



## Italy: Involvement of a fixed establishment in the intra-Community supply of goods

11 | 2023

### 1 Background

If a fixed establishment is involved in the supply of services, the place of supply shifts away from the company's headquarters to the fixed establishment (sec. 3a para. 1 sentence 2 of the German VAT Act). There is no special regulation on the place of supply of goods as regards fixed establishments. A supply of goods is always deemed to be rendered where the transport begins, irrespective of whether the supply is attributable to the headquarters or the fixed establishment (sec. 3 para. 6 sentence 1 of the German VAT Act). A fixed establishment can also be decisive for the reverse charge mechanism. If the fixed establishment is involved in a supply, the taxable person is deemed to be established in the EU Member State in which the fixed establishment is located and there can be no reverse charge mechanism. However, a fixed establishment is only considered to be involved in a supply if the work required for the supply is carried out wholly or mainly by the fixed establishment's technical and human resources (Art. 53 para. 2 of the Council Implementing Regulation). Administrative support tasks carried out by the fixed establishment (e.g. accounting, invoicing, etc.) are not deemed to be sufficient for the fixed establishment to be involved in the supply (Art. 53 para. 2 of the Council Implementing Regulation).

In the context of a request to the Italian tax authorities for a binding tax ruling, a German company wanted to know whether its Italian fixed establishment was deemed to be involved in an intra-Community supply of goods. The decision taken by the Italian tax authorities is worth noting (Agenzia delle Entrate, Tax Ruling No. 57/2023 of 17.01.2023).

### 2 Facts

A company established in Germany maintains a fixed establishment in Italy. The company sells goods to a customer in Italy. The goods are transported directly from the company's headquarters in Germany to the customer in Italy. The Italian fixed



Inge Sötl  
Certified Tax Consultant  
Master of Science (M.Sc.)

+49 (0) 89 217 50 1282  
inge.soeltl@kmlz.de

establishment is not involved in the movement of the goods from Germany to Italy. However, the fixed establishment was involved in the negotiations and the conclusion of the contracts between the company's headquarters and the customer. In addition, the Italian fixed establishment also provides after-sales services.

### 3 Opinion of the Italian tax authorities

The Italian tax authorities state that the evaluation of the facts, from a VAT perspective, depends on whether the fixed establishment's technical and human resources are being used by the company's headquarters to carry out the supply of goods. The Italian tax authorities do not comment on the regulations regarding the place of supply. The fact that the fixed establishment can, in principle, conclude contracts for the headquarters and carry out marketing activities is not, in itself, sufficient for the fixed establishment to be involved in the provision of supplies by the headquarters.

However, according to the company, the fixed establishment's activity, in the case at hand, was particularly complex with regard to the preparation phase of the supply. The fixed establishment was significantly involved in both the negotiation of the contracts and their technical content. This activity influenced the quality and characteristics of the goods that were sold. Thus, the fixed establishment played a crucial role in the run-up to the supply of the goods. The Italian tax authorities therefore concluded that the fixed establishment is significantly involved in the supply by the headquarters. It follows that:

- (1) The company's headquarters carries out an intra-Community transfer of own goods to the fixed establishment (and not an intra-Community supply to the customer!).
- (2) The fixed establishment carries out a supply of goods, subject to VAT in Italy, to the customer. The VAT liability is not shifted to the customer.

### 4 Comments

In our opinion, the decision is legally doubtful. A supply of goods is always deemed to be carried out where the transport of the goods begins. The involvement of a fixed establishment does not change this. Even if the supply of goods was attributable to a fixed establishment (i.e. the fixed establishment was the supplier, to a certain extent), the place of supply is determined by where the transport of the goods began. The tax revenue in Italy does not benefit from the fixed establishment's "intermediary role". Even in the absence of the fixed establishment's involvement, the acquisition of goods would be taxable in Italy, however the Italian customer would be liable for the VAT.

The tax ruling is only binding for Italy. This results in a discrepancy between the German and Italian VAT assessment. From a German perspective, a zero-rated intra-Community supply to the customer would still be given. Accordingly, the headquarters would have to declare the intra-Community supply in its EC Sales List in Germany, stating the customer's Italian VAT-ID. In order to claim zero-rating, the headquarters would also need to provide documentary evidence (usually an entry certificate signed by the customer). The declaration of an intra-Community transfer of own goods to the fixed establishment in the EC Sales List would be incorrect. Then, the intra-Community supply to the Italian customer would not be zero-rated because of the filing of an incorrect EC Sales List.

In the end, the headquarters' supply would have to be declared twice: in Germany as a zero-rated intra-Community supply and in Italy as a supply subject to Italian VAT. It would be difficult to find an appropriate (automated) tax determination in the ERP system for the case. The headquarters should, if need be, discuss the Italian decision with the German tax office in order to find a solution for the declaration in Germany.