RSM PALEA LAURI GERLA

Associazione professionale di Studio Palea, Studio L4C, Studio Gerla Associati

TAX NEWS

2015 – 3

RSM

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JURISPRUDENCE

False letters of intent and liability of the seller
(Italian Court of Cassation, judgment no. 4593 of March 6th, 2015)

The new legislation related to letters of intent has recently been analysed in depth in the Tax News. Now such legislation provides for a burden of reporting towards the Tax Authorities by the purchaser, and no longer by the seller.

But what happens to the seller when it is ascertained that the purchaser was not eligible to purchase goods free of tax and that, therefore, he has voluntarily perpetrated a VAT fraud? In other words, is a responsibility in the hands of the seller due to the obligations of reporting by the purchaser still existing?

In the case analysed by the Italian Supreme Court, both the seller and the purchaser operated in the market of cars purchasing and selling, and the Italian Revenue Agency had challenged that the seller (operating with tax suspension on the basis of false declarations of intent by the purchaser), could not be released from the liability on the VAT not paid to the Exchequer only because he had carried out sales under tax suspension, having to suspect the falsity of the above mentioned declarations.
As a matter of fact, the purchaser worked in the motor vehicles trade sector completely evading taxes, without having the requirements of the habitual exporters, without having any structure and operating substantially as a "paper-mill".

Among the circumstantial evidence of the fraud it shall be ascertained that the payments to the seller were carried out in cash or by cheques related to bank accounts of Italian car showrooms , which represented a sign of awareness, by the seller, of the national destination of the cars sold.
The Italian Supreme Court ruled in favour of the Tax Authorities, regarding also the seller – who should/could have checked the compliance of the status of the habitual exporter of the purchaser - as a subject indirectly responsible for the fraud.

According to the principle set out by the law, in case of sale of goods allegedly destined for exportation, the non-taxability for VAT purposes is subject to the purchaser written statement of responsibility on the destination of the goods outside the EU territory and it is subject to the fulfilments of the objective and subjective requirements provided for by the Italian Presidential Decree no. 633 of 1972, art. 8, while such responsibility *does not exist* if it is established that the goods have not actually been exported and that such declaration is ideologically false, *with the result that the seller, then, has to pay the tax* on such goods, unless it is proved that he has adopted *all the reasonable measures within his power* in order to ensure that the sale carried out did not lead him to participate in the fraud.
This principle, state the judges, complies with the EU directives on VAT and with the principles expressed by the Italian Court of Justice, based on which the national authorities and judges are obliged to deny benefits and exemptions if the taxpayer *knew or should have known* to participate, through the transactions carried out, to a tax evasion, even considering the observance of the formal requirements provided for by the national legislation in order to apply a preferential tax regime.

FOCUS ON EMPLOYMENT
(IN COLLABORATION WITH DE LUCA & PARTNERS AND HR CAPITAL IN MILAN)

De Luca & Partners has been specialized in Employment Law since 1976. With its 16 professionals, it assists clients with i) day-to-day advice; ii) industrial relations; iii) extraordinary transactions; iv)

restructuring and social safety nets ; v) judicial litigation and arbitration.

HR Capital® is the service company established by the partners of De Luca & Partners which, for over 30 years, has been providing services and solutions for outsourced personnel administration payroll and social security contribution processing.

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Conventions

On 24 March at the Convention Hall in Palazzo Turati on Via Meravigli 9/b – Milano, Studio De Luca – Employment Lawyers organised a convention with top level speakers from industrial associations, trade unions and government ministries (Massimo Bottelli from Assolombarda Employers association, Giampietro Castano from the Italian Ministry for Economic Development and Marco Bentivogli, national general secretary from FIM CISL unions) who offered various viewpoints on their interpretation of the vast reform of Labour Law currently taking place in Italy, just after the first two implementing decrees of the Jobs Act took effect.
More than 180 attendees, including foreign nationals, who were offered a simultaneous interpretation service.

Ruling of the month

Dismissal is legal if a position has been eliminated and in the absence of job duties compatible with the employee's physical limitations

(case followed by Alberto De Luca and Elena Cannone)

The Labour Court of Lodi confirmed that it is legal to dismiss a worker due to the elimination of the department and tasks to which the worker was assigned, and impossibility to re-use the employee in other positions compatible with physical limitations reported by the designated Company Doctor and Public Health Service. In challenging the dismissal, the worker had in particular requested that the lack of a justified motive be verified, asking that the Company be sentenced to reinstate the worker pursuant to article 18 of Italian Law 300/1970, objecting to the retaliative nature of the dismissal and Company's violation of the reinstatement obligation, listing a series of positions considered compatible with the prescribed limits related to repetitive movements and lifting of heavy loads.

Appearing in court, the Company defended the lack of a retaliative motive – since the job had been actually eliminated and had been done for a reorganisation aimed at containing fixed costs – offering proof of the impossibility of assigning the worker to the duties stated in the appeal.

Granting the defence submitted for the Company, the Court rejected the appeal, finding the lack of a retaliative motive claimed by the worker and demonstrated, based on preliminary investigation, the impossibility of reusing the worker in other job duties. With this ruling, the Court also sentenced the plaintiff to pay the court costs.

Press review

- **Jobs Act: the first two implementing decrees of the reform become effective (Il Sole 24 Ore, 7 March 2015, page 2)**

The first two implementing decrees of the Jobs Acts, the one on contracts with increased protection based on seniority and the one for overhaul of social shock absorbers, were published in the Official Gazette of 6 March this month, becoming effective 7 March 2015. In terms of the contract with increased protection based on seniority, regulated by Legislative Decree 23/2015, the main new features include: (i) introduction of a compensation mechanism for cases of wrongful dismissal, based on job seniority and reinstatement only in certain cases; (ii) introduction of a new type of settlement with predetermined sums and linked to job seniority. In terms of the decree on social shock absorbers, the main innovation is represented by the so-called "Naspi" which will become effective 1 May.

- **Implementing laws for post-employment benefits in pay packets (Il Sole 24 Ore, 20 March 2015, page 47)**

Decree no. 29/2015 was published on 19 March 2015, which contains the implementing laws on post-employment benefits in pay packets. This decree establishes that post-employment benefits will be paid, subject to certain exceptions, to employees who make a request not earlier than April 2015, and only be subject to ordinary taxation and exempt from social security charges.

- **Jobs Act: the decree on overhaul of contracts moves forward (Il Sole 24 Ore, 26 March 2015, page 49)**

With the injection of approximately 45-50 million euro for economic coverage of the transformation of collaboration contracts into open-ended contracts with increased protection based on seniority, the findings submitted by the State General Accounting Department should be overcome. This could result in approval for the third implementing decree of the Jobs Act in terms of overhauling contracts since an approval in this sense should allow the draft to be transmitted to the competent parliamentary commissions for their opinions. The decree draft states that starting 1 January 2016 employment will be considered as all forms of work which is personally and continuously provided, of a repetitive nature and with executive procedures organized by the employer.

- **The return of the collective contract to the Tertiary sector (Il Sole 24 Ore *on line*, 31 March 2015)**

Confcommercio and the trade unions have reached an agreement for renewal of the Tertiary sector contract. The new features of the agreement include an average raise of 85 euro per month for 4th level employees, updating of rules on working hours, flexitime schemes and the job market, especially related to short-term contracts and classification of personnel. These new contractual provisions will become effective 1 April 2015 and remain in effect until 31 December 2017.

- **Cassation Court: wrongful dismissal for injured worker who works elsewhere (Il Sole 24 Ore, 5 March 2015, page 51)**

According to the Cassation decision no. 4237/2015 the conduct of a worker, who during a period of leave due to injury worked at a third party performing a job substantially coinciding with his employment does not constitute just cause for dismissal. This conduct can only be punished with a penalty preserving his employment. The Supreme Court clarified that, to assess if the performance of another job during a period of leave is such as to compromise recovery, it is necessary to make an ex post evaluation, i.e. after the period of leave is completed. In the case in hand, the worker's performance of another job at the same time as the period of leave did not prevent the worker from regularly returning to work, consequently it could not be considered a condition preventing the fastest recovery from disabling consequences.

- **Cassation: a double check required for declaring an employee unfit for work (Il Sole 24 Ore, 11 March 2015, page 41)**

The Court of Cassation, with its decision no. 4757 of 10 March 2015, established that dismissal due to a worker being unfit to perform his job is unlawful if, on one hand, the dismissal is justified solely by a competent doctor and not also by a local health commission and, on the other, the employer has not proven the impossibility of assigning the employee to other tasks within the company.

- **Occupational health and safety: limits and requirements of the designation of functions (Il Sole 24 Ore, 16 March 2015, page 31)**

The designation of functions regarding occupational safety must be shown on a written document, bearing a specific date, and have a series of requirements which are essential for being able to release an employer from significant liability in cases of damage to health. The employer, through a suitable designation of functions "has the possibility (...) to transfer to another subject the powers and obligations originally belonging to the designating party (editor's note: the employer) regarding occupational safety issues (Penal Cassation, Fourth Section, decision 41063/2012), with the legal effect of being released "from the obligation of prevention, which he is otherwise bound by" (Penal Cassation, Fourth Section, decision 38111/2010). However, a designation document does not eliminate the protection role of the employer-designating party for safety, since part of the original position of guarantee remains with the employer for the purposes of occupational safety, with possible consequences in terms of liability.

- **Notice, parties free to establish the duration (Il Sole 24 Ore, 21 March 2015, page 16)**

The Court of Cassation, with its decision no. 4991/2015, recognized the autonomy of the parties to set the duration of notice.
The Court of Cassation rejected the petition of an employee who sustained the principle whereby the parties may regulate, with an individual agreement, the duration of notice, including regardless of the requirements of the collective contract.

TAX DEADLINES – APRIL 2015

- This list is not comprehensive of all tax deadlines; the most recurrent administrative deadlines have been omitted
- From January 1st, 2014, the compensation limit has increased from Euro 516,456 to Euro 700,000.

The limitations applicable to compensations shall be reminded, as follows:
- ☐ in terms of VAT (see Tax News 2010/09);
- ☐ in terms of income tax and IRAP (Regional Income Tax) (see Tax News 2014/9);

- ☐ in the presence of expired tax debts recorded in the debtors' list, for amounts exceeding Euro 1,500 (see Tax News 2009/10, 2009/12 and 2010/1).

Friday, 10th

Submission of 2014 "spesometro"

By the above mentioned date, the list of customers and suppliers of 2014 (the so-called "Spesometro") must be sent electronically by the taxpayers paying the VAT on a monthly basis.

Taxpayers paying the VAT on a quarterly basis have time to submit such list up to April 20th.

Thursday 30th

Submission of the claim for VAT credit refund/off-setting for the first quarter 2015

By the above mentioned date, the companies that meet the requirements provided for by the rules in force can claim for the refund or for the possibility to offset the tax credit related to the first quarter 2015.

The news related, in particular, to the provision of guarantees and to the affixing of the stamp of approval shall be reminded: please see Tax News 2014/12.

For the (electronic) request submission, the new Vat form "TR" shall be used.

Italian stamp duty – payment of the bimonthly instalment

By the above mentioned date, those who have opted for the payment of the Italian stamp duty in a "virtual" way, upon approval of the Italian Revenue Agency, shall pay, by means of F24 form, the second bimonthly instalment for 2015.

SPECIAL FOCUS

VAT – Reverse Charge –2015 news

The Legge di Stabilità 2015 (i.e. Law no. 190/2014) has introduced, with effect from January 1st, 2015, new tax provisions on the applicability of the reverse charge mechanism to those transactions carried out within the construction, energy sector and to the sale of wooden pallets recovered from cycles of use following the first one.
The primary objective of these new rules is to counter frauds and to consequently reduce tax evasion within the VAT tax.

Article 1, paragraph 629 of Law no. 190/2014 has extended the range of the services to which the reverse charge mechanism shall be applied, providing, under Article 17, paragraph 6 of the Italian Presidential Decree no. 633/1972, among others, also an extension to of this mechanism to:

- provisions of cleaning services, demolition, installation of apparatuses services and buildings completion services;
- transfers of shares related to greenhouse gas emissions;
- transfers of certificates related to gas and electricity;
- the supply of gas and electricity to a reseller-taxpayer.

On March 27th the Resolution no. 14/E was published by the Italian Revenue Agency, aimed at dissolving the several interpretative doubts that have recently occurred regarding the correct application of the provisions above.

In the Resolution it is specified that, first of all, in order to correctly identify what the provisions of the cleaning services, demolition, installation of apparatuses services and the provisions of buildings completion services are, it is necessary to refer to those activities which can be deduced from the ATECO 2007 codes (i.e. Classification of economic activities). It also states that the reverse charge has to be applied, regardless of the existing contractual relationship with the counterparty and of the type of business carried out by the service provider, therefore, regardless of whether the service provider operates in the construction industry or carries out an economic activity included in the codes of the section F (Construction) of ATECO table.

The following table shows the ATECO codes to refer to in order to correctly identify the provisions of cleaning , demolition, installation of apparatuses services and the provisions of buildings completion services.

Building cleaning services	
81.21.00	Not-specialized general cleaning of buildings
81.22.00	Other specialized building cleaning activities
Demolition	
43.11.00	Demolition
Installation of plants related to buildings	
43.21.01	Installation of electrical appliances in buildings or in other construction works (including maintenance and repair)
43.21.02	Installation of electrical appliances (including maintenance and repair)
43.22.01	Installation di plumbing, heating and air-conditioning systems (including maintenance and repair) in buildings and in other construction works;
43.22.02	Installation of apparatuses for gas distribution (including maintenance and repair)
43.22.03	Installation of fire suppression systems (including the integrated ones, maintenance and repair)
43.29.01	Installation, maintenance and repair of elevators and moving stairs
43.29.02	Heat, sound or anti-vibration insulation works
43.29.09	Other works of construction and installation not classified elsewhere (limited to the provisions of services referred to buildings)
Completion of buildings	
43.31.00	Plastering and puttying
43.32.01	Installation of safe, coffers, security doors
43.32.02	Installation of fixtures, furniture, suspended ceilings, moving walls and similar structures (the reverse charge shall not apply for the installation of furniture as this latter is not than on buildings
43.33.00	Floor and wall covering

43.34.00	Painting and glass installation
43.39.01	Not-specialized construction works – masons (limited to the services related to buildings)

With reference to the case where the provider of cleaning , demolition, installation of apparatuses services and the provisions of buildings completion services systematically carries such economic activity, and that this latter has not been communicated to the Italian Revenue Agency pursuant to article 35, paragraph 3 of the Italian Presidential Decree 633/72, the Tax Authorities requires that the reverse charge is applied to such transactions, while the service provider shall notify the adjustment of the ATECO code to the Italian Revenue Agency by submitting the AA7/10 form.

It is also stated that the reverse charge continues to be applied only within **the subcontract agreement**, in case of services provisions identified in section F of the ATECO table (including labour) and different from those defined under letter a-ter) of article 17, paragraph 6 or provisions of cleaning , demolition, installation of apparatuses services and the provisions of buildings completion services carried out in the construction industry by subcontractors towards building companies or real estate renovation companies or towards the main contractor or towards another subcontractor.

Moreover, the Resolution also dwells on the analysis of the relationships between the reverse charge and the **split payment**, and between the reverse charge and the **cash accounting**.
In the first case (reverse charge and split payment), the Resolution specifies that the split payment mechanism does not apply in case of sale of goods or supplying of services for which public institutions are liable to tax and when the same ones carry out the purchases of goods and services within their own economic and not institutional activity.

Instead, with reference to the relationship between reverse charge and **cash accounting** it has been clarified that those operators who have chosen the cash accounting regime, starting from January 1st, will not be able to apply such regime only to the transactions included in the reverse charge mechanism.

With reference to the definition of **building** as of article 17, paragraph 6, letter a-b) of the Italian Presidential Decree 633/1972, the Resolution, returning to what has already been mentioned in the Resolution no. 46/1998, limits the scope to the buildings for residential purposes, instrumental to the business as well as new buildings (and to the parts thereof). Moreover, it is specified that also those buildings falling into the cadastral category F3 and F4 (buildings under construction) should be included in the definition of buildings.
It is therefore confirmed the intention of the legislator to limit the scope to the *only buildings* and not to the broader category of real estate.

The Resolution continues the analysis by also highlighting cases where the reverse charge mechanism *does not apply* and that are mainly referable to land, parts of ground, parking spaces, swimming pools, gardens, etc.
However, in the event that such cases represent an *integral part* of the main building to which the rule applies (the Resolution mentions, as examples, the swimming pools located on the buildings, roof gardens, photovoltaic systems placed on the roofs, etc.), the rule will again be applied.

Moreover, the Legislator has regulated the reverse charge also for the **energy sector**, when, with the introduction of the letters d-bis), d-ter) and d-quarter) under paragraph 6 of article 17 of the Italian Presidential Decree no. 633/1972, the obligation to carry out the reverse charge is provided for in the following cases:

- transfers of shares related to greenhouse gas emissions;

- transfer of certificates related to gas and electricity;
- supply of gas and electricity to a reseller-taxpayer.

Finally, the regulatory provision as of letter d), paragraph 629 of article 1 of the Legge di Stabilità 2015, explains the "new" scope of the reverse charge mechanism applied to the sale of **wooden pallets**.
In particular, the reverse charge is applied every time there is a phase of marketing following the launching of the new pallet onto the market, being the requirement of the "non-usability" of the goods in question no longer necessary for the mechanism application purposes.

In conclusion, the Resolution no. 14/E highlights the subjects for which the **reverse charge mechanism is not applicable** and, more precisely, such subjects are the following:

- subjects who have used the new facilitated regime and who, by purchasing goods and services under the reverse charge system, shall pay the VAT, not being able to have the right to deduction;

- subjects who benefit from special tax regimes and who are exempted from VAT obligations, such as agricultural producers with a turnover not exceeding € 7,000, subjects carrying out entertainment businesses and subjects who make travelling shows.

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