The adjustments in the value added tax system

Summary

Changes of value added tax are connected to events that may give rise to a tax adjustment in relation to the position of both taxable persons involved in the transaction: seller / provider and buyer / client.

The causes that can result in changes with consequent effects on the determination of the tax, essentially fall into two types:

a) errors in fact or in law at the time of billing, which also comprise invoices for nonexistent transactions;

b) subsequent events that change the original transaction.

The procedures that lead to the change are not explicitly covered by Directive 2006/112, and neither were by the previous Directive 77/338 (the Sixth Directive). European Union legislation in force, indeed, substantially disciplines two cases, sub b), relating to the reduction of the tax base and the adjustment of the deduction.

The "change" sub a) determines that the charge is a tax "not due". Although such a case is not explicitly covered by Directive 112/2006, it is however accepted by the Court of Justice, under conditions which shall be determined by the Member States.

With regard to domestic law, “notices of change” envisaged by art. 26 of Presidential Decree n. 633/1972, are a remedy, in terms of procedure, aimed at correcting a transaction within the system of deductions and recharge through a correcting invoice, which can has the opposite sign of the original invoice, in case of decrease, or the same sign, in the event of an increase.

With specific reference to decreases, the Supreme Court established that the remedy of obtaining reimbursement, pursuant to art. 21 of Legislative Decree no. 546/1992, is a free alternative to get the additional tax paid in excess by the seller / provider.

This conclusion, reached on the basis of the applicable law, increases the complexity of the changes which, not being confined within the

symmetrical and simultaneous adjustments referred to in art. 26, are likely to break the fundamental mechanism of VAT based on recharge and deduction.

The operating mechanism, based on the principle of tax neutrality, is assured by the deduction and recharge. The principle of fiscal neutrality precludes the deduction system having the consequence that the amount of VAT for which the person concerned is declared liable to pay the authorities exceeds the amount of the tax which he has recovered or which he is owed by his customers. Only the customers bear the burden of the tax.

In the commercial phases prior to the final consumer, the practical application of the principle of neutrality affects three positions: the client / buyer, the seller / provider and the tax authorities.

This principle must also be respected in the process of adjusting the VAT invoiced.

The procedures of variation, therefore, while being of a different nature, should be placed on the same level, regardless of the mechanism chosen, provided that they safeguard the fundamental principles of the functioning of the tax and, in particular, the principle of tax neutrality.

In general, the procedure pursuant to Art. 26 of Presidential Decree no. 633/1972, does not give rise to any particular problem in terms of symmetry and neutrality of the tax, while the action for reimbursement, as involving only two of the parties involved, may cause the occurrence of situations incompatible with the value added tax system.

In this context, it must be emphasized that, for the general principle established by the Court of Justice, VAT unlawfully charged cannot be deducted by the buyer/client.

This principle, however, must be balanced with the fact that the tax is due solely as a result of being mentioned on the invoice by the seller / provider, which meets the requirement that the Treasury is exposed to a loss of revenue caused by the actual deduction made by the buyer / client. In other words, the issuer of the invoice must be responsible for the payment of the tax mentioned, as long as the invoice has not been corrected and the risk of loss of tax revenue has not been eliminated.

Consequently, in the event of a VAT unlawfully charged, only when there is no risk of loss of revenue, it is possible to make the adjustment for VAT purposes.

With regard to the process of change by reimbursement, the Supreme Court has so far supported the autonomy of the three parties involved. However, even in the most recent pronouncements, it is apparent a certain openness concerning the need to take into account the position of the third party not directly involved in the litigation. That procedure would avoid the breach of the principle of tax neutrality and should be applied under the administrative and the judicial procedure as well.

As noted above, the provisions of Directive 2006/112, in particular Art. 90, contain an explicit reference only to cases concerning reduction of the taxable base. The occurrence of events subsequent to those existing at the time of execution (in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place), entails that the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

With reference to the reduction of the tax base, domestic law establishes the right to trigger the mechanism of the change in the hands of the seller / provider. That right may be exercised at any time over the implementation of the original transaction.

If such a mechanism is put in place, the transferee / buyer must also proceed with the symmetrical variation of the deduction, thereby giving full effect to the principle of symmetry of the change.

These events - a declaration of nullity, annulment, revocation, termination, cancellation, etc., discounts and rebates provided by contract - modeled, in substance, the content of art. 90 of Directive 2006/112, with the particularity that national law has granted the change only for non-payment due to insolvency proceedings and enforcement proceedings fruitless.

Therefore, in view of the compatibility with EU law, there are at least two critical profiles.

The first concerns the right, established by national law, of the reduction of the tax base and the tax, when in fact, EU law, as interpreted by the Court of Justice, requires the implementation of the adjustment.

The other question concerns the (alleged) improper implementation of the change for non-payment. As a matter of fact, national law makes reference to the closure of insolvency proceedings and executive fruitless, and not to non-payment altogether.