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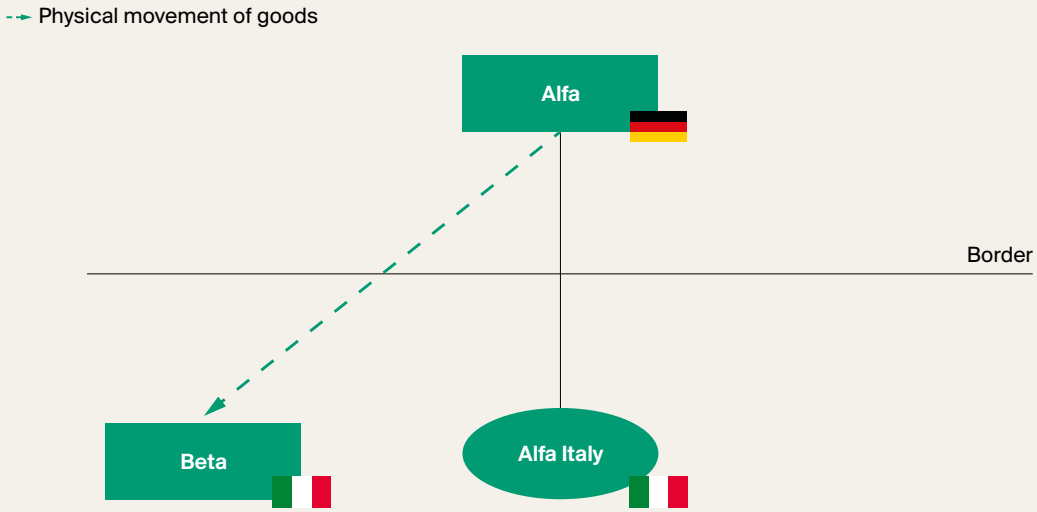
EU AND INTERNATIONAL TAX POLICY

Fixed Establishments: unexpected potential VAT liabilities from Intra-Community transactions

A few days ago the Italian Revenue Agency published ruling no. 57 of 2023, concerning the scope of fixed establishments' "intervention" and its potential application to intra-EU transactions.
Quite surprisingly, the Italian Revenue Agency set aside its previous interpretation (which was also confirmed by the EU Commission in its working paper No. 857 of 6 May 2015), by stating that a fixed establishment may be deemed to be involved not only in supplies of goods and services performed by the foreign head office, but in intra-community transactions as well.
As the interpretation taken by the Italian Revenue Agency in the ruling seems to go beyond the wording of Article 192a of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("**VAT Directive**"), foreign companies making intra-EU supplies of goods to Italian established or VAT registered customers should be well aware of it and of its potential implications when designing their supply chains.

The ruling request...

The factual background of the ruling request submitted to the Italian Revenue Agency is the following:



- a German company ("**Alfa**") sells components and accessories for the automotive industry to an Italian established customer ("**Beta**");
- Alfa DE has a fixed establishment in Italy ("**Alfa Italy**") acting as distributor on behalf of the German head-office, which possesses both human and technical resources and operates an Italian warehouse;
- Alfa Italy participates in the negotiation phase with Beta, and it is also engaged with complex pre and post sales activities;
- the products supplied by Alfa to Beta are dispatched or transported directly from the German head office to the premises of the Italian customer Beta, either by the Italian customer or by the German supplier, without the goods passing through the Italian warehouse managed by Alfa Italy, nor becoming physically available to the latter.

The applicant requested the Italian Revenue Agency to confirm whether Alfa Italy should be considered as "intervening" in the supply made by Alfa for the purposes of Article 192a of the VAT Directive and Articles 11 and 53 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 ("**VAT Implementing Regulation**") and to clarify the VAT regime applicable to the transaction at stake..

... and the Italian Revenue Agency position

The Italian Revenue Agency first of all recalled that, from the joint reading of Article 53 of the VAT Implementing Regulation and Article 192 a of the VAT Directive, a taxable person shall be seen as established in the Member State where the VAT is due, if:

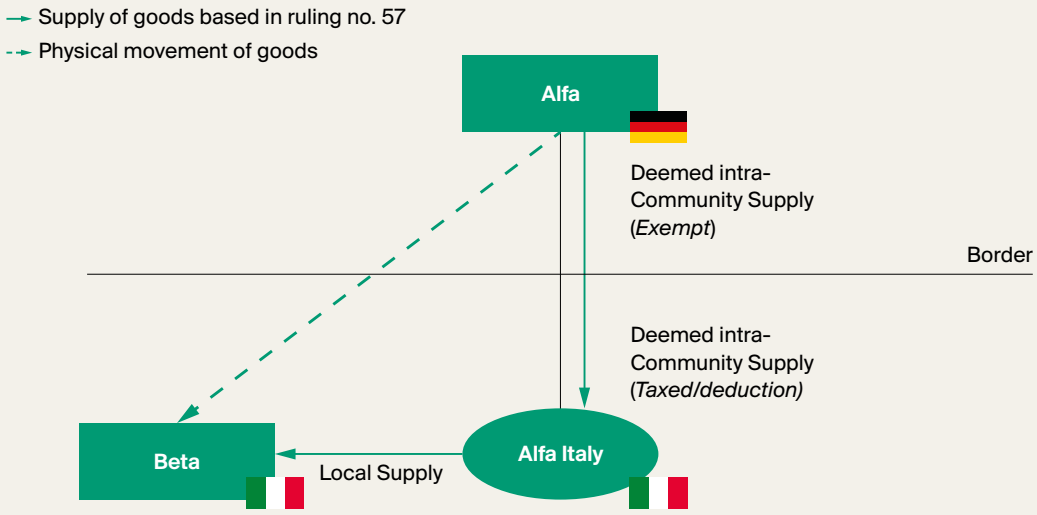
- the taxable person has, in that Member State, a fixed establishment;
- the fixed establishment is "*characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes*";
- this fixed establishment has actually intervened in a supply of services or goods supplied by the taxable person (i.e. the "*technical and human resources of that fixed establishment are used*");
- the technical and human resources of the fixed establishment are used "f*or transactions inherent in the fulfilment of the taxable supply*"; in this regard, administrative support tasks are regarded as being insufficient for considering the fixed establishment as intervening in the supply.

On this basis, and taken into account the significant involvement of the Italian fixed establishment, especially in the pre-sale stage (with the performance of complex activities capable of influencing the actual quality, features and functionalities of the products supplied by Alfa, the German head office, which cannot therefore be considered as simple administrative support tasks), the Italian Revenue Agency considered Alfa Italy as having intervened in the supply of the products made by Alfa.

According to the Italian Revenue Agency, the intervention of the Italian fixed establishment requires the intra-community supply of the products made by Alfa with the involvement of Alfa Italy to be split into:

i. a (deemed) intra-community supply of the products from the German head-office (Alfa) and its Italian fixed establishment (Alfa Italy), for which the latter should be liable to pay Italian VAT through the reverse charge mechanism[1]; followed by
ii. a domestic supply of the same products, by the Italian fixed establishment (Alfa Italy) to the Italian established customer (Beta), for which Alfa Italy should be liable to pay Italian VAT[2].

According to the Italian Revenue Agency, the reached conclusion cannot be influenced by the fact that the transport may be carried out by either Alfa or Beta, Alfa Italy never acquiring the power to dispose of the products.



Preliminary comments and critical remarks

The Italian Revenue Agency position is based on the assumption that the provision laid down by Article 192a of the VAT Directive (read in conjunction with Article 53 of the VAT Implementing Regulation) shall apply to the (intra-community) transaction under discussion, but this is not the case. Said provision is indeed aimed at identifying the person liable for the payment of VAT to the tax authorities, and should hence not display any effect on the determination of the place of supply for VAT purposes.
In other words, Article 192a of the VAT Directive stipulates that, if the supplier's fixed establishment in the customer's Member State *intervenes* in a taxable supply of goods (or services) – the latter being regarded as taking place in such a Member State, based on the applicable place-of-supply rules – the liability to pay VAT is shifted from the customer to the intervening fixed establishment, which would hence be required to charge and report local VAT on the supply.

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[1] Though not specifically addressed by the Italian Revenue Agency, the taxable base of the (deemed) intra-community acquisition made by Alfa Italy should in this case be the purchase price of the goods or similar goods or, in the absence of a purchase price, the cost price, determined at the time of the supply, as provided by Article 83 of the VAT Directive.
[2] The taxable basis should in this case be based on the consideration actually agreed by the parties.

The outlined shift of liability to pay VAT (from the customer to the supplier's intervening fixed establishment) may thus only occur when the supplier carries out a taxable supply in a Member State (Italy, in the present case) other than the one in which his place of business is established (Germany, in the present case).
However, in the case at stake, Alfa was in any case prevented from carrying out a taxable supply in Italy, since:

- supplies of goods with transport are deemed to take place in the place where the goods are located at the time when dispatch or transport of the goods begins; such a rule applies irrespective of the person taking care of the transport (who might be the supplier, the customer, or a third party) and regardless of the final destination of the goods (i.e. to supplies within one single country, but also to intra-Community supplies and to export supplies to extra-Eu Countries). In ruling no. 57, the supply of the products was hence to be regarded as being made in Germany, since the products were located in the German territory (Alfa premises) at the time the time their transport began; and
- the goods ordered by the Italian client Beta left the German territory having Beta premises as their direct destination, without the goods becoming physically available to the fixed establishment (Alfa Italy); this means that all conditions for the transaction to qualify as an intra-community transaction between Alfa and Beta (i.e. Alfa and Beta are both taxable persons; the right to dispose of the products has been transferred to Beta; the products have been dispatched or transported to another Member State and they physically left the Member State of the supply) were met.

As the transaction between Alfa and Beta clearly qualifies as an intra-community one (the VAT exempt intra-community supply made by Alfa in Germany having as its corollary a taxable intra-community acquisition made by Beta in Italy), no taxable supply is actually made by Alfa in Italy.
In spite of the significant involvement of Alfa Italy in the fulfilment of the (intra-community) supply of the products, such intervention should have hence been considered irrelevant for the purpose of determining the person liable to pay VAT.

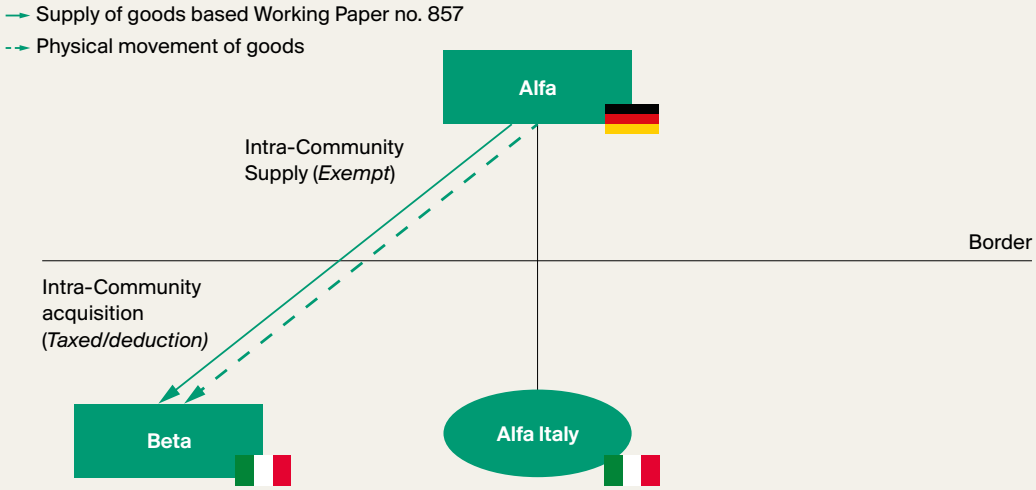
Inconsistency with previous positions of both the Italian Revenue Agency and the EU Commission

It is worth noting that in 2015 the very same Italian Revenue Agency submitted to the VAT Committee some questions with regard to the concept of fixed establishment and, more specifically, with regard to the implementation of Article 192a of the VAT Directive and the determination of the person liable for the payment of VAT.
In one the questions raised, Italy wondered about the consequences of Article 192a of the VAT Directive in the case of an intra-community supply of goods when "*the fixed establishment is involved with its human and technical resources in the supply, since it stipulates the contract with the customer in the name and on behalf of the parent company, it is in charge of business relations, strategy of the sale price, supply personnel management and performs other activities that cannot be considered as simple administrative support tasks*".
Quite surprisingly, Italy in that occasion suggested to disregard the involvement of the fixed establishment for the purpose of determining the person liable to pay VAT, by arguing that:

> *"Article 192a should not cover the possibility of an intra-Community supply of goods* ***with direct transport from State "A of the supplier to State "B" of the customer****, even in the presence of a fixed establishment of the supplier in State "B" intervening, with its human and technical resources, in some phases of the operation, for instance stipulating a contract with the customer. Indeed, in such a case, the customer receiving the goods, who is a taxable person, should be deemed to be making a taxable* ***intra-Community acquisition under Article 20 of the Directive*** *and should therefore be liable for payment of VAT in accordance with Article 200 of that*

Directive. Thus, the intervention of the fixed establishment in the above-described supply should not be relevant for the purposes of designating the person liable for payment of VAT.

*The circumstances are different where the goods are transferred **from State "A" of the supplier to the warehouse of his fixed establishment situated in State "B"** in which VAT is due, i.e. where the goods become physically available to such fixed establishment prior to their delivery in State "B" to the final customer who is a taxable person. In this case, it is deemed that the supplier carries out, through its fixed establishment, a transaction, to be 'treated as' an **intra-Community acquisition of goods pursuant to Article 21 of the VAT Directive** and, subsequently, a domestic supply of goods to his customer. In such circumstances, with regard to the cross-border transfer between the parent company and the fixed establishment, the person liable for payment of VAT can only be the fixed establishment".*



In response to the questions raised by the Italian Revenue Agency, the European Commission in its working paper no. 857 of 6 May 2015 ("*Clarifications on the concept of fixed establishment*", taxud.c.1(2015)2177802 –EN) expressly confirmed that "*...Article 192a of the VAT Directive and Article 53 of the VAT Implementing Regulation do not target specifically domestic or intra-Community supplies. These two provisions do not, in any way, make reference to any of these two categories of supplies*".
Unfortunately, the VAT Committee on its 104th meeting held in June 2015 did not specifically addressed the issue, which has been now re-opened by the "interpretative u-turn" made by the Italian Revenue Agency with ruling no. 57 of 2023[3].

[3] The Italian Revenue Agency there argues that such Working Paper "*can be considered as discussion hypotheses drafted by the Commission's legal services, also on the basis of the arguments presented by Italy, in view of the Committee's meeting No. 104 and not as the position taken by the Committee itself. In fact, at present, there are no guidelines on the subject produced by the VAT Committee in response to the requests made in the Working Paper cited above that conform to the interpretative hypotheses outlined therein*".

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