



Newsletter

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With two recent ministerial circulars issued during the summer break, the Revenue Agency has provided important clarifications on the requirement to apply for authorisation to carry out intra-Community transactions, on the criteria used to verify the VAT territoriality of supplies of services and on the obligations relating to the payment of VAT and on the persons responsible for such obligations.

Request for authorisation to perform intra-Community transactions: supplies of services and effects of failure to enter a VAT number in the Vies system

As previously mentioned in our Newsletter dated 4 January 2011, Decree Law no. 78 of 2010 introduced the obligation for taxpayers intending to perform intra-Community transactions to apply for authorisation from the Tax Authorities.

In Ministerial Circular no. 39/E dated 1 August 2011, the Revenue Agency confirmed the procedure for requesting authorisation (attaching a draft authorisation/revocation form).

The Agency also provided further clarifications with reference to the following aspects:

- persons required to apply for authorisation;
- suspension of the requirement for intra-Community transactions pending completion of the authorisation procedure;
- rejection or revocation of the authorisation and failure to enter the VAT number in the Vies system;
- inclusion in the Vies archive in the event of extraordinary company restructuring operations.

1. Persons required to apply for authorisation

The Revenue Agency has included amongst those required to apply for authorisation those persons who:

- **provide intra-Community supplies of services** to non-residents subject to taxation in the client's country of residence; and/or
- **receive supplies of intra-Community services** regulated by art.

7-ter of Presidential Decree 633/1972.

Note that the extension of the prior authorisation requirement to supplies of intra-Community services is not established by the regulation, but derives exclusively from the Revenue Agency's interpretation.

2. Suspension of the requirement for intra-Community transactions pending completion of the authorisation procedure

In the thirty days after a VAT number is issued (for persons starting a business), or on receipt of the application form (for persons already in possession of a VAT number), the competent Revenue Agency offices will carry out the appropriate checks before entering the person's VAT number in the Vies archive.

During this period, according to the Revenue Agency, the right to perform intra-Community transactions (services or goods) must be considered "suspended".

According to Circular 39/E, "*person who are absent from the VIES Archive are not entitled to carry out intra-Community transactions or to apply this tax regime, since they cannot be considered an Italian VAT taxpayer for the purposes of performing intra-Community transactions. (...) Therefore, intra-Community supplies carried out by a taxpayer not yet included in the VIES Archive (or excluded due to rejection or revocation) must be subjected to tax in Italy, with the consequent implications, including penalty implications under art. 6 of Legislative Decree no. 471 of 18 December 1997, if the economic transaction was subject to the VAT regime of the intra-Community supply carried out by a taxpayer (not taxable or not subject to tax)*".

In the event of purchase, the Circular states that "*it is the Community counterparty himself who, not having any way of verifying whether the Italian transferee/client is included in the VIES Archive, should avoid classifying the transaction as being subject to the tax regime for intra-Community exchanges*".

The same conclusions apply in the event of rejection or revocation of the authorisation. The taxpayer nevertheless retains the right to take action to obtain the annulment of the rejection or revocation order, using the 'self-protection' facility [*autotutela*] or in court (before the tax commissions).

Penalties do not apply to violations committed prior to the publication of Circular 39/E (i.e. before 1 August 2011), in compliance with the principles of reliance and good faith of the

taxpayer.

The interpretation provided by the Revenue Agency regarding the absence of "VAT taxpayer" status, for the purpose of carrying out supplies of intra-Community services, may - in practice - give rise to distortions which are not in line with the VAT Directive. The Agency's aim is clearly to "push" for applications for inclusion in the Vies System by all Italian VAT taxpayers trading with taxpayers in other European Union Member States.

This should also be taken into consideration, in relation to the risk of a challenge (and related penalties) by the Revenue Agency if such transactions are performed without prior authorisation.

3. Inclusion in the VIES archive in the event of extraordinary company restructuring operations

In the event of mergers, splits, business contributions or other substantial transformations that lead to the extinction of a taxpayer, the authorisation must be applied for by the company emerging from the operation.

It is possible to ask the Revenue Agency to bring forward the evaluation for entry in Vies of the subject resulting from the extraordinary operation to prior to the filing of the declaration of commencement of business or of the application form indicating the subject's wish to carry out intra-Community transactions.

In such a case, the Revenue Agency issues a certificate confirming that the resulting subject should be considered included in Vies, even if the entry effectively takes place more than thirty days after the date the declaration of commencement of activities is filed or after the subject expresses his intention to carry out intra-Community transactions.

This certificate may be used by the taxpayer in relations with Community counterparties until the subject is definitively included in the Vies archive.

Clarifications on the VAT territoriality of supplies of services

With Circular no. 37/E dated 29 July 2011, the Revenue Agency summarised the changes in VAT rules introduced by Legislative Decree no. 18 of 2010, also in

light of the rules contained in Community Regulation no. 282 of 2011.

More specifically, the Revenue Agency focused on the following issues:

- criteria for verifying the requirement of territoriality for supplies of services;
- obligations relating to payment of VAT and subjects responsible for such obligations.

The main clarifications provided are indicated below.

Shell companies

In cases where the subject commissioning a service provided by a non-resident is a company which, under art. 4, par. 5 of Presidential Decree 633/1972, may be defined as a shell company, the service is not territorially relevant in Italy. In such a case the "business to consumer (B2C)" rule applies, which provides for the payment of VAT in the provider's country. Indeed, as shell companies, according to the law, do not engage in an effective commercial activity, they are considered to be equivalent to private individuals.

Non-commercial entities

Services provided to entities, associations and other organisations that are not usually considered taxpayers but which are identified for VAT purposes, are considered taxpayers in the following cases:

- when they registered for VAT purposes because they performed intra-Community and postal purchases worth more than Euro 10.000, or
- when these subjects, despite having made purchases worth less than Euro 10.000, voluntarily registered for VAT purposes in order to pay the VAT on intra-Community purchases.

Permanent establishments

The Circular cites the definition of a permanent establishment contained in Community Regulation no. 282 of 2011, which states that a permanent establishment

is characterised by a sufficient degree of permanence and adequate human and technical resources, which enables it to:

- receive and use the services it is provided with by third parties based on its needs;
- provide the services required.

This change significantly extends the perimeter of a permanent establishment which, in the absence of regulations and additional clarifications by the Revenue Agency, includes cases where non-resident companies only carry out auxiliary and support functions in "fixed places of business".

For example, even though representative offices carry on merely promotional and research (scientific and market) activities, information-gathering and purchasing of goods, they may potentially receive and use the services they are provided with.

VAT treatment of services in the event of a change in purpose

If, when paying a deposit for the purchase of a service, the client expects to use the service for private use but, when paying the balance amount, he decides to use the service for professional or business purposes, the deposit and balance must be subject to two different regimes:

- the advance payment must be treated according to B2C rules;
- the balance, on the other hand, must be treated on the basis of the B2B rule.

Real estate

The Revenue Agency has clarified that real estate consists of those assets for which "it is not possible to separate movable assets from the immovable asset (land or building) without changing the function of the asset itself or when, in order to use the asset in a different context with the same purpose, uneconomical adjustments need to be made".

Furthermore, intermediary hotel booking services and tax/fiscal advice provided prior to the signing of the contract are non included under real estate-related services, even if

they refer to a specific building.

Cultural, artistic and similar activities

Supplies of ancillary cultural, artistic, sporting and educational services include all those services which, while not directly constituting the object of the principal activity, are an essential requirement for such activities. The identity of the subjects involved in the principal and ancillary operations is unimportant.

Supplies of services ancillary to participation at events are, conversely, classified as services that must be "provided separately (and against consideration) to the event participant and include, in particular, the use of changing rooms or sanitary facilities, but exclude intermediary services for ticket sales".

For example, the Revenue Agency considers the supply of restaurant services, lodgings and document distribution services as part of the organisation of a scientific event if they are connected to that event.

Leasing and rental of vehicles

In order to define short or long-term leasing one must examine the contract entered into by the parties.

If the rental of a vehicle is covered by consecutive contracts for different periods of time and signed by the same parties, provided the taxpayer is acting in good faith, the rental should be considered short-term for each contract whose duration is less than 30/90 days, even if it precedes a contract signed for a longer period.

Payment of VAT and processing of goods

The Revenue Agency has stated that, following the changes introduced from 1 January 2010, the VAT on the processing of goods temporarily sent abroad should be applied by the Italian client at the time of processing by issuing a reverse charge invoice or adding to the supplier's invoice. The VAT paid in this way may then be deducted from the tax calculated by customs on re-importation of the processed goods.

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