributaria", Convegno Genova 14-15 ottobre 2016 – Per un nuovo ordinamento tributario*, *Atti preparatori,* 2016, 941 et seq. See also case-law: Constitutional Court, sentences nº 196 of June 4, 2010, and nº 104 of April 18, 2014, in the '*fisconline*' data base.

2 On the same topic, see TOPPAN, Arturo, *Art. 9 – Concorso di persone*, in *Commentario alle disposizioni generali sulle sanzioni amministrative in materia tributaria* edited by F. Moschetti, L. Tosi, Padova, 2000, 270; NUCERA, Valeria, *Art. 9 – Concorso di persone,* in *Commentario breve alle leggi tributarie, Volume 2 – Accertamento e sanzioni*, edited by F. Moschetti, Padova, 2011, 745.

3 On this theme, see DEL FEDERICO, Lorenzo, *Le sanzioni amministrative nel diritto tributario,* cit., 355 et seq.; SANDULLI, Maria Alessandra, *Le sanzioni amministrative pecuniarie*. *Principi sostanziali e procedimentali*, Napoli, 1983, *passim.*

construct shows certain peculiarities, proper of tax law, that criminal law does not leverage[4].

In the first place, with regard to the element of "plurality of subjects" (costitutive element *sub* a), unlike what occurs in criminal law (where complicity can be necessary or possible, whether or not the plurality of subjects performing the act is a costitutive element of the illegal conduct[5]), in tax matters it is not possible to identify cases of illegal practices where complicity is necessary. Each offence can, in fact, be perpetrated by means of the conduct of one person, the taxpayer, who, with no other actors present, is able to infringe any tax provision in terms of formal or substantive obligations. For this reason, within the confines of tax offences, cases of complicity are only possible since, to this end, it is necessary to examine, with particular attention, the tangible contribution made by each contributing person. In fact, under tax law, complicity is a legal construct which is applicable only in sporadic cases, also owing to the difficulties of tax authorities in establishing the wrongdoing of all contributing parties. This insomuch as tax authorities are reasonably confined to verifying only the breach committed by the beneficiary of the effects produced by the tax offence[6].

Another peculiarity of complicity in tax law, as compared to the parallel legal construct in criminal law, can be found in respect of the second costitutive element that, as previously remarked, is the commission, in the sense of full accomplishment, of the tax offence (costitutive element *sub* b). Indeed, the tax legal system, unlike the criminal one, do not admit the hypothesis of attempt to commit an offence and, accordingly, in order for the conduct of an individual to be sanctioned, the fact described in the sanction provision must have been fully accomplished.

By contrast, minor differences can be found about complicity between tax provisions and the provisions of criminal law, regarding the requirement of the necessary contribution made by each contributing actor in accomplishing the wrongdoing (constitutive element *sub* c). In this respect, in order for a case to be regarded as complicity, it is necessary to have a causal contribution in the commission of the tax offence, meaning that the illegal situation could not occur without the contribution – commission or omission – of all contributing parties

4 Italian tax authorities, analysing the legal framework of administrative tax penalties set forth in Legislative Decree nº 472/1997, pointed out that the notions of criminal law, reintroduced by the legislator in the area of taxation in Legislative Decree nº 472/1997, must necessarily take into account that some of the principles criminal law refers to, assume an almost exclusively theoretical relevance in the area of taxation (see Ministry of Finance, Circular Letter of July 10, 1998, nº 180/E, para. 10, in the "*fisconline*" data base).

5 For example, the crime of theft, referred to in art. 624 of Criminal Code, as a type of offence where complicity is possible, and that of brawl, laid down in art. 588 of Criminal Code, that constitues instead a type of offence where complicity is necessary.

6 On the same issue, see also DEL FEDERICO, Lorenzo and LUPI, Raffaello, *Contro l'evasione un grande concorso (nell'illecito),* in *Dial. trib.,* 2012, 633; BUCCISANO, Andrea, *In tema di responsabilità sanzionatoria del contribuente* e *del suo consulente fiscale,* in *Riv. dir. trib.,* 2010, I, 57.

(causal relationship). However, in tax matters, a causal relationship does not necessarily imply a physical conduct of each actor, but can require, sometimes, also a merely psychological involvement, given the peculiarity of a tax offence case as a form of conduct that is usually "*unisussistente*", i.e. a wrongdoing perpetrated by means of one single act or omission. In fact, under tax law, it is possible, in the abstract, that the offence is either committed through a fractioned performance over time or a sequence of actions or omissions, but this turns out to occur quite infrequently, since in tax matters illegal acts "*unisussistenti*" (i.e. single illegal acts) of commission or omission are those which mainly assume greater importance. One may consider, for example, infringements in tax returns set forth in art. 1 of Legislative Decree nº 471 of December 18, 1997, where the taxpayer, though having complied with the preparatory instrumental requirements, then specifies – in the tax return – a lower disposable income than the real one.

Even with respect to the last costitutive element of complicity in the commission of tax offence, i.e. the necessary existence of the psychological element in each contributing actor (constitutive element *sub* d), one should draw a comparison with the parallel legal construct in criminal law. Indeed, art. 5 of Legislative Decree nº 472/1997 specifies that, even in tax law, the participation in the accomplishement of an offence, whether a commission or an omission, can only be sanctioned if it occurred with intent or by negligence. However, whilst the conscious and voluntary involvement of the actor in the commission of the wrongdoing does not hinder the sanctioning of his conduct[7], majors problems arise, instead, in respect of the situation of cooperation of negligent character. Except that, even with no explicit legal provision in this regard, as is the case instead in criminal law pursuant to art. 113 of Criminal Code (under the heading "cooperation in negligent offence"), it appears legitimate to provide for complicity by negligent behaviour also with regard to tax offences, insomuch as the tax lawmaker, under art. 5 of the previously mentioned Legislative Decree nº 472/1997, provided that any illegal conduct, even though merely *"negligent",* must be sanctioned. However, it should be recalled that, in actual fact, complicity arising from negligence turns out to occur quite infrequently, since the perpetration of a tax offence, in and of itself, is usually connected to specific

7 By way of example, reference should be made to the supply of goods that may be subject to VAT. Here, it is easy to identify, in the behaviour of the final consumer, the possible wilful cooperation in the commission of the offence, i.e. failure to invoice. Indeed, if the transferor, faced with the request made by the consumer to receive a proof of purchase (invoice or receipt) certifying the taxable transaction, does not satisfy the request, it is clear that no charge can be brought against the final consumer. By contrast, in cases where the consumer is willing to waive his entitlement to obtain the proof of purchase in exchange for a discount on the purchase price, then this consitutes a liability of the consumer for intentional involvement in the offence perpetrated by the VAT taxable person.

choices of taxpayers. Therefore a negligent conduct is already a rare occurrence: complicity by negligent behaviour is, accordingly, even more so[8].

3 COMPLICITY OF TAX ADVISORS

The theme of complicity in the commission of a tax offence is relevant, however, with particular reference to the liability of tax advisors for offences attributable to taxpayer, and from which the latter might benefit illegally[9]. It is certainly possible, in fact, that the violation ascribable to the taxable person is, sometimes, also a consequence of the contribution of a tax practitioner through his expertise[10]. In such cases, in order to identify complicity in the offence, one needs to assess, in actual fact, to what extent the tax advisor affected the illegal conduct of the taxpayer. In that regard, it is to be noted that the complicity of an advisor in the commission of a tax offence by a taxpayer can occur both as *moral* and *material complicity*. As regards moral complicity, the contribution of the practitioner is realized by engaging in a conduct aimed at providing the taxpayer with such expert advice, opinions or solutions as to induce the taxpayer to commit the offence, being enticed by the possible benefits (in terms of tax savings) ensuing from it. Such conduct is relevant for complicity only if the tax advisor incites the taxpayer to perpetrate the offence or when, because of the advisor's conduct, the taxpayer is persuaded to perpetrate the offence. In material complicity, on the contrary, the tax advisor directly intervenes in the accomplishment of the wrongdoing, by making a contribution either in the preparatory phase of the infringement or in the subsequent commission phase[11].

8 For example, it could be a case where one or more directors of a company entrust an unqualified person the keeping of the accounting records with the aim to reducing costs. In that case, in fact, the director creates a clear situation where the verification of irregularities are likely to arise, irregularities that can lead, consequently, to violations of tax rules (i.e., a false tax return).

9 In respect of the previous system of penalties provided before the introduction of Legislative Decree nº 472/1997, DEL FEDERICO, Lorenzo, *Le sanzioni amministrative nel diritto tributario,* cit., 353-358, in dealing with the issue of liability of tax advisors from the standpoint of tax penalties, had properly pointed out that tax offences occur in the form of the so-called "*illecito proprio*" or "proper" offence, and not in the form of the so-called "*illecito comune*" or "common" offence, and, accordingly, the tax violation can only be committed by subjects that are specifically identified by the law. This raised considerable doubts as to the involvment of tax advisors in the administrative penalty liability, in view of the fact that it turned out to be extremely difficult to identify the specific legal basis of shared liability of tax advisors. However, it was concluded that the enforceability of the complicity offence in such cases, pursuant to art. 5 of Law nº 689/1981, had to be excluded. The administrative penalty liability of the tax practitioner was actually declared thanks to the analogic interpretation of the provisions of art. 11 of the same Law nº 689/1981, which governs in fact the shared liability to incur penalties if the tax offence is committed by multiple people, considering that the principle of jointly and several responsibility of the actors of the infringement is generally applicable in the area of tax penalties.

10 On a similar issue, in particular with regard to the liability of subjects performing audit activities, see FICARI, Valerio, *Certificazione del bilancio IAS, rilevanza probatoria, responsabilità del revisore contabile e sanzioni amministrative,* in *Rass. trib.,* 2010, 1090.

11 Consider, for example, the case in which the tax advisor, keeping the accounting records of the taxpayer, omits to record and account for, even unintentionally, some sales invoices of the taxpayer. This act would be relevant both for the commission of the breach, in the area of the recording of tax documents, and for the preparation for the infringement, i.e. the false tax return.

In both cases, in fact, the joint participation of the *estraneus* constitutes an essential element for the actual commission of the offence by the *intraneus,* i.e. the taxpayer. However, these criteria must be related – in cases where the professional service required of the tax advisor is especially complex – to the provisions of art. 5, para. 1, of Legislative Decree nº 472/1997, that, in accordance with the principle of fault, which set forth that the tax advisor incurs liability as accomplice of the taxpayer only if he acted deliberately (as is the case where the tax advisor is conscious of its irregularity in the keeping of accounting records) or by severe negligence (when, for example, a tax advisor makes a macroscopic error in a particularly complex bookkeeping). By contrast, there is no question of the liability of tax advisors in cases of mere connivance, since the tax regulations do not prescribe a general duty to impede someone else's illegal conduct[12].

Once established the above principles, then one needs to verify, without any pretence of being exhaustive, what are the cases in which moral and material complicity can be identified in the administrative tax offence.

With regard to *moral complicity,* it must be noted that there are different ways in which tax practictioners can affect the psychological sphere of their clients so as to induce them to commit the tax offence. The most common case is certainly that of the request from the client for an opinion or advice to reduce the tax burden. Here, the taxable person is reasonably already prone to commit the tax breach considering that, in fact, he specifically turns to the advisor to this very end and, accordingly, it is not the practitioner who instils, in the client, the idea of escaping taxation.

The liability of the tax practitioner, from the tax penalty standpoint, can only be identified, therefore, if such professional – by providing advisory services – suggested the *modus operandi* and made it possible, in practice, for the taxable person to achieve the illegal goal he was pursuing. Moral complicity is accomplished also in cases where the advisor showed the taxable person a form of fiscally incorrect conduct that is already well-known and widespread, and that the client might already know, independently of the professional advice. In fact, even though the client was already aware of the tax evasion method, the tax practitioner, by means of the advice provided, has unquestionably driven the taxpayer to pursue the evasion goal[13]. Likewise, if it

12 In this regard, see also LA GROTTA, Fabiola, *Il concorso di persone nei reati tributari*, in *Dir. prat. trib.*, 2005, II, 891; FAVA, Claudia, *Il concorso di persone,* in Various Authors, *La riforma delle sanzioni amministrative tributarie*, cit., 128.

13 For this case, instead, even though in respect of infringements of criminal character, CARDONE, Vincenzo, *Sul concorso del consulente fiscale nei reati tributari commessi dal contribuente*, in *Riv. dir. trib.*, III, 2008, 8, excludes any shared liability of tax practitioners since the latter, pointing out to the client a form of illegal behaviour that is so well-known and widespread, would not, at the very least, affect the psyche of the requesting client.

was the client who "devised" a method in order not to correctly contribute to public spending, and the practitioner simply provided his advice supporting whatever was "devised" by the taxable person, it must be considered that the advisor acted in moral complicity considering that, through his conduct, he approved and reinforced the client's intent to evade. At any rate, it is difficult to refer to exclusively general judgement criteria about this subject, since it is necessary to assess, on a case-by-case basis, besides the type of advice provided to the client, also the actual effect of such advice on the commission of the administrative offence. In fact, it does not appear plausible to identify a case of advisor's moral complicity if the taxpayer was firmly convinced to evade taxes and – in actual fact – the practitioner's advice has not reinforced that intent. Moreover, the conduct of an advisor who, upon request of the client, enlightens him on prospective risks and benefits of actions or omissions aimed at obtaining a tax advantage, neither encouraging, nor at the same time discouraging the taxable person from perpetrating the tax offence, should be regarded as mere connivance and, therefore, not punishable[14]. Such expert action, in fact, appears to be part of the ordinary professional activity of impartially advising clients about the consequences of their conduct, and then letting them decide whether to adopt it.

In cases where it is the tax advisor who directly submits to the client the strategy for tax evasion, with no specific request, moral complicity appears certainly occurs, obviously when the taxpayer then implements the advice of the expert. Here, in fact, the drive for engaging in illegal conduct directly originates from the tax advisor, who is certainly morally involved in the infringement of tax law by the taxpayer. The same remarks apply in those cases where the expert merely suggests to engage in conduct aimed at committing an abuse of tax law, rather than actual tax evasion. In fact, considering that the abuse of law in tax matters is sanctioned pursuant to art. 10a, para. 13, of Law nº 212 of July 27, 2000, if the tax advisor devises for his client a transaction that is considered abusive, it appears difficult to uphold his non-involvement in the responsibility for the offence.

It is worth pointing out here that there is a more delicate issue in terms of liability of the advisor, from the tax penalty standpoint, in cases where he is requested to give what is generally called an *independent pro-veritate opinion* on the abusive character of an arrangement put forward by, and upon the exclusive initiative of, the client. In this case, moral complicity can indeed be identified only in those cases where the client presents to the tax advisor an arrangement or a series of arrangements which appear to be manifestly an abusive scheme and, notwithstanding that, the advisor issues an opinion of approval. The

14 Cordeiro Guerra Roberto, *Concorso di persone ed autore mediato nella nuova disciplina delle sanzioni amministrative tributarie,* in *Rass. trib.,* 2000, 400-401.

scope of the tax law abuse, being outside the perimeter of the violation set out in tax regulations, is, in and of itself, uncertain and refers to requirements which are not always clearly defined and objective. As a consequence, as we mentioned earlier, except for the cases that are manifest, the tax advisor could have supported, in good faith, the arrangement put forth by the client, but then, contrary to the opinion of the expert, this is qualified as abusive by tax authorities. In such cases, therefore, provided that the advisor accurately interprets the case submitted to his examination, moral complicity is excluded, because the advisor was unaware of issuing an opinion aimed at validating an abusive conduct. In this regard, reference must be made to the above provisions of art. 5 of Legislative Decree nº 472/1997, which limits the possibility to punish for infringements committed (as accomplice, in this case) in providing tax advice in cases where it is necessary to solve especially difficult problems. Assessing whether an arrangement can be regarded as abusive, indeed, is usually a complex and difficult professional task; therefore, the conduct of the advisor can be associated to that of the taxpayer, from the stanpoint of sanctions, only if the expert acted deliberately or by gross negligence. In actual fact, liability from the penalty standpoint can be extended to a tax practitioner by tax authorities only if he issued an *independent pro-veritate opinion* validating an arrangement that, pursuant to the provisions of art. 10a of Law nº 212/2000, was clearly aimed at circumventing tax law or if he supported the client's initiative, reinforcing his intent to proceed, in a superficial manner, without performing the required analysis that falls within the duty of the expert.

As for *material complicity,* it is worth recalling that one of the most contentious issues among the scholars and in jurisprudence, in terms of the possibility of establishing a liability of the tax advisor to incur penalties, concerns the (eventual) obligation to perform also a substantive analysis of the lawfulness of the documents delivered to him for bookkeeping as well as for the tax or VAT returns. Likewise, this calls into question whether the tax advisor issuing what is generally called a *light-weight visa*, i.e. the visa proving compliance, or a *heavy visa*, i.e. tax certification, with a view to avoiding that the punishable conduct be identified, is actually obliged to verify the truthfulness of the documented transactions or his professional obligation is confined to controlling that the transactions documented match the bookkeeping and comply with the legislation on corporate income tax. The issue is, therefore, the necessary nature of the verification by the tax advisor, first, of the existence of the transactions, relevant for VAT purposes, certified by the documents and, then, of their inherence to the taxpayer's business. In these cases, in fact, material complicity of the advisor in the tax offence can be identified, since he performs actions, such as transposing the bookkeeping data in the tax return or issuing the visa proving compliance, which allow the taxpayer to evade taxes. In this type of case – where the advisor's specific conduct assumes relevance for the commission of the tax offence (for

instance, in drawing up accounting records and filling in the tax return) and if he didn't engage in such conduct, the offence would not occur – one can identify an actual obligation of the advisor to establish the lawfulness of the transactions that are relevant for tax purposes and documented by the taxpayer. In fact, if the tax practitioner became aware that such operations are not in line with tax rules, he should refuse to perform the professional activity aimed at perpetrating the tax offence[15]. The tax advisor, in actual fact, cannot feel obliged to perform his professional work, if this is (also) aimed at accomplishing a breach of the law. Rather, the advisor's refusal to carry out his professional work should deter the taxable person from proceeding to commit the offence. Here, in fact, the tax advisor would make a substantial causal contribution to the occurrence of the illegitimate conduct. It ensues that this case is beyond mere connivance where the advisor, having become aware, while performing his work, of the potential tax offence that the taxpayer is about to accomplish, does not prevent it. In the latter case one cannot identify any form of complicity, since the tax advisor does not provide any support, whereas in the above mentioned case the professional work assumes relevance for the perpetration of the offence.

Subject to these positions of principle, it is indeed worth pointing out that advisors, in performing their job, are not required to carry out an audit of the documents delivered to them, like the one which is incumbent on tax authorities. They are not tasked with accurately verifying the lawfulness of the activities of their clients, but must be confined, with a view to excluding their liability for tax penalties, not to cooperate in cases where the potentially illegitimate conduct is manifest[16], or they must request clarifications from their clients for those cases in which the violation or the circumvention of the regulation is not so apparent, but could be reasonably upheld. Once they receive such clarifications, according to the requirements of due diligence, they will have to carefully assess them, so as to figure out if the conduct might lead to infringe tax regulations and, accordingly, decide whether to perform the task they are entrusted with. With the exception of the cases of manifest illegality, of course, advisors in carrying out the necessary checks must not engage in conduct that may affect the taxpayer's proper compliance with tax obligations. It is well known, in fact, that it is necessary to fulfill tax obligations by strict deadlines.

Thus, the advisor, in taking up his appointment, must demand from his client to receive all documents required to perform his duties sufficiently in advance with respect to the deadline of tax compliance in order for both the practitioner to have time to review it and for the client, in case the advisor refuses

15 See also SCHIAVOLIN, Roberto, *La responsabilità penale del professionista*, in *Rass. trib.*, 2015, 540, who, even though in the area of criminal offences, reckons that the tax advisor should refrain from performing his assignment. As regards tax administrative sanctions, in the same sense, see Court of Cassation, Section Civil III, sentence nº 9916, April 26, 2010, in the *"Pluris"* database.

16 For example, in the tax return, an allowance of a cost that is manifestly not inherent to the business activity.

to perform his professional assignment, to have time to fulfill (even though by commission of an infringement) the tax obligation, possibly appointing another tax advisor[17].

Finally, it is also worth recalling, in respect of the conduct of the tax advisor, the provisions of art. 10 of Legislative Decree nº 472/1997 on the "*mediated offender*" *(autore mediato),* based on which if an advisor misleads a blameless taxpayer, he will incur liability in his place. The most frequent case, considered also in case-law, occurs in the area of breaches concerning the obligation to submit tax returns. Here, the advisor usually takes on the assignment and then fulfils the tax obligations in full autonomy. However, the advisor could fail to perform his work even though, instead, he assured the taxable person that he would: the client, accordingly, assumes that the practitioner he entrusted with the task actually proceeded to submit his tax return electronically. It is important to notice though that the *mediated offender* is not automatically identified. In fact, it is not sufficient that the submission of the tax return – or the fulfilment of any other tax obligation – is transferred to an agent, however qualified, for the taxable person not to be subject to tax penalties, pursuant to art. 10 of Legislative Decree nº 472/1997. The appointment of an agent does not release, in fact, the taxpayer from his obligations to check the tax advisor's work and, therefore, to verify that the latter has fulfilled properly his tax obligations[18]. The fact that the omission is the result of the sole conduct of the agent, responsible for the breach by gross negligence, as is certainly the case for the omission or late submission of tax returns, does not relieve, therefore, the taxpayer of responsibility for the infringement of the obligation to submit the tax return.

4 THE COMMISSION OF THE TAX OFFENCE BY AN INDIVIDUAL IN THE INTEREST OF A LEGAL PERSON

Without any intention of carrying out an exhaustive analysis of the problems concerning complicity, it is finally worth considering also the case where the tax offence is accomplished by a natural person in the interest of a legal person. In that case, the legislator, pursuant to art. 7 of Decree-Law nº 269 of September 30, 2003, converted, with amendments, into Law nº 326

17 This is the case where the tax advisor realizes that some invoices (booked under costs) document nonexistent transactions. The advisor will have to promptly inform the client that he does not intend to fill in the tax return, that will also include entirely lawful costs, and not too close to the deadline by which the tax return must be lodged, since the dutiful abstension of the tax practitioner from fulfilling his work must not turn into a damage for the private client.

The latter, in fact, deprived of the professional support at the very end of the deadline set out for filing the tax return, would risk – because there was not enough time – incurring in failure to submit the tax return, a wrongdoing that the taxpayer had reasonably no intention to commit.

18 See Court of Cassation, Section Civil VI-T, order nº 11832, June 9, 2016, in the *"fisconline"* database; Court of Cassation, Section Civil V, sentence nº 27712, December 11, 2013, in the *"De Jure"* database; Court of Cassation, Section Civil V, order nº 12472, May 21, 2010, in the *"fisconline"* database.

of November 24, 2003, does not faithfully apply the principle of personal liability of the subject that physically commits the infringement, but lays down that administrative penalties, which result from the violations concerning tax obligations of companies or entities having legal personality, are solely charged to the legal person benefiting from the violation. This regulatory position, however, must not be interpreted by way as a derogation from the provisions of art. 2, para. 2, of Legislative Decree nº 472/1997, pursuant to which the penalty is applicable to the individual that committed the breach or contributed to it, but rather it appears to be in line with them. In actual fact, the legal person acts – obviously – through its organs that are, in practice, individuals. The actions or omissions of the individual, when conducted in the performance (whether legal or illegal) of their functions as organs of the represented entity, are actions or omissions of the entity itself and not of the person. Essentially, there is identity between the action (or omission) of the organ of the body corporate and the person that engages in (or omits) such conduct.

Correctly, in this case therefore it is impossibile to invoke the principle according to which the physical offender (i.e. the natural person) must be punished, since the sanction would be inflicted on a person that legally – on account of the organic identification – has nothing to do with the commission of the offence, unlike the taxable person (i.e. the legal person) who, thanks to that action (or omission) of his organ, perpetrates the offence and benefits from that[19]. Accordingly, with respect to the case in question, it appears proper to arrive at the conclusion of the *"sole"* responsibility of the legal person, since we do not deem it appropriate to recall the provisions of art. 9, para. 1, of Legislative Decree nº 472/1997 on complicity.

Undoubtedly, however, the current regulatory framework, laid down in art. 7 of Decree-Law nº 269/2003, determines an unwarranted and irrational inequality of treatment between similar cases[20]. In fact, in respect of tax offences committed by the representative in the interest of subjects having no legal personality, such as breach of VAT legislation by partnerships, the sanction is inflicted on the physical offender, since the above art. 7 is (unreasonably)

19 Even though by arguing about art. 98 of Decree nº 602 of the President of the Republic of 29 September 1973, which has been repealed, also DEL FEDERICO, Lorenzo, *Le sanzioni amministrative nel diritto tributario,* cit., 325, raises perplexities in respect of the double liability incurred by the entity and by the representative/administrator since, based on the organic theory, the entity operates through its organs, but he clearly points out that, whether he embraces the organic theory or not, the legislator, except the compliance with constitutional principles, is legitimized in any case to characterise a double liability for wrongdoing to be incurred by the entity and the representative (327). In any case the repealed art. 98 set out a legal construct different from complicity, but provided for the mere joint and several liability between the entity and the representative/administrator. Such legislation can be found today under art. 11 of Legislative Decree nº 472/1997.

20 This is emphasized by GALLO, Franco, *L'impresa e la responsabilità per le sanzioni amministrative tributarie*, in *Rass. trib.*, 2005, 11 et seq., who adopts a critical approach with respect to the provisions of art. 7 of Decree-Law nº 269/2003; as can be found in CARDON, Andrea, *Le nuove sanzioni amministrative tributarie*, in *Dir. prat. trib.*, 2005, I, 385.

applicable only to legal persons[21]. Nor does analogy appear to rescue this illogical regulatory framework and to be able to govern in the same way the above mentioned similar cases, in consideration of the well-known difficulty to employ interpretation by analogy in the field of penalties. However, besides the provisions of the above mentioned art. 7, from a more general standpoint, the current rules governing penalties appear excessively targeted to prosecuting the physical offender more than the taxable person that benefited from the breach committed in his interest. Financial penalties applicable for tax offences are inflicted, in fact, following an infringement that (almost always) allows the beneficiary to obtain the reduction or cancellation of the tax debt[22]. Basically, the tax obligation is a financial obligation as well as the sanction, which is commensurate also with the economic size of the former. Therefore, if the wrongdoing allows the taxable person to save on taxes *contra legem*, and the legal system responds applying a penalty having the same financial nature of the unfulfilled obligation, then it appears proper that the sanction be mainly inflicted on the person that did not abide by the principle of taxpaying capacity more than on the physical offender who acted in favor of the subject obtaining the benefit.

It is quite a different matter when, by contrast, the physical offender is the legal guardian of the natural person that is disqualified or incapacitated. The legal guardianship is, in fact, the form of legal protection provided for in the Civil Code that allows the recipient to be supported in carrying out every action. The legal guardian takes the place of the person under legal guardianship in all legal acts, also concerning the financial situation: thus, the legal guardian does not perform any act for himself, but as if he were the protected person. Following the approach set out by the legislator for legal persons, if the analogy were applicable, only the person under legal guardianship should incur liability. Because, however, the person under legal guardianship is such since he is not deemed to be in full possession of his faculties, he cannot be considered liable to any tax penalty pursuant to art. 4 of Legislative Decree nº 472/1997. It ensues that, in such case, from the sanction standpoint it is the legal guardian that must fulfil the obligation, otherwise if one thought to sanction the beneficiary of the tax offence – being disqualified, in this case – the illegal conduct would not be

21 Therefore, we can endorse the considerations by COMASCHI, Elena, *Sanzioni amministrative fiscali: riflessione sulla lesione del principio di irretroattività in* malam partem *a danno della persona giuridica,* in *Dir. prat. trib.,* 2006, II, 365, according to whom, in enforcing the provisions of art. 7 of Decree-Law nº 269/2003, it is possible to identify two channels for ascribing liability for tax offences. In particular, for entities having no legal personality, the general rule of directly sanctioning the individual perpetrating the breach is still being applied. On the contrary, for entities having legal personality, the special provisions based on the opposite direct liability of the legal persons are applied.

22 Naturally, the infringements of the so-called formal obligations are sanctioned as well, such as the failure to fill in the questionnaire sent to the taxpayer by tax authorities, but the penalties arising from it do not appear to take on particular importance in consideration of their irrelevant economic size.

sanctionable, and thus actions or omissions *contra legem* would be legitimized just because they are performed within a regime of legal protection.

With regard to any offence committed by a natural person in the interest of a legal person one should not disregard, finally, art. 11 of Legislative Decree nº 472/1997 entitled "persons liable to administrative penalties"[23]. In our opinion, the provision is improperly phrased since it should refer only to persons or entities that are obliged to pay the administrative penalty. In other words, it should not fulfil the function of indicating the person or entity to be charged with the infringement and that, therefore, who is subject to sanctions. The person or entity to be sanctioned can, in fact, already be identified pursuant to the above mentioned articles 2 and 9 of Legislative Decree nº 472/1997. Art. 11 recalls the breach committed in the determination or payment of the tax by a person different from the taxable one, but that is so closely connected to him – i.e. the legal representative of a natural or legal person – that this gives rise to a joint and several obligation to pay the sanction debt of the perpetrator of the offence, not benefiting from the illegal conduct, and the taxable person. The involvement of both the perpetrator and the taxable person in the payment of the penalty should therefore just be aimed at providing a financial safeguard for the proper fulfilment of the financial obligation and should not affect the ascription criteria as provided for in articles 2 and 9 examined above. For the cases of legal representation or representation in a legal transaction, the tax penalty must only be inflicted on the taxable person, since he is the one who benefits from the wrongdoing: however, it should be garanteed to the latter the right to claim recourse from the agent that physically perpetrated the offence. Basically, the terms of art. 11 under examination should be reversed with respect to the current regulatory provisions. The rule, in fact, provides for considering the physical offender as the person on whom the penalty must be inflicted, then adding to it the joint and several obligation of the represented person. By contrast, in our view, in terms of financial sanctions, the proper type of involvement of the physical offender who, not being the taxable person, certainly does not obtain any economic benefit from the breach itself, should be joint and several, yet secondary (*dipendente),* as against the primary obligation of the taxable person. Thus, the legislator should revise the provisions of art. 11 of Legislative Decree nº 472/1997, following the route already marked out in the area of sole responsibility of legal persons for wrongdoings committed in their interest by natural persons, as provided for in art. 7 of Decree-Law nº 269/2003. Furthermore, today, there is in fact a discrepancy between art. 11, providing for the sanction to be inflicted upon the individual who is the physical offender, ascribing the joint and several liability, on a secondary basis

23 See PIERRO, Maria, *Il responsabile per la sanzione amministrativa tributaria: art. 11 D.Lgs. n. 472 del 1997*, in *Riv. dir. fin. sc. fin.*, I, 224 et seq.; D'AYALA VALVA, Francesco, *Aspetti problematici dell'imputazione soggettiva della sanzione amministrativa tributaria,* 2003, I, 220-233.

(*in via dipendente),* to the legal person, and art. 7 of Decree-Law nº 269/2003. Arguably, however, art. 7, already mentioned above as the provision in force, following art. 11 of Legislative Decree nº 472/1997, should have implicitely repealed the provisions of art. 11 in respect of wrongdoings committed in the interest of collective subjects (companies or entities) having legal personality. Indeed, the implicit repeal is perhaps questioned by the recent intervention of the delegated legislator through art. 16 of Legislative Decree nº 158 of September 24, 2015. In fact, the delegated legislator has intervened precisely on art. 11 of Legislative Decree nº 472/1997, but without affecting the principle of joint and several obligation between the natural person that commits the breach of the law and the entity benefiting from that breach, which has remained formally unchanged also after the introduction of the new provisions. As a consequence, the legitimate question is, if in the *mens legis* in 2003, with the introduction of art. 7 of Decree-Law nº 269/2003, there was a tacit repeal of the scope of art. 11 of Decree-Law nº 472/1997, with the aim of imposing sanctions exclusively on legal persons, but such repeal remained however implicit, why such repeal was not later made esplicit on the occasion of the recent partial revision of the system of tax penalties and, more specifically, of the provision of art.11?[24]. Such observations that, if agreed upon, raise serious doubts on the interpretation of the rules reviewed here, should encourage the legislator to clarify the scope of art. 11 of Legislative Decree nº 472/1997. It would be advisable, in this regard, to remove, from art. 11, the function of rule for the subjective ascription of the sanction, to privilege its purpose of guarantee for the collection of the tax credits ensuing from the sanctions. In fact, art. 11 should be applied as a provision about the collection of financial penalties and merely strengthen the possibility of cashing in tax credits due to sanctions. In fact, ascribing the sanction burden primarily to the physical offender appears to be open to question since, as pointed out, the actor does not benefit from the offence, whereas by modifying the legislation as we suggested, at any rate, the creditor of the financial penalty would be protected as well. It is in fact evident that providing for a joint and several bond between the representative and the person represented, the former – already entrusted with the necessary powers to pay the obligations of the person represented – will ensure that the latter properly complies with his obligation to pay the penalty so as to avoid an enforcement order by the tax penalty creditor.

If the position outlined here is agreed upon, the issue of (apparent) overlap between art. 7 of Decree-Law nº 269/2003 and art. 11 of Legislative Decree

24 The tacit repeal of art. 11 of Legislative Decree nº 472/1997 by means of art. 7 of Decree-Law nº 269/2003, in the section providing for the joint and several liability for the debt resulting from tax penalties between the representative and the represented entity, is supported by BATISTONI FERRARA, Franco, *Art. 11 – Responsabili per la sanzione amministrativa,* in *Commentario breve alle leggi tributarie,* cit., 755; COMASCHI, Elena, *Sanzioni amministrative fiscali: riflessione sulla lesione del principio di irretroattività in* malam partem *a danno della persona giuridica, cit.,* 375.

nº 472/1997 will be solved as well: the former determines the sanctionable persons, the latter sets forth which persons can be required to pay the penalties. However, the joint and several liability appears to be imperative, even if is improperly provided for in art. 11, as previously pointed out, since the figures of the main obligor, i.e. the perpetrator of the tax offence, and that of the secondary (*dipendente)* obligor, the beneficiary of the tax offence, should be reversed. The categories of persons having an obligation to pay the penalties must, in fact, be firmly maintained, in order to ensure to a greater extent that such obligation is complied with, regardless of the criteria guiding the subjective imposition of the sanction itself.