



RSM PALEA LAURI GERLA

Associazione professionale di Studio Palea, Studio L4C, Studio Gerla Associati

TAX NEWS

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JURISPRUDENCE

Usability of "Lista Falciani" (i.e. Falciani list) in tax assessments (Italian Court of Cassation, judgment no. 8505 and 8506 of April 28th, 2015)

Over the past few years the various events related to the "misappropriation" and "resale" of lists containing lists of taxpayers with assets hidden in Tax Havens have caused a great stir.

In this sense, the story of Henry Falciani has been emblematic.

He is an IT technician who worked in Switzerland employed by the banking giant HSBC (Hongkong & Shanghai Banking Corporation).

In 2009 Falciani has stolen, from the bank, a list containing the names of thousands of customers, who concealed their assets from the Tax Authorities of different Countries. Falciani was arrested in 2009 in France, and began to cooperate with justice by providing these lists of names: in their turn, the French authorities said the names of their respective citizens contained in the list to the other countries (including Italy).

Since that time many Italian taxpayers were subject to tax assessed by the Italian Revenue Agency for violation of the legislation on tax monitoring (non- indication of the foreign assets of the RW section).

The event was immediately the subject of a bitter dispute before the tax courts and the main question raised in the courtrooms consisted in the usability or non-usability of a list acquired in an illegal/irregular way.

Up to April 28th, there were judgments diametrically opposed: as a matter of fact, the jurisprudential trend endorsing the usability of such lists has emerged, while many other tax courts have denied the validity, given the illegal method used to gather names.

The Italian Court of Cassation, with the two judgments mentioned, settles the dispute in favor of the Exchequer, laying down the following important principles:

- an information that has been transmitted by another Country in compliance with the rules on the exchange of information is, in principle, legitimately usable, for the tax assessment purposes;
- the irregularity in the acquisition of elements relevant for tax assessment purposes does not imply, in itself, the non-usability of these latter, in the absence of a specific provision of law in such sense and excluding, obviously, the cases in which the protection of fundamental rights at constitutional level (such as the inviolability of personal freedom, of the domicile, etc.) is brought into question;
- the mandatory obligations of tax solidarity (safeguarded by art. 53 of the Italian Constitution), among which the main one consists in contributing to the public expenses based on the ability to pay, which is associated, in a mandatory way as well, with the aim of creating a strong "fight" against tax havens, justify the possibility to use the evidence gathered by the Tax Authorities also with reference to "Falciani" story.

FOCUS ON EMPLOYMENT

(IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

De Luca & Partners has been specialized in Employment Law since 1976. With its 16 professionals, it assists clients with i) day-to-day advice; ii) industrial relations; iii) extraordinary transactions; iv)

restructuring and social safety nets ; v) judicial litigation and arbitration.

HR Capital® is the service company established by the partners of De Luca & Partners which, for over 30 years, has been providing services and solutions for outsourced personnel administration payroll and social security contribution processing.

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Press, conventions and seminars

Studio De Luca – Employment Lawyers has always been committed to studying and anticipating changes in its field of expertise.

Its partners and lawyers are often invited as speakers at training courses, workshops and seminars and regularly write in leading sector journals, as well as "Il Sole 24 Ore".

Articles:

Some of the most recent articles are provided below:

- "Credit enhances requalification interventions" (Il Sole 24 Ore, Norme e Tributi – 8 April 2015, page 35)
http://www.studiodeluca.it/news_654_IL+CREDITO+POTENZIA+GLI+INTERVENTI+DI+RIQUALIFICAZIONE
- "An opportunity for overhauling incentives for hiring" (Il Quotidiano del Lavoro – Il Sole 24 Ore – 10 April 2015)
http://www.studiodeluca.it/news_656_UN%27OCCASIONE+DI+RIORDINO+DEGLI+INCENTIVI+PER+ASSUMERE
- "No Cig if the company closes" (Il Sole 24 Ore, Norme e Tributi – 10 April 2015, page 40)
http://www.studiodeluca.it/news_655_NIENTE+CIG+SE+L%92AZIENDA+CHIUDE
- "Failure to comply with reinstatement order does not constitute a crime" (Il Quotidiano del Lavoro – Il Sole 24 Ore, 23 April 2015)
http://www.studiodeluca.it/news_659_L%92INOTEMPERANZA+ALL%92ORDINE+DI+REINTEGRAZIONE+NON+COSTITUISCE+REATO+%28IL+QUOTIDIANO+DEL+LAVORO+-+IL+SOLE+24+ORE%2C+23+APRILE+2015%29
- "Solidarity contracts with 70% unemployment benefits (il Sole 24 Ore – Focus, 29 april 2015, page 5)
http://www.studiodeluca.it/news_671_CONTRATTI+DI+SOLIDARIET%C0+CON+INTEGRAZIONE+A



[L+70%25+%28IL+SOLE+24+ORE+--+FOCUS%2C+29+APRILE+2015%2C+PAG.+5%29](#)

http://www.studiodeluca.it/news_672_NIENTE+CASSA+INTEGRAZIONE+PER+CHI+CHIUDE+L%92ATTIVIT%C0+%28IL+SOLE+24+ORE+--+FOCUS%2C+29+APRILE%2C+PAG.+15%29

Interviews:

Class CNBC – On March 31st, Vittorio De Luca released a television interview concerning the impact of the Labour Law reform on the employment trend in Italy.

<https://youtu.be/kUeudr1y7Dk>

Conventions and seminars:

Alberto De Luca participated as a Speaker at the convention "The implementing decrees of Jobs Act – Overhaul of contract types and rules governing job duties – Ambasciatori Palace, Rome, 17 April 2015".

<http://www.studiodeluca.it/convegno/slide.pdf>

Ruling of the month

Compensation for damages not due to an employee who cannot prove a causal relationship between a pathology and an occupational accident

(case followed by Vittorio De Luca and Giulia Ambrosino, attorneys-at-law)

The Milan Court, Labour Section, Judge Mariani, with a ruling of 13 November 2014, made a decision in a proceeding started by a worker who challenged a dismissal for objective justified reason following physical unfitness for performing the job to which he was assigned, and requesting compensation for damages resulting from an occupational accident from the Employer, who was assisted by our law firm.

The plaintiff sustained that he fell from scaffolding while applying film to a train and had started to suffer from a disabling back problem.

The appearing Company sustained the complete lack of proof of a causal relationship between the claimed pathology and the occupational accident involving the worker which, for the Company, had occurred in a different manner than described.

The Judge rejected the appeal, considering, in line with what the employer sustained, that the Company's responsibility was not proven, nor was the causal relationship between the pathology claimed by the plaintiff and the accident.

The Judge also rejected the request regarding the wrongfulness of the dismissal due to the statute of limitations, since the appeal was filed more than 180 days after the challenge.

Press review

1. Agreement signed to renew Commerce National Collective Contract (Il Sole 24 Ore, 1 April 2015, page 13)

http://www.studiodeluca.it/news_661_SOTTOSCRITTO+L%92ACCORDO+DI+RINNOVO+DEL+CCNL+COMMERCIO+%28IL+SOLE+24+ORE%2C+1+APRILE+2015%2C+PAG.+13%29

An agreement was signed on 31 March to renew the collective labour contract of the tertiary, distribution and services sector starting 1 April 2015. The changes include: *i*) increase in wages of 85.00 euro before taxes for IV level employees over 14 months pay; *ii*) flexible working hours and contracts; *iii*) short-term contracts. The agreement also establishes that during peak work periods, companies can ask their employees to work four hours more (for a maximum of 16 weeks in a 12 month period) without the need for consent from the trade union or worker and without higher pay for the overtime. The hours will be recovered in the following 12 months, but in periods when the company is not as busy.

2. Post-employment benefits (TFR): decree on monthly payment of post-employment benefits ("QUIR") becomes effective (Il Sole 24 Ore, 4 April 2015, page 14)

http://www.studiodeluca.it/news_662_TFR%3A+ENTRATO+IL+VIGORE+IL+DECRETO+SULLA+Q+UIR+%28IL+SOLE+24+ORE%2C+4+APRILE+2015%2C+PAG.+14%29

With the Decree 29/2015, which became effective last 3 April, workers can request monthly payment of their post-employment benefits (so-called "QUIR") in relation to pay periods from 1 March 2015 to 30 June 2018. The worker's request becomes effective starting the month after submission of a formal application.

3. Cassation: indemnity reduced if a new job offer is not accepted (Il Sole 24 Ore, 10 April 2015, page 40)

http://www.studiodeluca.it/news_663_CASSAZIONE%3A+INDENNIZZO+RIDOTTO+SE+NON+SI+ACCETTA+LA+NUOVA+OFFERTA+DI+LAVORO+%28IL+SOLE+24+ORE%2C+10+APRILE+2015%2C+PAG.+40%29

With its ruling no. 3486/2015, the Cassation Court established that if a company is sentenced to reinstate a worker due to wrongful dismissal, the months pay that the worker would have received if he had accepted the company's offer of a new job, are subtracted from the total compensation for damages owed to the worker (calculated as wages lost from the day of dismissal until the day of reinstatement). Thus, in the case in question, the compensation is reduced because the worker did not accept the company's settlement proposal to reinstate the worker by assigning him to new job duties, two months from the termination.

4. Layoffs and shops (Il Sole 24 Ore, 13 April 2015, page 25)

http://www.studiodeluca.it/news_664_LICENZIAMENTI+COLLETTIVI+E+PUNTI+VENDITA+%28IL+SOLE+24+ORE%2C+13+APRILE+2015%2C+PAG.+25%29

The Milan Court, Labour Section, with its ruling of 29 January 2015, established that an employer who intends to dismiss more than five workers for objective reasons in one hundred and twenty days and at more than one shop, must apply the layoff procedure where the single shops (even if located in different provinces) do not constitute autonomous production units from a technical and organisational standpoint.

5. Dismissal for exceeding the protection period in the Jobs Act (Il Sole 24 Ore, 14 April 2015, page 37)

http://www.studiodeluca.it/news_665_LICENZIAMENTO+PER+SUPERAMENTO+DEL+PERIODO+DI+COMPORTO+NEL+JOBS+ACT+%28IL+SOLE+24+ORE%2C+14+APRILE+2015%2C+PAG.+37%29

The decree no. 23/2015 omitted regulating dismissal for exceeding the protection period. Therefore, for new hirings, the unlawfulness of this type of dismissal is considered as unjustified dismissals, with consequent granting of two months pay for each year of job seniority with a minimum of 4 and maximum of 24 months pay (in small companies the worker can ask for halved increasing protection, with a minimum of 2 and maximum of 6 months pay). Lastly, the voluntary arbitration procedure envisaged by article 6 of the decree is also applicable for cases of dismissal for allegedly exceeding the protection period. Thus, in this case the employer may offer the worker a sum based on job seniority, equal to one month pay for every year of employment with a minimum of 2 and a maximum of 18 months pay (from one to six months pay in small companies).

6. Justified absence if the office temperature is very cold (Italia Oggi, 2 April 2015, page 36)

http://www.studiodeluca.it/news_667_ASTENSIONE+GIUSTIFICATA+SE+L%27AMBIENTE+%C8+GELIDO+IN+UFFICIO+%28ITALIA+OGGI%2C+2+APRILE+2015%2C+PAG.+36%29

The Cassation Court, with its ruling no. 6631/2015 of 1 April 2015, confirmed that an office environment which is too cold justified the workers refusal to work, and in such cases the workers do not lose their right to pay. The case regarded the restitution of pay to employees corresponding to an hour and a half of work withheld due to the fact that they had left work because of the cold temperature in the office caused by a malfunction of the boiler. The Court confirmed that the employer *"is obligated, pursuant to article 2087 of the Civil Code, to ensure working conditions suitable for guaranteeing the safety of processing"*. The violation of this obligation, added the Court, *"gave the workers the right not to perform their job, objecting to the breach of others"*. In such case, the Court continued, the workers *"maintained their right to be paid"*.

7. The use of vulgar expressions does not justify dismissal (Il Sole 24 Ore, 15 April 2015, page 43)

http://www.studiodeluca.it/news_658_L%92UTILIZZO+DI+ESPRESSIONI+VOLGARI+NON+GIUSTIFICA+IL+LICENZIAMENTO+%28IL+SOLE+24+ORE%2C+15+APRILE+2015%2C+PAG.+43%29

The conduct of a female worker who gave work files vulgar names is not just cause for dismissal. The Cassation Court established this with ruling no. 5878/15, confirming that the conduct of the worker, despite being censurable in terms of correctness, could not be considered serious enough to irreparably damage the relationship of mutual trust, because it did not constitute a clear and repeated disregard for the company's honour and image.

The ruling provides a basis for highlighting the disparity in treatment that will emerge with the first legal applications of the new law on disciplinary dismissals, between old and new hirings as per Legislative Decree no. 23/2015. If the same case had regarded a worker hired after 7 March 2015, the Judge would not have been able to order reinstatement due to the disproportion of the dismissal compared to the disputed event.

8. Ministry of Labour: Naspi unemployment benefits also cover cases of disciplinary dismissal (Il Sole 24 Ore, 25 April 2015, page 13)

http://www.studiodeluca.it/news_669_MINISTERO+DEL+LAVORO%3A+LA+NASPI+COPRIR%C0+ANCHE+LE+IPOTESI+DI+LICENZIAMENTO+DISCIPLINARE+%A0%28IL+SOLE+24+ORE%2C+25+APRILE+2015%2C+PAG.+13%29

The Ministry of Labour, with reply to a question of 24 April, clarified that the new social insurance for employment (Naspi) will apply to all cases of involuntary unemployment, including cases of (i) dismissals for just cause, (ii) consensual termination at the time of preventive arbitration before the local employment offices (DTL) and (iii) disciplinary dismissal. In addition, according to the Ministry, payment of the benefit will apply to those workers who accept the economic indemnity envisaged by the new settlement offer of the increasing protection contract.

Court of Milan: generic dispute is grounds for reinstatement (Il Sole 24 Ore, 25 April 2015, page 13)

http://www.studiodeluca.it/news_670_TRIBUNALE+DI+MILANO%3A+LA+CONTESTAZIONE+GENERICA+D%C0+LUOGO+ALLA+REINTEGRAZIONE+%28IL+SOLE+24+ORE%2C+25+APRILE+2015%2C+PAG.+13%29

The Milan Court, Labour Section, with ordinance no. 11340 of 15 April 2015, specified that a generic disciplinary dispute prevents the identification of the act which is the basis for the dismissal. In this case, the conduct the worker is charged with must be considered inexistent, with the consequent right of the worker to be reinstated in his job as per article 18 of the workers' statute.

SPECIAL FOCUS

Payment of the Italian stamp duty in a "virtual" way

On April 16th, the Italian Revenue Agency has issued a detailed resolution (no. 16/E) in which the rules regarding the payment of the Italian stamp duty in a virtual way is analysed.


The "excuse" for the issuing of said document is given by the recent introduction of the following news:

- the issuing of the Order of the Director of the Italian Revenue Agency dated November 14th, 2014, by which the new form of "stamp duty return paid virtually" has been introduced: the electronic filing of this form represent, starting from January 1st, 2015, the only way allowed to have access to the regime;
- the possibility to use automated procedures for the submission of the return by the taxpayers and for the tax payment by the Italian Revenue Agency;
- the extension of the terms of payment through F24 form (provision dated February 3rd, 2015).

The publication of the resolution no. 16/E provides a hint to summarize, as follows, the main elements of the regulation related to the stamp duty paid virtually.

What the regulation consists in

Article 15 of the Italian Presidential Decree no. 642/1972 states that the stamp duty can be paid in a virtual way, on request of the interested parties, for specific deeds and documents.



Upon receipt of the authorization for the payment of the stamp duty in a virtual way, the related document does not bear the usual stamp anymore, but there is a wording concerning the virtual way of payment of the tax and the details of the related authorization.

How to access

The interested party must request a *prior authorization* to the competent Office of the Italian Revenue Agency, by submitting a proper request accompanied by a statement signed by the former, stating the type and the presumptive number of the deeds and documents that can be sent and received during the year.

The authorization order is issued following the checking of the legitimacy of the request, (which shall be related to the documents and deeds for which there is the possibility to pay the tax virtually), and after having checked some eligibility requirements of the subject and some requirements related to the activity carried out.

The authorization is regarded as granted for a *permanent period* and is *revocable* by means of deed to be notified to the interested party: likewise, the taxpayer can give up the authorization and, in such case, the waiver is carried out by means of proper communication (submitting, at the same time, the return of the deeds and of the documents issued in the period from January 1st until the day when the waiver comes into effect).

The Provincial Department, within which there is the tax domicile of the taxpayer, is competent to give the authorization and to provide for the payment of the tax.

How and when the stamp duty is paid

The competent Office carries out the *initial payment* of the tax due for the period from the date in which the authorization is in force until December 31st of the same year.

The payment is made *provisionally*, according to the figures shown in the return submitted with the application for authorization and is divided into the same number of instalments as the *two-month periods* are included in the above period, expiring at the end of each two calendar months.

Starting from the calendar year *following* the first period of effectiveness of the payment in a virtual way, the authorized taxpayer shall submit to the Office, by January 31st of each year, a *return* stating the number of deeds and documents issued in the previous year, divided based on the tariff item, and of other information useful for the tax payment.

Based on the data mentioned in such return, the Office shall proceed with the *final* payment of the tax due for the previous year, attributing the positive credit or negative debit difference to the bi-monthly instalment expiring in February or, if necessary, to the following one.


The final payment, balanced and amended by the Office in relation to any possible changes of the regulation or of the tax amount, is taken as basis for the *provisional payment* for the ongoing year.

Therefore, from a practical point of view, the Office carries out the final payment for the previous calendar year and the provisional one for the current year.

Both payments and the allocation of the amount due in bi-monthly instalments come together into an only deed which represents a notice of payment of the stamp duty due.

Management of the changes during the year

Should any change in the regulation or in the tax amount be carried out during the year, after the *provisional payment has already been made*, the Office carries out the *provisional repayment* of the



remaining instalments by means of notice to be served to the taxpayer within the month following in which the provision ordering the changes has entered into force.

The higher amount of tax related to the first instalment being subject of the repayment is paid together with the tax related to the following instalment: for the repayment purposes during the current year, changes occurred in the last two two-month period are not taken into account.

If, instead, the changes lead to the application of a tax whose amount is lower than the one provisionally paid, the repayment is carried out by the Office, *on request of the taxpayer*, within 30 days from the submission of the application itself.

Payments

The payments for the settlement of the stamp duty in a virtual way, as well as the payment on account are carried out, from February 20th, 2015, by F24 form.

The payments shall be made with the following duty codes:

- "2505", called "virtual stamp duty-instalment";
- "2506", called "virtual stamp duty – payment on account";
- "2507", called "virtual stamp duty – sanctions";
- "2508", called " virtual stamp duty – interest".

Deduction of the payment on account

The payment on account can be deducted "for reasons of liquidity" from the payments to be made from the following month of February.

The payment on account actually carried out in the previous year can be deducted with the method chosen by the taxpayer (with reference to the two-monthly instalments and/or to the payment on account for the following year), considering the express reference to the "liquidity needs" contained in article 15-bis.

To such extent, the taxpayer can choose, in the annual return (that, starting from the next return, will contain a dedicated line), how to deduct the payment on account: in such case, the Office will pay the bi-monthly instalments and the payment on account for the following year based on the instructions provided by the taxpayer.

Sanctions

In case of *non-payment or late payment* of the stamp duty to be settled virtually the sanction of equal to 30% of the not paid amount shall apply.

For the violation related to the *failure to submit the return* for calculating the balance due *or to the submission of wrongful return* for calculating the balance due (to be filed, as mentioned, by January 31st of each year or together with the waiver), the sanction equal to 200% of the tax due shall apply; this penalty is also applicable to the *late submission* of the return.

The collection of the sanctions is made by a proper notice of assessment.

With reference to the above mentioned irregularities, the voluntary disclosure procedure is applicable



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