Taxpayers Division

Central Management Major Taxpayers

Answer n. 305

SUBJECT: Intra-community transfers: proof of the transfer of the asset

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

QUESTION

Alfa (hereinafter the Company or the applicant) is active in Italy in the large scale sector organized retail distribution of non-food products.

As part of its business, ..., the company would open a new point of sale in the city of ....

The Company would carry out intra-community transfers of goods pursuant to article 41 of Law Decree n. 331 of 1993, with the "ex works" clause to taxable persons established in other Member States that handle their transport starting from the aforementioned point sale. The petitioner specifies that the transfers in question, sometimes given the smallness of the amount, they could also be paid through non-payment systems traceable (for example, by cash, within the limits of the law).

With reference to the proof of the physical transfer of the asset from the transferor to transferee, with regard to intra-community "ex works" supplies, the petitioner observes that it would be consolidated both in practice and in jurisprudence the principle that proof of the transfer can be provided

with any suitable document to prove that the goods were sent to another Member State (the petitioner cites resolution no. 477 / E of 15 December 2008 and the resolution n. 19 / E of 2013).

With the EU Regulation no. 1912 of 4 December 2018 (in force since 1 January 2020) the EU legislator would have introduced a relative presumption of the goods have been shipped or transported on the basis of specific documents indicated by the same Regulation (article 45-bis of the EU Implementing Regulation no. 282/2011 of March 15, 2011).

Specifically, article 45-bis would govern two different situations:

1) the goods have been shipped / transported by the transferor, directly or through third parties acting on its behalf;

2) the goods have been shipped / transported by the transferee or by third parties on his behalf.

With reference to case 1), the seller certifies the intra-EU transfer with the possession of at least two of the following (not contradictory) documents, issued by two different parties independent of each other, from the seller and from the buyer:

A. CMR document or letter signed by the transferor, the transferee or the vector;

B. bill of lading;

C. air freight invoice;

D. invoice issued by the forwarder;

Alternatively, the transferor could produce any of the above elements in combination with one of the following documents, always issued by two different parties independent of each other, the seller and the buyer:

the. insurance policy relating to the shipment or transport of goods;

ii. bank documents certifying the payment of the service shipment or transport of goods;

iii. official documents issued by a public authority (e.g. notary) that confirm the arrival of the goods in the EU country of destination;

iv. certification issued by the depositary in the EU country of destination a confirms that the goods were received there.

With reference to case 2), the seller would certify the intra-EU transfer with possession of the same documentation described above and with a declaration issued by the buyer by the tenth day of the month following that of carrying out the assignment that:

- certifies that the goods have been transported or shipped by the buyer, or by a third party on behalf of the same buyer; is
- identify the Member State of destination of the goods.

The petitioner highlights that the only document he would be able to producing on the basis of those identified by article 45-bis is represented by the document official issued by a local public authority: however, according to the instant the finding the document would in any case be difficult to achieve, determining an excessive burden on the transferees.

Given the above, the petitioner asks the writer for clarifications about the possibility to document proof of transport or shipment of the goods with alternative documentary methods to those indicated by art. 45-bis of

EU Implementing Regulation no. 282/2011 of March 15, 2011, in force since 1st January 2020.

INTERPRETATIVE SOLUTION PROSPECTED BY THE TAXPAYER

The applicant deems it possible to produce alternative evidence to those indicated

in article 45-bis of the EU Implementing Regulation no. 282/2011 of March 15, 2011 able to certify the leakage of the asset from the Italian territory.

In particular, the Company intends to proceed as follows (Solution A):

- acquire, together with the delivery of the goods, a declaration in lieu of a notorious deed (facsimile in Annex 1 to the application), in which the customer abroad declares to:

1. be a VAT taxable person in the jurisdiction of the final destination of the goods purchased (which must of course be an EU Member State);

2. be able to provide for the physical transfer of these with its own means goods indicating their destination;

- issue a non-taxable invoice pursuant to article 41 of Legislative Decree 331/1993;

- keep the documentation described, together with the Intrastat lists that the Company sends according to the legal deadlines and the documentation bank payment, where available.

The petitioner notes that the behavior described above would be consistent with the information provided by the Revenue Agency with response no. 100 of 2019. The petitioner also specifies that the proposed solution would be applicable limited to points of sale that are located near national borders and with reference only to transactions of a contained value, indicatively, within Euro 2,000.00.

As an alternative to Solution A, the applicant asks for confirmation to be able to adopt the following behavior (Solution B):

- issue a taxable invoice pursuant to article 2 of Presidential Decree 633/1972;

- acquire confirmation of the transfer by means of a declaration

written by the transferee, in which it will be asked to expressly indicate that the goods relating to the invoices [x] are regularly received at the

warehouse / shop / headquarters in [EU country] on [xx / xx / xxxx];

- following the acquisition of the confirmation, proceed with the reversal of the VAT taxable invoice with credit note pursuant to article 26 of Presidential Decree 633/1972 e the issue of a new invoice, pursuant to article 41 of Legislative Decree 331/1993, with reference to documentation received;

- keep the documentation acquired together with the Intrastat lists that the Company sends according to the legal deadlines and the documentation bank payment, where available.

Solution B in the opinion of the applicant would allow not to remain engraved of the amount of VAT due, should you fail to receive the return from

part of the transferee about the actual transfer of the goods, thus keeping the marginality on products. However, such a modus operandi would not be anyway consistent with the genesis of the transaction which, upon declaration by the transferee, it would qualify as an intra-community transaction already at the time of its carrying out.

OPINION OF THE REVENUE AGENCY

With the EU Regulation 2018/1912 of 4 December 2018, applicable from the 1st January 2020, article 45- *bis* was introduced into the EU Implementing Regulation no. 282/2011 of 15 March 2011 containing "provisions for the application of the directive 2006/112 / EC relating to the common system of value added tax ".

The aforementioned article deals with the documentary charges relating to the transfers community of goods referred to in Article 138 of Directive 2006/112 / EC. In in particular, with paragraph 1, letters a) and b), of article 45- *bis* of the EU Regulation of execution no. 282/2011, a relative presumption was introduced regarding the occurrence transport of goods within the community. The Commission has provided some clarifications

regarding this provision with the Explanatory Notes on the "quick fixes 2020", published to December 2019. Paragraph 1, letter a), governs the hypothesis in which the goods have been shipped or transported by the seller or a third party on his behalf and, to the letter b), the one in which the goods have been transported by the buyer or by a third party on his behalf.

In the first case (the one referred to in letter a)) the seller, in addition to declare that the goods have been shipped or transported by him or by a third party on his behalf, must produce at least two documents, not contradictory and coming from subjects different from each other and independent of both the seller and the buyer.

These documents are indicated in paragraph 3, letter a) of article 45- *bis* : this is documents relating to the transport or shipment of goods, for example a CMR document or letter bearing the carrier's signature, a cargo, an air freight invoice, or an invoice issued by the shipper.

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

"i) an insurance policy relating to the shipment or transport of the goods oi bank documents certifying payment for the shipment or transport of the 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 assets in that Member State ".

In the second case (referred to in letter b), in which the transport comes made by the buyer or by a third party on his behalf, the buyer must provide the seller, by the tenth day of the month following the sale, a declaration written certifying that the goods have been transported or shipped by the buyer or a third party on its behalf, and from which the Member State of destination must come of the goods, the date of issue, the name and address of the buyer, the quantity and nature

of the assets transferred, the date and place of their arrival, the identification of the person who has

accepted the goods on behalf of the buyer and, in the case of means of transport, the vehicle identification number. In addition to this declaration, the buyer will have to be in possession of at least two of the documents relating to the transport of goods, of which under letter a) of paragraph 3 of article 45- *bis* , issued by two different parties independent of each other, from the seller and from the buyer or of a document of transport referred to in letter a) cited together with a document relating to the other means test indicated in letter b) of the same paragraph 3.

As clarified in the Explanatory Notes of the EU Commission *quick fixes* 2020, the application of the presumption that the goods have been transported or dispatched to another Member State if the transport or dispatch has been carried out by the transferor or the transferee with its own means without the intervention of other subjects such as, for example, the shipper or the transporter (par. 5.3.5.).

The presumption contained in article 45- *bis* of Regulation no. 282 of 2011 is applicable only if the documentation in the possession of the taxpayer meets the requirements therein. However, the tax authorities of EU countries retain in any case, the right to overcome the presumption of transport or shipment intra-community (see paragraph 2 of the aforementioned article 45-bis).

Likewise, the taxpayer retains the opportunity to prove, if he is not in possession of the documentation specifically requested by

Union provision for the purpose of applying the presumption, with other elements objective evidence, that the operation actually took place (see also par. 5.3.3 Explanatory notes).

The article 45- *bis* in question, in fact, does not preclude Member States the application of additional national rules or practices on proof of transfers intra-community, possibly more flexible than the presumption provided by VAT Regulation (see par. 5.3.2).

Thus having reconstructed the current community regulatory framework, it should be noted that the

recent circular no. 12 / E of 12 May 2020 provided clarifications in this regard; in in particular, in the aforementioned document of practice we read that " *in the state, in all cases in which the presumption referred to in article 45-bis is not applicable, may continue to apply the national practice, even adopted before the entry into force of the same article regarding proof of intra-community transport of goods. Stay understood, in any case, that said national practice identifies documents, the suitability of which a*

proving that Community transport has taken place is in any case subject to evaluation, case by case, of the financial administration (see Explanatory Notes, par. 5.3.3.).

Before the entry into force of article 45- *bis* of the Regulations 282/2011, the writer had provided some clarifications on the matter; also for this purpose, yes refers to the indications contained in the aforementioned circular no. 12 / E of 2020.

That said, the means of proof proposed by the applicant do not appear consistent with the indications provided by the Administration in previous documents of practice, as they do not seem to deduce, with sufficient evidence, that the property has been transferred from the State of the transferor to that of the purchaser (see resolution no. 71 / E). In any case, any evaluation of the actual set remains unaffected document in the possession of the taxpayer, which can be carried out in practice as part of the control activity.

With specific reference to Solution B), moreover, how much is not shared expected, expected, as also noted by the applicant, that the uncertainty pertains, since from the origin, to the validity of the means of proof of the assignment and not to the existence of the abstract requirements to which the qualification of the transaction as a sale is subject intra-community. In this circumstance, therefore, the applicant cannot make use of the issue of the note of variation in decrease, which is used only in cases expressly provided for by the legislator, which does not include the hypothesis proposed.

THE CENTRAL DIRECTOR

(digitally signed)