2000 2010 10 ANNI DI CONTRATTO COLLETTIVO NAZIONALE DI LAVORO PER LE IMPRESE DI TELECOMUNICAZIONE

ASSOTELECOMUNICAZIONI
ASSTEL
ADERENTE A CONFINDUSTRIA SERVIZI INNOVATIVI E TECNOLOGICI

IL DIRETTORE

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**Directorate-General for Taxation and Customs Union**
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**Rome, May 31st 2011**

**Prot. 126/11**

**Object: European Commission - Green Paper VAT –** Answers to the public consultation ***(questions D9. – D10.)***

The European Commission has started a broad debate referred to the Value Added Tax system in order to increase its consistency and to improve its efficiency overcoming the criticity risen during the forty years of its life.

For this purpose, considering the policy document (called the Green Paper) written with the intention to point out the critical situations and the complexity of the current tax system, it has been promoted a public consultation aiming to involve the operators in the mentioned legislative review by receiving their amending questions: those concerned can send to the Commission their contribute in the shape of answer to all the questions of the Green Paper, from D1 to D 33 or only to part of them.



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In this context it is possible to place the present document, drawn up by Assotelecomunicazioni-ASSTEL (hereinafter ASSTEL), the business association that represents the firms working in the electronic communications field, in connection with "Confindustria, Confederazione generale dell'Industria italiana,";

ASSTEL, answering to the invitation of the Community Institutions, aims at giving voice to certain critical issues belonging to the current VAT system, urging the adoption of Community interventions, in some cases to simplify the system and in other cases to interpret it.
After the analysis carried out by ASSTEL it has been developed the following emendatory instance that more than other must be brought to the attention of the legislator and that mean to answer to the questions D9. – D10.: - Simplification of the procedures of recovery of VAT (bad debt) paid in respect of billing operations that later, as a result of the recipient default, create outstanding credit positions, generating financial anticipation of the tax by the seller/provider (questions D9.- D10)[1].

The proposed amendements are designed primarily to preserve, in the specific cases highlighted, full respect for the principle of tax neutrality.

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[1]Here the text of the questions D9. –D10.: "What do you consider to be the main problems with the right of deduction? What changes would you like to see to improve the neutrality and fairness of the rules on deduction of input VAT?" .



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***Simplification of the procedures aimed at the recovery of the VAT paid in respect of the billing operation which generated outstanding credit positions for the seller/provider (questions D9. – D10.)***

The Community legislator disposes in Article 90 of Directive 2006/112/EC that "in case of cancellation, withdrawal, resolution, total or partial default or reduction of price after the time of the transaction, the taxable income shall be duly reduced according to the conditions set by the Member States. "

Thus, leaving wide discretion to each State about the application of the Directive, the mentioned legislator recognized the right, unbreakable by the Member States, to reduce the taxable income in every case of cancellation, withdrawal, resolution, total or partial default or reduction of price after the time of the transaction (paragraph 1 of article 90) , and to recover consequently the tax paid, with modality discretionally definable by the Member States. A limitation of this right (and not just to its implementation) is currently confirmed in paragraph 2 of art. 90, which allows every individual state to derogate only with reference to the case of total or partial default for reasons different from cancellation, withdrawal, resolution.

This case was disciplined by the Italian legislator in Article 26 of D.P.R. n. 633/1972 that, in the context of the mentioned delegation, has significantly restrained the field of the Community law, by limiting it to only two default situations of the operation carried out: the cases of the default due to insolvency proceedings or due to unfruitful enforcement proceedings[2]..

[2]Article 26, second paragraph, of D.P.R. 633/1972 states that "If an operation for which an invoice is issued, subsequently to the registration under Articles. 23 and 24, totally or partially fails, or if it reduces the amount of tax as a



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Actually, the provider can issue credit notes and thus recover the tax paid only if the irrecoverableness of the credit evidently results by insolvency proceedings or by unfruitful enforcement proceedings toward the debtor's estate.

Consequently, it is clear that the conditions imposed by the legislator for the recovery of the tax, in case of costumer default, are subject to particularly strict, hard and above all onerous procedures as to deter the operator to undertake them in case of modest outstanding credits.

That circumstance, in fact, leads to a violation of the principle of tax neutrality that in such cases becomes a real cost for the operator going to add to the loss of credit. Some operators related to ASSTEL indicate that where the amount of the credit accrued as a result of the default is modest, the national legislation which allows the recovery of tax paid is in fact impracticable.

In such cases the practical application of the mentioned provision does not allow in any way the respect of the principle of tax neutrality where, because of the effect of it, the mentioned tax has to charge the final consumer, without constituting an economic burden for the seller/provider of the service or of the good.

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result of a declaration of nullity, cancellation, revocation, termination, rescission or similar or total or partial default due to insolvency proceedings or by unfruitful enforcement proceedings or through the application of rebates or discounts provided by contract, the seller of the goods or the provider of the service has the right to deduct under Article. 19 the tax corresponding to the variation, registered under Article 25. The seller or the customer who had already registered the transaction under the latter article must in this case register the variation in accordance with art. 23 or art. 24, but he is also entitled to the refund of the amount paid to the supplier as compensation. "



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In these terms, the mentioned corruption of the system undergo to a multiplier effect in those sectors, such as those of interest[3], where the relevant billing is engendered by very fragmented performances; in those cases are frequently engendered outstanding credits in relation to unpaid asset position of modest claims, for which the need to enforce the mentioned procedures case by case results uneconomic, achieving a deterrent effect to the process foreseen by the provision. However, the cost in terms of tax not recovered charge heavily on corporate balance sheets.

The case described is the result of a distortion that arises from the tax operation system. In fact the duty to pay VAT is accomplished at the time of performing taxable transactions, aside from the payment of the amount due; the default generates a cash benefit for the customer, who may deduct the tax not paid, while the provider initially support a financial burden which, in case of outstanding credits for which it result uneconomical to enforce the above-mentioned procedures, it become an economic burden, with irreparable infringement of the principle of proportionality and neutrality of the tax[4].

Said that it is required, as the solution of the above mentioned distortion, the action of the Community Institutions aimed to reduce the discretionary perimeter allowed to the Member States from the wording of Article 90 of Directive 2006/112/EC, in order to bind them to take measures that guarantee to the creditor the access to simplified, previously defined and uniform procedures

[3] This happens in particular in the sector of telecommunications and telephone service, where you find a real "atomization" of the irrecoverableness credits, which are in extremely large numbers, even if individually amounting to modest sums.

4 The principle of tax neutrality has been repeated several time by the Corte di Giustizia UE (we mention the sentence of. 10 april 2008 "Marks & Spencer" in causa C-309/06, the sentence of 27 september 2007, Causa C-409/04 e the sentence 19 september 2000 "Schmeink & Cofreth e Strobel" in causa C-454/98).



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under the regulations of the EU for the recovery of the tax paid in advance, in case of default of the amount due by the debtor.

In these terms, after a comparison among the different provisions regulating the case under discussion, aiming to promote regulatory solutions to harmonize the mechanisms of VAT rules, favoring the disposition that proved to be easier and at the same time more respectful of the general principle of fiscal neutrality, it is proposed to specify the content of Article 90 of the Directive in line with the solution adopted by English law[5].

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What is written above is only a brief representation of the amendative instance that the companies associated to ASSTEL believe should be brought to the attention of the Community legislator.
If necessary, ASSTEL is available to provide any further information and integration to the Commission.

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5 Just for example is to point out the effectiveness of the solution adopted by English law, which allows the issuance of credit notes, without taking further legal actions, only after a period of six months from the issuance of the invoice unsolved. It is important to point out that in several Member States there are no special requirements to recover the tax paied for transactions which generated credit positions totally or partially unpaied. Mention is made in regard to Austria, Finland, Ireland and Holland



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