Italy – New VAT regulations concerning personnel secondments as of 1/1/2025

Content

1 Premise

Personnel secondment is characterized by the temporary dissociation between the holder of the employment relationship ("Home Company") and the beneficiary of the work service ("Host Company"). Although in the course of the secondment the work service must be performed for the benefit of the Host Company, from a functional point of view the employment contract with the Home Company continues to operate, as the employment relationship remains with the latter. The use of this labour law instrument is particularly frequent in the context of MNEs.

From an Italian labour law perspective, the secondment of personnel is regulated by Article 30 of Legislative Decree No. 276/2003, according to which "*an employer, in order to satisfy its own interest, temporarily puts one or more workers at the disposal of another party for the performance of a specific work activity*". The second paragraph of said Article states that "*in the case of secondment, the employer remains responsible for the economic and legal treatment of the worker*".

2 Brief history of the VAT treatment of staff secondment in Italy

Prior to the introduction of a specific provision in the Italian VAT law, the Italian tax administration had taken the view that the consideration paid in exchange of the secondment of personnel was always subject to VAT, even when it was merely intended to cover the costs of the seconded employee (Ministry of Finance, Resolution No. 363853 of October 31, 1986).

In 1988 Italy introduced a specific provision stating that "*any lending or secondments of personnel for which only the reimbursement of the relevant cost is paid are not to be considered relevant for value added tax purposes*" (Article 8, Paragraph 35, Law No. 67/1988). In other words, according to said law provision, if the Home Company charges the Host Company only for the cost of the seconded employee (including social security charges, fringe benefits, etc.), the transaction would not fall within the scope of VAT.

Over the years, the Italian Supreme Court was frequently asked to rule on the correct application of the afore-mentioned VAT provision, especially in cases where the consideration amount was higher than the mere cost of the seconded employee. However, the decisions of the Supreme Court were not uniform:

- the Supreme Court Judgment No. 19129/2010, affirmed that in the event that the consideration exceeds the mere cost reimbursement, only the margin charged by the Home Company is subject to VAT; consequently, only the VAT charged on the margin is deductible for the Host Company;
- the Supreme Court Judgement No. 23021/2011 (Joint Chambers), overturned what was stated earlier, arguing that in case that the consideration exceeds the mere cost, the whole amount is to be considered subject to VAT and not only the mark-up.

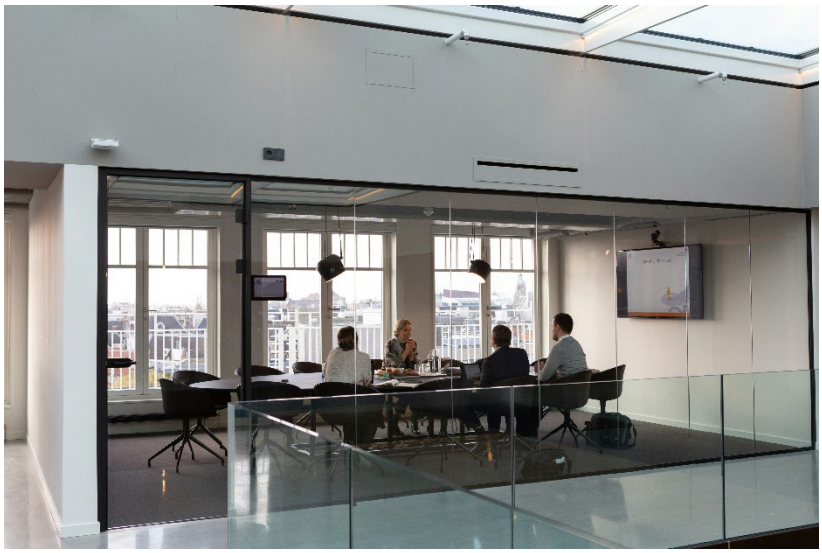
In light of the above, Article 8, Paragraph 35, Law No. 67/1988, would be applicable only in case of absolute coincidence between the cost of the seconded personnel and the amount charged back (see Supreme Court Judgments No. 13118/2012, No. 14053/2012 , No. 23996/2013 and No. 4024/2015).

For the sake of completeness, as far as cross border lending or secondments of personnel are concerned, it is worth mentioning that B2B general services rendered to VAT taxable persons not established in Italy are non VAT taxable transactions in Italy (Article 7-ter, Presidential Decree No. 633/1972); indeed, lending and secondments of personnel are considered general services.

3 The CJEU Judgement and impact on the Italian case law

In 2019 the Supreme Court (see Ruling No. 2385/2019) referred the matter to the Court of Justice of the European Union (CJEU). This latter in Case C-94/19 of March 11, 2020, ruled that "*Article 2, point 1, of Sixth Council Directive 77/388/EEC of 17 May 1977 [...] must be interpreted as precluding national legislation under which the lending or secondment of staff of a parent company to its subsidiary, carried out in return for only the reimbursement of the related costs, is irrelevant for the purposes of VAT, provided that the amounts paid by the subsidiary to the parent company, on the one hand, and that lending or secondment, on the other, are interdependent*". Furthermore, according to the CJEU a supply of services is effected "for consideration" within the

meaning of Article 2, point 1, of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. That is the case if there is a direct link between the service supplied and the consideration received.



As a consequence of the CJEU Judgement, Article 8, Paragraph 35, Law No. 67/1988, was disapplied in a significant number of Judgments of the Italian Supreme Court (see, among others, Supreme Court Judgements No. 529/2021, No. 530/2021, No. 14716/2021, No. 28592/2021, No. 7552/2022, No. 17197/2022, No. 37737/2022 and No. 22700/2024). Nevertheless, there have been also opposing Judgements, as for instance Judgment No. 16234/2024, where the Supreme Court stated that the consideration is excluded from VAT. In conclusion, it can be argued that in the years following the CJEU Judgement a relevant consensus can be retrieved from the Supreme Court Judgements that Article 8, Paragraph 35, Law No. 67/1988, should be deemed contrary to EU law.

4 New VAT law provision on personnel secondment

As a consequence of the relevant tax controversy triggered by interpretative uncertainty, the Italian Government approved a specific provision within the Law Decree No. 131/2024, converted by Law 166/2024, which came into force on November 14, 2024.

Namely, Article 16-ter of said Law Decree provides for the repeal of Article 8, Paragraph 35, Law No. 67/1988, as of January 1, 2025. Namely, Article 8, Paragraph 35, Law No. 67/1988, shall not apply to agreements concerning lending and secondments of personnel entered into from January 1, 2025 onwards.

Furthermore, according to Paragraph 2 of the same Article 16-ter, past conduct adopted by taxpayers before January 1, 2025, cannot be challenged. This is both in the case where taxpayers have applied VAT in accordance with the CJEU Case C-94/19 of March 11, 2020, and in the case where they have not applied VAT according to the domestic legislation in force at that time.

For the sake of completeness, the safe harbour provided by Article 16-ter, Paragraph 2, Law Decree No. 131/2024 has no effects on tax assessments that have become final and cannot be subject to any appeal.

In the light of the above, the taxpayers should draw the following distinction:

a) secondment agreements already in place before January 1, 2025: in the absence of a final tax assessment, the VAT treatment adopted by the taxpayer shall be considered compliant with VAT law;

b) secondment agreements entered into or extended on or after January 1, 2025: the consideration paid by the Host Company shall be subject to VAT according to Article 16-ter, Law Decree No. 131/2024.

In our view, uncertainties on the interpretation that will be taken by the Italian tax authorities may still exist for secondment agreements under letter a) where the Home Company has charged VAT only on the mark-up amount, due to the circumstance that according to the CJEU the direct link between the services supplied and the consideration received should be assessed regardless of the fact that the amount of the consideration is equal to, greater or less than, the costs which the taxable person incurred in providing his service. Therefore, the CJEU seems to envisage two alternative VAT treatments: the total amount of the consideration is either subject or not subject to VAT, depending on the existence or not existence of said direct link.

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