

## INDIRECT TAXES PRACTICE GROUP

# Reverse charge extended to sales of PCs, tablets and game consoles

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Italian Legislative Decree No. 24 of 11 February 2016 (hereinafter the “Decree”) entered into force on May 2nd 2016 and brought about a particularly rapid proceeding to allow EU States to apply the reverse charge method when tax inspections reveal the occurrence of sudden and massive fraud in relation to specific business transactions.

In particular, the Decree amended the heading of Art. 17 of Presidential Decree (DPR) No. 663/1972 from “taxable person” to “tax payer” in order to identify more precisely the person who has to pay the tax due.

In accepting EU Directive No. 2013/43/UE, the Decree also amends the list of operations to which Member States may apply the reverse charge method for the payment of VAT, on a pilot basis until 31 December 2018. The reverse charge has been extended to the sales of game consoles, PCs, tablets and laptops (lett. c), as well as to integrated circuit devices such as microprocessors and central processing units, transferred prior to their installation in products for the end user.

Instead the sales of (i) mobile phone components and accessories (lett. b); (ii) personal computers and their components and accessories (lett. c); (iii) stone materials and products directly derived from quarries and mines (lett. d); (iv) goods made to hypermarkets, supermarket and food discounts (lett. d - quinquies) were deleted from Art.



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17, Paragraph 4 of Presidential Decree (DPR) No. 633/1972. These provisions had been erased because they were not authorised by the EU.

The Decree confirmed the power of the Ministry of Economics and Finance to identify further operations subject to reverse charge by other Decrees. In this regard, it was explained that they should be included among those listed in articles 199 and 199-bis of EU Directive No. 2006/112.

In order to apply the reverse charge method to further operations other than those set out under articles 199, 199 bis and ter of EU Directive No. 2006/112, it was also explained that the release of a special measure of exception by EU bodies was necessary.

In compliance with the EU Directive, the Decree provides that the reverse charge is applied on a temporary ba-



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sis until 31 December 2018 to: (i) sales of mobile phones, (ii) sales of game consoles, PCs, tablets and laptops and integrated circuit devices (such as microprocessors and central processing units transferred prior their installation) for the end user, (iii) transfers of greenhouse gas emission allowances, (iv) transfer of other units and certificates for gas and electricity, (v) transfer of gas and electricity to a “taxable dealer” (soggetto passivo rivenditore under Italian law)”.

Moreover, Italian Law No. 208 of 28 December 2015, (the so-called Italian Stability Law 2016) added letter a-quaer to Art. 17 of Presidential Decree (DPR) No. 633/1972 provided that the reverse charge is also applied to the provisions of services by the members of consortia to consortia that, as suppliers of the Public Administration, ap-

ply VAT in a split payment regime.

This provision aims to reduce the negative financial effects for Public Administration suppliers which, following the entry into force of split payment, have found themselves in a constant creditor position against tax authorities.

The new reverse charge only applies to consortia of cooperatives of production and work, those of artisans, the consortium companies, and ordinary consortia of competitors. The rule does not apply to temporary groups of companies and organisations participating in a network agreement (the Italian ("contratto di rete").

This new type of reverse charge will be applicable when the EU Council releases a special authorisation.

Furthermore, Legislative Decree No. 158 of 24 September 2015 has mitigated the penalty regime previously in force regarding the violations of reverse charge, with reference to the sanction notice that has not become definitive in the meantime, as at the date of entry into force of this law (1 January 2017, whereas the 2016 Italian Stability Law was established one year earlier with an effective date as of 1 January 2016).

In particular, the Decree has completely rewritten Art. 6, Paragraph bis

of Legislative Decree No. 471/1997, also introducing new paragraphs 9 bis 1, 9-bis 2 and 9-bis 3.

Under this new sanctioning system, if VAT has mistakenly been paid where the requirements for the application of the reverse charge apply (under Art. 6, Paragraph 9 bis 1 of Legislative Decree No. 471/1997) a sanction amounting to between EUR 250 and EUR 10,000 is levied. The assignee/buyer and the assignor/lender are both liable for payment. The assignee or buyer may deduct VAT if it has been mistakenly paid. Previously, the sanction was equal to 3% of the tax with a minimum amount of EUR 258.00. If the error is due to tax avoidance or tax fraud, a sanction of between 90% and 180% of the tax applies. In this regard, the burden of proof is on the tax authority.

Conversely, if the reverse charge method has been mistakenly applied where it does not apply, a sanction of between EUR 250 and EUR 10,000 is applied (under Art. 6 Paragraph 9 bis 2 of Legislative Decree No. 471/1997). The assignor/lender and the assignee/buyer are both liable for payment. The assignee or buyer may deduct VAT mistakenly applied through the reverse charge method, but if the mistake is due to evasion or tax fraud by the as-

signor/lender, a sanction of between 90% and 180% of the tax applies. Previously the sanction was equal to 3% of the tax with a minimum amount of EUR 258.00.

Finally, if the buyer does not apply the reverse charge, a sanction of between EUR 500.00 and EUR 20,000.00 is applied. Even if the transaction does not result from accounting, a sanction of between 5% and 10% of taxable income is raised, with a minimum amount of EUR 1,000.00. Previously, the sanction was between 100% and 200% of taxable income, with a minimum of EUR 258.

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## INTERNATIONAL TAXATION PRACTICE GROUP (ITPG)

“Treaty Override”

# New German Constitutional Court decision

By **Bernhard Schwechel**

In a decision in December 2015, the German Federal Constitutional Court confirmed the practice of treaty override

in tax law. “Treaty override” described the procedure whereby the German legislator adopts a law which violates a prior international treaty (often a treaty on double taxation). The German Fed-

eral Fiscal Court (Bundesfinanzhof) had doubts about the constitutionality of this practice. It was convinced that a recent amendment to the Income ...next page