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Reggio Emilia, July 5, 2024

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MEMORANDUM N. 32/2024

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Subject: Decreasing VAT variations in institutions governed by the Business Crisis and Insolvency Code

Avv. Francesca Palladi

1 PREMISE

Article 18 of Decree-Law No. 73 of May 25, 2021 (so-called "Support-Bis Decree," also "d.l. 73/2021" for short), converted with amendments by Law No. 106 of July 23, 2021. 106, introduced substantial changes to the discipline of decreasing changes in the VAT taxable amount or the tax due, pursuant to Article 26 of Presidential Decree 633/72, providing that, in the case of non-payment of consideration related to insolvency proceedings, one no longer has to wait for the conclusion of those proceedings.

However, the new rules are applicable for procedures initiated as of May 26, 2021, the date of entry into force of the same Sostegni-bis Decree, while for pre-existing ones the previous rules remain in place.

2 DISCIPLINE APPLICABLE BEFORE MAY 26, 2021

With reference to proceedings opened before May 26, 2021, in order to recover the uncollected VAT, it is still necessary to wait for the conditions contemplated in the "old" rules of Article 26 of Presidential Decree 633/72, in force prior to the amendments introduced by the aforementioned Decree Law 73/2021, to accrue: according to these rules, the creditor has the right to proceed with the downward variation in order to recover the tax paid to the Treasury, but not collected, without time limits. However, in the case of bankruptcy, this is possible only after the plan of distribution of assets has become final. Or, in the absence of apportionment, upon the expiration of the time limit for complaint to the decree of bankruptcy closure.

With regard to the arrangement with creditors, "the right to the variation is subject to the "unfruitfulness" of the procedure, because it is only upon the occurrence of this condition that there is a reasonable certainty of the incapacity of the debtor's assets. In this specific case, the Ministry of Finance and, more recently, the Internal Revenue Service, have held that one can speak of unfruitfulness of the procedure only for unsecured creditors for the percentage

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part of their claim that does not find acceptance with the closing of the arrangement. In order to ascertain the aforementioned unfruitfulness, it is necessary to have regard not only to the judgment of approval (Art. 181 of the Bankruptcy Law) that has become final, but also to the time when the debtor in composition fulfills the obligations undertaken in the arrangement. Until that date, in fact, the arrangement may be terminated and bankruptcy may be declared.

For all these "pending procedures" it continues to be necessary to wait for their conclusion and the decree under Article 119 of the Bankruptcy Law.

3 THE CHANGES INTRODUCED BY D.L. 73/2021 FOR PROCEDURES INITIATED AFTER MAY 26, 2021

The new paragraph 3-*bis*-introduced in Article 26 of the VAT Decree by Article 18, paragraph 1, letter b), of the Supports-*bis* Decree-provides that the cases in relation to which the supplier of the goods or the provider of the service can make decreasing variations in the taxable base and the resulting tax, with reference to transactions for which he has already issued an invoice charging VAT, also applies in the case of non-payment of the consideration, in whole or in part, by the transferee or client:

- for bankruptcy proceedings, debt restructuring agreements under Article 182-bis of the Bankruptcy Law (now Article 57 CCII) and certified plans under Article 67(3)(d) of the same Bankruptcy Law (letter a) (now Article 56 CCII);
- for individual enforcement proceedings that have remained unsuccessful (letter b).

The same paragraph 3-*bis* also identifies, with reference to the procedures referred to in paragraph (a), the date from which the variation can be made.

More specifically, if the non-payment is due to the debtor being subject to bankruptcy proceedings, the resulting variation may be made as of the date of the opening of the bankruptcy proceedings (thus without waiting for the outcome), i.e., the date:

- of the judgment declaring bankruptcy/judicial liquidation;
- of the order ordering compulsory liquidation;
- of the decree of admission to the procedure of arrangement with creditors under Article 47 CCII;
- of the decree ordering the extraordinary administration procedure of large enterprises in crisis.

With regard to the other crisis regulation instruments, it is noted that, pursuant to the same paragraph 3-*bis*, this right is exercisable from the date of the decree approving a debt restructuring agreement pursuant to Article 48 CCII, or from the date of publication in the commercial register of a certified plan pursuant to Article 56 CCII. In the case of failure to register the plan with the Chamber of Commerce, the rules set forth in Paragraph 3 of the aforementioned Article 26, relating to supervening agreements between the parties, apply, making the recovery of VAT subject to the condition that one year has not already elapsed since the transaction was carried out, as otherwise only an "out-of-court" credit note may be issued. It is

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understood that the VAT downward variation should refer only to the part of the claim that in the access decree (arrangement with creditors), approval judgment (restructuring agreement) or reorganization plan will remain unsatisfied.

With regard to the negotiated settlement of the crisis, for creditors is introduced, on the other hand, the possibility of proceeding to the decrease in VAT, already from the date of publication in the business register of the contracts (ex art. 23, paragraph 1, lett. a), CCII) or agreements (ex art. 23, paragraph 1, lett. (c), CCII) that positively conclude such an out-of-court path; conversely, in the event that it has been found impossible to rehabilitate the company through an agreement between the parties, and the company in crisis decides to take the path of simplified arrangement, the date to be taken as a reference for the issuance of the change note is that of the decree provided for in paragraph 4 of Art. 25-sexies CCII, i.e., the measure that, in fact, opens the procedure, appoints the auxiliary and establishes the obligations to inform creditors and sets the date of the approval.

4 DEADLINE FOR THE DEDUCTION OF TAX

According to Revenue Agency Circular No. 20/E of Dec. 29, 2021, which elaborates on the issue of VAT recovery on uncollected receivables in bankruptcy proceedings following the amendments introduced by Article 18 of Decree-Law No. 73 of May 25, 2021 in commentary, the date by which to exercise the right to deduct must be identified in the date of the periodic VAT settlement for the month or quarter in which the note is issued or, at the latest, in the VAT return for the year in which the note is issued.

For further clarification, an explanatory example is given below:

- November 30, 2023: Following the sale of an asset, the transferor (creditor) issues an invoice for taxable transactions amounting to €45,000 and tax of €9,900, which is not paid by the transferee (debtor);
- January 10, 2024: judgment declaring judicial liquidation of the debtor;
- January 10, 2024: commencement of the period from which the decrease variation note can be issued;
- creditor issues decrease variation note for € -45,000 and tax for € -9,900;

Hypothesis 1: The creditor issues the change note in the year 2024:

the right to deduct can be exercised at the latest when submitting the VAT return for the year 2024 (to be submitted by April 30, 2025); as a result, the creditor reduces the tax payable by €9,900.

Hypothesis 2: The creditor issues the change note within the first four months of the year 2025 (deadline for submitting the VAT return for the year 2024):

in this hypothesis, the right to deduct can be exercised in the periodic settlement related to the month/quarter of issuance or, at the latest, in the VAT return related to the year 2025 (April 30, 2026); to the effect, the creditor reduces the tax payable by 9,900 euros.

In summary, according to the Internal Revenue Service:

- the date from which a credit note can be issued is the date on which the transferee is subject to the procedure;

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- the date by which the credit note can be issued coincides with the deadline for submitting the VAT return for the year in which the procedure is opened;
- of said credit note may be taken into account in the periodic settlements for the year in which it is issued (beginning with that relating to the month or quarter in which it is issued) and, at the latest, in the annual return for that year.

The circular also specifies that, in keeping with the new wording of the rule, the issuance of the credit note-and, consequently, the deduction of the uncollected tax-is not precluded even for a creditor who has not filed a claim in the proceedings. In case the time limit for issuing the credit note aimed at recovering the tax paid at the time has expired, the aforementioned circular (para. 6) provides that the exceeding of the time limit provided by the legislator for the exercise of the right to deduct does not imply, as a general rule, that the recovery of the non-deducted tax can take place, alternatively, by submitting, at a later stage, the supplementary favorable declaration containing the non-deducted reduction of the tax, or a refund application pursuant to Article 30-ter of Presidential Decree 633/72.

However, with reference to the possibility of having recourse to the submission of a supplementary favorable declaration, the same practice document argued that this remedy would not be possible to recover the tax paid, where the presence of errors and omissions to be remedied is not found, prerequisites that would be necessary for the purpose of submitting a supplementary favorable declaration; on the other hand, with regard to the refund, it is specified that this option is viable only in the presence of objective conditions that have prevented the issuance of the downward variation note, thus precluding the exercise of the right to deduct.

5. DOWNWARD VARIATION IN INSOLVENCY PROCEDURES FOR TAXABLE AND VAT

According to the tax authorities, the change cannot refer only to VAT, as it must relate to the consideration not collected by the supplier and, therefore, must be issued with reference to both the taxable amount and the corresponding tax. This was confirmed by the Internal Revenue Service in its response to interpellation No. 485 of Oct. 3, 2022, which reiterates its previous resolution No. 127 of April 3, 2008. The same rate as the original invoice should be applied to the downward change, even if there is any change in the original invoice; the notes should be numbered consecutively and an appropriate sectional may be used. It is also important to specify the invoice to which the note refers.

Documents must be prepared in XML format (using document type "TD04") and transmitted to the Interchange System. The possibility of formalizing the document in simplified form regardless of the amount is contemplated, but in this case the XLM file should be prepared using document type "TD08." Identification of the previously issued and sent invoice to be corrected in field 2.1.6 in the case of "TD04" and block 2.1.2 in the case of "TD08" is required.

6. FINALITY OF THE PROCEDURE. FURTHER CHANGE (INCREASING)

The new paragraph 5-*bis* of Article 26 of Presidential Decree No. 633 of 1972-introduced by Article 18, paragraph 1, letter d), of the Sostegni-*bis* Decree-provides

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that "in the event that, subsequent to the events referred to in paragraph 3-bis," and thus subsequent to the issuance of the downward variation note, "the consideration is paid, in whole or in part, the provision of paragraph 1 applies," i.e., the obligation to issue an upward variation note. "In such a case, the transferee or principal who has fulfilled the obligation under paragraph 5 is entitled to deduct under Article 19 the tax corresponding to the upward variation".

Following up on the explanatory example of judicial liquidation given above, the following can be further assumed:

- June 10, 2026: settlement of the debtor's bankruptcy/judicial liquidation proceeding distribution plan that provides for partial payment to the creditor of the agreed consideration, in the total amount of €30,000, i.e., in an amount exceeding the amount adjusted downward;
- June 18, 2026: payment of consideration as per the distribution plan;
- June 30, 2026: deadline for issuing the upward variation note under paragraph 5-bis; creditor issues upward variation note for € 24,590 of taxable income and € 5,410 of tax;
- July 16, 2026: Deadline of the June 2026 settlement (for monthly taxpayers), to which the tax pertaining to the upward change note, i.e., a debit tax of €5,410, should be contributed; or
- August 20, 2026: settlement deadline for the second quarter of 2026 (for quarterly taxpayers), to which the tax pertaining to the upward change note, i.e., a debit tax of €5,410, should be contributed.

The following is a comparison of the pre- and post-amendment forecasts brought about by L.D. 73/2021.

Art. 26 d.P.R. 633/72 before d.l. 73/2021	Applicable to procedures initiated before May 26, 2021	Art. 26 d.P.R. 633/72 post d.l. 73/2021	Applicable to procedures initiated as of May 26, 2021
Decrease in VAT in insolvency proceedings.	Variation is subject to non-payment in whole or in part due to bankruptcy proceedings or individual enforcement proceedings that have remained unsuccessful. It is therefore necessary to wait:	Decrease in VAT in insolvency proceedings.	The change can be made from the date on which the transferee/buyer is subject to bankruptcy proceedings. For the instruments covered in paragraph 10-bis art. 26 Presidential Decree 633/72, reference must be made to the following:

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	<p>FOR BANKRUPTCY the expiration of the deadline for filing a complaint against</p> <p>1) the plan of distribution of assets, or alternatively</p> <p>2) the decree of bankruptcy closure;</p> <p>FOR THE BANKRUPTCY ARRANGEMENT the final passage of the judgment approving the arrangement;</p> <p>FOR THE ARRANGEMENT WITH CREDITORS the res judicata of the judgment approving the arrangement;</p> <p>FOR THE REORGANIZATION PLAN the publication in the commercial register or one year after the transaction has taken place (Art. 6 Presidential Decree 633/72).</p>		<p>FOR BANKRUPTCY/JUDICIAL LIQUIDATION To the judgment declaring bankruptcy/judicial liquidation;</p> <p>FOR ADMINISTRATIVE COATAL LIQUIDATION to the order directing liquidation;</p> <p>FOR THE PROCEDURE OF EXTRAORDINARY ADMINISTRATION OF LARGE ENTERPRISES IN CRISIS To the decree ordering the extraordinary administration procedure;</p> <p>FOR THE ARRANGEMENT WITH CREDITORS To the decree of admission to the procedure.</p> <p>In Notice No. 20/E/2021 issued by the Internal Revenue Service, it was clarified that the downward variation is not precluded by the application for lodgement of liability of the creditor. In the case of subsequent full or partial payment, the creditor must make an upward variation (paragraph 5-bis art. 26</p>
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			Presidential Decree 633/72).
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The Firm remains available for any clarifications.

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