Italian Revenue Agency rules on fixed establishments, limiting VAT liability

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In brief

In November 2015, the Italian Revenue Agency (IRA) issued a ruling providing further guidance on the scope of Value Add Tax (VAT) liability for an Italian fixed establishment. According to the IRA, a fixed establishment in Italy shall be liable for VAT where there is “actual intervention” in a transaction and where such intervention is considered “essential.”

In detail

The context

The ruling has not been published, therefore the facts of the case are not available in detail.

The issue, however, concerned the proper scope of the European (EU) VAT law with respect to provisions that identify the person liable for the payment of VAT for the supply of goods or services in the Member State of the fixed establishment (i.e., article 192a of the EU VAT Directive — 2006/11/EC, and article 53 of the VAT Implementing Regulation — Council Implementing Regulation No. 282/2011 of March 15, 2011).

Historically, the precise perimeter of the concept of “participation” of the fixed establishment was not entirely clear, and the EU Commission through the VAT Committee Working Paper No. 857/2015 (Working Paper), provided further clarification. According to the Working Paper, the fixed establishment is liable for VAT only in circumstances of “actual intervention” in a transaction.

Notably, the VAT liability of the fixed establishment has been significantly mitigated and reduced in its scope. As noted, according to the Working Paper, only the actual intervention of the fixed establishment in the supply of goods or services is relevant, whilst the IRA seemed closer to construe a “force of attraction” of the fixed establishment.

That is, the IRA had broadly interpreted the term “participation” in the supply of goods or services (e.g., circular letter no. 37/E of 2011). In particular, the IRA had argued that fixed establishment is not deemed as participating in the supply of goods or services if no human and/or technical resources of the fixed establishment are involved.

The decision of the Italian Revenue Agency

The IRA’s ruling concludes that a fixed establishment in Italy shall be liable for VAT where there is “actual intervention” in a transaction. The IRA’s decision is based on the premise that in order to deem an existing Italian fixed establishment of a foreign company it is necessary that intervention is an “essential” part of the transaction. In other words, the supply of human and/or technical resources in and of itself by the fixed establishment does not imply VAT liability.
In this regard, the abovementioned requirements — i.e., what constitutes “essential” — will likely be assessed on a case-by-case basis.

The takeaway
The participation of an Italian fixed establishment in a transaction will subject the fixed establishment to tax liability to the extent that such participation is considered an actual intervention that is “essential” in a cross-border operation.

Let’s talk
For more information, please contact:

Tax Controversy and Dispute Resolution

Carlo Romano, Rome
+39 06 57127220
carlo.romano@it.pwc.com

Valentino Guarini, Milan
+39 02 91605807
valentino.guarini@it.pwc.com

Luca Lavazza, Milan
+39 349 6509210
luca.lavazza@it.pwc.com

Tax Controversy and Dispute Resolution Global Leader

David Swenson, Washington, D.C.
+1 202 414 4650
david.swenson@us.pwc.com