

Italy – When an Italian FE is deemed "to intervene"?

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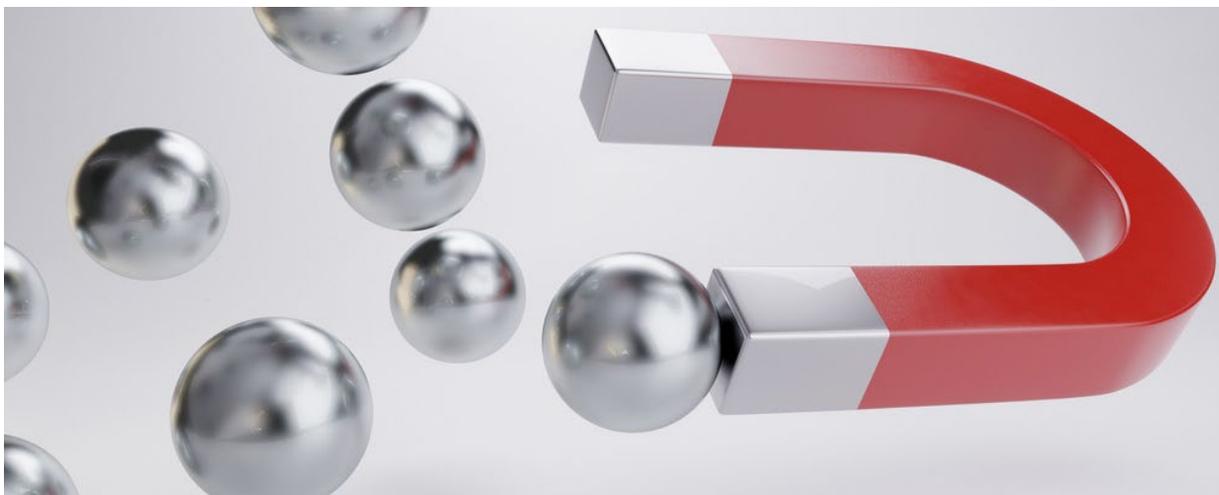
## 1 Italy – When an Italian FE is deemed "to intervene"?

According to both EU and Italian VAT rules, a fixed establishment (hereinafter also "FE") in Italy of a non-resident taxable person shall be regarded as a taxable person within the territory of Italy provided that said FE does intervene in a taxable supply of goods or services within the Italian territory (Art. 192a, Directive 2006/112/EC, Art. 7, Presidential Decree 633/72).

According to Art. 53, EU Regulation 282/2011, the FE is deemed to intervene provided that the following 3 requirements are met:

- › the FE has a sufficient degree of permanence and a suitable structure, including both human and technical resources which enable the FE to make the supply of goods or services in which it intervenes; and
- › the FE actively uses its human and technical resources in order to make the supply of goods or services; and
- › the intervention of the FE is not limited to ancillary activities, e.g., administrative supporting tasks.

But **how can be ascertained in practical terms the "intervention" of a FE?**



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## 2 Recent administrative guidance

No clear guidelines supports taxpayers with this regard and the clarifications recently provided by the Italian Tax Authorities contributed to create an even more uncertain framework.

### Intra-community supplies of goods

In case of intra-community supplies of goods promoted by the FE but with **direct delivery of the goods** from the EU Member State of establishment of the Head Quarter to the customer in Italy, the Italian Tax Authorities concluded that, even if the FE was not acquiring the physical possession of the goods, the FE shall be regarded as “intervening” in the transaction (**Reply to ruling n. 57 dated 17.01.2023**). Such a conclusion was driven by the analysis of the specific circumstances outlined by the taxpayer who filed the ruling, according to which the activities carried out by the FE were characterized by a **high degree of complexity**, since (among else) the FE was involved in the negotiation of the technical contents of the contracts, had a relevant influence on the definition of the product features supplied by the Head Quarter, played a relevant role in the concrete determination of the quality, structure and functionality of the product supplied by the Head Quarter and was operating with a significant degree of autonomy from the Head Quarter. Such a clarification differs from the solution proposed by the Italian Tax Authorities in Working Paper 857/2015, however (according to our interpretation) this could be due to the peculiar circumstances at hand.



Similar conclusion came in the **Reply to ruling n. 374 dated 10.07.2023**. In this case the Italian Tax Authorities concluded that the Italian FE had a **qualifying profile**, since it was involved in the following activities: customer relationship management, with regard to both the quantities to be ordered and the possible qualitative amendments to be made to the products and to be submitted for approval to the Head Quarter; inventory management and warehouse supervision; relationship with the production plants; organization of deliveries; relationships with carriers from third party warehouse to customers; assistance in billing and accounting procedures; technical assistance; customer feedback and quality control; assistance in the Customs fulfillments (with this regard, the Italian Tax Authorities has already clarified that, in case the VAT ID N. of the FE is stated in the Customs bill, said FE is deemed to be involved in the transactions performed in Italy, Reply to ruling n. 160 dated 29.05.2020).



### Intra-community provisions of services

In case of provision of services, according to the Italian Tax Authorities (**Reply to ruling n. 336 dated 01.06.2023**), the role played by the FE has to be appraised considering the **overall activity performed by the legal entity** (consisting of the Head Quarter and the FE taken as whole). In this sense, the Italian Tax Authorities concluded that the FE is deemed to intervene since with its preparatory activity it allows the Head Quarter to provide its services considering that the activities performed by the FE are pertaining and preemptive to the subsequent services rendered by the Head Quarter.



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### 3 Final remarks

In our view, the abovementioned clarifications should not be interpreted in the sense that having a FE would automatically mean that this latter is "intervening". Conversely – as remarked by the Italian Tax Authorities in all the above mentioned official clarifications – they shall be interpreted in the sense that **the "possible" intervention of the FE must be appraised in detail on a case-by-case basis**, having a deep analysis of the factual circumstances and of the terms and conditions of the transactions under scrutiny.

The present matter is quite sensitive since, in case the Italian FE would intervene in the supply of goods or services within the Italian territory, said FE shall take care of several fulfillments for VAT purposes in Italy, including the implementation of the mandatory **e-invoicing via SDI** procedure.

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