Taxpayers Division

Central Management Small and medium-sized enterprises

Answer n. 632

OBJECT: Article 11, paragraph 1, letter a), law n.212 of 27 July 2000 - Triangulation community

With the request for ruling specified in the subject, the following has been exposed

QUESTION

Alfa (hereinafter, "Company", "Instant" or "Taxpayer") is a company incorporated under German law with its registered office in Germany. He declares that he has no tax position in Italy, nor a permanent establishment, nor a tax representative.

The Company represents to carry out activities of wholesale trade of household items, purchasing the goods marketed at companies, including foreign ones, and reselling them on the national territory, in other European Union or non-EU countries.

The Applicant also purchases goods from an Italian company (Beta., In short also "Seller" or "Supplier"). The commercial relations between the two companies are governed by a sales contract, which includes, among other things, the EXW clause (

Ex Works, or "ex works"), with which the Company instructs a carrier to collect the goods from the Italian Seller in the place indicated by the latter (usually the factory or warehouse), and to deliver the same goods to the customer

the final. In the invoice issued by the Italian Supplier, the name of the final customer and the place of destination of the goods (EU country outside Italy) are already indicated.

The Taxpayer reports that he treats the described commercial transaction as an intra-community export triangulation, not taxable for VAT purposes.

By way of example, with reference to a purchase of goods made from the Italian Seller, subsequently resold to an Austrian customer, the Company presented:

- the sales invoice issued by the Italian Supplier;

- the CMR international consignment note specifying that the Italian Supplier is the sender on behalf of the Applicant and that the recipient of the goods is an Austrian company, a client of the Applicant;

- the *packing list* relating to the invoice issued by the Italian Seller;

- communications via *e-mail* between Beta and the carrier in charge of transporting the goods;

- documentation issued by the Applicant as proof of the delivery of the goods, with which the same summarizes the invoices received from the Austrian customer to its Italian Supplier.

As described above, the Taxpayer asks for confirmation of the regularity of the procedure applied to the case represented.

INTERPRETATIVE SOLUTION PROSPECTED BY THE TAXPAYER

The Applicant considers that the non-taxability of the sale of the goods carried out by the Italian Supplier is correct as it is part of a community triangulation.

OPINION OF THE REVENUE AGENCY

With the ruling in question, the Company asks for confirmation of the legitimacy of the behavior followed in relation to the Community triangular operation described therein, which involves three VAT taxable persons, each established in different Member States.

As part of this operation, the applicant intervenes as a promoter of the triangulation that purchases the goods from a taxable person established in Italy (the so-called first transferor) and then resells them to an Austrian customer, the final recipient of the goods. The goods are transported from Italy directly to Austria, by the promoter of the triangulation (*ie* the society).

Considering that the documentation produced by the Taxpayer concerns operations carried out in 2019, the provisions of the Directive 2018/1910 / EU of 4 December 2018, not yet implemented by Italy, are not applicable to this case, nor in general those of the EU Regulation 2018 / 1912, in force from January 1, 2020, except as clarified below.

The sale of goods by the Italian Supplier to the Applicant is governed by article 41 of the decree law of 30 August 1993, n. 331, and with regard to the proof of the transfer, the various clarifications made by the Financial Administration with its own practice documents are valid, issued also taking into account the judgments of the EU Court of Justice (judgments of 27 September 2007, in cases C-409 / 04, C146 / 05 and C-184/05; judgments of 16 December 2010, in case C-430/09 and 6 September

2012, in case C-273/11).

According to the aforementioned article 41 - in compliance with article 138 of directive no. 2006/112 / EC of 2006 (so-called "VAT Directive") - in order for a sale of goods to a community subject to be qualified as an intra-community sale, consequently taking advantage of the non-taxability to VAT, it is necessary that the operation:

- occurs between two taxable persons, established in different Member States;
- is for consideration;
- involves the acquisition or transfer of ownership or other rights

right in rem on tangible movable property;

- provides for the shipment or transport of the goods to another EU country. Moreover, the shipment or transport can be carried out by the transferor, the transferee or by third parties on their behalf.

These requirements must be applied jointly, otherwise the sale does not benefit from VAT exemption.

Therefore, when all these conditions are met, the Italian Seller (*ie* first transferor) issues a non-taxable invoice to the Taxpayer *former* article 41 of the legislative decree n. 331 of 1993, while the physical transfer of the assets from Italy to Austria can be demonstrated by the first transferor through a set of mutually consistent documents relating to the transaction, from which it is possible to deduce the transfer of the assets.

In this regard, reference is made to the response to the appeal of 8 April 2019 n. 100, with which the writer confirmed the relevance of the clarifications made with resolutions no. 345 / E of 2007, 477 / E of 2008 and no. 19 / E of 2013, also stating that " *This policy is also compliant with the provisions of the recent Implementing Regulation of 4 December 2018, no. 2018/1912 / EU which intervened in the corpus of Implementing Regulation (EU) no. 282/2011, inserting the following article 45 bis, applicable from 1 January 2020 ".*

In particular, according to resolution no. 345 / E, to prove the shipment of the goods to another EU country, the Italian Seller must keep the following tax and accounting documentation:

- the sales invoice to the Community buyer (*ie* invoice from the Italian Seller at the Instant);

- INTRA summary lists relating to intra-community sales made by the Italian Supplier;

- the signed "CMR" transport document;

- the buyer's bank remittance (*ie* the Applicant) relating to the payment of the

goods.

Given that in general it can be difficult for the national transferor to have a copy of the CMR signed, with the resolutions of 15 December 2008 and 25 March 2013, n. 19 / And it has been stated that there is no rigid constraint regarding the proof to be provided. As for saying that:

1. when it is not possible to show the transport document, others are admissible suitable means of proof;

2. the proof of the transfer of the asset to another EU State derives from a set of documents from which it is clear, with sufficient evidence, that the asset has been transferred from the state of the transferor to that of the purchaser.

If, therefore, the national transferor has not directly carried out the transport of the goods and is unable to exhibit a "suitable" CMR, the above proof may be provided with any other suitable document to demonstrate that the goods have been sent in another EU State, such as the electronic CMR, having the same content as the paper one, or a set of documents from which the same information present in the same and the signatures of the subjects involved (transferor, carrier, and transferee) can be obtained.

It remains understood that where the Italian Seller is in any case in possession of a "suitable" CMR, this document is suitable for demonstrating the exit of the goods from Italy.

The "replacement" documents of the CMR must be kept for the verification period and together with the sales invoices, the bank documentation certifying the sums collected in relation to the aforementioned transfers, the documentation relating to the contractual commitments undertaken and the Intrastat lists.

All this documentation can also be acquired after the transaction has been carried out, but there remains the opportunity to find it without delay as soon as commercial practice makes it possible in order to be able to promptly exhibit it during any control by the tax authorities.

For the sake of completeness, it is noted that with the answer to question no. 100 of 2019

this Agency has specified that the following are also suitable for proving the exit of the goods from the territory of the State:

- DDT with signature of taking charge of the goods by the carrier (carrier who can also be appointed by the transferee, for sales made ex works or *ex works);*

- declaration of receipt of the goods by the customer;

- documentation regarding the contractual commitments undertaken with the customer (concluded contract or exchange *mail).*

With this information it is not necessary to have CMR or other transport documents signed by the recipient.

The same principles were most recently taken up in the responses to the ruling of 23 April 2020, n. 117 and of 3 September 2020, n. 305.

With reference to the case in point of the survey in question, it is noted that the proof of the movement of the goods is requested by the Italian tax authorities from the Italian Supplier, the first assignor, and not at the instant. The latter must refer, for his part, to the requirements required by his own financial administration.

Taking this into account and the fact that an unsuitable CMR is attached to the application because it lacks the signature of the final recipient of the goods, it is considered appropriate to integrate the means of proof proposed by the Applicant (which must be shown by the first Italian transferor) with the bank documentation certifying the sums collected in relation to the sale, a declaration of receipt of the goods by the end customer and with the documentation relating to the contractual commitments undertaken and the Intrastat lists.

In any case, any assessment of membership remains unaffected *set* document held by Beta, which can be carried out in practice as part of the control activity.

To complete what has been noted up to now, it is finally pointed out that in

circular 12 May 2020, n. 12 / E it was stated that the relative presumptions, provided for by the new article 45- *BIS* of the EU Implementing Regulation 282/2011 of 15 March 2011 on the proof of the transport of goods are applicable "... *also in relation to the transactions carried out before January 1, 2020 if the taxpayer possesses a set of documents that fully coincides with the indications of the aforementioned rule.*

In other words, even prior to 1 January 2020, in the presence of the proof documents deemed suitable pursuant to article 45-bis, the same must be admitted (with relative presumption) as proof of the arrival of the goods in the other Member State ".

Before and after January 1, 2020, therefore, the taxpayer has two levels of protection:

- a basic level, where by acquiring the documents required by Italian practice (which circular 12 / E has confirmed), one can rely on the fact that the FA recognizes that the transport has taken place;

- an enhanced level, where possession of the documents required by the aforementioned article *BIS* entails the legal presumption of carrying out the transport in another Member State (with reversal of the burden of proof on the AF).

For the purposes of interest here, the case referred to in paragraph 1, letter b) of the aforementioned article, which governs the case in which the goods are transported by the buyer or by a third party on his behalf, is relevant.

In this case " *it is assumed that the goods have been dispatched or transported from the territory of a Member State to an external destination ....: (...) b) [.* ed if]
the seller is in possession of: i) a written declaration from the buyer certifying that the goods have been transported or dispatched by the buyer, or by a third party on behalf of the buyer, and which identifies the Member State of destination of the goods; this written declaration indicates the date of issue; the name and address of the buyer; the quantity and nature of the goods; the date and place of arrival of the goods; in the case of transfer of means of transport, the identification number of the means of transport; as well as

identification of the person accepting the goods on behalf of the buyer; (...) ".

The transmission to the seller of this written declaration after the deadline of "

tenth day of the month following the sale " does not preclude the possibility for the seller to benefit from the relative presumption in the presence of all the other conditions provided for by the same article (see par. 5.3.8. of the Explanatory Notes on "

quick fixes 2020 ", published in December 2019).

The declaration *de quo* must be possessed by the seller together with at least two of the documents relating to the transport of the goods, referred to in letter a) of paragraph 3 of article 45- *bis (ie* a document or a CMR letter bearing the signature, a bill of lading, an air transport invoice, or an invoice issued by the forwarder), or a transport document referred to in the aforementioned letter a) together with a document relating to the other means test indicated in letter b) of the same paragraph 3 (*ie* an insurance policy relating to the shipment or transport of the goods or bank documents certifying payment for the shipment or transport of the goods).

This evidence must be non-contradictory and come from two independent parties, the seller and the buyer (for further details, see circular 12 / E of 2020).

THE CENTRAL DIRECTOR

(digitally signed)