

LEGAL INFORMATIVE NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

VALUE ADDED TAX – OVERVIEW OF THE POWERS AND DUTIES OF DOMESTIC TAX AUTHORITIES OVER VAT MATTERS

INTRODUCTION - Value added tax (VAT) (*imposta sul valore aggiunto - IVA*) was introduced in the Italian Republic in 1973. The main VAT statutory regulation is the Presidential Decree 633/1972, so called the VAT Act.

VAT is a European Union tax and its application has to be considered by reference to EU Law. EU law prevails over domestic law to the benefit of the taxpayer. Where an EU directive is unconditional and sufficiently precise, an individual may rely on its provisions against national legislation which does not conform to it.

This article provides an overview of the powers and duties of the Tax Authorities over the VAT.

AUDIT AND ASSESSMENT - The local VAT offices have a duty to check the payments of tax made and returns submitted by taxable persons, and to raise assessments for VAT evasion or fraud or for underpaid VAT, and inflict the relevant administrative penalties.

In order to carry out its inspections, the tax authorities may gain access to business premises to inspect books and records and verify the activities undertaken (articles 51 and 52 of the VAT Act). They may also obtain further information from a number of sources to enable them to verify the tax paid or to raise an assessment. For example, they may require

taxable persons to provide books, records and other documentary evidence, or to appear in person or through a representative, to provide information, clarification, etc.

The tax authorities may send questionnaires requiring specific information not only to suppliers of goods and services but also to their customers and clients.

They may also obtain information about specific taxable persons, or groups of taxable persons, from other state departments, insurance companies, financial companies, etc., and obtain copies of documents deposited with notaries.

The tax authorities have specific powers to raise an assessment, in the following situations:

- an assessment may be raised where a VAT return has been submitted, if the tax authorities believe that the tax due has been understated, or an input tax deduction has been overstated. The assessment may be based on the information contained in the return, or on information obtained by the tax authorities;
- the tax authorities may raise an “inductive assessment” where no VAT return has been submitted, without prior reference to the books and records of the taxable person;
- where the tax authorities consider there is real danger that tax may not be collected, they may raise an inductive assessment for shorter periods, without reference to the due dates for periodic payments or submission of the annual return; and
- the tax authorities may automatically presume that any goods which have been acquired, purchased or imported by a taxable person have been supplied by him for VAT purposes.

An assessment must be notified by the tax authorities to the taxable person in writing, with an explanation of the fact(s) and the reason(s) for which it has been raised. Where the motivation is based on specific documents which are not known to the taxable person, such documents must be either enclosed with the VAT assessment or the main part of their content must be reported in the explanation of the VAT assessment.

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STATUTE OF LIMITATIONS – There are specific statutes of limitation for the tax authorities to issue and notify a VAT assessment.

If a VAT assessment is notified after the relevant statutory statute of limitation, it is void.

When the taxable person has submitted a VAT return, an assessment must be issued by 31 December of the 4th year following the year in which the VAT return was filed. For example, for tax year 2012 the VAT return should have been filed in 2013; any VAT assessment concerning that tax year should be issued and notified by the tax authorities by 31 December 2017.

In the event that a taxable person fails to file the VAT return for a certain tax year, the statutory statute of limitation is one year longer compared to the ordinary one.

In the event that no VAT return was filed by the taxable person for 2008, for example, the assessment period is extended to 31 December 2014.

In the event of a tax offence for which the tax authorities have the duty to deliver a crime notice to the competent authorities, the statutory terms within which the tax authorities may carry out a VAT assessment are automatically doubled. As a result, in such circumstances, the tax authorities can issue a notice of VAT assessment by:

- 31 December of the eighth year following the one in which the VAT return was filed (e.g. tax year 2004 would be time barred at the end of year 2013, instead of in 2009); and
- 31 December of the tenth year following the one in which the VAT return should have been filed (in the case that the VAT return was not filed or its filing was not valid).

The statutory terms for VAT assessments are also doubled for tax assessments based on the presumption that investments and financial activities held in low tax jurisdictions in violation of tax monitoring provisions result in tax evasion.

A taxable person who disagrees with an assessment raised by the VAT office may file for a settlement procedure before the competent tax authorities or file a formal opposition before the competent Tax Court (see section 15.). Failing any settlement between the tax authorities and the taxable person, the latter is still entitled to file opposition against the VAT assessment before the competent tax court.

TAX RULING (*diritto d'interpello*) - Taxable persons may submit to the tax authorities specific questions concerning the application of tax rules to specific and personal cases, where there is an objective uncertainty in the interpretation of the said rules.

The tax authorities must provide their answers, in the form of rulings, within 120 days from the filing date of the request and, failing any answer, it is assumed that the tax authorities agree with the proposed interpretation of the taxable person.

The answer of the tax authorities must indicate the reasons for their opinion, which is binding only for the specific case under examination and exclusively relates to the specific taxable person applying for the ruling. Most of the rulings are also published by the tax authorities and become a possible reference for the interpretation of certain tax provisions.

INTEREST – Interest is due on amounts of VAT which are assessed to be understated or overpaid. Currently, the annual rate is equal to 3.5%.

With respect to interest on VAT refunds, due for whatever reason, the annual rate to be paid by the tax authorities is equal to 2%, effective from 1 January 2010.

PENALTIES - The basic principles of administrative penalties for VAT violations are:

- the principle of “legality”: the penalty must be set forth by law and it may not be inflicted for facts committed before such law had come into effect; and
- the principle of favor rei: if a subsequent law sets forth a different penalty for the same violation, the lower penalty shall apply.

The pecuniary penalty is:

- a percentage of the tax due (e.g. 120% to 240% for failure to file a VAT return); or
- a fixed amount (e.g. EUR 1,032 to EUR 7,746 for failure to keep proper VAT accounting records).

The actual penalty is determined by the tax authorities and depends on the seriousness of the offence and the offender’s social and economic situation. A penalty may be increased up to 50% if the offender has committed other offences of the same nature in the previous 3 years. The penalty decreases down to one half of the minimum charge when circumstances show an obvious disproportion between the penalty and the offence.

The penalty will not be inflicted if there is a reason not to prosecute, i.e. error of fact without fault or in the case of objective doubt about the correct application of the law or, where the violation does not affect the determination of the taxable amount, of the tax due and the tax payment.

The same rule applies if the offence was caused by an objective uncertainty concerning the interpretative meaning of the instructions given by the tax authorities.

A taxable person who, with a single action or omission, violates different regulations or with many actions or omissions violates the same regulation many times or, in several periods, committed violations intended to cause prejudice in the calculation of the taxable amount, is punished with the highest penalty, increased as established by the law for each single case.

The offender (physical person or director of a partnership) is personally liable for the pecuniary penalty.

The partnerships or other transparent entities on behalf of which the offender(s) acted (managers and directors) are jointly liable to the penalty.

If the offender did not act fraudulently, nor with gross negligence, and did not benefit directly from the offence, his liability is limited to a maximum amount of EUR 51,645.69 (reduced to 25% if the payment is made within 60 days after the tax assessment notice was served).

In the case of penalties applicable to companies, the directors are not considered to be responsible for paying the tax penalties.

The main provisions regarding penalties for failure to comply with the obligations of the taxable person, concerning VAT and income tax, are contained in Legislative Decree 471/1997.

The most important administrative penalties are:

- non-payment or partial remittance of the VAT due according to the annual VAT return: 30% of the amount of the tax not paid;
- non-payment within the established time limit, or partial remittance of the advance or periodical monthly (or quarterly) remittance of the VAT: 30% of the amount of the tax not paid;
- failure to submit an annual VAT return (VAT return is not considered omitted when it is presented within 90 days from the deadline): 120% to 240% of the amount of tax due for the year, with a minimum of EUR 258;

- where the annual return shows an evasion of tax (or an overclaimed refund): 100% to 200% of the tax evaded (or overclaimed);
- failure to submit a periodical VAT return and submission of a periodical VAT return showing an evasion of tax or an overclaimed payment: from EUR 258 to EUR 2,065;
- failure to submit any other VAT declaration (e.g. when commencing or ceasing business activity): from EUR 516 to EUR 2,065;
- failure to issue or record a tax invoice or failure to charge VAT: 100% to 200% of the tax not charged with a minimum of EUR 516;
- failure to issue or record an invoice for an exempt or non-taxable transaction, where required to do so: 5% to 10% of the amount with a minimum of EUR 516. Where the failure does not affect the calculation of the income: from EUR 258 to EUR 2,065;
- a taxable person who receives a supply of goods or services for his business and does not receive a correct tax invoice, must regularize the position by presenting the correct documents to the VAT office and paying any due: otherwise the recipient of the supply is liable to remit 100% of the tax due, with a minimum of EUR 258; and
- failure to keep (or to keep sufficient) books and records: from EUR 1,032 to EUR 7,746.

A special category of penalties relates to errors and omissions concerning export:

- where goods have been sold VAT free for export by the customer, but they are not exported within the prescribed time limit: 50% to 100% of the tax not charged;
- the above penalty is not chargeable if the supplier corrects the invoice and pays the tax due within 30 days of the export deadline;
- where goods or services are acquired VAT free without the prescribed letter of intent or by a person who falsely claims status as a frequent exporter or who exceeds the exporters' plafond facility: 100% to 200% of the tax the "exporter" should have paid;
- if goods have been incorrectly acquired VAT free because they were purchased for export in their original state, but then fail to be exported within the time limit: the penalty is reduced by a half; and
- the above penalty is not chargeable if the supplier corrects the position and pays the tax due within 30 days of the export deadline.

The following penalties apply to Intrastat returns:

- failure to present Intrastat returns or correcting returns: from EUR 516 to EUR 2,065, for each return;
- the above-mentioned penalty is reduced by half when the failure to present Intrastat returns is

corrected within 30 days of the request from the competent office; and

- the above penalties for inaccurate returns will not apply where the compiler spontaneously, or upon request from the competent office, corrects the errors.

Within 60 days from receipt of the penalty, the taxable person may pay an amount equal to one quarter of the penalty.

The penalty may be increased by 50% where the taxable person, during the previous 3-year period, had committed violations of the same type. Exceptionally, the penalty may be reduced up to 50% in case of disproportionality.

VOLUNTARY REDRESS (ravvedimento operoso) - A taxable person may reduce the penalties outlined through voluntary correction of any errors or omissions before they are found by the tax authorities, or before the beginning of tax audit or other administrative investigation of which the offender has formal knowledge.

The omitted or insufficient remittance of taxes may be regularized by paying spontaneously the amount due, the penalty and the interest.

In particular, the following penalties apply:

- one tenth of the minimum amount of the penalty (basically equal to 3%), in the case of failure to make a tax payment, if the position is corrected within 30 days of the due date; and

- one eighth of the minimum (basically equal to 3.75%) if the payment is effected later than 30 days from the due date but within the date established for the filing of the annual VAT return for the year in which the violation was committed.

The payment of reduced penalty must be effected jointly with the remittance of the tax due plus the deferred interests at the legal rate (currently fixed at a rate of 2.5%) on a daily accrual basis.

CRIMINAL PENALTIES - Establishing the existence of a tax crime involves the identification of fraud consisting of the specific will or intention to “evade” the tax.

VAT-relevant crimes and the respective sanctions are:

- fraudulent VAT return using invoices or other documents concerning false transactions: imprisonment between 18 months and 6 years;

- fraudulent VAT return using other instruments, if the unpaid tax is higher than EUR 77,468.53: imprisonment between 18 months and 6 years;

- untrue VAT return, if the unpaid tax is higher than EUR 103,291.38: imprisonment from 1 to 3 years;

- failure to file VAT return, if the unpaid tax is higher than EUR 77,468.53: imprisonment from 1 to 3 years;

- issuance of false invoices or other documents to allow third parties not to remit VAT, if the false amount reported in the documents is higher than EUR 154,937.07: imprisonment between 6 months and 2 years;

- the concealment or removal of accounting and tax documents: imprisonment between 6 months and 5 years; and

- fraudulent subtraction of tax payment, through false sales of property intended to avoid enforcement of payment procedure, if the unpaid tax is higher than EUR 51,645.69: imprisonment between 6 months and 4 years.

ANTI AVOIDANCE MEASURES – All VAT transactions, whose amount is not lower than EUR 3,000, must be communicated electronically to the competent tax authorities.

The transactions to be included in this communication are those relevant for VAT purposes (taxable, not taxable, outside the scope of VAT, self-invoice, etc.), with a taxable amount higher than EUR 3,000.

For all transactions for which there is no obligation to issue an invoice, the communication threshold is EUR 3,600, inclusive of VAT.

The transactions excluded from the communication are the following:

- import;

- the export (including sales to usual exporters);

- transactions within the European Union which have already been included in the Intrastat forms relating to economic operators with registered offices established or domiciled in so-called black list Countries, except when there is an assumption of territoriality in Italy (for example, services related to immovable property situated in Italy).

- transactions which have been communicated to the Tax Register (e.g. supply of electricity, gas and telephone services, insurance, sale of property, leases); and

- internal transfers among business units, as proved by the related invoice.

Failure to comply with this obligation entails the application of a penalty between EUR 258 to EUR 2,065.

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