



# Newsletter

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## Legal-Tax

Company law and taxation

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## Incoterms: identifying the place of delivery

In a judgement dated 9 June 2011, the European Court of Justice delivered its opinion on the interpretation of art. 5 of EC Regulation 44/2001, stating the principle that *'in order to verify whether the place of delivery is determined "on the basis of the contract", the national judge must take into consideration all the relevant terms and conditions of said contract that could clearly justify the place, including the terms and conditions that are generally-recognised by international commercial practice, such as the Incoterms drawn up by the International Chamber of Commerce [...]'*.

More specifically, art. 5, point 1, lett. a), first indent of EC Regulation 44/2001 provides an exception to the general rule [based on the domicile of the defendant] to determine the jurisdiction of the judge, establishing that in contractual matters the dispute may be brought before the judge in the place where the contested obligation was or will be performed.

In this context, the definition of the place of performance of the obligation is provided by art. 5, point 1, lett. a), first indent of EC Regulation 44/2001, which defines it as *"the place in a Member State where, under the contract, the goods were delivered or should have been delivered"*.

Therefore, it is important to identify the elements that the judge must take into consideration when verifying whether or not the place of delivery could be considered determined on the basis of the contract.

With the above judgement, the Court of Justice - which was asked to express an opinion on the clause **"Delivered free ex our business premises"** - emphasised the importance of the practices adopted by economic operators in international trade, e.g. Incoterms, when identifying the place of delivery in order to ascertain the competent judge to handle disputes relating to purchases and sales of intra-Community goods. In the case in question, the Court clarified that it is the national judge who must assess whether the clause corresponds to the Incoterm Ex Works, to another Delivered free ex our business premises clause or to another commercial practice that clearly identifies the place of delivery of the goods.

This decision therefore opens the way to a new tendency in contrast with the Italian Supreme Court case law accumulated to

date. Indeed, in its recent pronouncements, the Italian Supreme Court had indirectly defined the area of application of international practices, stating that, in the absence of an agreement regarding the place of delivery of the goods (necessary to identify the jurisdiction pursuant to Regulation 44/2001), one should refer to the rules essentially determined according to the conflict rules of the presiding judge, or to art. 31 of the 1980 Vienna Convention (which highlights the final place of delivery of the goods), excluding the use of any commercial practices contained in the contract.

### Legislative references

- Supreme Court, Sez. Un., judgement 20887/2006
- Supreme Court, judgement 14299/2007
- EC Regulation 44/2011
- European Community Court of Justice, judgement 9 June 2011.

## Register of Enterprises: compulsory PEC for registered companies

*All partnerships and joint stock companies incorporated before 29 November 2008 must inform the Register of Enterprises of their certified electronic mail address [PEC] by 29 November 2011.*

In order to promote the use of electronic communication methods and to reduce operators' administrative costs, the Legislator has stated that all businesses incorporated in company form must activate a PEC address.

The communication, which is entirely free of charge, must be made through "ComUnica".

In the event of failure to comply with this rule a fine of between Euro 206 and Euro 2,065 will be imposed on each person failing to make the required report, communication or filing with the Register of Enterprises, in accordance with art. 2630 of the Italian Civil Code.

Sole traders and any business not incorporated in company form are excluded from this obligation.

### Legislative references

- Art. 16 of D.L. 29 November 2008, n. 185 converted into Law 28 January 2009 n. 2

- D.Lgs. 30 June 2003, n. 196 [*Personal Data Protection Code*].

## OIC document no. 6 - Debt restructuring and information on the financial statements

Accounting standard OIC 6 - Debt restructuring and information on the financial statements, was definitively approved in July 2011.

The document defines the accounting treatment and information to be provided on the effects produced by a debt restructuring operation, in financial statements drawn up in compliance with the going concern principle.

Having identified the area of application, the standard provides the definition of "debt restructuring" and subsequently identifies cases in which different types of restructuring may occur:

The main aspects covered concern:

- arrangements with creditors under article 160 et seq. of the Bankruptcy Law;
- debt restructuring agreements under article 182-bis of the Bankruptcy Law;
- certified reorganisation plans under article 67, par. 3, letter d) of the Bankruptcy Law;
- other forms of debt restructuring different from those identified in the Bankruptcy Law.

The accounting effects deriving from restructuring are described below, particularly the following aspects:

- date of restructuring, i.e. the date from which the economic and/or financial effects of restructuring are booked in the debtor's accounts and financial statements and related information;
- methods for booking the accounting effects of restructuring;
- representation of the effects of the restructuring operation in draft financial statements and notes.

Finally, the accounting standard defines the accounting treatment of costs connected with the restructuring operation and of hedging derivatives connected with the debt being restructured.

## Accounting standards for non profit organisations

Standard no. 1 “Systematic framework for preparing and presenting the financial statements of non profit organisations” was published in May 2011. The standard was drawn up by a special Technical Committee comprising representatives from the Third Sector Agency (formerly the Agency for Non Profit Organisations), from the Italian Accounting Body (*Organismo Italiano di Contabilità*) and from the national accountants’ council (*Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili*).

The document in question, which will apply with effect from financial years ending after 31 December 2011 (although early application is permitted), defines the general principles that must be used by non profit organisations to standardise the presentation of financial statements (meaning “quantitative and qualitative accounting statements aimed at providing a representation of the financial-asset position of the entity and its result for the period”).

In summary, the document defines the area of application of accounting standards and general criteria for the preparation of financial statements.

Area of application: accounting standards are rules that are regulated hierarchically below the law, providing an interpretative and/or supplementary role in the absence of specific regulations.

Consequently, non profit organisations that are required to adopt specific rules when drawing up financial statements may apply the accounting standards for non profit organisations only when these are compatible with the related legislative rules.

General principles: the general presentation principles are made up of the elements described below, organised hierarchically.

Purpose of the financial statements: the purpose of the financial statements is to provide a truthful and correct representation of the financial-asset position of an entity and the financial result of the period of an operating entity.

Achieving these objectives is subject to compliance with the presentation principles, comprising:

- A. Accounting assumptions: financial statements are drafted by non profit organisations based on the assumption of an ongoing business (i.e. the assumption

that the entity is operating and will continue to do so for the foreseeable future) and on an accrual basis.

- B. General clauses, means the principal purposes that must be considered with reference to evaluations and information:
- clear presentation,
  - truthfulness,
  - accuracy,
  - aim to ensure a high level of accountability.
- C. General principles of the financial statements, summarised as follows:
- understandable,
  - impartial (neutral),
  - meaningful,
  - prudent,
  - prevalence of substance over form,
  - comparability and consistency,
  - possibility of verifying information,
  - yearly,
  - cost principle.

## Tax credit for scientific research

Decree Law 70/11 (known as the development decree) established a tax credit for companies financing research projects carried out by universities, public research bodies and other structures identified in a decree issued by the Education Ministry.

The tax credit is due:

- in three annual parts starting from 2011 and 2012;
- at a rate of 90% of the “incremental investment” i.e. the cost incurred for research exceeding the average value of investments of the same kind made from 2008 to 2010.

The credit must be indicated in the income tax return, does not form part of the IRES or IRAP taxable basis and may be used to offset other tax debts other than social security and pension contributions, using the F24 form.

The Revenue Agency recently issued the rules to be followed to take advantage of this bonus (decree no. 130237 of 9 September 2011 and resolution no. 88 of 12 September 2011).

More specifically, the tax credit accrued with reference to investments made starting from

the tax year following the year in progress on 31 December 2010 and until the end of the tax year in progress on 31 December 2012, may be obtained for each of the previous tax years, starting from the day after the incremental investment is realized.

Tax code “6835” has been introduced to enable taxpayers to offset the tax credit using the F24 form.

## Enforceable tax assessment notices

The rules set forth in art. 29 of Decree Law 78/2010, regarding the concentration of collection in tax assessment notices, came into force on 1 October 2011.

Consequently, tax assessment notices issued by the Revenues Agency starting from this date, for income tax, VAT and IRAP purposes relating to tax years in progress as at 31 December 2007 et seq., must contain an order to pay the amounts indicated therein within 60 days of receipt of the notice, or, if the tax assessment notice is challenged before a Provincial Tax Commission, to pay a third of the higher taxes deriving from the notice.

If a taxpayer fails to comply with the payment obligation, the tax assessment notice will become enforceable and, 30 days after the payment deadline, the Revenues Agency will appoint the Equitalia Group as agents to enforce the collection of the above amounts (for example by forcibly expropriating the taxpayer’s assets).

The new rules essentially enable the collection agent to directly implement the forcible collection of amounts claimed in the tax assessment notice, without first having to serve a tax bill.

The Legislator’s intention was to speed up the collection process, eliminating the intermediary tax bill phase, which according to the previous rules should precede the forcible collection of a debtor’s assets. Nevertheless, to better protect the taxpayer, art. 7, par. 2, letter n. Decree Law 70/2011 states that enforcement measures carried out by Equitalia on a taxpayer’s assets (e.g. forcible sale of moveable and immovable assets) are automatically suspended for 180 days from the date on which the collection of the tax assessment notice is assigned to Equitalia by the Revenues Agency.

During this period, Equitalia may take only precautionary measures and perform seizures of the taxpayer’s property (e.g. registering mortgages, distraint, impounding of vehicles, etc.).

Where there is a well-founded risk that the collection will not be successful:

- if the risk arises during the period of 60 days from notification, the Revenues Agency may immediately appoint Equitalia to collect the amount claimed;
- if the risk arises after the collection has been assigned to Equitalia, the agent may immediately carry out enforcement measures, without waiting for the 180-day term to elapse.

In light of the reform, it has become fundamentally important for taxpayers to act quickly following receipt of a tax assessment notice and, where the appropriate conditions exist, to challenge the notice before a Provincial Tax Commission, which may also be asked to suspend collection activities pursuant to art. 47, Legislative Decree 546/1992.

Should the Provincial Tax Commission uphold the request to suspend collection activities, Equitalia shall be prohibited from carrying out any collection activities until the judgement is published.

## Obligation to communicate 2010 VAT transactions online

With an order dated 16 September 2011, the Director of the Revenues Agency extended until **31 December 2011** the deadline for filing the online communication of VAT transactions with a value of over € 25.000 relating to 2010. The technical specifications, which had already been previously amended, have also been replaced (orders issued by the Director of the Revenues Agency on 22 December 2010 and 21 June 2011).

## VAT accounting obligations and territoriality of building planning costs

Circular 29/E dated 27 June 2011 made

official the tax authorities' replies on the Professional Update Form (MAP) of 26.06.2011 regarding certain VAT obligations.

The replies regarding VAT particularly concerned the separation of assets, the issuing and registration of reverse charge invoices under art. 17 of Presidential Decree 633/72 and the place of delivery of building planning services.

### Separate VAT accounting

The general rule states that a company opting for separate VAT accounting must do so from the start of the year, unless it begins operating during the year.

A taxpayer choosing this option must therefore effectively do so from the start of the year and must inform the Revenues Agency of its decision in its VAT return for the previous year.

Exceptions to this general rule may apply in the event of extraordinary company restructuring operations such as mergers, splits and reorganisations, which bring under a single organisation different kinds of activity, both taxable and exempt, previously pertaining to different subjects.

The Revenues Agency has stated that in such cases the option may be exercised during the year.

### Issuing of accumulated reverse charge invoices

The Circular also deals with the case of a VAT taxpayer resident in Italy who, in the space of one month, receives more than one VAT-relevant service in Italy under art. 7-ter of Presidential Decree 633/72 from a non-resident taxpayer.

According to the Revenues Agency, the Italian taxpayer may issue a single invoice, provided the time of transaction (i.e. payment) has not yet passed.

The "advance" reverse charge invoice must indicate the total value of services received, sub-divided by each service.

### Procedures for recording reverse charge invoices under art. 17, par. 2, Presidential Decree 633/1972

VAT taxpayers resident in Italy are obliged to pay VAT by issuing a reverse charge invoice under art. 17, par. 2 of Presidential Decree 633/72, in cases where they purchase goods and services relevant in Italy from non-residents.

A single reverse charge invoice must be issued and recorded in both the sales and purchase ledgers.

The Circular clarifies that recording obligations may be met by recording the invoices in special registers with sections, or in sales and purchase ledgers.

In the latter case the taxpayer must use different numerical series and must respect the progressive sequential order of each series.

The numerical series adopted may be indicated on the first page of each ledger.

### Territoriality of building planning costs

Article 7-quater, par. 1, lett. a) of Presidential Decree 633/72 states that supplies of services relating to buildings, including surveys and services relating to the preparation and coordination of work, are relevant in Italy if that is where the building is situated.

The Revenues Agency has clarified that services provided by engineers, architects or other qualified professionals, in relation to the planning or direction of works on a specifically-identified building, and in relation to the planning of interiors and furnishings, must be considered included in the above services.

The territorial criterion ratified by art. 7-quater, par. 1, lett. a) as an exception to the general rule does not apply in cases where the planning does not relate to a specific building or when consultancy services or technical and legal assistance do not directly relate to the preparation and coordination of building works, even if they relate to a specific building.

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