

Answer n. 52

OBJECT: Article 11, paragraph 1, lett. a), law n.212 of 27 July 2000 - Stable organization in Italy - Gas pipeline - Tax payer

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

QUESTION

Alfa (hereinafter, "Company", "Instant" ") represents that it is a company under foreign law, established for the design, construction and commissioning of the gas pipeline that will transport natural gas to Europe.

On X, the Company filed an application for a ruling in order to find out whether the purchase that it itself makes, i.e. without the intervention of its Italian permanent establishment, of the filling gas is territorially relevant for VAT purposes in Italy (hereinafter also " *line-fill gas* "), necessary for the operation of the Italian section of the pipeline. The purchase takes place from a non-resident supplier, without a permanent establishment in Italy.

In the opinion, the Revenue Agency clarified the VAT territorial relevance of the operation in Italy as the *line-fill gas* it is used there for the operation of the Italian route.

The same Agency also specified that " *whether to buy gas from a seller*

abroad is the Italian permanent establishment, limited to this operation, the Company would be liable for tax, since the obligations relating to the sale of goods and the provision of services carried out in the territory of the State by non-resident subjects towards taxable persons established in the territory of the State (...) they are fulfilled by the transferees or clients (see article 17, second paragraph, of the VAT Decree) ".

With respect to the situation covered by the aforementioned ruling, Alfa points out that in the meantime partially different facts have emerged as it is now expected that the Italian permanent establishment, through the staff employed by it, will receive and use the *line-fill gas* as part of the activity for which it will have been responsible, in line with what has been agreed between the parties in the supply contract negotiated and signed by the Company.

The exact identification of the VAT taxable person required to fulfill the tax with regard to the sale of the filling gas is of crucial importance for the Applicant in order to guarantee the correctness of the VAT obligations both of the Company and of its counterpart.

The Company specifies that although its Italian permanent establishment was not directly involved in the negotiation and stipulation of the gas supply contract, there has been an increasing involvement of the same permanent establishment to the point that the latter will play an active role in the execution of the contract, functional to the fulfillment of the obligations arising from it and to the functioning of the conduct.

In particular, as part of the broader functions carried out by the Italian stable organization, in line with the provisions of the APA, the support activity in Italy was consolidated in the "*asset management*" for the management of the Italian section of the pipeline and in the "*dispatching and control*".

The Italian permanent establishment is involved in the remote control and control of *asset*, with the aim of ensuring the supervision of the activities functional to the testing of

Italian section of the pipeline - in the meantime started - and the subsequent commissioning of the pipeline in Italy, scheduled for the start of commercial operations, expected by mid-November. The aforementioned activities of the Italian permanent establishment are part of the broader management function " *operations* " of society.

The Italian permanent establishment is involved, among other things, in the following activities: the evaluation of the quantity and quality of *line-fill* gas to be introduced into the pipeline, as well as in the preparation of recommendations on the performance and conditions of the Italian section (*onshore* is *offshore*) of the pipeline in order to ensure the correct operation of the pipeline, monitoring and control of the *line-fill gas*, in addition to verifying the existence of the conditions for the correct transport of the same (with reference, for example, to the pressure and flow rate).

These activities, to be carried out by the Italian permanent establishment, cannot be carried out without the gas in question, since in the absence of the same (which must be kept constantly at a pre-established minimum pressure), the conduct cannot work and therefore the contractual obligations of the Company do not can be fulfilled.

Furthermore, the activity of " *procurement* " relating to the gas in question carried out by Alfa is functionally linked to the aforementioned activities carried out by the Italian permanent establishment.

In the opinion of the applicant it is quite clear that the purchase of the *line-fill gas*, as it is instrumental to the correct functioning of the Italian section of the conduct and to the fulfillment of its contractual obligations, it must be considered carried out for the benefit of its Italian permanent establishment.

Consequently, it is the latter (and not the Company) that periodically communicates the quantities of *line-fill gas* necessary for the proper functioning of the conduct and its VAT number to the non-resident supplier for the issue of the relative invoice to him.

In this regard, the Applicant presents an example of the correspondence between the

Italian permanent establishment and the non-resident supplier with reference to the quantities to be purchased. From this correspondence it is also clear that the invoice issued by the foreign supplier will be made out to the Italian permanent establishment. Therefore, with this request for an appeal, Alfa asks to know what the correct invoicing methods are and whether it is possible to identify the tax payer in its Italian permanent establishment.

INTERPRETATIVE SOLUTION PROSPECTED BY THE TAXPAYER

The Company believes that to determine the tax payer of the purchase of the *line-fill gas* may refer to the criteria indicated in Article 53 of Implementing Regulation (EU) 282/2011 of 15 March 2011. In particular, considering that:

- although the filling gas supply contract was negotiated directly by the Company with the foreign supplier, the Italian permanent establishment will define and request the quantities of *line-fill gas* necessary for filling the Italian section of the gas pipeline (as can be seen from the attached correspondence);

- the relative purchase invoice will be made out to the Italian permanent establishment;

- the latter will provide the means necessary for the purchase and use of the *line-fill gas*, as part of the performance of the activity related to the " *operations* ", aimed at ensuring the continuous and reliable operation of the Italian section;

- it would not be possible to purchase this gas in the absence of the building organization, subject to which the *line-fill gas* is intended for the operation of the Italian section of the pipeline,

the Applicant believes that the aforementioned criteria must be referred and applied to its Italian permanent establishment which will therefore be the VAT taxable person of the sale in question, called upon to pay the tax through the reverse charge mechanism. This is because it is evident that the " *technical or human resources of the building* "

organization in Italy " are used " for the execution of the assignment "" during the realization of said assignment " .

OPINION OF THE REVENUE AGENCY

This opinion is made on the basis of the information contained in the request for ruling, here taken uncritically, in relation to which any possibility of control and review by the financial administration remains unaffected.

Pursuant to article 17, second paragraph, of the decree of the President of the Republic no. 633 (in short, "VAT Decree") « *The obligations relating to the sale of goods and the provision of services carried out in the territory of the State by non-resident subjects towards taxable persons established in the territory of the State, including the subjects indicated in Article 7-ter, paragraph 2, letters b) and c), are fulfilled by the transferees or clients " .*

For article 7, paragraph 1, letter d) of the VAT Decree, the Italian permanent establishment of a person domiciled and resident abroad is a VAT taxable person established in the territory of the State *" ..., limited to the transactions made or received by it " .*

According to article 17, fourth paragraph, of the VAT Decree *" the provisions of the second and third paragraphs do not apply to transactions carried out by or in relation to non-resident subjects, if they are made or received through permanent establishments in the territory of the State " .*

Therefore, for the combined provisions of articles 7 and 17, second and fourth paragraphs of the VAT Decree, so that the Italian permanent establishment of Alfa becomes a tax payer and fulfills the invoicing obligations through *reverse charge* it is necessary that the sale of the gas is made to it by the foreign supplier. This presupposes a direct intervention of this permanent establishment in the passive operation in the absence of which the supply is considered to be rendered not to it but to

favor of its foreign parent company (*ie* the society).

Article 53 of Regulation no. 282 of 2011 pursuant to which a permanent establishment located in the State where the VAT is due participates in a supply of goods when " 2. *the technical or human means of said permanent establishment are used by the same for operations related to the realization of the sale of such goods or the provision of such taxable services carried out in that Member State, before or during the realization of said assignment or performance.*

If the means of the permanent establishment are used solely for administrative support functions, such as accounting, invoicing and credit recovery, it is considered that they are not used for the realization of the sale of goods or the provision of services.

However, if an invoice is issued with the VAT identification number assigned by the Member State of the permanent establishment to the same, it shall be considered, unless proven otherwise, that this permanent establishment has participated in the supply of goods or services carried out in that Member State " .

Although this article concerns only active operations, there are no obstacles to a mirror reading of the same in relation to passive operations carried out by the permanent establishment with reference to which it can be seen from the representation made by the applicant an intervention of the same also " *during*" the passive transaction, ie while this is in progress. Especially when this passive operation is continuous, as in the present case.

In our case, as represented by the Company, although it was not directly involved in the negotiation and stipulation of the gas supply contract, the said Italian permanent establishment intervenes with its own human and technical means " ***during***" the purchase transaction. Moreover, the involvement in the execution of this contract has grown over time, as it is functional to the fulfillment of the related obligations and the functioning of the conduct.

According to what was stated by the applicant, its Italian permanent establishment in

substance assumes an active role during the implementation of the "continuous" supply of gas, which includes the " *asset management* ", the dispatching and control of the Italian section, the " *procurement* " as well as the direct management of the supply flow, interfacing directly with the foreign supplier to the point that the latter invoices the sale of the *file-line gas* to the same permanent establishment. This latter condition " *unless proven otherwise* " allows to assume that this permanent establishment has actively participated in the purchase, made in Italy.

What has just been pointed out, together with the fact that Alfa's Italian permanent establishment is the actual recipient and user of the gas, so as to determine the VAT territoriality of the supply, allows this purchase to be attributed to said permanent establishment which thus becomes tax payer to the pursuant to article 17, paragraph 2, of the VAT Decree, paying the tax through the *reverse charge*.

On the other hand, that the purchase is attributable to its Italian permanent establishment is also confirmed by the APA signed by the applicant with the Revenue Agency which ascribes the relative cost - for the part attributable to it - to the income produced by said stable. organization in Italy As already highlighted in the reply to the previous question, it is recalled that the evaluation of the concrete attitude of contractual relationships and the role played by the Italian permanent establishment of the Company in individual transactions involves a judgment which cannot be exercised during the question . Therefore, any control power of the financial administration remains unaffected also on this aspect.

THE CENTRAL DIRECTOR

(digitally signed)