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| **Answer No 305** |   |

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|  **SUBJECT:** |  Intra-Community supplies: proof of transfer of goods |   |

 **QUESTION**

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

As part of its activity, ..., the company allegedly opened a new sales outlet in the city of ....

The company carries out intra-Community sales of goods pursuant to Article 41 of Decree-Law No 331 of 1993, with an "ex-works" clause, to taxable persons established in other Member States who take care of their transport from the aforementioned point of sale. The applicant points out that the supplies in question, given the small amounts involved, could also be paid for by non-traceable payment systems (for example, by cash, within the limits of the law).

With regard to the proof of the physical transfer of the goods from the supplier to the transferee, as regards intra-Community supplies 'ex works', the applicant notes that it would appear to be established both in practice and in jurisprudence that the proof of transfer can be provided by

with any document proving that the goods have been sent to another Member State (the applicant cites Resolution No. 477/E of 15 December 2008 and Resolution No. 19/E of 2013).

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

Specifically, Article 45-bis would regulate two different situations:

(1) the goods have been dispatched/transported by the supplier, either directly or through a third party

acting on its behalf;

2) the goods have been dispatched/transported by the transferee or by a third party on his behalf.

With reference to case 1), the seller certifies the intra-EU supply with the

possession of at least two of the following documents (not contradictory), issued by

two different parties independent of each other, the seller and the buyer:

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

carrier;

B. bill of lading;

C. air transport invoice;

D. invoice issued by the freight forwarder;

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

i. insurance policy covering the shipment or transport of the goods;

ii. bank documents proving payment for the dispatch or transport of the goods;

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

iv. a certificate issued by the depositary in the EU State of destination confirming that the goods have been received there.

With reference to case 2), the seller would certify the intra-EU supply by possession of the same documentation as described above and by a declaration made by the purchaser by the tenth day of the month following that in which the supply took place that:

- certifies that the goods have been transported or dispatched by the purchaser, or by a

third party on behalf of the same purchaser; and

- identifies the Member State of destination of the goods.

The applicant points out that the only document that it would be able to produce on the basis of those identified in Article 45-bis is an official document issued by a local public authority: however, according to the applicant, obtaining such a document would in any event be difficult and would place an excessive burden on the transferees.

In view of the foregoing, the applicant requests clarifications on the possibility of documenting the proof of transport or shipment of the goods by alternative documentary methods to those indicated in Article 45-bis of EU Implementing Regulation no. 282/2011 of 15 March 2011, in force from 1 January 2020.

**INTERPRETATIVE SOLUTION PUT FORWARD BY THE TAXPAYER**

The applicant considers it possible to produce alternative evidence to that indicated

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in Article 45-bis of EU Implementing Regulation No 282/2011 of 15 March 2011, capable of certifying the removal of the goods from Italian territory.

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

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

1. be taxable for VAT in the jurisdiction of 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 talibens by their own means and indicate their destination;

- issue a non-taxable invoice pursuant to Article 41 DL 331/1993;

- keep the documentation described above, together with the Intrastat lists that the Company sends out in accordance with the legal deadlines and the bank payment documentation, where available.

The petitioner observes that the behaviour described above would be consistent with the indications provided by the Revenue Agency in its answer no. 100 of 2019. The petitioner also specifies that the proposed solution would be applicable only to points of sale located close to national borders and with reference only to transactions of a value contained, indicatively, within €2,000.00.

As an alternative to Solution A, the applicant asks for confirmation that the following course of action can be adopted (Solution B):

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

- to obtain confirmation of the transfer by means of a written declaration by the transferee, in which the transferee will be expressly requested to indicate that the goods relating to invoices [x] have been duly received by the

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

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

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

Solution B would, in the applicant's view, enable him not to be affected by the amount of VAT due if he failed to receive the supplier's declaration of the actual transfer of the goods, thus preserving the marginality of the products. However, such a modus operandi would not be consistent with the origin of the transaction, which, according to the supplier's declaration, would already qualify as an intra-Community transaction when it was carried out.

**OPINION OF THE REVENUE AGENCY**

With EU Regulation 2018/1912 of 4 December 2018, applicable from 1 January 2020, Article 45-bis was introduced in EU Implementing Regulation No. 282/2011 of 15 March 2011 laying down "implementing provisions for Directive2006/112/EC on the common system of value added tax".

The aforementioned article deals with the documentary burdens relating to the intra-Community supply of goods referred to in Article 138 of Directive 2006/112/EC. In particular, paragraph 1(a) and (b) of Article 45a of EU Implementing Regulation No 282/2011 introduces a rebuttable presumption that the goods have been transported within the Community. The Commission has provided some clarifications

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on this provision in the Explanatory Notes on the 2020 quick fixes, published in December 2019. Paragraph 1(a) deals with the situation where the goods have been dispatched or transported by the seller or by a third party on his behalf, and (b) with the situation where the goods have been transported by the buyer or by a third party on his behalf.

In the first case (that referred to in (a)) the seller, in addition to declaring that the goods have been dispatched or transported by him or by a third party on his behalf, must produce at least two documents, which are not contradictory and which come from different parties and are independent of both the seller and the buyer.

These documents are referred to in Article 45a(3)(a): they are documents relating to the transport or dispatch of the goods, e.g. a CMR document or letter bearing the signature of the carrier, a bill of lading, an airway bill or an invoice issued by the freight forwarder.

Alternatively, the seller may produce, in addition to a declaration that the goods have been dispatched or transported by him or by a third party on his behalf, a document referred to in paragraph 3(a) above and any of the documents referred to in paragraph 3(b) below:

"(i) an insurance policy relating to the dispatch or transport of the goods or bank documents proving payment for the dispatch or transport of the goods;

(ii) official documents issued by a public authority, e.g. a notary, confirming 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 that the goods have been deposited in that Member State".

In the second case (referred to in point (b)), where the transport is carried out by the purchaser or by a third party on his behalf, the purchaser must provide the seller, not later than the tenth day of the month following the month in which the supply takes place, with a written declaration certifying that the goods have been transported or dispatched by the purchaser or by a third party on his behalf, and indicating the Member State of destination of the goods, the date of issue, the name and address of the purchaser, the quantity and the nature of the goods.

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of the goods supplied, the date and place of their arrival, the identification of the person who accepted the goods on behalf of the purchaser and, in the case of means of transport, the identification number of the means of transport. In addition to this declaration, the buyer must be in possession of at least two of the documents relating to the carriage of the goods referred to in Article 45a(3)(a) issued by two different parties independent of each other, the seller and the buyer, or a transport document referred to in Article 45a(3)(a) together with a document relating to the other means of proof referred to in Article 45a(3)(b).

As clarified in the Explanatory Notes of the EU Commission *quick fixes2020*, the application of the presumption that the goods have been transported in another Member State is excluded, if the transport or dispatch has been carried out by the transferor or the transferee by his own means without the intervention of other parties such as, for example, the forwarder or the carrier (par. 5.3.5.).

The presumption contained in Article 45-bis of Regulation No. 282 of 2011 is only applicable if the documentation held by the taxpayer meets the requirements set out therein. However, the tax authorities of the EU countries retain the right to overcome the presumption of intra-Community transport or dispatch (see paragraph 2 of the aforementioned Article 45-bis).

Similarly, the taxpayer retains the possibility of demonstrating, where he is not in possession of the documentation specifically required by the Union provision for the purposes of applying the presumption, by other objective elements of proof that the transaction actually took place (see also paragraph 5.3.3. of the Explanatory Notes).

Article 45a does not preclude Member States from applying other national rules or practices concerning proof of intra-Community supplies which may be more flexible than the presumption laid down in the VAT Regulation (see paragraph 5.3.2).

Having thus reconstructed the current Community regulatory framework, it should be noted that the

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The recent Circular No. 12/E of 12 May 2020 has provided clarifications in this respect; in particular, the above-mentioned practice document states that "*at present, in all cases in which the presumption set out in Article 45-bis is not applicable, the national practice, even adopted before the entry into force of that Article, concerning the proof of intra-Community transport of goods, may continue to apply. In any event, it is understood that this national practice identifies documents whose suitability as evidence of Community transport is subject to the assessment, on a case-by-case basis, of the tax authorities (see Explanatory Notes, par. 5.3.3.).*

Prior to the entry into force of Article 45-bis of Regulation 282/2011, the writer had provided some clarifications on the subject; also for this purpose, please refer to the indications contained in the aforementioned Circular no. 12/E of 2020.

That said, the evidence proposed by the taxpayer does not appear to be consistent with the indications provided by the tax authorities in their previous practice documents, as it does not appear to be sufficiently clear that the asset has been transferred from the State of the transferor to the State of the purchaser (see Resolution No. 71/E of 24 July 2014). This is without prejudice, however, to any assessment of the actual documentary set in the possession of the taxpayer, which may be carried out in the context of the audit activity.

With specific reference to solution B), moreover, we do not agree with what has been said, given that, as the applicant has also pointed out, the uncertainty concerns, from the outset, the validity of the means of proof of the transfer and not the existence of the abstract conditions to which the classification of the transaction as an intra-Community transfer is subject. In those circumstances, therefore, the applicant cannot rely on the issue of the decreasing variation note, which is used only in the cases expressly provided for by the legislature, which do not include the case in question.

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