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Reggio Emilia, Sept. 24, 2024

MEMORANDUM N. 38/2024

Insight

Subject: Proof of delivery of goods within the EU

PREMISE

Pursuant to Article 41(1)(a) of DL No. 331/93, supplies of goods made by Italian traders to EU traders are considered non-taxable VAT transactions because the taxation regime in the EU state of destination of the goods is applicable to them. For the transaction to be considered “intra-EU,” the following requirements must be met:

- 1. onerosness of the transaction;**
- 2. transfer of the goods to another EU state;**
- 3. passive subjectivity of the purchaser in another EU state (or identified there);**
- 4. registration in VIES of both operators (transferor and purchaser);**
- 5. regular submission of INTRA forms.**

In the absence of even one of these elements, the supply is taxable in the state of the transferor.

The transferor must be in possession of adequate documentary evidence capable of certifying that the transferred goods have actually been transferred to another EU state.

Pursuant to Article 50, paragraph 1, DL n. 331/93, intra-EU supplies can be made without the application of VAT to traders who have communicated their identification number assigned by the EU state of origin. It should be emphasized that the application of the VAT regime mentioned above is also subject to the registration of the Italian operator (transferor) and the EU operator (purchaser) in the VIES. In fact, pursuant to Art. 35, Presidential Decree No. 633/72, parties intending to carry out EU transactions must obtain specific authorization from the Revenue Agency following which registration in a special file, so-called VIES, takes place.

As pointed out by the Agency in Memo no. 39/E, dated Aug. 1, 2011, from the lack of registration in VIES derives:

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- “The disappearance of the possibility of carrying out intra-Community transactions and applying their own tax regime”;
- That the operator “cannot be considered as an Italian VAT taxable person for the purpose of carrying out intra-Community transactions”.

Invoices for intra-EU supplies of goods rendered by an Italian trader to an EU trader must:

- be issued in paper form, in duplicate (in which case communication to the Sdl - so-called *esterometro* - is mandatory), or in electronic form, at the time the transaction is carried out;
- bear the purchaser's VAT identification number in the EU country of origin;
- be numbered consecutively;
- contain the indication, instead of the amount of tax, that it is a “Non-taxable transaction art. 41, DL n. 331/93 - reverse charge (or *reverse charge*)”.

EVIDENCE OF INTRA-COMMUNITY SUPPLIES: REGULATIONS IN EFFECT FROM JANUARY 1, 2020

Italian law does not dictate any specific provision regarding the documents that the taxpayer must keep, and exhibit in case of any control, to prove the transfer of the asset to another EU state.

At the EU level, EU Regulation No. 2018/1912/EU of December 4, 2018 was enacted and entered into force on January 1, 2020, which inserted Article 45-*bis* into EU Regulation No. 282/2011 of March 15, 2011, **which lists the evidence that the supplier must provide to prove the actual transfer of goods from one member state to another, so as to benefit from the VAT nontaxable regime, establishing an absolute presumption of the transfer of goods from one EU country to another in the presence of the above evidence.**

At the national level, the matter has been dealt with by Revenue Agency Circular MAy 12, 2020 No. 12, according to which (paragraph 3) in all cases in which the absolute presumption set forth in Article 45-*bis* of the EU Regulation does not apply, national practice may continue to apply. It is understood, in any case, that said national practice identifies documents, the suitability of which for proving that EU transport has taken place is in any case subject to the assessment, on a case-by-case basis, of the tax administration.

We distinguish the following cases.

1. Shipment of goods with carrier appointed by the transferor

The goods are presumed to have been dispatched/transported to the Member State of arrival if the transferor is in possession of:

- a. at least two of the following documents issued by independent parties other than the transferor and the transferee:

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- transport document (e.g., CMR or DDT) signed by the carrier;
- bill of lading;
- air freight invoice;
- invoice issued by the shipper

or

- b. of any of the documents under a. and any of the following documents issued by parties independent of each other and other than the transferor and the transferee:
- Insurance policy related to the shipment or transportation of the goods;
 - bank documents confirming payment for the shipment or transport;
 - official documents issued by a public authority, such as a notary public, confirming the arrival of the goods in the Member State of destination;
 - receipt issued by a depository in the member state of destination confirming the deposit of the goods in that member state.

Since transportation is done by a carrier contracted by the transferor, these documents are readily available from the transferor and, therefore, delivery is easily proven by possession of these documents.

2. Shipment of goods with carrier appointed by the transferee

Goods are presumed to have been shipped/transported to the Member State of arrival if the transferor is in possession of:

- a. of a written statement issued by the purchaser by the tenth day of the month following the transfer (non-peremptory deadline), certifying that the goods were transported or shipped by the purchaser, or by a third party on his behalf, and identifying the member state of destination of the goods.

This statement must indicate:

- the date of issue;
- the name and address of the purchaser;
- the quantity and nature of the goods;
- the date and place of arrival of the goods;
- the identification of the person accepting the goods on behalf of the buyer.

- b. of at least two of the following documents issued by mutually independent parties other than the transferor and the transferee:

- transport document (e.g., CMR or DDT) signed by the carrier;
- bill of lading;
- air freight invoice;
- invoice issued by the shipper

or

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c. as an alternative to item b., any of the documents referred to in item b. and any of the following documents issued by parties independent of each other and other than the transferor and the transferee:

- insurance policy relating to the shipment or transportation of the goods;
- bank documents evidencing payment for the shipment or transportation;
- official documents issued by a public authority, such as a notary public, confirming the arrival of the goods in the Member State of destination;
- receipt issued by a depository in the member state of destination confirming the deposit of the goods in that member state.

It is obvious that it is difficult to find these documents since the buyer is often not willing to provide them to the seller.

As a result, since it is extremely difficult to find the documents required by the EU Regulations, the Revenue Agency in Memo 12/5/2020 No. 12 (paragraph 3) provided that the documents provided by Italian practice can be used as evidence.

d. Specifically, the Internal Revenue Service has considered proof of delivery to be valid if the following documents are present:

- **DDT or CMR signed by the transporter and the purchaser**
- or**
- **DDT or CMR signed by the transporter and the transferee's declaration of receipt of the goods in the country of destination.**

The Answer to Question No. 141 dated 3.3.2021, recalling Revenue Agency Resolution No. 19 dated 25.3.2013 and Answer to Question No. 100 dated 8.4.2019, stipulates that the following documentation can also be used as proof of the EU transfer:

- A set of documents from which the parties involved can be identified
- (transferor, carrier and transferee) and all useful data to define the transaction;
- invoices and bank documentation showing the amounts collected in connection with the transaction;
- documentation regarding contractual commitments made;
- INTRASTAT lists.

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3. Goods transported by the transferor's or transferee's own means

If the transport is carried out by the transferor or the transferee with their own means, EU Regulation 282/2011 does not apply, as it is practically impossible to obtain the documentation with which to prove the transfer of the goods to an EU country since these are documents from third parties (carrier/shipper). In this case, Revenue Agency Circular 12.5.2020 No. 12 specifies that the documentation indicated above in point d. of paragraph 2 can be used as evidence.



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The Firm remains available for any clarification.

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