

Taxpayers Division

Central Management Major Taxpayers

Answer n. 339

SUBJECT: Fulfillments of a non-resident person, identified for VAT purposes in Italy
- correct method of reimbursement

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

QUESTION

Alfa is a company under law ... authorized by the competent authority of supervision ... as an "alternative investment fund management company" (EU AIFM) pursuant to Directive 2011/61 / EU on alternative investment fund managers ("AIFM Directive").

Alfa manages the Italian real estate mutual fund called "Range".

In particular, the fund currently consists of two sub-funds, called "Gamma 1" and "Gamma 2" (collectively, the "Funds") respectively. Sectors of Gamma can be summarized, as regards the VAT profiles examined here, as follows:

- i) purchase of building land located in Italy, sold by taxable persons VAT resident in Italy;
- ii) construction of new buildings for the logistics sector;

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iii) leasing of these buildings to VAT taxable persons resident in Italy;

iv) sale of buildings located in Italy to taxable persons resident in

Italy or to subjects residing in other Member States of the European Union.

Alfa qualifies as a VAT taxable person not resident in Italy, as without a permanent establishment in Italy, but identified directly pursuant to art. 35-ter of Presidential Decree 633 of 1972 (starting from July 2019).

Furthermore, pursuant to art. 8, paragraph 1, of Legislative Decree 25 September 2001, converted with amendments by law 23 November 2001, n. 410 ("Decree 351"), the EU AIFM (Alfa), like an asset management company (SGR) resident in Italy, is taxable person for VAT purposes for the active and passive operations of real estate AIFs from it established (in the present case, Gamma).

Therefore, the EU AIFM must separately determine the VAT arising from the own activity and the VAT deriving from the transactions charged to each fund established in Italy (or sector) and managed by it. The tax is paid cumulatively for the total amounts owed by the manager and the funds (or sectors).

By virtue of a contribution deed stipulated ... and registered on ..., Gamma 1 has acquired a real estate complex for logistic use, located in Italy. In the month of ..., Gamma 2 has purchased two building plots on which buildings for the sector will be built logistics, intended for leasing based on the investment policy of that sector. In particular, the purchase of building land by Gamma 2 took place for a total consideration of approximately Euro ... plus VAT.

With reference to Gamma 1, in the context of the aforementioned contribution, the fund has also acquired a VAT credit equal to Euro ... (the "VAT Credit"). To about, the Revenue Agency, with the response to question n 71 of 2018., after having confirmed the legitimacy of the transfer of the VAT credit, clarified that to give evidence of this transfer the real estate fund (rectius, the EU AIFM) must

indicate it in your VAT return, according to the procedures provided for transfer of VAT credits in the context of extraordinary transactions.

Alfa, on behalf of Gamma 1, is therefore required to submit the VAT return in which to indicate the VAT credit, which can be used in compensation, in the presence of active operations with output VAT, or requested a reimbursement. For the preparation of the VAT return and its presentation, Alfa will use the Italian VAT number.

Having said that, the petitioner asks to clarify the following issues.

Question 1 " ... "

Regarding the active operations of Gamma 1 (and once the construction, the active operations of Gamma 2), Alfa will mainly carry out leases of properties located in Italy in favor of taxable persons resident in Italy.

For these territorially relevant services, Alfa, on behalf of Gamma, issues a *reverse charge* invoice integrated by the client.

The applicant asks whether the procedure he intends to adopt is correct or whether, al on the contrary, must issue the invoice in the ordinary way using the lot Italian VAT (see Article 17, third paragraph, of Presidential Decree 633/1972).

Question 2 "...".

With reference to the exercise of the right to deduct and refund VAT paid on the purchase of land located in Italy (VAT credit), the applicant asks if he should exercise this right through the Italian VAT number by submitting the

declaration (art. 38- *bis* of Presidential Decree 633 of 1972), or can make use of the reimbursement procedure for non-resident subjects pursuant to art. 38- *bis*2 of the aforementioned decree (which does not require the submission of a VAT return in Italy).

In this regard, the petitioner states that the Revenue Agency stated that a non-resident person, identified directly in Italy (which is Alfa) cannot request a refund of VAT pursuant to art. 38-bis2 of Presidential Decree 633/1972 but must ask for reimbursement through the VAT return, i.e. pursuant to art. 17, paragraph

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3 of Presidential Decree 633/1972 with direct identification (see answer no.40 of the FAQ of 12 July 2010, published on the Agency's website in the section "Information sheets e services / Refunds ").

INTERPRETATIVE SOLUTION PROSPECTED BY THE TAXPAYER

As regards **Question 1**, Alfa, as the manager of Gamma, believes

that art. 17, second and third paragraphs, of Presidential Decree 633 of 1972, must be interpreted as meaning that for the invoicing of the leases in question, attributed to Sections, the VAT number of the EU Member State of Alfa itself must be used, and not the Italian VAT number, indicating in the invoice also the name of the sector to which the leasing transaction pertains.

The indication on the invoice of the VAT number of the EU Member State is based on following reasons:

the) Alfa, as an EU AIFM, is the taxable person for VAT purposes for transactions attributed to the individual Sub-Funds and qualifies as a non-resident to VAT purposes;

ii) pursuant to art. 17, second paragraph, of Presidential Decree 633/1972, the VAT obligations relating to the aforementioned leases must be fulfilled by the tenant, being a VAT taxable person resident in Italy, with the reverse procedure community charge;

iii) consequently, with reference to these active operations, Alfa does not qualifies as a "tax payer" and, therefore, has no obligation to use the lot Italian VAT from direct identification, pursuant to art. 17, third paragraph, of the DPR 633/1972.

This conclusion can be extended to the case in which the non-resident subject (Alfa), besides being formally identified in Italy, submit the VAT return in Italy.

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As regards **Question 2** Alfa, as a non-resident taxable person without a permanent establishment and identified directly for VAT purposes, the applicant considers interpret the combined provisions of art. 17, third paragraph (on the fulfillments of non-resident subjects without permanent establishment) and 38-bis2 (direct refund without declaration) in the sense of having the right to deduct the VAT paid on the purchase of land for Gamma 2 (and on purchases of other goods and services for Gamma 1 and 2) through one of the following methods:

the) through the VAT return presented with the VAT number by direct identification, entering in the declaration the purchases invoiced to the fund with the use of the Italian VAT number; the VAT credit relating to these purchases reimbursement may be requested pursuant to art. 38-bis, or

ii) through direct reimbursement pursuant to art. 38-bis2, it being understood that the direct refund will be precluded pursuant to art. 38-bis2, paragraph 1, second sentence, if in a tax period should carry out active operations without *reverse charge* community (i.e. with invoices with VAT payable).

In fact, as already noted, art. 38-bis2, paragraph 1, second sentence, precludes the direct reimbursement, thus imposing the declaration procedure, only for subjects with a permanent establishment and for subjects who carry out active operations without community *reverse charge* .

Therefore, on the assumption that Alfa, on behalf of the Gamma 1 and 2 Sections, in a certain tax period only carry out reverse charge active transactions Community, the same may exercise the right to deduct through the procedure of the art. 38-bis2 or through the VAT return (through offsetting or reimbursement).

This interpretation would find confirmation in the judgment of the Court of Justice of 6 February 2014, case C-323/12, according to which the refund procedure pursuant to art. 38-bis2 cannot be precluded simply by the fact that the non-resident (Alfa) has an Italian VAT number from direct identification

OPINION OF THE REVENUE AGENCY

With reference to **Question 1** , concerning the leases of buildings located in Italy, carried out by Alfa and allocated to the individual Gamma 1 and 2 Sections, we can see how much follows.

The transactions in question made to taxable persons established in Italy are territorially relevant pursuant to art. 7- *quater* , paragraph 1, letter a), of Presidential Decree no 633 of 1972 (services relating to properties located in the territory of the State).

From the point of view of the VAT debt and its fulfillment, it goes to these services applied the reverse charge referred to in articles 46 and 47 of Legislative Decree no. 331 of 1993 in what is returned by a non-resident person, established in an EU Member State, to a buyer taxable person, resident in the territory of the State (see article 17, second paragraph, of Presidential Decree 633 of 1972).

As specified in the circular 37 / E of 2011, the third paragraph of article 17 it is applied in the event that the operations for the sale of goods or the provision of

territorially relevant services in Italy are performed by a non taxable person resident and without a permanent establishment in the territory of the State in relation to, between the other, of transferees or clients who cannot be qualified as subjects passive pursuant to article 7-ter, paragraph 2, of Presidential Decree 633 (and therefore in one hypothesis other than that referred to in this ruling in which the client of the lease is, according to what the applicant declares, a VAT taxable person).

It follows that in relation to the lease of buildings located in Italy, Alfa, not assuming any tax liability under the reverse charge mechanism, does not have the obligation to use the Italian VAT number (see Article 17, third paragraph, of the aforementioned decree), but must use the VAT number of the country of establishment (...).

On the other hand, the Italian taxable persons, clients of the services in question, they will pay the VAT by means of the reverse charge and merge these transactions

in their statements.

Therefore, in the light of the considerations made above, the procedure that the applicant, a non-resident subject, intends to adopt, even if identified directly for VAT purposes in Italy and even if he has submitted a return in Italy with said identifier.

With regard to **Question 2**, concerning the deduction of VAT paid by each sector on the purchase of land , we observe ... the following.

Article 38 - *bis2* of Presidential Decree 633 of 1972 (which incorporates article 171 of the Directive 2006/112 / EC) governs the refund procedure for VAT paid on purchases of goods and services, as long as it is deductible, for non-resident taxable persons, established in other Member States of the Community, subject to tax in the State in which have their domicile or residence. This procedure, by express legislative provision, is precluded where a permanent establishment is operating.

Having said this, it is of the opinion that the applicant, in the present case, cannot join the reimbursement procedure envisaged for non-resident persons referred to in article 38 *bis2* of Presidential Decree 633 of 1972. This foreclosure is not based on the circumstance highlighted from the instant, to be identified directly in Italy for VAT purposes, but rather because, by submitting, as stated, a declaration with the Italian VAT number, he has in fact he himself made the choice regarding the "physiological" mode of delivery of the VAT refund (Article 38-bis of the aforementioned decree).

THE CENTRAL DIRECTOR

(digitally signed)