Taxpayers Division

Central Management Major Taxpayers

Answer n. 304

OBJECT: VAT plafond

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

QUESTION

Alfa (hereinafter also "the Company" or "the Applicant"), purchased in ... from Beta an industrial real estate complex located in ..., granting it, on the same date, under a finance lease, for a duration of eighteen years to the aforementioned company (consideration Euro ...). The fees are paid every six months through an amortization plan (...). The value of the redemption (option foreseen in favor of the tenant) is equal to ten percent of the contract price (Euro ...).

Subsequently, on ..., Alfa purchased from Beta ... a building located in ..., granting it, on the same date, under a finance lease for a duration of eighteen years to the aforementioned company (consideration in Euro ...). The fees are paid every six months through an amortization plan (...). The value of the redemption (option foreseen in favor of the tenant) is equal to thirty percent of the contract price (Euro ...).

Beta, on the basis of a corporate reorganization that provides for a downsizing of its activity in the real estate complex of ..., on ..., signed with the instant a Memorandum of Understanding for the construction of a "Polo ..."

within the compendium of ..., formerly owned by Alfa.

Said Memorandum of Understanding actually provides that the so-called "Beta" compendium of ... continues to host the industrial activity of Beta on a non-exclusive basis, while dedicating specifically defined spaces to the activities of third-party companies, through the stipulation by of Beta and said companies of autonomous ordinary lease agreements with Alfa, after termination of the financial lease agreements referred to in the previous paragraphs.

Consequently, on ..., Alfa and Beta terminated the real estate finance lease agreements in question, signing a settlement agreement, in accordance with which they undertook to sign new lease agreements with the Gamma and Delta companies which envisage, on the one hand, the continuation of the use of the real estate complex by Beta, and on the other hand, the construction, in other spaces, of a "Polo ..." with the companies Gamma and Delta.

Alfa specifies that Beta's debt towards itself, at ..., would amount to Euro ..., of which Euro ... relating to the use of the industrial complex already invoiced by Alfa (...) and Euro ... for the use of the industrial complex not yet invoiced (...).

Beta, who qualified as a habitual exporter, asked Alfa not to application of VAT pursuant to art. 8 paragraph 1, letter c), of Presidential Decree no. 633/1972, for the provision of services to be invoiced in application of the settlement agreement signed on ... up to a total amount of Euro ....

That said, the applicant intends to receive confirmation from the party of the Financial Administration that Beta can take advantage of the VAT ceiling pursuant to art. 8, paragraph 1, lett. c, of Presidential Decree 633 of 1972, in relation to the financial lease payments not yet invoiced by Alfa (...), equal to Euro ....

INTERPRETATIVE SOLUTION PROSPECTED BY THE TAXPAYER

The applicant believes that there are objective conditions of uncertainty regarding the use of the ceiling with reference to the hypothesis of financial leasing, as the financial administration in some practice documents has denied the possibility of using the declaration of intent for the purchase of provision of services relating to real estate finance leases or procurement contracts for the purchase of buildings (circular no.145 / E of 10 June 1998 and, more recently, the principle of law

n. 14 of 2019).

According to the petitioner, this orientation would appear to be in contrast with

the orientation of recent jurisprudence as well as with the substance of the transaction itself which would not entail the actual acquisition of ownership of the real estate complex by the client Beta (the original leasing contract, which however did not provide for the obligation to redeem to the tenant, was in fact terminated with the subsequent stipulation, between Beta and Alfa, of a lease contract having as its object only a part of the complex object of the original financial lease.

The Court of Cassation with the sentence of 8 February 2000, n. 1362 ha

specified that " *then the exclusion of the sale of buildings from the exemption of art. 8, DPR n. 633/1972, referred to in Law 28 February 1997, n. 28, because the leasing, for the periods referred to in the exemption, did not give rise to a transfer of property; the express provision of the benefit for the lease of a business which may also include properties (art. 1, Legislative Decree no. 417 of December 30, 1991) confirms instead the affirmed extension of the facility to the financial lease relating to properties, also in this case not transferred ".* In the judgment of 27 February 2001, n. 2888 it was clarified that the leasing having as its object the achievement of the availability of vehicles to be used as a transport company falls within the provision of services, since " *the contract (...) has the connotations of the sale of the asset, not of the ownership of it, as long as it remains in the phase prior to the eventual final purchase of the asset itself by option to that effect exercised by the user at the expiry of the relationship ".*

The petitioner also states that both financial leasing contracts

stipulated between the applicant and Beta provide ... the mere faculty (and not the obligation) for the tenant to exercise the right of redemption.

Therefore, according to the petitioner, the contracts in question have no effect

translation of the property of the complex: Alfa remains the owner of the real estate compendium by agreeing with Beta to charge the latter the fees for the use of the property in previous years, essentially qualifying as the provision of services for the concession in use of the real estate complex itself , without the user having any right to acquire ownership of the property.

Therefore, the applicant believes that Beta is entitled to use the ceiling for

the purchase of the services in question and consequently believes that it can issue an invoice by applying the VAT non-taxable regime against the declaration of intent received. The aforementioned invoice must be issued at the moment in which the provision of services will be considered carried out, ie at the time of receipt of the consideration.

OPINION OF THE REVENUE AGENCY

Preliminarily, it is noted that this opinion is beyond any assessment of the fiscal aspects and the correctness of the procedures for terminating contracts, the compensation and relative quantification of mutual debts and credits described in the application, referring to the question formulated exclusively on the applicability of the Article 8, first paragraph, letter c) of Presidential Decree 633 of 1972 to the case in point as proposed.

Article 8, first paragraph, letter c), of Presidential Decree no. 633 of 1972 states that "

the following constitute non-taxable export sales: (...) c) the sales, including through commission agents, of goods other than buildings and building areas, and the provision of services rendered to subjects who, having made export sales or

intra-community transactions, make use of the right to purchase, even through commission agents, or import goods and services without paying the tax ". According to current legislation, the ceiling can be used to purchase or import, without paying VAT, all goods and services inherent to the activity, with the sole exception of buildings and building areas. Obviously, this does not apply to the "tied" ceiling (commission agents or triangulation promoters), which can only be used to purchase goods to be exported in their original state.

This interpretation is confirmed by circular no. 145 / E of 10 June 1998, which clarifies the scope of the rule currently in force, according to which " *since in the current provisions there is no longer any reference to the intent, on the part of the economic operator, to export the goods or to send them to another EU state, it follows that, compared to the past, the facilitation is also applicable to goods depreciable, to assets acquired under leasing and to the purchase of overheads, to nothing noting, for the latter, their inherence or otherwise with the subsidized activity ".*

In relation to the exclusion of the facility for the sale of buildings and building areas, in the same circular no. 145 / E of 1998 it was stated that it becomes operative not only in the event of a purchase, but also in the event that the building is built on its own or through a contract, or is used under a financial leasing contract. . In particular, it was specified that it must be considered understood " *the prohibition to use the ceiling for the acquisition of buildings, depending on procurement contracts having as their object their construction or leasing; and this because, although the provision referred to in letter c) of art. 8 of Presidential Decree no. 633 of 1972 expressly excludes from the benefit only the sale of buildings, the exclusion is obviously to be extended to such methods of acquiring the buildings themselves, which have an equivalent effect ".*

Therefore, in relation to financial leasing fees, referring to use of the industrial complex and not yet invoiced by Alfa ... equal to **EUR...,** it is believed that Beta cannot take advantage of the VAT ceiling pursuant to art. 8, paragraph 1, lett. c, of the dPR

n. 633 of 1972, with no relevance, for this purpose, to the subsequent termination of contracts and / or the stipulation of rental contracts relating to part of the same compendium.

THE CENTRAL DIRECTOR

(digitally signed)