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VAT – E.U. OPERATIONS: GOOD FAITH IS DECISIVE IN DISPUTES

For the European Court of Justice, the substantive aspect of a European Community operation (in this case the acquisition of a service provided by a person or entity that carries on their business in another EU country), together with the good faith of the operator, is the main element for classifying an operation as a "European Community" operation, that is, even if the service provider had recently been deprived of their VAT identification number. In the Court's opinion, passive party status has an objective aspect. This judgement, however, contrasted with the Tax Office's "internal" practice which (through circulars and resolutions) affirms that VIES (VAT Information Exchange System) registration is essential.

TRANSFER PRICING FOR E.U. TRANSACTIONS: THE POSSIBILITY OF ARBITRATION AGREEMENT

It is possible to opt for ARBITRATION AGREEMENT in international tax disputes (within the EU) regarding transfer pricing. This procedure, to which access is gained through appropriate application to the Ministry of the Economy, can be initiated even before receiving the notice of assessment, for example following notification of a verbal notice of assessment. The case should be resolved within two years; otherwise the authorities are obliged to set up an advisory committee, reaching an arbitration decision binding on the parties. Until the conclusion of the proceedings, it is possible to make a request to the Tax Office for the suspension of collection and of enforcement measures relating to the greater amount of tax assessed, pursuant to art. 110, paragraph 7 of the Consolidated Act, and to relative sanctions and interest.

ACE FOR NEW COMPANIES

One of the "ACE" (adjusted current earnings) problems for which the Tax Office has not yet provided precise indications is the situation in which a company was incorporated during 2011. The problem is whether to apply the ACE benefit in relation to the duration of the tax period. Most authoritative views (the *SOLE 24 ORE* newspaper and *MAP* experts) opt for non-proportional application, favouring this solution only in the case of a financial period different from 12 months (for example, by virtue of an extraordinary operation). Another "critical" area is the incorporation of a company at the end of 2010, with the first financial period closing 31.12.2011. According to the letter of the law, this company would not benefit from ACE, since it was not incorporated in 2011, but this excessively restrictive interpretation would go against the logic of the concession in question and is therefore to be excluded (ASSONIME, circular no. 17/2012).

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EU SALES OF GOODS: PROOF OF DELIVERY TO THE TRANSFEREE'S COUNTRY IS ESSENTIAL

As already referred to in appropriate detail, also in relation to the repeated requests of Financial Administration inspectors for intra-Community transfers of goods, it is essential to acquire proof that the assets have arrived at the EU member state of the transferee. The "key" element of proof is the CMR undersigned by the transferee. This document is not always easy to obtain, but other means of proof are available; the simplest is an appropriate declaration by the buyer, also relating to a number of transfers. Proof of payment of the supply is not in itself sufficient (since the goods, although delivered to a European Community transferee, may not have entered their country's territory). We are drawing up a Baldi Studio circular on the matter for all clients with, attached, a for-forma wording for requesting the aforementioned declaration from the transferee.

VAT: INTERMEDIATION AND TRANSPORT WITH REFERENCE TO EXTRA EU SALES

Special attention should be paid to the treatment of VAT regarding invoices for transport and intermediation relating to export operations. When the provider of these services (to a resident person or entity) is a resident person or entity, the operation is not taxable (art. 9, paragraph 1, no. 2-7 of D.P.R. no. 633/1972). When the provider is an EU or extra EU person or entity, the Italian customer must register the relevant purchase and sales invoice, affixing the wording: "operation not subject to V.A.T. pursuant to art. 9, paragraph 1, no. 2 (or 7) of D.P.R. no. 633/1972". Even when the aforementioned registrations do not affect determination of the tax, inspectors require them and may issue sanctions.

VAT REFUNDS BY THE END OF THE YEAR

During Question Time in the Chamber of Deputies on 19 September, the Finance Minister, Vittorio Grilli, affirmed that VAT credits for € 4.3 billion will be refunded to taxpayers by the end of the year. After the € 2.2 billion refunded in May, the new undertaking should contribute to easing the financial burden of taxpayers, largely exporters, and to improving trust in the public administration system. It should be noted, moreover, that the refund of credits occurs within sixty days in several European Union countries (including Germany, France and Belgium).

ELEMENTS OF THE EMPLOYMENT REFORM

We are continuing to analyse the changes introduced by Law no. 92 of 28 June 2012 reforming the labour market, which came into force on 18.07.2012, divided into in separate elements.

DISMISSAL OF WORKERS

The procedure for notification of individual dismissal and protection for the worker.

From the law's entry into force, dismissal must be notified in writing, indicating the specific grounds for dismissal.

With reference to dismissals notified after the law has come into force, any extra-judicial challenge of dismissal must be made within 60 days from termination and an appeal or request for conciliation or arbitration must be made within 180 days.

1. **Changes to dismissal for objectively just grounds as per art. 3 of Law 604/1966**
   - For cases of dismissal (only on objectively just grounds and only with regards to companies that employ more than 15 workers) there is now the obligation to seek settlement before the Territorial Employment Office.
     In the event of dismissal for objectively just grounds, the employer has the obligation to set up a preventative procedure before the Territorial Employment Office, declaring their intention to terminate employment and illustrating the grounds.
     In the event of the employee's legitimate impediment to attend, proceedings may be suspended for a maximum of 15 days.
     In the preventative procedure an attempt will be made at conciliation, during which alternative solutions to termination will be assessed (*repechage obligation*), which will be concluded within twenty days from when the Territorial Employment Office forwarded convocation for the meeting, unless **the parties, by mutual agreement,** decide to continue discussions aimed at reaching an agreement.
     If the attempt fails the employer may notify dismissal to the parties.

If conciliation is successful and provides for the agreed termination of employment, the provisions regarding Social Insurance for Employment (ASPI) apply, and for the purpose of helping to find new employment, the worker may be referred to an employment agency as per Leg. Dec. 276/2003.

In conclusion, an employer may dismiss the worker upon the unsuccessful obligatory attempt at conciliation or once twenty days have elapsed from convocation before the reconciliation Commission.

- Dismissal occurs as a consequence of disciplinary proceedings as per art. 7 of Law 300/1970 (the Workers' Statute) or of the preventative procedure as per art. 40 of Law 92/2012 in the case of dismissal for objectively just grounds. This is without prejudice to the application of suspension of employment in the case of maternity/paternity rights or resulting from a work-related injury.

2. Changes to Law 300/70 (the Workers' Statute)

- **Discriminatory dismissal**

  Art. 18 of Law 300/1970 introduces penalties for discriminatory dismissal, which is considered as a separate situation from unfair dismissal.

  Regardless of the number of workers employed in cases of discriminatory dismissal, the judge declares the dismissal as invalid, ordering the employer to reinstate the employee, unless the latter opts for compensation in lieu of reinstatement, equivalent to 15 monthly salaries, and which is not subject to social security contributions, as well as the payment of compensation for damages equivalent to remuneration receivable from the date of termination to the effective date of reinstatement with the deduction of amounts received for the performance of other work activities (*aliunde perceptum*).

  The right of the worker who has obtained reinstatement to their original job to opt for compensation equivalent to 15 monthly salaries in lieu of reinstatement is confirmed.

- **Verbally notified dismissal**

  The judge declares the invalidity of a verbally notified dismissal, ordering the employer to reinstate the employee, as well as the payment of compensation for damages equivalent to remuneration receivable from the date of termination to the effective date of reinstatement.

THE SUPREME CRIMINAL COURT ESTABLISHES A NEW SITUATION OF FRAUDULENT BANKRUPTCY IN THE EVENT OF THE SALE OF COMPANY ASSETS OR COMPANY BRANCH

The Supreme Court, through a recent judgement (**Criminal Section V, no. 2940 of 11.07 – 17.09.2012**) has confirmed that the sale of assets – or, as in the case in question, of a company branch – at a ridiculously low price, on the part of a company hit by the crisis and which has then become insolvent, comes under the definition of fraudulent bankruptcy (art. 216, paragraph I, no. 1, L.F.).

The operation through which an asset of the company has been disposed of without an equivalent amount entering into the balance sheet upon bankruptcy is considered as insolvency by virtue of distraction as per art. 216 paragraph 1, no.1 of the Bankruptcy Law, that is, if subsequent to the disposal there has been no attempt at the recovery of the value, and even as intentional causation of insolvency as per art. 223, paragraph 2, no. 2 of the same law (Section 5, Sentence no. 5408 of 26/11/1997 Cc. (dep. 20/01/1998) Rv. 209883).

If it is true that the sale of assets "is theoretically a legitimate and permissible action carried out according to the business objects of the company", the legitimacy of the operation is recognised only in the event that it is an effectively onerous sale (that is, providing for the payment of a consideration) and for a suitable price: bankruptcy by virtue of distraction occurs, in fact, not only in the event of the apparent acquisition of the consideration never collected by the subsequently insolvent company, but also in the event of the acquisition of a partial consideration.

The risk of committing an offence naturally applies to the selling businessman, but the criminal liability of the acquiring businessman on the grounds of participation in the commission of the offence (sharing criminal intentions with the administrative bodies of the selling company in difficulty), cannot be excluded.