CIRCULAR No. 12

Taxpayers Division

International sector

Rome, May 12, 2020

SUBJECT: Clarifications on proof of disposals intra. Article 45-bis of EU Regulation no. 282 of 2011, introduced by EU Regulation no. 1912 of 2018.

INDEX

Premise

The introduction of article 45- *BIS* of the EU Implementing Regulation no. 282/2011 (the "VAT Regulation"), applicable from January 1, 2020 [1] has made significant changes to the discipline of proof of transport or shipment of goods to another Member State.

This circular summarizes the current evidence practice documents relating to intra-Community supplies, in light of the provision union mentioned above.

1. National legislation and practice on means of proof for supplies intra

In general terms, please note that non-taxable disposals constitute assignments for consideration of goods transported or shipped to the territory of another State member by the transferor, by the buyer or by third parties on their behalf, against taxable persons (article 41, paragraph 1, letter a) of the Legislative Decree of 30 August 1993, n. 331). [2]

Basically, according to national legislation, for the realization of a intra-community transfer, with the consequent issue of a non-taxable invoice VAT, the following requirements must exist:

1. cost of the operation;
2. acquisition or transfer of ownership rights or other real rights on goods;
3. *status* of economic operator of the national transferor and transferee

[1] The provision was in fact introduced by EU Regulation 2018/1912 of December 4, 2018.

[2] Provision transposing Article 138 of Directive 112/2006 / EC.

Community;

4. actual movement of the asset from Italy to another Member State,

regardless of whether the transportation or shipping is done by the customer of the transferor, the transferee or third parties on their behalf.

These requirements must be applied jointly; failing even one only, the transfer will be considered taxable for VAT purposes according to the provisions contained in the decree of the President of the Republic 26 October 1972, n. 633 ("VAT Decree").

Italian law - complying on this point with Directive 2006/112 / EC ("VAT Directive") - does not dictate any specific provision regarding documents that the taxpayer must keep, and exhibit in case of any control, for prove that the asset has been transferred to another EU state [3].

Before the entry into force of Article 45- *BIS* of the VAT Regulation, the Revenue Agency had provided several clarifications on the matter.

In particular, in resolution 25 March 2013, n. 19 / E, also referring to previous resolutions of 28 November 2007, n. 345 / E and of 15 December 2008, n. 477 / E, the issue of proof of the effective movement of goods was addressed from Italy to another Member State, regardless of whether the transport or shipping had taken place by the transferor, the transferee or third parties for them bill. In that circumstance - which drew inspiration, like resolution no. 477 / E of the 2008, from a case relating to the so-called *ex works* "- it has been clarified that, for intra-community supplies, the electronic CMR (the waybill international regulated by *Convention des Marchandises par Route* "), Bearing it same content as the paper one, constitutes a means of proof suitable for demonstrate the exit of the goods from the national territory. Furthermore, it has been recognized,

3 Circumstance which also led to a significant dispute, with jurisdictional decisions not always converging.

as a means of proof equivalent to paper CMR, a set of documents from which one can obtain the same information present in the same CMR on paper, as well as the signatures of the parties involved (transferor, carrier and assignee). this documentation, which must show that the physical movement has taken place of the goods and that the latter has reached another Member State has value only if kept together with the sales invoices, the bank documents certifying the sums collected for the aforementioned transfers and related documentation the contractual commitments undertaken and the lists *Intrastat.*

Subsequently, with resolution 24 July 2014, n. 71 / E, with reference to the proof of the intra-community transfer, the following two principles were expressed:

1. when it is not possible to show the transport document, they are eligible other suitable means of proof;
2. evidence of the transfer of the property to another Member State derives from a set of documents from which it is obtained, with sufficient evidence, that the good it was transferred from the transferor to the buyer.

Finally, please note that in the answer to question no. 100 published on 8 April 2019, the writer returned to the issue of proof of the effectiveness of a transport made by Italy to another Member State, in relation to a company which put in place intra-Community supplies of goods both *clear destiny* ", be " *franc factory* ".

In particular, at the time of shipment of the goods, the instant company issued a transport document (DDT) with indication of the destination of the goods, normally signed also by the transporter for taking charge and, when the transportation was handled by the same company, which received the carrier's invoice with an indication of the transport carried out. In addition to DDT, the Italian company prepared a document containing:

1. the identifier of the client (i.e. the transferee on the invoice);

2. the reference of the sales invoice;

3. the reference of the logistics invoice (internal document);

4. the invoice date;

5. the date of the DDT;

6. the date of destination of the goods, the country of destination and the year to receive the goods themselves;

7. the following declaration by the Community transferee: « *goods relating to the invoices indicated above were regularly received by the our subcontractor, our warehouse or in our stores* ».

In the opinion, in addition to recognizing the suitability of the documentation indicated a constitute proof of intra-Community transport, the necessity was confirmed that the documents involved, i.e. transferor, carrier and transferee, and all data necessary to define the transaction to which they refer. The writer reiterated the need for the taxpayer to keep the related sales invoices, the banking documentation certifying the sums collected in relation to the previous ones sales, the documentation relating to the contractual commitments undertaken and the lists Intrastat.

2. Presumption that goods have been transported or shipped to another state member

As noted in the previous paragraph, the VAT Directive does not indicate the methods by which operators can demonstrate that transport has taken place or shipment to the other State of the Union for the exemption to be recognized of the operation itself.

At the Union level, it has been observed [4] how states have adopted approaches different in applying this legislation and this has created a situation of uncertainty and difficulty for businesses. In order to improve exchanges commercial, providing practical solutions for businesses and guarantees for tax administrations, the Council of the European Union therefore considered It is necessary to identify certain circumstances in which the goods should be considered shipped or transported from the Member State of supply to an external destination with respect to their territory but in any case in the Community, thus creating the conditions to ensure the harmonized application of the non-taxability envisaged for intra-Community transfers within the single market.

In particular, a relative presumption about the occurrence has been introduced transport of goods within the Community (paragraph 1, letters a) and b), of article 45-*BIS* of the VAT Regulation). The Commission has provided some clarifications on this to this provision with the Explanatory Notes on the " *quick fixes 2020* ", Published in December 2019.

In particular, the cases in which:

to) the goods have been shipped or transported by the seller or a third party to your account (letter a) of paragraph 1 of article 45- *BIS* in comment);

is

b) the one in which the goods were transported by the buyer or by a third party on his behalf (letter b) of paragraph 1 of the same article 45- *BIS).*

In the first case (letter a), to benefit from the presumption of transport, the seller, in addition to declaring that the goods were shipped or transported by he or third parties on his behalf will have to produce at least two documents, not contradictory and coming from different subjects and independent from both seller than by the buyer. These documents are those indicated in paragraph 3,

[4] See the preamble (so-called "recital") of the EU Regulation 2018/1912 of 4 December 2018.

letter a) of article 45- *BIS:* these are documents relating to transport or shipment of goods (for example a document or a CMR letter bearing the signature of the carrier, a bill of lading, an air freight bill, or one invoice issued by the shipper).

Alternatively, the seller may present, in addition to the declaration that the goods a document has been sent or transported by him or by third parties on his own account referred to in paragraph 3, letter a) and any of the documents indicated in subsequent letter b) of the same paragraph 3, or:

the) an insurance policy relating to the shipment or transportation of goods or bank documents attesting to payment for shipping or transportation of goods;

ii) official documents issued by a public authority, for example by a notary, who confirm the arrival of the goods in the Member State of destination;

iii) a receipt issued by a depositary in the Member State of destination confirming the deposit of the goods in that Member State.

In the second case (letter b), in which the transport is carried out by the purchaser or by a third party on his behalf, the purchaser himself must provide the seller, within the tenth day of the month following the assignment, one written declaration indicating the release date, name and the buyer's address, the quantity and nature of the goods sold, the date and place of their arrival, the identification of the person who accepted the goods on behalf of the buyer and, in the case of means of transport, the identification number of the medium.

In particular, it is specified that the transmission to the seller of the declaration written by the buyer beyond the term of the " *tenth day of the month following the sale* ", Provided for in article 45- *BIS,* paragraph 1 (b) (i), not

precludes the possibility for the seller to benefit from the presumption in the presence of all the other conditions set out in the same article (see par. 5.3.8. of the Notes Explanatory).

This declaration must be held by the seller together with at least two of the documents relating to the transport of goods, referred to in letter a) of the paragraph 3 of article 45- *BIS,* or to a transport document as per letter a) together with a document relating to the other means of proof indicated in letter b) of the same paragraph 3.

It is believed that the presumption in question can also be recognized in report on transactions carried out before January 1, 2020 if the taxpayer have a documentary kit that fully coincides with the indications of the standard referred to.

In other words, even prior to January 1, 2020, in the presence of the test documentation deemed suitable pursuant to article 45- *BIS,* the same must be admitted (with relative presumption) as a demonstration of the arrival of the goods in the other Member State.

As clarified in the explanatory notes " *quick fixes 2020 ",* it is instead excluded the application of the presumption that the goods have been transported or shipped to another Member State where the transport or shipment was made by the transferor or by the transferee without the intervention of other subjects such as, for example, the shipper or the conveyor (par. 5.3.5.). This is because the evidence is not contradictory required for the purpose of applying the presumption in comment must, for express provision of article 45- *BIS,* come from two independent parts, from the seller and the buyer.

The VAT Committee has clarified that, for the purposes of the discipline in question, it is not It is possible to consider two parts as "independent" when they are part of the same legal entity (this is the case, for example, with a permanent establishment and

parent company) or they are subjects linked by family ties or other close ties personal, managerial, associative, proprietary, financial or legal as defined by Member States (e.g., managing director and managed company; companies linked by inspection reports pursuant to article 2359 of the Civil Code) [5].

3. Relationship between the presumption referred to in article 45-bis of the VAT Regulation and national practice regarding proof of transport in the assignment intra-Community

The presumption contained in article 45- *BIS* of the VAT Regulation is applicable only if the documentation held by the taxpayer responds to requirements therein.

However, the tax authorities of the EU countries still retain the right to overcome the presumption of intra-Community transport or shipment (see par. 2 of the aforementioned article 45- *BIS).*

This can occur when the Financial Administration comes into possession evidence that intra-Community transport has not actually taken place realized. For the sake of simplification, the case in which during a check that the goods are still in the seller's warehouse or on if you become aware of an accident during your transportation resulted in the destruction of property. In such circumstances, there being evidence that the Community transport did not take place, the non-taxability of the mentioned operation article 41 of Legislative Decree no. 331 of 1993 cannot be recognized.

Another hypothesis in which the presumption of intra-community transport occurred it can be exceeded if the Financial Administration proves that one or

[5] See Guidelines resulting from the 113th meeting of the VAT Committee on 3 June 2019. These are the criteria identified by Article 80 of the VAT Directive with reference to the possibility of applying the normal value instead of the fee for transactions between "related parties" .

more among the documents required for presumption and provided as evidence they contain incorrect or even false information (cf. par. 5.3.4. of the explanatory notes).

In this case, as in any other case in which you do not have the documentation specifically required by the Union provision for the purpose of the application of the presumption, the taxpayer retains the possibility of demonstrate with other objective evidence that the transaction really is occurred (see also paragraph 5.3.3 of the explanatory notes).

Article 45- *BIS* in fact, it does not preclude Member States from commenting the application of additional national rules or practices regarding the proof of supplies intra-community, possibly more flexible than the presumption provided by the VAT regulation (see par. 5.3.2).

Thus reconstructed the current EU regulatory framework, the writer believes that, at present, in all cases where the presumption referred to does not apply in article 45- *BIS,* national practice may continue to apply, too adopted before the entry into force of the same article regarding the proof of intra-Community transport of goods. It is understood, however, that this practice national identifies documents, the suitability of which to prove the successful transport Community is still subject to evaluation, case for case, of the financial administration (see Explanatory Notes, par. 5.3.3.).

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The regional directorates will monitor the stated principles and instructions provided with this resolution are promptly observed by the Departments provincial and employee offices

THE DIRECTOR OF THE AGENCY

Ernesto Maria Ruffini

(digitally signed)